

VULNERABLE WITNESSES IN THE COURT ROOM

Justice Gita Mittal

**Former Chief Justice,
High Court of Jammu and Kashmir**

**Former Acting Chief Justice,
High Court of Delhi**

**Chairperson,
Vulnerable Witness Committee, constituted by the Supreme Court of India**

**Chairperson,
Committee constituted by the Supreme Court of India in Manipur matters**

The embarrassment, and reservations of those concerned with the proceedings including the prosecutrix, witnesses, counsel may result in a camouflage of the trauma of the victim's experience. The judge has to be conscious of these factors and rise above any such reservations to ensure that they do not cloud the real facts and the actions which are attributable to the accused persons. **The trial courts must be alive to the onerous responsibility which rests on their shoulders and be sensitive in cases involving sexual abuse.**

***Ref: Virender v. State of NCT of Delhi, 2010 (3) AD (Delhi) 342;
MANU/DE/2606/2009***

Bytes of Dr. Achal Bhagat, Mental Health Expert (Video to play here)

Who is a vulnerable witness?

- Child witnesses shall include children who have attained the age of 18 years;
- Age neutral victims of sexual assault read with Sections 273 and 327* of the Code of Criminal Procedure 1973 and Section 354# of the Indian Penal Code 1860;
- Gender neutral victims of sexual assault read with Section 2(d) of the Protection of Children from Sexual Offences Act 2012;
- Age and gender neutral victims of sexual assault under Section 377^ of the Indian Penal Code 1860 read with paragraph 34(1) of the decision in ***Sakshi v. Union of India***, (2004) 5 SCC 518;

Ref: Smruti Tukaram Badade v. State of Maharashtra, 2022 SCCOnline SC 78

Now* Section 308 and section 366 of BNSS, 2023

Section 74 of BNS, 2023

^ No section prescribed

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- Witnesses suffering from “mental illness” as defined under Section 2(s) of the Mental Healthcare Act 2017 read with Section 118* of the Indian Evidence Act 1872;
- Any witness deemed to have a threat perception under the Witness Protection Scheme 2018 of the Union Government as approved by the Supreme Court in *Mahender Chawla v. Union of India*, (2019) 14 SCC 615;
- Any speech or hearing impaired individual or a person suffering from any other disability who is considered to be a vulnerable witness by the competent court; and
- **Any other witness deemed to be vulnerable by the concerned court.**

Ref: *Smruti Tukaram Badade v. State of Maharashtra*, 2022 SCCOnline SC 78

*** Now Section 124 of BSA, 2023**

A vulnerable witness could be in court

- in a civil or criminal case
- in a family matter
- in a custody dispute
- as a victim of sexual abuse
- in a paternity action
- before Juvenile Justice Boards
- before Children's Courts

A VWDC facilities can be used in other jurisdictions

“3. The use of VWDCs should, in addition to criminal cases, be allowed for other jurisdictions, including, civil jurisdictions, family courts, juvenile justice boards and Childrens’ courts. Permission should be granted for recording the evidence of vulnerable witnesses in cases across all jurisdictions. This suggestion in the report is appropriate and is accepted.”

Ref: Smruti Tukaram Badade v. State of Maharashtra, order dated 08.04.2022

- **The legal systems are adversarial. This is particularly problematic for vulnerable witnesses.**
- **Justice systems were NOT developed with children or vulnerable witnesses in mind**



Special issues regarding children...

- Children are often the only material witnesses in cases of child sexual abuse (CSA).
- Children may also be witnesses to domestic violence and crimes of other kinds.



“Why is everyone dressed like penguins”?

- A Child Witness



Children may be unable to give a full and proper account of their evidence because of...

- i. multiple interviews
- ii. long wait before trial goes to court
- iii. court delays
- iv. confronting the accused
- v. Questions framed in difficult language (*“legal language” / “legalese” / “age inappropriate”*)
- vi. unnecessary questioning about irrelevant details by the defence lawyer
- vii. honest answers used to make the child appear to be unreliable

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Unable to give a full account because....

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- viii. Inappropriate questioning about abstract concepts (eg. *the conceptual difference between the truth and a lie*)
- ix. interruptions by the lawyers
- x. directions by adults about how they could answer (as *'just answer the question that is asked'*)
- xi. the use of cross-examination which is designed to “catch witnesses out”.
- xii. admissibility issue constraints and having to edit their stories
- xiii. Trauma

“I am upset that as a result I could not tell the truth, the whole truth and nothing but the truth.”

- A child witness

Judicial pronouncements and literature on the subject are unanimous on the

- **terrifying impact** of the foreboding criminal justice system, the **court environment** and **complicated legal procedures** on vulnerable victims/ witnesses.
- **confrontation** with the offender; **recounting** and **repetition** of violent and intrusive offensive experiences; facing **aggressive** and **humiliating cross-examinations** in court room resulting in **secondary traumatization** of the vulnerable witness.

The court environment – formal and austere – inhibits even adults and would result in terrified silence or confusion of a child witness.

