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**COMBATING SEXUAL VIOLENCE AGAINST WOMEN WITH DISABILITIES  
IN INDIA: A Brief Conspectus of the Legal Framework**

*Monica Chaudhary*

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# COMBATING SEXUAL VIOLENCE AGAINST WOMEN WITH DISABILITIES IN INDIA: A Brief Conspectus of the Legal Framework

*Monica Chaudhary\**

*[Abstract: Sexual violence against women is a global reality. Women with disabilities (WWD) face a heightened risk of sexual violence due to their greater vulnerability. They also face greater barriers in access to justice in criminal justice systems that are mainly designed for the able bodied. The increased awareness about disability rights at the global level and the increased recognition of sexual violence towards WWD has also had an impact on the legal measures adopted to deal with sexual violence against WWD in India in the current century. Over the past decade, substantive and procedural criminal laws relating to sexual violence against women and children in India have been strengthened through extensive, periodic amendments. An important facet of these amendments has been the introduction of specific provisions to deal with sexual violence against WWD and to make justice more accessible to such women. The amended substantive laws have specific provisions that treat sexual offences against WWD as aggravated forms of sexual violence, inviting harsher punishment. This reveals the legislative intent of treating sexual violence against WWD with stringent laws. The substantive provisions are supplemented by special procedural provisions to facilitate the reporting of sexual offences by the victims with disabilities and their deposition during judicial proceedings. This paper analyses the relevant statutory provisions and significant judicial pronouncements on issues that emerge in the implementation of these provisions. These issues include, inter alia, retrospective application of the procedural amendments to pending cases, pleas for inclusion of 'mental age' as opposed to 'biological age' as the criterion for application of the provisions specific to children with disabilities, inclusion of acid attack victims in the disability list, availability of interpreters and special educators for recording of statements of victims in the manner prescribed by law and the issue of consent for medical termination of pregnancies resulting from sexual assaults on WWD.]*

**Keywords:** *Women with disability, sexual violence, offence, termination of pregnancy, justice etc.*

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## I

### Introduction

The intersection of gender and disability makes women with disabilities (WWD) more vulnerable to sexual violence. It also affects their access to justice. A 2018 Report by Human Rights Watch recognises that physical disabilities that affect mobility hamper the ability of WWD to escape from violent situations.<sup>1</sup> Auditory disabilities make women more vulnerable due to the inability to hear their surroundings. Such disabilities also affect the ability to call for help or to communicate the abuse.<sup>2</sup> Intellectual or psycho-social disabilities may incapacitate the women from understanding that non-consensual sexual acts are criminal acts which need to be reported.<sup>3</sup> Thus, the helplessness of WWD victims begin at the stage of victimization and continues throughout the judicial process where they do not get the required support for reporting the offences, for medical care as well as during court proceedings. This Report has also been cited in a recent judgment of the Supreme Court to highlight the unique problems created by the intersection of gender and disability for WWD who face sexual violence.<sup>4</sup>

Some of the recent amendments in Indian criminal laws, both substantive and procedural, have incorporated specific provisions relating to sexual violence against WWD, in order to ensure condign punishment for such offences and to make justice more accessible to WWD. The Protection of Children from Sexual Offences Act, 2012 (hereinafter POCSO Act), which came into force on November 14, 2012, was the first Central law in India to deal with child sexual abuse in a comprehensive, gender-neutral manner. The Act which covers a wide gamut of sexual offences against children below the age of 18 years, was the first law to have specific provisions for dealing with sexual violence against children with disabilities, irrespective of their gender.<sup>5</sup>

The Criminal Law (Amendment) Act, 2013 (hereinafter 2013 Act), *inter alia*, introduced specific provisions relating to sexual violence against WWD for the first time in the substantive provisions of the Indian Penal Code, 1860 (hereinafter IPC) and penalised sexual assaults on disabled victims as aggravated forms, inviting higher punishment. The amended provisions cover two kinds of situations - one,

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<sup>1</sup> News Release, *Invisible Victims of Sexual Violence: Access to Justice for Women and Girls with Disabilities in India*, HUMAN RIGHTS WATCH (Apr. 03, 2018) at 4, available at: <https://www.hrw.org/report/2018/04/03/invisible-victims-sexual-violence/access-justice-women-and-girls-disabilities> (last visited on Oct. 25, 2021).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Patan Jamal Vali v. The State of Andhra Pradesh*, 2021 S.C.C. OnLine S.C. 343, paras 35-40.

<sup>5</sup> Section 5, clauses (j), (k); section 9, clauses (j), (k); section 26(3); section 38(2) POCSO Act.

where the sexual assault is committed on a person with disability and second, where the assault leads to disability. The relevant procedural provisions in the Code of Criminal Procedure, 1973 (hereinafter CrPC) and the Indian Evidence Act, 1872 (hereinafter IEA) were also amended by the 2013 Act in order to make reporting of sexual offences and recording of evidence of WWD easier.

In the year 2018, the IPC, the CrPC, the IEA and the POCSO Act were further amended by the Criminal Law (Amendment) Act, 2018, which *inter alia* enhanced the punishment for rape to a minimum of ten years.<sup>6</sup> Higher punishment ranging from twenty years to the rest of the offender's natural life was provided for rape of girls under sixteen years of age.<sup>7</sup> In case of rape on girls under twelve years of age, death sentence was also provided as one of the punishments.<sup>8</sup> In order to bring the POCSO Act at par with the amended IPC provisions, the POCSO Act was further amended by the Protection of Children from Sexual Offences (Amendment) Act, 2019. In the amended POCSO Act, the minimum punishment for penetrative sexual assault (PSA), which is equivalent to rape under the IPC, was increased to imprisonment for ten years.<sup>9</sup> Aggravated penetrative sexual assault (APSA), which includes PSA on children with disabilities, was made punishable with imprisonment ranging from minimum twenty years to the rest of the offender's natural life, or with death.<sup>10</sup>

Some provisions dealing with sexual violence against WWD have also been included in the Rights of Persons with Disabilities Act, 2016 (hereinafter RPWD Act). The Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter the JJ Act) also considers disability as an aggravating factor for offences committed under Chapter IX of the Act, which *inter alia* includes cruelty or abuse leading to physical incapacitation or mental illness.<sup>11</sup> If offences under the JJ Act are committed against children certified to be disabled by a medical practitioner, they will attract twice the penalty provided for the offence.<sup>12</sup> The Medical Termination of Pregnancy Act, 1971 (hereinafter MTP Act) which provides for the legal procedure for termination of pregnancies, also becomes relevant in context of rape of WWD leading to pregnancies.

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<sup>6</sup> Section. 376(1), Indian Penal Code, 1860 (IPC, 1860).

<sup>7</sup> *Id.*, section 376(3), section 376DA.

<sup>8</sup> *Id.*, section 376AB, section 376DB.

<sup>9</sup> Section 4(1), POCSO Act.

<sup>10</sup> *Id.*, section 6(1).

<sup>11</sup> Section 75(3), Juvenile Justice (Care and Protection of Children) Act, 2015.

<sup>12</sup> *Id.*, section 85. Since the JJ Act, 2015, came into force before the Rights of Persons with Disabilities Act, 2016, the explanation to section 85 of the JJ Act states that 'the term 'disability' shall have the same meaning as assigned to it under clause (i) of section 2 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996)'.

This paper critically analyses these statutory provisions and significant judicial pronouncements on issues that emerge in the implementation of these provisions, in order to assess the impact of these provisions in ensuring justice to WWD who face sexual violence.

### ***Facts and Figures***

According to the 2011 Census, out of the 121 crore persons in India, 2.68 crore persons, that is, 2.21 per cent of the total population are 'disabled'.<sup>13</sup> Among the disabled population, 56 per cent (1.5 crore) are males and 44 per cent (1.18 Crore) are females.<sup>14</sup> According to a Report submitted by Disabled People's International (India) and its partners to the Committee on the Elimination of Discrimination against Women (CEDAW) in September 2013, 'almost 80 per cent of women with disabilities are victims of violence, and they are four times more likely than other women to suffer sexual violence'.<sup>15</sup> There is lack of reliable governmental data on violence against WWD which 'renders the violence committed against women with disabilities invisible'.<sup>16</sup> The Supreme Court has also lamented that lack of disaggregated statistical data on the extent of violence against women with disabilities 'poses a formidable obstacle to understanding the problem better and designing suitable solutions'.<sup>17</sup>

### ***Definition of 'Woman' and 'Disability'***

The IPC defines 'woman' as a 'female human being of any age'.<sup>18</sup> This definition has been adopted for this paper. The recent amendments to the criminal laws in India, introduced specific provisions for punishing sexual violence against women who are 'temporarily or permanently mentally or physically disabled'. However, these provisions do not refer to any statutory definitions of such disabilities.

