

Court on Its Own Motion vs.state

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Court : Delhi

Decided On : Aug-04-2018

Appellant : Court on Its Own Motion

Respondent : State

Advocate for Def. : Ms. Aashaa Tiwari

Advocate for Pet/Ap. : Mr. Dayan Krishanan, Mr. Trideep Pais, Ms. Aakash Lodha, Mr. Sanjeevi Seshadri, Mr. Pranav Jain, Ms. Manvi Priya, Ms. Vrinda Bhandari

Judgement :

\$~ *IN THE HIGH COURT OF DELHI AT NEW DELHI % + Reserved on :

27. h July, 2018 Date of decision :

4. h August , 2018 CRL.REF.No.2/2016 COURT ON ITS OWN MOTION

... Petitioner

Through: Mr. Dayan Krishanan, Sr. Adv. and Mr. Trideep Pais, Adv. (Amici Curiae) with Ms. Aakash Lodha, Mr. Sanjeevi Seshadri and Mr. Pranav Jain, Ms. Manvi Priya and Ms. Vrinda Bhandari, Adv. versus Respondent Through: Ms. Aashaa Tiwari, APP for STATE the State. CORAM: HON'BLE THE ACTING CHIEF JUSTICE HON'BLE MS. JUSTICE ANU MALHOTRA JUDGMENT GITA MITTAL, ACTING CHIEF JUSTICE1 The following reference dated 6th October,

2016 has been received from Shri Vishal Singh, Principal Magistrate, Juvenile Justice Board-I, Sewa Kutir Complex, Kingsway Camp, Delhi. Criminal Reference No.2 of 2016 Page 1 of 40 Inasmuch as the issues which require to be considered are succinctly set out therein, we extract the reference made by the Id. Judge under Section 395(2) of the Code of Criminal Procedure, 1973 in extenso which reads as follows : (1) This Board seeks the kind attention of Honble High Court of Delhi towards the practice adopted by Delhi Police and other connected Institutions in the investigation of cases of rape and sexual assault on women and children.

(2) Juvenile Justice Board conducts inquiry into the offences committed by children in conflict with law in accordance with the procedure laid down in Juvenile Justice (Care and Protection of Children) Act, 2015. While conducting inquiry into offence of sexual assault in case FIR No.621/16, PS Rajouri Garden, U/s. 323/3545B/506/376(D) IPC, this Board noticed that FIR was registered on 20/06/2016 on the basis of statement of victim Ms. N. Thereafter, IO got the statement of victim Ms. N recorded U/s. 164 Cr PC by Ld. MM on 23/06/2016. However, on the same day i.e. on 23/06/2016 IO recorded two more statements of victim Ms. N, either before or after recording of her statement U/s. 164 Cr PC by Ld. MM. In addition, one memorandum in the form of Counselling Report was also prepared by Counsellor Ms. Divya Vats, belonging to Sahyog Charitable Trust funded by DCW, Govt. of NCT, Delhi, on the basis of version of victim girl Ms. N related to the incident of sexual assault.

(3) Thus, the judicial file contains five versions of victim girl Ms. N related to the incident - the FIR, the statement given U/s. 164 Cr PC, the statement given to the Counsellor, and two more statements recorded by the IO.

(4) In the cases of sexual assault on women and children multiple recording of statements/versions of the Criminal Reference No.2 of 2016 Page 2 of 40 victim can adversely affect the veracity of prosecution case due to obvious reasons. Besides, the recording of statement/version of a victim by anyone other than the IO and judicial officer has no sanction of law, barring exceptional circumstances.

(5) There is no law which sanctions or requires an Investigating Officer to get the statement or version of a victim of sexual offence recorded through an NGO or a private Counsellor. Since it has become a prevalent practice of Delhi Police to get the statement or version of a victim of sexual offence recorded by a private Counsellor working with an NGO and then file the same as a part of Challan/Final Investigation Report U/s. 173 Cr.P.C., its legality needs authoritative pronouncement by Honble High Court. Thus, the question of law arising in all such cases is hereby referred for the decision of Honble High Court for guidance. Yours faithfully (VISHAL SINGH) Dated:

06. 10/2016 Magistrate, Principal Juvenile Justice Board-I Sewa Kutir Complex, Kingsway Camp, Delhi. Below is the description of other similar cases pending before JJB-I in which the Investigating Officer got the statement or version of the victim of sexual offence recorded by a private Counsellor, in addition to recording the statement himself and also through a Judicial Officer U/s. 164 Cr.P.C.:-

"Criminal Reference No.2 of 2016 Page 3 of 40 a) b) c) FIR No.159/16, PS Roop Nagar, U/s. 354/3

IPC & Section 6 & 10 POCSO Act. FIR No.310/16, PS Khyala, U/s.