Best interests of the vulnerable witness requires the concerns of the physical environment being addressed and sensitive treatment of the witness from home, to and in, the Vulnerable Witness Deposition Complex.

We are not miniature
adults and cannot
morph suddenly into
adults either



Experience of a Vulnerable Witness_ Suzette Jordan (video to play here)

The Indian experience

Guidelines for the several stages from investigation to adjudication have been laid down in several judicial pronouncements which are to be followed by

- police conducting investigations
- doctors in medical examinations
- magistrates recording pre-trial statements
- trial judges during victim/witness appearances and depositions
- reintegration of victims

Ref: Virender v. State of NCT of Delhi, 2010 (3) AD (Delhi) 342; MANU/DE/2606/2009

***Justice J.S. Verma Commission Report, Chapter XI, Paras 23, 24,
<https://spuwac.in/pdf/jsvermacommittereport.pdf>***

“Guidelines For Recording Of Evidence Of Vulnerable Witnesses In Criminal Matters”

The Guidelines draw from legislations and guidelines from all over the world including the United Nations Guidelines, International instruments, legislations in India and judicial precedents from India, New Zealand, Australia, Canada, South Africa, UK, USA, Philippines.

Provision has been made for:

- **support person, facilitator, guardian ad litem, legal aid**
- **pre-trial visit to court complex**
- **Interaction with judge and prosecutor**

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- In-camera proceedings (Section 366 of BNSS, 2023)
- concealment of witness identity
- developmentally appropriate questioning
- use of screens, one way mirrors and other devices to enable Vulnerable Witnesses to give their best evidence
- no adverse inference to be drawn from special measures
- competency of vulnerable witness

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- recommend giving high priority – to be handled as expeditiously as possible, minimizing unnecessary delays and continuances (whenever necessary & possible, court schedule to be altered to ensure that the testimony of Vulnerable Witness is recorded on sequential days, without delays).
- ensuring that developmental needs of Vulnerable Witnesses are recognized and accommodated in the arrangement of the courtroom
- provision of separate and safe passage and waiting areas

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Identification, recognition and addressal of the developmental stages and needs of Vulnerable Witnesses throughout court process by requiring usage of appropriate language; timing of hearings & testimony to meet the attention span and **physical needs of such witness and allowing use of **testimonial aids** as well as *interpreters, translators*, when necessary.**

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- **Flexibility** in allowing presence of *support person* for the Vulnerable Witness to & guarding against unnecessary sequestration of support persons
- **Scheduling hearings** involving Vulnerable Witnesses on days/time when the witness is not inconvenienced or the routine/regular schedule of child is not disrupted

Important to minimize secondary victimization

Please keep in mind our unique requirements with reference to

***Language, Memory,
Disposition, Cultural Context
and the Environment***

while asking us for information



Concept of Vulnerable Witness Court Room

The ***Vulnerable Witness Court Room*** has been conceptualized and operationalized to overcome these several disadvantages and barriers.

- Guided by preventing any interface of the vulnerable witness with the offender or public exposure.
- Using a video link and intermediary to avoid a physical confrontation between the witness and the offender, court and lawyers.

Conversion of existing court into VWDC (video to play here)

Some barriers to an enabling witness experience

- Law teachers, judges, prosecutors and defence lawyers are all from the same social – cultural milieu and carry with them prejudice, bias, discomfort, etc.
- Understanding of the dynamics of violence, trauma and development not given the attention/importance it warrants.
- Training of judges and prosecutors is inadequate to address lacunae – e.g. to assess competency of a vulnerable witness - child or a witness with disabilities.



Intimidating experience for witness which compromises justice dispensation

Success of the Programme Depends on

Judicial leadership by actively engaging with the witness in pre-visit, court appearance and during testimony and cross-examination

Judicial intervention must ensure that the vulnerable witness in the court room is treated with respect, questioning is fair, and developmentally appropriate, that the dignity and self respect of the witness is preserved throughout the court room appearance.