The RPWD Act, 2016 was enacted to fulfil India's obligations as a signatory to the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD),

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<sup>13</sup> See, Chapter 3 in Ministry of Statistics and Programme Implementation, Government of India, PERSONS WITH DISABILITIES (DIVYANGJAN) IN INDIA – A STATISTICAL PROFILE 2021 (2021) 28 available at: [http://www.nhfdc.nic.in/upload/nhfdc/Persons\\_Disabilities\\_31mar21.pdf](http://www.nhfdc.nic.in/upload/nhfdc/Persons_Disabilities_31mar21.pdf) (last visited on Oct. 20, 2021).

<sup>14</sup> *Id.*

<sup>15</sup> See, Ashwaq Masoodi, *Sexual Rights of Disabled Women*, MINT available at: <https://www.livemint.com/Politics/FDPpol4IJ0pX037spUU1kL/Sexual-rights-of-disabled-women.html> (last visited on October 25, 2021).

<sup>16</sup> Rashida Manjoo, *Report of the Special Rapporteur on violence against women, its causes and consequences*, United Nations General Assembly, Human Rights Council, April 01, 2014 at p. 18, para 72 available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/187/50/PDF/N2118750.pdf?OpenElement>.

<sup>17</sup> Per D.Y. Chandrachud, J. in *Patan Jamal Vali*, *supra* note 4, para 37.

<sup>18</sup> Section 10, Indian Penal Code, 1860.

2006.<sup>19</sup> The RPWD Act defines a 'person with disability' as a 'person with long term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his full and effective participation in society equally with others'.<sup>20</sup> The Central Government has been empowered to add more types of disabilities in the Schedule to the Act.<sup>21</sup>

Unlike the RPWD Act, the POCSO Act and the amended IPC, CrPC and IEA provisions do not insist on 'long term' impairment. Temporary disabilities, whether mental or physical, which enhance the vulnerability of the victim to sexual violence, are also encompassed in the statutory provisions in these amended laws. A perusal of the case law shows that, while deciding the issue of disability, the criminal courts focus on the ability of the victim to understand and communicate the criminal act complained of. Medical and familial evidence is often referred to in the judgments, apart from the trial judge's assessment of the victim's ability to understand the incident and to answer the questions in that regard, although there are some cases where the definition of 'person with disability' in the RPWD Act is also referred to.<sup>22</sup>

## II

### Relevant Substantive Criminal Law Provisions

#### *Provisions Relating to Rape under the IPC*

Post the 2013 amendments to the criminal laws, the definition of rape in section 375 of the IPC is not limited to non-consensual penile-vaginal penetration only. The expanded definition of rape also includes non-consensual anal and oral penetrative assault on a woman by a man, whether with the penis or by fingers or objects. Non-consensual application of mouth to the private parts is also included in the amended definition of rape. A woman's consent to any of these sexual acts is not valid if she is unable to understand the nature and consequences of the act, due to unsoundness of mind at the time of giving such consent<sup>23</sup> or when the woman is unable to communicate consent,<sup>24</sup> which may be because of disability. In 2013, the age of consent was also increased from 16 years to 18 years to bring the IPC provisions at par with the POCSO Act. A new explanation of consent was also added to section 375 which specifies that consent includes 'communication by the woman of

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<sup>19</sup> Preamble, Rights of Persons with Disabilities Act, 2016.

<sup>20</sup> *Id.*, section 2(s).

<sup>21</sup> *Id.* section 99.

<sup>22</sup> See, *Dal Bahadur Darjee v. State of Sikkim*, 2019 S.C.C. OnLine Sikk 122, para 14.

<sup>23</sup> Section 375, clause fifthly, Indian Penal Code, 1860.

<sup>24</sup> *Id.*, section 375, clause seventhly.

willingness to participate in the specific sexual act through gestures or any form of non-verbal communication also'.<sup>25</sup> Lack of physical resistance to the act of penetration alone does not signify consent.<sup>26</sup>

After the 2018 amendments to the criminal laws, the minimum punishment for rape is ten years and it may extend to imprisonment for life along with fine.<sup>27</sup> Commission of rape 'on a woman incapable of giving consent'<sup>28</sup> or 'on a woman suffering from mental or physical disability'<sup>29</sup> is punishable with imprisonment ranging from minimum ten years and extending up to imprisonment for the remainder of the offender's natural life, and fine. The same punishment is provided for commission of rape by someone in the management or on the staff of a place of custody or a hospital, on a woman in that place of custody or hospital and in cases of rape by a relative, guardian, teacher, or a person in a position of trust or authority towards the woman.<sup>30</sup> These provisions can be invoked in cases of rape of WWD in institutional set ups.

If an injury is inflicted in the course of commission of rape which leads to the death of the victim or leads to her being in a persistent vegetative state, the offender is punishable with a minimum imprisonment of twenty years which may extend up to imprisonment for the remainder of the offender's natural life, or with death.<sup>31</sup>

If a man, in a position of authority or in a fiduciary relationship or a public servant or a superintendent or manager of a jail, remand home or other place of custody or a women's or children's institution or on the management or staff of a hospital, abuses such position or fiduciary relationship to induce or seduce any woman in his custody or under his charge or present in the premises to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, he is punishable with rigorous imprisonment ranging from five years to ten years, and fine.<sup>32</sup>

For other sexual offences under the IPC like assault on a woman with intent to outrage her modesty,<sup>33</sup> sexual harassment,<sup>34</sup> assault with intent to disrobe a

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<sup>25</sup> *Id.*, section 375, explanation 2.

<sup>26</sup> *Id.*, explanation 2, proviso.

<sup>27</sup> *Id.*, section 376 (1).

<sup>28</sup> *Id.*, section 376 (2) clause (j).

<sup>29</sup> *Id.*, section 376 (2) clause (l).

<sup>30</sup> *Id.*, section 376 (2) clauses (d), (e) and (f).

<sup>31</sup> *Id.*, section 376A.

<sup>32</sup> *Id.*, section 376C.

<sup>33</sup> *Id.*, section 354.

<sup>34</sup> *Id.*, section 354A.

woman,<sup>35</sup> voyeurism,<sup>36</sup> stalking,<sup>37</sup> or use of word, gesture or act intended to insult the modesty of a woman,<sup>38</sup> there are no specific substantive provisions for WWD, though some of the procedural amendments cover these offences also, to make the reporting of these offences easier for WWD, as discussed later in this paper.

### ***Relevant Provisions under the POCSO Act***

As discussed above, under the POCSO Act, PSA committed on a child below eighteen years leading to physical incapacitation or mental illness of the child, or PSA committed on a child taking advantage of the child's mental or physical disability, is treated as APSA.<sup>39</sup> After the 2019 Amendments to the POCSO Act, APSA is punishable with minimum imprisonment for twenty years which may extend up to imprisonment for the remainder of the offender's natural life, or with death and with just and reasonable fine to meet the medical expenses and rehabilitation of the victim.<sup>40</sup>

Unlike the IPC, the specific provisions relating to violence against children with disabilities are not limited to PSA under the POCSO Act. If sexual assault (SA) which includes touching of a child's private parts with sexual intent, is committed on a child below 18 years of age, leading to physical incapacitation or mental illness of the child, or if SA is committed on a child taking advantage of the child's mental or physical disability, it is treated as aggravated sexual assault (ASA)<sup>41</sup> which is punishable with imprisonment ranging from five years to seven years, and with fine.<sup>42</sup>

### ***Relevant Provisions under the RPWD Act***

The RPWD Act imposes a duty on the appropriate government<sup>43</sup> to take measures to protect persons with disabilities from all forms of abuse, violence, and exploitation and to prevent the same.<sup>44</sup> Under section 92 of the RPWD Act, 'assaulting or using force with intent to outrage the modesty of a woman with

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<sup>35</sup> *Id.*, section 354B.

<sup>36</sup> *Id.*, section 354 C.

<sup>37</sup> *Id.*, section 354 D.

<sup>38</sup> *Id.*, section 509.

<sup>39</sup> Section 5 clauses (j) and (k), Prevention of Children from Sexual Offences Act, 2012.

<sup>40</sup> *Id.*, section 6.

<sup>41</sup> *Id.*, section 9 clauses (j) and (k).

<sup>42</sup> *Id.*, section 10.