IPC & Section 6 of POCSO Act. FIR No.634/16, Ranholla, U/s. 376/342/506/120-B

IPC & Section 4 of POCSO Act. PS2 It appears that a practice which is being followed at the pre- trial stages in Delhi in cases under the Protection of Children from Sexual Offences Act, 2012 (POCSO Act or the Act hereafter). This may be severely impacting the outcome of trials therein. We are required to consider the permissibility, legality and validity of this practice. The two broad issues raised by this practice which are required to be considered can be enumerated thus : Q. No.1: What is the legality of recording a statement or version of the incident enumerated by a victim of sexual offence by an NGO or a private counsellor and filing of such statement or counselling report along with a chargesheet before the trial court under Section 173 of the Cr.P.C.?. Q. No.2: What is the permissibility and legality of recording of multiple statements/versions of a victim of sexual assault, both women and children, by an investigating officer/judicial officer?. Q. No.1 - answered Statutory scheme in India 3. The principal laws relevant for examination of the reference in the present case would be the Protection of

Children from Criminal Reference No.2 of 2016 Page 4 of 40 Sexual Offences Act, 2012 (POCSO Act hereafter) and the Protection of Children from Sexual Offences Rules, 2012 (POCSO Rules hereafter) framed thereunder as well as the Juvenile Justice (Care and Protection of Children) Act, 2015 (J.J.

Act hereafter).

4. For expediency, let us set down the relevant provisions of the POCSO Act thus : Chapter VI PROCEDURES FOR RECORDING STATEMENT OF THE CHILD²⁴ Recording of statement of a child.- (1) The statement of the child shall be recorded at the residence of the child or at a place where he usually resides or at the place of his choice and as far as practicable by a woman police officer not below the rank of sub-inspector. (2) The police officer while recording the statement of the child shall not be in uniform. (3) The police officer making the investigation, shall, while examining the child, ensure that at no point of time the child come in the contact in any way with the accused. (4) No child shall be detained in the police station in the night for any reason. (5) The police officer shall ensure that the identity of the child is protected from the public media, unless otherwise directed by the Special Court in the interest of the child.

25. Recording of statement of a child by Magistrate.- (1) If the statement of the child is being recorded under section 164 of the Code of Criminal Procedure, 1973 (herein referred to as the Code), the Magistrate recording such statement shall, notwithstanding anything contained therein, record the statement as spoken by the child: Criminal Reference No.2 of 2016 Page 5 of 40 Provided that the provisions contained in the first proviso to sub-section (1) of section 164 of the Code shall, so far it permits the presence of the advocate of the accused shall not apply in this case. (2) The Magistrate shall provide to the child and his parents or his representative, a copy of the document specified under section 207 of the Code, upon the final report being filed by the police under section 173 of that Code. Having regard to the scope of the reference, it is critical to 5. analyze the statutory scheme in order to determine the following : (i) Whether a Counsellor is envisaged in law and what is the role of the counsellor?. (ii) Whether or not the statements mandate counselling report?. (iii) What is the legal significance of such counselling

reports/notes prepared by the counsellor?. (iv) What is the manner in which the statement of a child victim of sexual offences needs to be recorded under the Acts?.

6. The above extracted provisions of POCSO Act amply establish that the law contemplates recording of the statement of a child victim only by a police officer under Section 24 of the Act, and/or the Magistrate under Section 25 of the Act and not that by any third party such as a counsellor. The law has also clearly delineated specifically even the gender, attire, manner and the place at which such statement would be recorded.

7. A close scrutiny of the legislation would show that the law does not anywhere envisage recording of a statement of child Criminal Reference No.2 of 2016 Page 6 of 40 victim by a counsellor or a report of any kind from a counsellor about his/her interactions with the child.