Research showing how special measures are alleviating witness stress

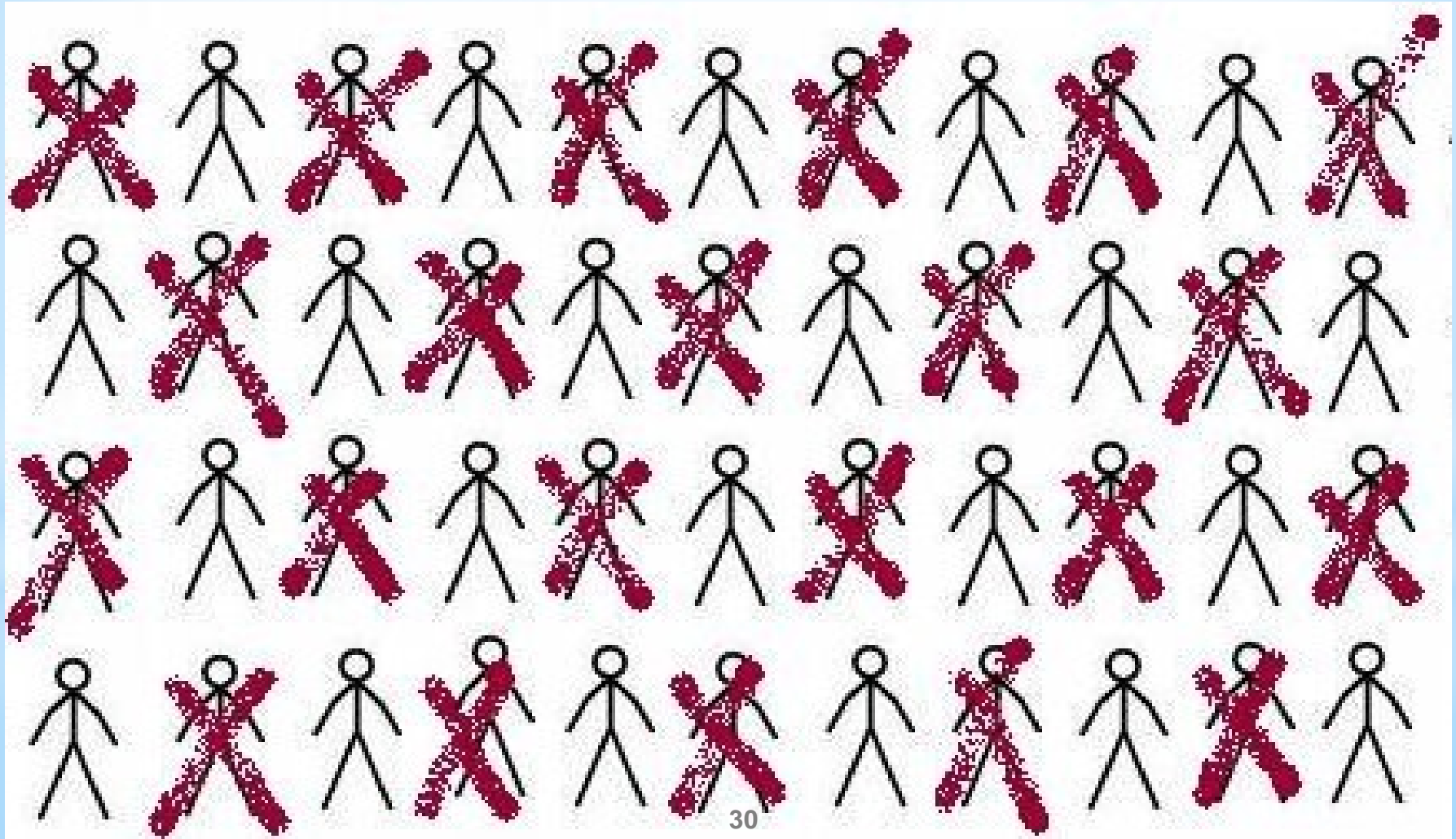
Measure	Very effective	Effective	Ineffective	Very ineffective	No answer
Screens	13	14	3	1	6
Live link	20	12	0	1	4
Evidence in private	4	14	5	0	14
Removal of wigs and gowns	7	8	9	2	11
Video recorded evidence-in-chief	26	6	1	0	4
Aids to communication	13	9	2	0	13
Interpreters	8	15	0	0	14
Escorts	10	14	2	0	11
Separate waiting areas	25	3	2	1	6
Liaison officers	19	7	1	0	10
Pagers	4	6	8	4	15

Source: <https://blogs.salford.ac.uk/made-in-salford/2019/07/06/law-blog-savannah-how-do-special-measures-help-vulnerable-witnesses/>

Judges' Bytes

(Video to play here)

Every second child/ young person reported some form of sexual victimization...(Ministry of Women and Child Development)



Screen as an alternative measure





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"No violence against children is justifiable and all violence against children is preventable."

Prof. Paulo Pinheiro

"Even a minor event in the life of a child is an event of that child's world and thus a world event." –

*Gaston Bachelard, French Philosopher
1884-1962'*

Way Forward

- Section 715.1 of the *Criminal Code of Canada* permits a pre-recorded video taped statement of a child witness to be read as his testimony.
- Some day our legislation shall meaningfully incorporate such provisions, especially in view of the scientific development !!!

Some Comments...

- Justice Altamas Kabir, Chief Justice of India at the inauguration ceremony said: *"When we get intimidated, think of how a child would feel when faced with lawyers and judges."*
- Justice A K Sikri, Former Supreme Court Judge when he was Acting Chief Justice of the Delhi High Court, said: *"The witness is the eyes and ears of the court. As such, it is our job to see that children are treated fairly, their voice is heard and their confidence in judicial services is maintained."*
(As quoted by Times of India)

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- *"It is a very positive step as the whole concept of a court is very intimidating for a child,"* said Ramesh Gupta, senior criminal lawyer. (As quoted by Daily Pioneer)
- *"This will be less intimidating for the child"* a source was quoted in Indian Express

Thank You