<sup>43</sup> Section. 2 (b), RPWD Act, 2016: 'appropriate Government means: (i) in relation to the Central Government or any establishment wholly or substantially financed by that Government, or a Cantonment Board constituted under the Cantonments Act, 2006, the Central Government; (ii) in relation to a State Government or any establishment, wholly or substantially financed by that Government, or any local authority, other than a Cantonment Board, the State Government.'

<sup>44</sup> *Id.*, section 7.

disability; or being in a position to dominate the will of a child or woman with disability and using that position to exploit her sexually' is punishable with imprisonment ranging from six months to five years and with fine.<sup>45</sup> According to section 95 of the RPWD Act, 'where an act or omission constitutes an offence punishable under the RPWD Act and also under any other Central or State Act, then, the offender found guilty of such offence shall be liable to punishment only under such Act as provides for higher punishment'. Using a position of domination to 'exploit sexually' is a broad phrase in section 92 of the RPWD Act and it can overlap with many provisions relating to sexual offences under the IPC and the POCSO Act, many of which provide for higher punishment than what is provided in section 92 of the RPWD Act. For example, the punishment for the similar offence of 'outraging the modesty of a woman' under section 354 of the IPC ranges from minimum one year to maximum five years of imprisonment and fine. In absence of any reference to these provisions of the RPWD Act in cases relating to sexual violence against WWD, their interpretation *vis a vis* similar provisions under the IPC and the POCSO Act and their impact in penalising sexual violence against WWD remains to be seen. Presently, with almost no use in the reported cases, these provisions seem redundant.

### III

#### Relevant Provisions in the Procedural Laws

##### *Relevant Provisions in the CrPC*

An enabling feature of the 2013 amendments to the CrPC was the introduction of provisions for use of interpreters or special educators and videography facilities for victims with disabilities at different stages of the criminal justice process.<sup>46</sup> These amendments provided for mandatory registration of FIRs for sexual offences against women by a 'woman police officer or any woman officer'<sup>47</sup> and non-registration of FIRs was made a punishable offence.<sup>48</sup> The 2013 amendments also provided that when rape and any other sexual offence under the IPC like assault on a woman with intent to outrage her modesty, sexual harassment, assault with intent to disrobe a woman, voyeurism, stalking, or use of word, gesture or act intended to insult the modesty of a woman, is committed on a woman with permanent or temporary mental or physical disability, the FIR should be recorded at the victim's residence or at a convenient place of her choice, in the presence of an interpreter or

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<sup>45</sup> *Id.*, section 92 clauses (b) and (d).

<sup>46</sup> Section. 54A, 154, 164(5A); Section. 119, proviso, Indian Evidence Act, 1872.

<sup>47</sup> Section 154(1), proviso 1, Criminal Procedure Code, 1973.

<sup>48</sup> Section 166A, Indian Penal Code, 1860.

a special educator along with videography of the recording.<sup>49</sup> During investigation, WWD can only be questioned by the police at their residence.<sup>50</sup> Any officer who knowingly disobeys any of these legal mandates is punishable with imprisonment ranging from six months to two years, and fine.<sup>51</sup> Police officers are also duty bound to get the statements of women victims of sexual offences recorded by a Judicial Magistrate as soon as possible.<sup>52</sup> In case of WWD, Magistrates are required to take the assistance of interpreters or special educators in recording the statements of the victims and the same should also be videographed.<sup>53</sup> Such statements can be considered as statements in lieu of examination-in-chief, as specified in section 137 of the IEA.<sup>54</sup> This 2013 amendment, which is only applicable in case of WWD, is meant to ensure that such victims can be directly cross-examined on their statements recorded by the Magistrate under section 164 of the CrPC, without the need for recording their statements again during trial.

Under the CrPC, a person who is arrested on the charge of committing an offence may be directed by the jurisdictional court, on the request of the officer in charge of the police station, to subject himself to identification by any person or persons.<sup>55</sup> If the person who has to identify such an arrestee is a mentally or physically disabled person, then a Judicial Magistrate has to supervise the identification process and take appropriate steps to ensure that the arrestee is identified by the person with disabilities using methods that the person with disabilities is comfortable with.<sup>56</sup> The identification process should also be videographed.<sup>57</sup> This general provision in the CrPC, is also relevant during identification of the accused by WWD who face sexual violence.

### ***Relevant Provisions under the IEA***

According to the IEA, when a man is being prosecuted for rape on a woman incapable of giving consent or on a woman with mental or physical disability, if sexual intercourse by the accused is proved and the victim states in her evidence before the court that she did not consent to it, the court 'shall presume' the absence of her consent.<sup>58</sup> Such a presumption shifts the burden of proving consent on the accused.

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<sup>49</sup> Section 154(1), proviso 2, Criminal Procedure Code, 1973.

<sup>50</sup> *Id.*, section 160(1), proviso.

<sup>51</sup> Section. 166A, Indian Penal Code, 1860.

<sup>52</sup> Section. 154, proviso 2, clause (c), Criminal Procedure Code, 1973.

<sup>53</sup> *Id.*, section 164(5A) (a) proviso 1 and 2.

<sup>54</sup> *Id.*, section 164 (5A) (b).

<sup>55</sup> *Id.*, section 54A.

<sup>56</sup> *Id.*, section 54A, proviso 1.

<sup>57</sup> *Id.*, section 54A, proviso 2.

<sup>58</sup> Section 114A, Indian Evidence Act, 1872.

Section 118 of the IEA deals with the question of competency of witnesses. As per this section, all persons are competent to testify 'unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions' due to young or extreme old age, or a disease of the body or mind, or any other similar cause. The explanation to the section clarifies that 'a lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them'.

Another significant provision is section 119 of the IEA, which deals, generally, with the evidence of witnesses who are unable to speak. As per this section:

'...a witness who is unable to speak may give her evidence in any other manner in which she can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court, evidence so given shall be deemed to be oral evidence'.

The proviso to section 119 further provides that 'if the witness is unable to communicate verbally, the Court should take the assistance of an interpreter or a special educator in recording the statement, and such statement should be videographed'. These general provisions can also cater to the special needs of WWD.

### ***Relevant Procedural Provisions under the POCSO Act***

According to section 26 of the POCSO Act, the Magistrate or the police officer should 'record the statement of the child as spoken by the child in the presence of the parents of the child or any other person in whom the child has trust or confidence'. In the case of a child having a mental or physical disability, 'the Magistrate or the police officer, may seek the assistance of a special educator or *any person familiar with the manner of communication of the child* or an expert in that field to record the statement of the child'<sup>59</sup> and 'wherever possible, the Magistrate or the police officer, shall ensure that the statement of the child is also recorded by audio-video electronic means'.<sup>60</sup> Similarly, according to section 38 of the POCSO Act, the Special POCSO Court 'may take the assistance of a translator or interpreter while recording the evidence of the child. If a child has a mental or physical disability, the Special Court may take the assistance of a special educator or any person familiar with the manner of communication of the child or an expert in that field to record the evidence of the child'. The use of the word "may" in all the above provisions of the POCSO Act dilutes the mandate of these provisions.

The Protection of Children from Sexual Offences Rules, 2020 (hereinafter POCSO Rules) which replaced the Protection of Children from Sexual Offences Rules, 2012 supplement the POCSO Act provisions. The POCSO Rules, 2020 came into force on

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<sup>59</sup> Section 26(3), Prevention of Children from Sexual Offences Act, 2012.

<sup>60</sup> *Id.*, section 26(4).

March 9, 2020. The POCSO Rules borrow the definition of disabilities from the RPWD Act.<sup>61</sup> These Rules define experts and special educators for the purposes of the POCSO Act. These experts have to be trained persons who can facilitate communication with children with disabilities as per their individual needs.<sup>62</sup>

Further, the POCSO Rules, define ‘person familiar with the manner of communication of the child’<sup>63</sup> to mean:

‘...a parent or family member of a child or a member of child’s shared household or any person in whom the child reposes trust and confidence, who is familiar with *that* child’s unique manner of communication, and whose presence may be required for or be conducive to more effective communication with the child’.<sup>64</sup>

## IV

### Legal Provisions for Medical Termination of Pregnancy

Rape of WWD sometimes leads to pregnancies which are often discovered after prolonged abuse and in their later stages. Such cases often raise complicated issues about the physical and mental health of the victim, her consent to termination or retention of the pregnancy and about the rights and future of the unborn child, especially in cases of victims with severe mental disabilities.

The legal recourse for termination of a pregnancy is provided in the MTP Act, 1971. The Act has been recently amended by the Medical Termination of Pregnancy (Amendment) Act, 2021. Before the amendment, section 3 of the MTP Act allowed termination of pregnancy up to the gestation period of twelve weeks, if one doctor opined that the continuance of the pregnancy would involve a risk to the life of the pregnant woman, or of grave injury to her physical or mental health; or in case of serious physical or mental abnormalities in the foetus. For a pregnancy allegedly caused by rape, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.<sup>65</sup> For a gestation period over twelve weeks and up to twenty weeks, the opinion of minimum two doctors were required for the termination of the pregnancy. The Medical Termination of Pregnancy (Amendment) Act, 2021 has increased the time period within which an abortion is legally allowed to twenty weeks on one

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<sup>61</sup> Rule 2, clause (d), explanation, Prevention of Children from Sexual Offences Rules, 2020.

<sup>62</sup> *Id.*, rule 2, clause (c) and clause (d).

<sup>63</sup> *See, supra* note 59.

<sup>64</sup> Rule 2, clause (e), Prevention of Children from Sexual Offences Rules, 2020.

<sup>65</sup> Section. 3, explanation 2, Medical Termination of Pregnancy Act, 1971 as amended by the Medical Termination of Pregnancy (Amendment) Act, 2021 which received the assent of the President on the March 25, 2021, and came into force on September 24, 2021.

doctor's advice and for a pregnancy exceeding twenty weeks and up to twenty four weeks, on two doctors' advice for *inter alia* victims of rape.<sup>66</sup> Medical boards set up under the amended MTP Act by States and Union Territories are empowered to decide if pregnancy may be terminated after twenty four weeks in cases of serious foetal abnormalities.<sup>67</sup>

Consent of the pregnant woman is required for termination of pregnancy under the MTP Act.<sup>68</sup> In case of termination of pregnancy of a woman under eighteen years of age, or a mentally ill person, written consent of the guardian is required.<sup>69</sup> The amended MTP Act also prohibits unauthorised disclosure of the identity of a woman whose pregnancy has been terminated under the Act. Any such disclosure is punishable with imprisonment up to one year, or with fine, or with both.<sup>70</sup>

In exercise of the powers conferred by section 6 of the MTP Act, the Central Government has notified the Medical Termination of Pregnancy (Amendment) Rules, 2021 with effect from October 12, 2021 to amend the Medical Termination of Pregnancy Rules, 2003. As per Rule 3B of the amended Rules, the categories of women eligible for termination of pregnancy for a period of up to twenty-four weeks, include rape and incest survivors, minors, women with physical disabilities which is explained as "major disability as per criteria laid down under the RPWD Act, 2016" and "mentally ill women including those with mental retardation".

The RPWD Act penalises performance of any medical procedures on WWD, if it leads to, or is likely to lead to termination of pregnancy, without her express consent. The offence is punishable with imprisonment ranging from six months to five years and with fine.<sup>71</sup> However, an exception is made for medical procedures for termination of pregnancy that are done in severe cases of disability and with the opinion of a registered medical practitioner and also with the consent of the guardian of the woman with disability.<sup>72</sup> This provision of the RPWD Act overlaps with the provisions of the MTP Act as well as the provisions penalising causing of miscarriage under the IPC.<sup>73</sup> Due to lack of case law on the provision under the RPWD Act so far, how these overlapping provisions will be interpreted by the judiciary in case of WWD is yet to be seen.

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<sup>66</sup> *Id.*, section 3(2).

<sup>67</sup> *Id.*, section 3(2B).

<sup>68</sup> *Id.*, section 3(4) (b).

<sup>69</sup> *Id.*, section 3(4) (a).

<sup>70</sup> *Id.*, section 5A.

<sup>71</sup> Section 92(f), Rights of Persons with Disabilities Act, 2016.

<sup>72</sup> *Id.*

<sup>73</sup> *See*, sections 312-316, Indian Penal Code, 1860.

## V

### Provisions for Compensation and Free Treatment for Acid Attack and Rape Victims

The 2013 Act introduced sections 326A and 326B in the IPC. These sections penalise acid attacks by throwing or administering acid and attempted acid attacks respectively. Both these offences under the IPC are gender neutral. However, the manner in which acid attacks are carried out have a gender dimension. Such attacks are mostly carried out on women by male accused due to refusal to enter into relationships or for breaking them off.<sup>74</sup> Since most acid attack victims need prolonged medical treatment and rehabilitation costs are immense, section 326A provides that the fine imposed under the section should be paid to the victim and it should be “just and reasonable” to meet the medical expenses of the victim.

Criminal courts also have the general power to order compensation to victims of crimes under section 357, CrPC. Victims can also claim compensation from State Governments under Victim Compensation Schemes framed under section 357A of the CrPC. In case of acid attacks, gang rape and rape of girls under sixteen or twelve years of age, the fine imposed on the convict has to be paid to the victim.<sup>75</sup> Such fine has to be just and reasonable to meet the victim’s medical expenses and rehabilitation.<sup>76</sup> The compensation payable by the State Governments under section 357A is not dependent on the conviction of the offender and it is in addition to the payment of the fine imposed on the convict to the victim.<sup>77</sup> The POCSO Act also provides for payment of compensation to victims for any physical or mental trauma caused as well as for the immediate rehabilitation of the victim.<sup>78</sup> As per Rule 9 of the POCSO Rules, the POCSO Courts can grant compensation on their own or on an application filed by or on behalf of the child.

Section 357C of the CrPC mandates that all public and private hospitals should provide free treatment to acid attack and rape victims and report the offence to the police. In case of non-compliance with the provision, the person in charge of the hospital can be punished with imprisonment up to one year or with fine or with both. These provisions for compensation and free treatment are applicable to all victims including WWD.

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<sup>74</sup> See, generally, Shivani Goswami, Rakesh Kumar Handa, *The Peril of Acid Attacks in India and Susceptibility of Women* 3(1) J. VICTIMOLOGY & VICTIM JUST. 72 (2020).

<sup>75</sup> Sections 326A, 376AB, 376D, 376DA, 376DB, Indian Penal Code, 1860.

<sup>76</sup> *Id.*

<sup>77</sup> Section 357B, Criminal Procedure Code, 1973.

<sup>78</sup> Sections 33(8), Prevention of Children from Sexual Offences Act, 2012.

## VI

### Significant Judicial Interventions

#### *Inclusion of Acid Attack Victims in Disability List*

In *Laxmi v. Union of India*,<sup>79</sup> in response to a writ petition filed by an acid attack survivor before the 2013 amendments, the Supreme Court issued a series of orders for regulation of sale of acid in India, and for the proper treatment and rehabilitation of acid attack victims.<sup>80</sup> The Court directed all States to include a minimum compensation of three lakh rupees for acid attack victims in their Victim Compensation Schemes.<sup>81</sup>

In *Pariwartan Kendra v. Union of India*,<sup>82</sup> the Supreme Court clarified that the decision in *Laxmi's case* does not bar the Government from awarding a compensation of more than three lakh rupees to acid attack victims, if required. The Court also directed all States and Union Territories to take appropriate steps for inclusion of acid attack victims under their disability lists. Pursuant to this judgment, acid attack victims were included in the disability list under the RPWD Act, which empowers them to access government welfare schemes and reservation benefits.<sup>83</sup>

#### *Age under the POCSO Act Does not Include Mental Age*

In *Ms. Eera Through Dr. Manjula Krippendorf v. State (Govt. of NCT of Delhi)*,<sup>84</sup> a 38 years old woman with cerebral palsy was allegedly raped. As per the medical evidence, her functional age was that of a child of 6 to 8 years. Due to the problems faced by her during deposition in the trial of the rape case, her mother approached the Supreme Court on her behalf, seeking a purposive interpretation of the definition of child under section 2 (d) of the POCSO Act to include persons who were biologically above 18 years of age, but whose mental age was below 18 years. Such an interpretation would have enabled the transfer of the case to a Special Court under the POCSO Act which would have ensured extension of the child friendly procedures under the POCSO Act to the victim. The accused died during the pendency of the proceedings. However, the Court went on to decide the principal issue since the petitioner contended that under the POCSO Act and the Rules framed thereunder, the victim would be entitled to get compensation and the procedure for it would be different.

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<sup>79</sup> (2016) 3 S.C.C. 669; 2015 S.C.C. OnLine S.C. 335.

<sup>80</sup> (2014) 13 S.C.C. 743; (2014) 4 S.C.C. 431; 2015 S.C.C. OnLine S.C. 335.

<sup>81</sup> (2014) 4 S.C.C. 427; (2016) 3 S.C.C. 669; 2015 S.C.C. OnLine S.C. 335.

<sup>82</sup> (2016) 3 S.C.C. 571.

<sup>83</sup> See, section 34 and Schedule, Rights of Persons with Disabilities Act, 2016.

<sup>84</sup> (2017)15 S.C.C. 133.

The division bench refused to interpret the definition of 'child' under section 2(d) of the POCSO Act to include persons whose 'mental age' is assessed to be less than 18 years on the basis of psychiatric evaluation. In two separate but concurring judgments, the learned judges referred to various principles of statutory interpretation and concluded that a reading of the Act as a whole in the light of the Statement of Objects and Reasons, makes it clear that the intention of the legislature was to focus on children, as commonly understood, that is, persons who are physically under the age of 18 years.<sup>85</sup>

According to Nariman, J. the modern trend in interpretation of statutes is to examine text as well as context, and object or purpose as well as literal meaning. After referring to various provisions under the POCSO Act and the other relevant statutes like the MTP Act, the RPWD Act, the Mental Healthcare Act, 2017, the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999. in detail, Nariman. J. concluded that to read the word 'mental' into section 2(1)(d) of the POCSO Act<sup>86</sup> would be *doing violence both to the intent and the language of Parliament* and given the fact that it is a beneficial/penal legislation, 'the Judges can extend it only as far as Parliament intended and no further'.<sup>87</sup>

This judgment raises *inter alia* critical issues relating to the need for an intersectional approach in legal reforms, infantilising of adult women with disabilities, unquestioned acceptance of medicalised notion of disability, the modes of determination of mental age which are generally based on much contested deductive intelligence quotient tests, treatment of WWD as a homogenous category and lacunae in the criminal justice system for WWD.<sup>88</sup>

### ***Retrospective Effect of the 2013 Amendments and the Challenges in Recording Testimonies of WWD***

In *State of Rajasthan v. Darshan Singh @ Darshan Lal*,<sup>89</sup> which is a pre POCSO Act and a pre-2013 amendments judgment, while interpreting section 119 of the IEA in a homicide case, a two-judge bench of the Supreme Court held that:

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<sup>85</sup> *Id.*, at 214, para 139.

<sup>86</sup> Section 2 (1)(d), Prevention of Children from Sexual Offences Act, 2016 states: 'child' means any person below the age of eighteen years.

<sup>87</sup> *Supra* note 84, at p. 219, para 147.

<sup>88</sup> See generally, Amita Dhanda, *On Protecting the Rights of Women with Disabilities*, THE NEW INDIAN EXPRESS (May 6, 2016) available at: <https://www.newindianexpress.com/opinions/2016/may/07/On-Protecting-the-Rights-of-Women-with-Disabilities-933711.html> (last visited on Nov. 03, 2020); Arushi Garg, *Navigating through 'Age' and 'Agency' in Eera v. State*, 14 SOCIO-LEGAL REVIEW 79 (2018).

<sup>89</sup> *State of Rajasthan v. Darshan Singh*, (2012) 5 S.C.C. 789.

'A deaf and dumb person is a competent witness. If in the opinion of the Court, an oath can be administered to him/her, it should be so done. Such a witness, if able to read and write, it is desirable to record his statement giving him questions in writing and seeking answers in writing. In case the witness is not able to read and write, his statement can be recorded in sign language with the aid of an interpreter, if found necessary. In case the interpreter is provided, he should be a person of the same surrounding but should not have any interest in the case and he should be administered oath'.<sup>90</sup>

This judgment is often cited in cases relating to sexual violence on women who cannot hear or speak or have some mental disability. A perusal of some of these judgments shows that the procedure prescribed in this judgment is often not followed by Magistrates who record the testimonies of disabled victims under section 164(5A) of the CrPC or by the trial courts during the deposition of the victims. This non observance often leads to the statements/testimonies not being considered reliable by the appellate courts leading to directions for taking additional evidence or for re-trial or even acquittal of the accused due to a reasonable doubt in the prosecution's theory. Some of these judgments are discussed here.

In *Lalmalsawma v. State of Mizoram*,<sup>91</sup> a 15-year-old 'deaf and dumb' girl was allegedly raped. The incident happened before the POCSO Act or the 2013 amendments came into force. Her statement was recorded before a Magistrate under section 164 CrPC during investigation. However, the victim was not examined in Court during trial and without such examination, her statement under section 164 CrPC could not have been used as evidence, although it was exhibited and the Magistrate who recorded that statement was examined as a witness. While hearing the appeal of the accused against his conviction by the Sessions Court, Tinlianthang Vaiphei, J. of the High Court of Gauhati (Aizawl Bench) noted that the trial of the case was pending when the 2013 Act came into force and the victim could have been examined in accordance with the amended section 119, IEA because, unlike the IPC amendments, the amendments to the CrPC and the IEA can be applied in pending cases.<sup>92</sup> Expressing the view that injustice had been caused to the prosecution as well as the appellant by non-examination of the victim, the learned Judge, instead of ordering a retrial, took recourse to section 391 CrPC and directed the Sessions Judge to take the evidence of the victim in accordance with section 119, IEA read with section 164(5A) (b) CrPC as amended/introduced by the 2013 Act and transmit the record to the High Court to enable it to give a correct finding.

However, when the case again came up before the High Court, it was held that the prosecution was unable to prove beyond reasonable doubt that the appellant

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<sup>90</sup> *Id.*, at p. 798, para 29.

<sup>91</sup> *Lalmalsawma v. State of Mizoram*, 2014 S.C.C. OnLine Gau. 259.

<sup>92</sup> *See, Gurbachan Singh v. Satpal Singh*, (1990) 1 S.C.C. 445.

committed rape upon the prosecutrix.<sup>93</sup> The accused was acquitted on the following grounds:

*Firstly*, the interpreter was not administered oath by the learned trial Court or by the Magistrate recording the statement of the prosecutrix under section 164(5)(a), CrPC read with section 119 of the IEA, which is contrary to the decision of the Apex Court in the case of *Darshan Singh*.

*Secondly*, the interpreter was a relative of the prosecutrix which made her an interested witness. Thus, in view of the legal position stated in *Darshan Singh*, the statement of the prosecutrix as interpreted by the interpreter was not admissible in law.

The interpreter's evidence was mostly based on the information obtained from the prosecutrix and not on her knowledge. No attempt was made by the prosecution to indicate that the evidence given by the interpreter about the incident was narrated to her by the prosecutrix immediately after the incident so as to make it relevant under section 6 of the IEA. Therefore, the statement of the interpreter which was mostly considered hearsay evidence, could not be considered as the basis for convicting the appellant. Even the medical evidence was held to be ambiguous, because the Medical Officer said that though the victim's hymen was torn in the posterior region but he could not say whether the rupture of hymen was recent or not and that there was no external injury on the body of the prosecutrix or any other incriminating signs on the body of the appellant either. Thus, the accused was given the benefit of doubt and acquitted.

In *Rahul v. State of Maharashtra*,<sup>94</sup> the appellant allegedly committed APSA under section 6 read with section 5 (k) of the POCSO Act on a 17 years old differently abled girl with a mental age of four and a half years. The Magistrate opined that the victim was capable of understanding the questions put to her and accordingly recorded her statement under section 164 CrPC with the assistance of a special educator. As per section 164 (5A) clause (b), such a statement is to be considered as a statement in lieu of examination-in-chief and therefore, the accused had a right to put the victim making such a statement to cross-examination. During the trial, the learned Additional Sessions Judge noted that he examined the victim and on preliminary examination, he found her to be unfit for recording her evidence or understanding fully the questions that would be put to her and, therefore, he did not permit her cross examination by the defence. But the Sessions Judge did not make any endorsement about the production of the victim before the Court on a particular date and her being examined in the manner mentioned in his judgment. There was also no record created for examination of the victim in the presence of the special educator. It was also seen from the impugned judgment that one translator/expert

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<sup>93</sup> *Lalmalsawma v. State of Mizoram*, 2015 S.C.C. OnLine Gau. 800.

<sup>94</sup> 2018 S.C.C. OnLine Bom. 69.

was present along with the victim in the Court. But, even the evidence of the translator/expert was not recorded, so as to enable the Court to form an opinion about the fitness or otherwise of the victim to testify before the Court. Pointing out these lapses on part of the Sessions Judge, the High Court of Bombay (Nagpur Bench), while hearing the appeal of the accused against his conviction by the trial court, held that 'no such effort as is contemplated under the law was made by the learned Additional Sessions Judge in considering the possibility of recording of evidence of the victim'. This was considered all the more necessary because, in the opinion of the Magistrate who recorded the victim's testimony under section 164(5A) CrPC, the victim was competent to testify. So, the defence of the appellant was prejudicially affected. There was no satisfactory evidence brought on record by the prosecution to prove the fact that at the relevant time, the victim of crime was a 'differently abled child'. The mother of the victim had stated in her testimony that the victim was a 'differently abled child'. But she did not clarify what she meant by the expression 'differently abled child'. The psychologist who gave the report about the mental state of the victim was not examined. Thus, according to the Hon'ble Court, there was no evidence to prove in a reasonable manner that the victim was a mentally disabled child, which is the requirement of section 5(k) of the POCSO Act. Thus, the accused could not be convicted under section 6 read with section 5(k) of the POCSO Act on the basis of just the testimony of the mother of the victim.

The High Court further held the mother's evidence regarding the nature of the PSA to be hearsay, since she was told about the incident by her son (brother of the victim) and then by the victim herself. The High Court held that 'these circumstances would require that a reasonable effort is made for ascertaining the mental condition of the victim directly as well as through the assistance of the expert or educator as contemplated under the law and the record of which proceeding is also properly made'<sup>95</sup> and remitted the case back to the trial Court for re-trial in terms of section 386 clause (b)(i) of the CrPC from the stage of charge. The appellant was released on bail pending the re-trial.

In *Shrikantgouda v. The State of Karnataka*,<sup>96</sup> a 26-year-old woman who was deaf, dumb, 76% physically disabled and mentally retarded with an IQ of 45 percent was allegedly raped by the accused when she was alone at home and taking a bath. Her mother had gone out of the house to meet somebody. Although the trial court convicted the accused, the High Court of Karnataka (Dharwad Bench) acquitted him, giving him the benefit of doubt on *inter alia* the following grounds:

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<sup>95</sup> *Id.*, para 17.

<sup>96</sup> *See*, Criminal Appeal No. 100229/2015, High Court of Karnataka (Dharwad Bench), judgment dated Sept. 14, 2017.

'The victim's statement under section 164 was recorded only after the lapse of 45 days which raised questions about its reliability due to the medically acknowledged weak memory of the victim due to her 'mental retardation'.

The mother of the victim, who was the complainant in the case, initially stated before the police that the accused *attempted to rape* the victim but ran away when the mother suddenly came back to her house. However, 45 days later, after the statement of the victim was recorded by the Magistrate under section 164 of the CrPC, she stated to the police that the accused had *raped* her daughter.

The two interpreters and the mother of the victim were not administered oath before recording of the victim's statement under section 164 CrPC.

The test identification parade (TIP) under section 54A of the CrPC, was conducted seven months after the arrest of the accused and not immediately after the arrest of the accused as required legally. The delay remained unexplained by the prosecution. No notice was issued to the persons who came to participate in the TIP, nor was the statement of such persons recorded by the investigating officer. Moreover, the TIP was conducted in the office of the Taluka Executive Magistrate and not under the supervision of the Judicial Magistrate as mandated by section 54A of the CrPC. There was no videography of the TIP as required by section 54A. According to the High Court, the photographs of the TIP on record showed that the translator/interpreter played an active role during the TIP and she held the hand of the victim and was pointing it towards the accused. Hence, the prosecution could not rely on the TIP for establishing the identity of the accused.

Although the doctor who conducted the medical examination of the victim deposed that there were fresh tears in the hymen and there was bleeding from the tears, however, no blood or seminal stains were found on the victim's clothes and there were no marks or injuries on her body. The factors that the doctor in her cross examination could not exactly distinguish between the *tear* and *rupture* and the possibility that 'blood is collected in hymen during menses period, then there is a chance of tear of the hymen' were considered relevant.<sup>97</sup>

The Sessions Judge had not mentioned in his judgment that he had viewed the CD of recording of the statement of the victim under section 164 CrPC before writing the judgment. The High Court watched the video recording and concluded that the interpreters took a little leading role in getting the things interpreted/translated to the learned Judicial Magistrate. Moreover, the interpreter was serving as a teacher in a school for deaf and dumb children, but that school had no students who were mentally retarded. The victim had also not studied in the school for deaf and dumb and whatever training is given to deaf and dumb children through signs by hand, will not be understood by her. Thus, the competence of the experts to understand

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<sup>97</sup> *Id.*, para 25

the sign made by the victim girl was in doubt. The Court noted the fact that, before proceeding to the Magistrate's Court for recording of the statement of the victim under section 164, CrPC, the interpreter went to the police station and the police explained to her about the incident and she also enquired with the victim girl for about half an hour.<sup>98</sup> This was done without the permission of the Court and was considered to be a material aspect to be taken into consideration, while attaching any value to the statement of the victim recorded under section 164 CrPC. Moreover, the Magistrate made no record of what were the signs made by the victim. What was interpreted by the interpreters was taken as the statement of the victim girl.<sup>99</sup> Due to these reasons, the High Court held that there were reasonable doubts in the case of the prosecution. The accused was given benefit of the doubt and was acquitted.

In *Dal Bahadur Darjee v. State of Sikkim*,<sup>100</sup> a 55-year-old 'deaf and dumb' lady suffering from paralysis was allegedly raped. No medical evidence was led by the prosecution to establish the form of paralysis or the state of her mental health. The victim was not examined, although a commission was ordered by the learned trial judge. The prosecution relied on the evidence of the daughter-in-law of the victim, who was stated to be the sole eye witness, and another witness who reached the place of occurrence immediately after the alleged act. The trial judge convicted the accused under section 376(2)(j) (punishment for commission of rape on a woman incapable of giving consent) and 376(2)(l) of the IPC (punishment for commission of rape on a woman suffering from mental or physical disability).

On an appeal by the accused, the Hon'ble High Court of Sikkim set aside the conviction and sentence of the accused. The Hon'ble High Court noted that the investigating officer deposed that the victim was forwarded to the District Hospital along with her guardian, where the doctor opined that she was deaf and dumb. He further deposed that the victim was unable to give her statement before the learned Magistrate under section 164 CrPC as she had never attended a special school for deaf and dumb and could not communicate with the special educator. The cross-examination of the victim's relatives also suggested that the victim was deaf and dumb. According to the High Court, that did not necessarily mean that she was incapable of giving consent. The prosecution had relied upon the opinion of the special educator in a document signed by the learned Judicial Magistrate stating why the victim's statement under section 164 CrPC could not be recorded. Both the learned Judicial Magistrate and the special educator deposed that the exhibited document was the special educator's opinion. Apart from stating that he was a special educator, he did not provide any further details about his expertise. He also did not clarify what multiple disabilities the victim suffered from. The learned

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<sup>98</sup> *Id.*, para 30.

<sup>99</sup> *Id.*

<sup>100</sup> 2019 S.C.C. OnLine Sikk. 122.

Judicial Magistrate had also recorded that as per her nephew, the victim just showed her hand when she was hungry and apart from that she did not communicate with them in any other way for any other matter. This, according to the High Court, was hearsay evidence which did not help the prosecution, because the nephew did not state this in his deposition before the trial court. Thus, the Hon'ble High Court set aside the conviction and sentence under section 376(2)(j) on the ground that the prosecution had failed to prove that the victim was a woman incapable of giving consent.

As far as the conviction under section 376(2)(l), IPC was concerned, the Hon'ble High Court opined that a deaf and dumb person as well as a person who is even partially paralysed, would be a person with physical disability as per the definition of 'person with disability' under section 2(s) of the RPWD Act. Thus, the evidence led by the prosecution established one of the ingredients of section 376(2)(l) IPC. However, the prosecution could not satisfactorily establish the second ingredient, which is, commission of rape on the person with disability. The High Court noted that, although the learned trial Judge had allowed the application of the prosecution under section 284 CrPC to examine the victim on commission in the Court of the learned Judicial Magistrate, but the records revealed that the victim was not examined. Therefore, the only evidence available was the evidence of the eye witness, that is, the daughter-in-law of the victim, but her evidence was doubtful on the aspect of penetrative sexual assault and unsubstantiated by medical evidence. Thus, absence of consent and the offence of rape was not established even under section 376(2)(l) IPC. So, the accused was given the benefit of doubt and acquitted.

These illustrative cases reflect a lack of clarity and non-observance of basic procedures in trial courts, which severely affects the chances of fair trials and justice for the victims, in cases of sexual violence against WWD. They also highlight the need for proper training and sensitisation of the lawyers, judges, interpreters and medical professionals, so that the beneficial amendments in the criminal laws for WWD do not remain just promises on paper.

### ***Medical Termination of Pregnancy Resulting from Rape***

In *Suchita Srivastava v. Chandigarh Administration*,<sup>101</sup> which predates the POCSO Act and the 2013 Act, the Supreme Court recognised 'a woman's right to make reproductive choices' as a 'dimension of personal liberty as understood under Article 21 of the Constitution of India'.<sup>102</sup> According to the Apex Court, reproductive choices can be exercised to procreate, as well as to abstain from procreating.<sup>103</sup> On the basis of such interpretation, the Supreme Court refused to allow the termination of the pregnancy of a 19-20 year old rape victim with 'mild to moderate mental

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<sup>101</sup> (2009) 9 S.C.C. 1.

<sup>102</sup> *Id.*, at 15, para 22.

<sup>103</sup> *Id.*

retardation' in this case. The victim was an orphan, brought up in government run welfare institutions. She had been allegedly raped by a security guard of the government run welfare institute where she stayed. The Expert Committee set up to examine her medical condition opined that the continuation of the pregnancy did not pose any grave risk to the physical or mental health of the victim. However, concerns were expressed about the victim's mental capacity to cope with the demands of carrying the pregnancy to its full term, the act of delivering a child and subsequent child care, since the maturity of the victim was that of a child of 7-8 years.

The Supreme Court held that the consent of the pregnant woman is an essential requirement for proceeding with the termination of pregnancy under section 3 of the MTP Act, 1971. Since the victim in this case was not a minor and suffered from mild mental retardation which is legally different from being a mentally ill person<sup>104</sup> in which case, a guardian's consent was required under section 3(4)(a) of the MTP Act, the Court allowed continuation of the pregnancy, in view of the victim's desire to have the child.

The Punjab and Haryana High Court had earlier allowed the Chandigarh Administration's plea for termination of the victim's pregnancy,<sup>105</sup> even though she had expressed her willingness to bear a child, on the ground that 'except her physical ability, the victim was neither intellectually nor on social, personal, financial or family fronts, is able to bear and raise a child'.<sup>106</sup> The High Court also considered the fact that if the child was allowed to be born, the child's own life, grooming and future prospects may be highly disappointing.<sup>107</sup>

On an appeal by two public spirited individuals against the High Court's order, the Supreme Court held that while a guardian can make decisions on behalf of a 'mentally ill person' as per section 3(4)(a) of the MTP Act, the same cannot be done on behalf of a person who is in a condition of mental retardation. The State must respect the personal autonomy of a mentally retarded woman with regard to decisions about terminating a pregnancy. The language of the MTP Act clearly respects the personal autonomy of mentally retarded persons who are above the age of majority. Therefore, the Court held that the victim's pregnancy could not be terminated without her consent.

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<sup>104</sup> Section 2(b), Medical Termination of Pregnancy Act, 1971 as amended in 2002 states: "mentally ill person means a person who is in need of treatment by reason of any mental disorder other than mental retardation'.

<sup>105</sup> See, *Chandigarh Admn. v. Nemo*, 2009 S.C.C. OnLine P.&H. 6154; *Chandigarh Administration v. Nemo*, 2009 S.C.C. OnLine P. &H. 6879.

<sup>106</sup> 2009 S.C.C. OnLine P. & H. 6879, para 23.

<sup>107</sup> *Id.*, para 24.

Invoking the *parens patriae* doctrine, K.G. Balakrishnan, C.J. stated that courts in other common law jurisdictions have developed two distinct standards while exercising *parens patriae* jurisdiction for the purpose of making reproductive decisions on behalf of mentally retarded persons. These two standards are the 'best interests test' and the 'substituted judgment test'. According to the learned judge, the 'best interests test' requires the Court to ascertain the course of action which would serve the best interests of the person in question. The Court's decision should be guided by the interests of the victim alone and not those of other stakeholders such as guardians or society in general. The fact that the woman will need care and assistance, which will in turn entail some costs cannot be a ground for denying the exercise of reproductive rights.<sup>108</sup>

On the other hand, the application of the 'substituted judgment test' "requires the court to step into the shoes of a person who is considered to be mentally incapable and attempt to make the decision which the said person would have made, if she was competent to do so. This is a more complex inquiry, but this test can only be applied to make decisions on behalf of persons who are conclusively shown to be mentally incompetent".<sup>109</sup> According to the Supreme Court, the victim in this case was not entirely incapable of making decisions for herself. She was capable of learning through rote-memorisation and imitation. She could perform basic bodily functions and was capable of simple communications. Thus, the 'best interests test' alone should govern the inquiry in her case and not the 'substituted judgment test'.<sup>110</sup>

The Court further held that, even if it were to be assumed that the victim's willingness to bear a child was questionable by the time the Courts decided the matter, the victim had already been pregnant for almost 19 weeks and any termination at that stage was likely to cause harm to the physical health of the woman and could have also caused further mental anguish to the victim, since she had not consented to such a procedure.<sup>111</sup>

The Court opined that 'persons with borderline, mild or moderate mental retardation are capable of being good parents'.<sup>112</sup> The Court emphasised the 'need to look beyond social prejudices in order to objectively decide whether a person who is in a condition of mild mental retardation can perform parental responsibilities'.<sup>113</sup> The Court directed that the best medical facilities be made available to the victim so

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<sup>108</sup> *Supra* note 101, at 18, para 37.

<sup>109</sup> *Id.*, para 38.

<sup>110</sup> *Id.*, at 18-19, para 39.

<sup>111</sup> *Id.*, at 19-20, para 45 and at 20-21, para 48.

<sup>112</sup> *Id.*, at 22, para 54.

<sup>113</sup> *Id.*, at 23, para 59.

as to ensure proper care and supervision during the period of pregnancy as well as for post-natal care.

While this judgment theoretically recognises the right of WWD to choose to carry a pregnancy or not, 'the question remains as to whether socio-economic and regulatory realities allow such a freedom to be truly accessible'<sup>114</sup> to WWD.

In *Z v. The State of Bihar*,<sup>115</sup> a 35-year-old destitute woman, abandoned by her husband and her family, living in abject poverty on a footpath, was taken to a shelter home where medical tests showed her to be carrying a pregnancy of 13 weeks and 6 days. In the midst of the 18th week, she alleged that she had been raped and expressed her desire to terminate the resultant pregnancy. The hospital authorities called her father and brother to sign a consent form, which they duly signed. However, the hospital authorities did not proceed with the termination of the pregnancy. Her father and brother expressed their inability to take her with them, because of social and financial constraints. Due to the delay caused by the hospital authorities, the pregnancy was not terminated and the statutory limit of 20 weeks was crossed, due to which the appellant was forced to approach the Patna High Court for a direction for termination of pregnancy. The victim was also discovered to be HIV positive. The High Court directed for a Medical Board to be constituted. The Board diagnosed her to have 'psychiatric illness, provisionally schizophrenia with mild mental retardation'.<sup>116</sup> After receipt of the report of the Medical Board, the High Court required the father of the appellant to file an affidavit giving his consent. Her husband was also impleaded. The father of the victim stated that he had no objection to the termination of the pregnancy. Her husband alleged that she had deserted him and their two children and he had already filed a divorce petition. By this time, the victim's pregnancy reached a duration of 24 weeks. The Court held that the medical report did not suggest that the foetus was suffering from any abnormality or that the foetus had already been infected with HIV. The medical report further did not suggest that if the victim was allowed to carry the pregnancy to its full course, then she would suffer any risk of life or grave injury to her physical or mental health. The Court referred to explanation 1 of sub-section 2 of section 3 of the MTP Act which states that 'pregnancy which is alleged to have been caused by rape shall be presumed to constitute grave injury to the mental health of the pregnant woman' but stated that in the instant case, the victim had alleged that 'she had been ravished, but her conduct of not disclosing the incident of rape for more than 13 weeks and deciding not to get the pregnancy terminated for more than 20 weeks, as the writ application had been filed after 20 weeks of pregnancy *prima facie*, does not suggest that such alleged concealment had really caused grave injury to

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<sup>114</sup> Sushmita Pati and Rajarshi Sen, *Unpacking Choice: What does Feminist Theory have to Rethink After the Nemo/Nari Niketan Cases?* 4.1 J.I.L.S. 54 (2012-13).

<sup>115</sup> (2018) 11 S.C.C. 572.

<sup>116</sup> *Id.*, at 582-583, para 7.

her mental health'. Moreover, the MTP Act only allowed termination of pregnancy up to 20 weeks at that time.

An appeal was filed in the Supreme Court where a three-judge bench held that only the consent of the appellant was needed in the present case and there was no reason whatsoever to implead the victim's husband and father. In pursuance of the order passed by the Supreme Court, a Medical Board at the All India Institute of Medical Sciences (AIIMS) examined the appellant and opined that the procedure involved in termination of the pregnancy would be risky to the life of the appellant and the foetus. In view of the medical opinion, the Supreme Court held that there cannot be termination of pregnancy. The State of Bihar was directed to provide all the medical facilities to the petitioner as per the treatment graph given by the AIIMS doctors. The State of Bihar was directed to pay a sum of Rupees three lakhs to the victim under the Victims Compensation Scheme framed under section 357A of the CrPC and a further compensation of Rupees ten lakhs was directed to be paid by the State under the public law remedy, keeping in view the mental injury that the victim had to suffer due to the negligence of the State.<sup>117</sup>

In *X v. Union of India*,<sup>118</sup> a deaf and dumb rape victim who was also suffering from 'severe mental retardation' diagnosed as Down's Syndrome was considered incapable of making the choice about termination of the pregnancy resulting from rape, due to her intellectual disability. Recognising her guardian and brother's right to make the choice on her behalf, the High Court of Bombay (Aurangabad Bench) allowed termination of her 22 weeks' pregnancy, in view of the fact that the victim was not even aware of the rape and the pregnancy. The Court held that when the victim is unable to take care of herself, there is every possibility that she will not be able to take care of the foetus. Though the risk of termination of the pregnancy was within normal acceptable limits, the Court took note of the psychological trauma that the petitioner was undergoing as a result of carrying the unwanted pregnancy. Thus, the Court opined that 'the pregnancy of the petitioner was definitely unwanted for her and was violative of her personal liberty' and the decision for termination of the pregnancy taken by her guardian was 'in the best interest of the victim and her survival'.<sup>119</sup>

### ***Recognition of Agency and Need for Intersectional Approach***

In *Patan Jamal Vali v. The State of Andhra Pradesh*,<sup>120</sup> the Supreme Court affirmed the conviction of the accused for the rape of a 19-year-old blind girl. The facts of the case had arisen in 2011, that is, before the POCSO Act or the 2013 amendments came into force. The victim was blind since birth and had identified the accused by his voice

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<sup>117</sup> *Id.*, at 603, para 57.

<sup>118</sup> 2017 S.C.C. OnLine Bom. 9334.

<sup>119</sup> *Id.*, para 13.

<sup>120</sup> *Supra* note 4.

which was familiar to her since he was a regular visitor to her home and was acquainted with her family. The testimony of the victim was corroborated by her family members, medical evidence as well as circumstantial evidence. While upholding the conviction of the accused for rape, a division bench of the Supreme Court, speaking through D.Y. Chandrachud, J. highlighted the need for an intersectional approach to sexual violence against women and disabilities. As per the learned Judge:

‘...When the identity of a woman intersects with, *inter alia*, her caste, class, religion, disability and sexual orientation, she may face violence and discrimination due to two or more grounds...In such a situation, it becomes imperative to use an intersectional lens to evaluate how multiple sources of oppression operate cumulatively to produce a specific experience of subordination for a blind Scheduled Caste woman’.<sup>121</sup>

Recognising the threat of violence as a familiar fixture for WWD in India, the learned Judge opined that such threat can ‘translate into a nagging feeling of powerlessness and lack of control, making the realization of the promises held by Parts III and IV of our Constitution a remote possibility for women with disabilities’.<sup>122</sup> The Court clarified that this did not mean that the Court subscribed to ‘the stereotype that persons with disabilities are weak and helpless, incapable of charting the course of their lives’ or deprived of agency and bodily autonomy, because ‘such a negative presumption of disability translating into incapacity would be inconsistent with the forward-thinking conceptualisation of disabled lives embodied in our law and, increasingly, albeit slowly, in our social consciousness’.<sup>123</sup>

Citing a study of High Court judgments by Saptarshi Mandal,<sup>124</sup> the Supreme Court opined that “the testimony of the disabled witnesses is devalued by not recording the testimony of the prosecutrix at all; or recording it without adherence to correct legal procedure, thereby rendering it ineffectual; dismissal of the testimony for its lack of intelligibility or for not being supported by the condition of her body”.<sup>125</sup> According to Chandrachud, J. such ‘judicial attitude stems from and perpetuates the underlying bias and stereotypes against persons with disabilities’.<sup>126</sup> Expressing the view that the testimony of victims and witnesses with disabilities cannot be considered weak or inferior, ‘just because such individuals interact with the world in a different manner, *vis-a-vis* their able-bodied counterparts’, the Apex Court held

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<sup>121</sup> *Id.*, para 15.

<sup>122</sup> *Id.*, para 31.

<sup>123</sup> *Id.*, para 32.

<sup>124</sup> Saptarshi Mandal, *The Burden of Intelligibility: Disabled Women’s Testimony in Rape Trials*, 20(1) INDIAN JOURNAL OF GENDER STUDIES, 1(2013).

<sup>125</sup> *Supra* note 4, para 50.

<sup>126</sup> *Id.*, para 51.

that if the testimony of such a witness inspires judicial confidence, it should be given full legal weight.<sup>127</sup>

Applying the principles to the case at hand, the Court said that the victim's blindness meant that she had no visual contact with the world. Therefore, her primary mode of identifying those around her was by the sound of their voices. Therefore, her testimony was entitled to equal weight as that of a prosecutrix who would have been able to visually identify the accused.

Upholding the conviction of the accused for rape, the Apex Court also issued certain guidelines for making the criminal justice system more disabled-friendly. These guidelines include sensitisation and training of trial and appellate judges as well as public prosecutors and standing counsels by the National Judicial Academy and state judicial academies to deal with cases involving survivors of sexual abuse and acquaint them with the special provisions regarding survivors with disabilities and the manner of their deposition. The Bar Council of India was asked to consider 'introducing courses in the LL.B. program that cover these topics and the intersectional nature of violence more generally'.<sup>128</sup> The Court also issued guidelines for appointment of trained special educators and interpreters to ensure effective implementation of the beneficial provisions introduced by the 2013 Act. A database of such educators, interpreters and legal aid providers should be maintained in all police stations in order to facilitate easy access and coordination. The National Crimes Record Bureau was also asked to 'seriously consider the possibility of maintaining disaggregated data on gender-based violence' with disability as 'one of the variables on the basis of which such data must be maintained so that the scale of the problem can be mapped out and tailored remedial action can be taken'.<sup>129</sup> The Court also emphasised the need for regular sensitisation of police officers for appropriate handling of cases of sexual violence against WWD. Such training should encapsulate all the stages of a case involving a disabled survivor from registration of complaints, access to accommodations, medical attention and suitable legal representation. Recognising the agency of disabled survivors, the Court also opined that the training should emphasise direct interaction with the disabled person instead of their caretakers or helpers. Need for awareness raising campaigns in accessible formats among women with disabilities, about their rights as survivors of sexual violence was also emphasised.<sup>130</sup>

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.*, para 45.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

## VII

### Conclusion

A perusal of the statutory provisions and leading case law relating to sexual violence against WWD shows that there is a lot that needs to be done in order to ensure effective implementation of the beneficial provisions. The case law shows that non observance of basic procedures by courts often leads to acquittals and re-trials which can be traumatic and inconvenient for the victims and their caregivers. There is an urgent need to evolve and implement standard protocols for investigation, medical examination and trials of cases of sexual violence against WWD. Training and sensitisation of police officers, judicial officers, lawyers, interpreters, special educators and medical professionals is an urgent need of the hour for appropriate handling of cases of sexual violence against WWD. Separate data relating to cases of sexual violence against WWD would help in evolving the road map towards more effective implementations of the statutory provisions, as well identifying the lacunae in the existing provisions.

A perusal of the law also reveals that archaic, discriminatory, and regressive language continues to inform legal discourse. The Legislature as well as the judiciary should step in to replace words like 'deaf and dumb', 'mentally retarded' and 'lunatic' in statutory provisions and judgments of the courts with more appropriate and dignified terms. That will also minimise their use in the legal practice and in the analysis of such provisions and judgments in academic writings and hopefully, ultimately in society. The existing education system segregates disabled persons in different institutions on the basis of functional incapacity, thus denying them equal learning opportunities.<sup>131</sup> Development of a more inclusive education system, incorporating the needs of WWD, will also help in addressing the invisibilisation and marginalisation of WWD and address the root causes of discrimination and violence against them. The proper implementation of the statutory provisions and judicial guidelines can go a long way in ensuring that WWD feel stronger in their arduous quest for justice against sexual violence.

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<sup>131</sup> See, Renu Addlakha, *Gendered Constructions of Work and Disability in Contemporary India: Discursive and Empirical Perspectives* in *DISABILITY, GENDER, AND THE TRAJECTORIES OF POWER* 216 (Asha Hans ed., 2015).