8. We find that Section 25 of the legislation has carefully set down the manner in which the statement of a child victim being recorded under Section 164 of the Code of Criminal Procedure, 1973 would be recorded by the Magistrate. Section 25 excludes the requirement under the first proviso or sub-section (1) of Section 164 of the Code so far as it permits the presence of the advocates of the accused. This exclusion in fact emphasizes the importance attached by the legislature to oust any kind of third party intervention in police investigations involving children.

9. It is also essential to consider the mandate of Section 26 of the POCSO Act which reads as follows : 26. Additional provisions regarding statement to be recorded.- (1) The Magistrate or the police officer, as the case may be, shall record the statement 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. (2) Wherever necessary, the Magistrate or the police officer, as the case may be, may take the assistance of a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, while recording the statement of the child. (3) The Magistrate or the police officer, as the case may be, may, in the case of a child having a mental or physical disability, 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, having such qualifications, experience and on payment of such fees as may be prescribed, to record the statement of the child. Criminal Reference No.2 of 2016 Page 7 of 40 (4) Wherever possible, the Magistrate or the police officer, as the case may be, shall ensure that the statement of the child is also recorded by audio-video electronic means. 10. It is noteworthy that Section 26(1) stipulates that a child's statement would be recorded only by the police officer or the Magistrate in the presence of their parents or any other person in whom the child has trust and confidence. This clearly underlines that the legislation does not contemplate recording of a statement by any person other than the authorities specified strictly in the statute.

11. It is trite that where law prescribes, the manner in which an act has to be performed, it has to be performed in that manner or not at all. This principle emerged from the case of *Taylor v. Taylor* reported as (1875) 1 Ch.D426(Chancery Division) and has been followed in *Nazir Ahmed v. Emperor* AIR 1936 PC253 *Ballabhadas Agarwala v. J.C. Chakravarty*, AIR 1960 SC576 *State of Uttar Pradesh v. Singhara Singh & Ors.*, AIR 1964 SC358 *Gujarat Electricity Board v. Girdharlal Motilal & Ors.*, AIR 1969 SC267 *Ramachandra Keshav Adke v. Govind Joti Chavare & Ors.*, AIR 1975 SC915 *Sulochna Uppal v. Surinder Sheel Bhakri*, 1990 (3) Delhi Lawyer 325; *Harnam Singh & Ors. v. Bhagwan Singh & Ors.*, ILR (1991) 2 Del 625. Any exercise of power, especially which impacts valuable rights of persons, can be effected only after strict compliance with statutory provisions. Criminal Reference No.2 of 2016 Page 8 of 40 12. It is also necessary to note that the expression any other person whom the child has trust or confidence cannot include a counsellor or an NGO. Even though it could be held that the expression includes a counsellor or an NGO, the only role permitted to them is their presence at the time the statement was being recorded and nothing more.

13. Vide Section 26(2), the POCSO Act specifically provides that the magistrate (under Section

25) or the police officer (under Section

24) shall record the statement. The Act enables the magistrate or the police officer to take the assistance of a translator or an interpreter. While Section 26(3) enables them, in the case of a child having a mental or physical disability, to 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. The role permissible to these experts is that of rendering assistance to the magistrate or the police officer wherever necessary.

14. While Section 26(4) of the POCSO Act mandates that wherever possible, the child's statement is also recorded by audio, video, electronic means. Unfortunately, the statute has failed to prescribe the procedure for recording/storing such evidence including the manner in which the recording is to be preserved and any provisions attaching confidentiality thereto.

15. It is important to note that Sections 26(1) and 26(2) only enable presence or facilitation of the parents or any other person Criminal Reference No.2 of 2016 Page 9 of 40 while a statement is being recorded by either the Magistrate or a police officer. No power is conferred on such persons named therein to record a statement.

16. It is significant to note that Section 26(3) only enables the Magistrate or the police officer to take assistance of the special educator or the persons named therein. It does not in any manner empower an NGO or a counsellor to record the statement.

17. The scheme of the legislation would show that after prescribing the procedure and powers of the Special Courts and recording of evidence in Chapter VII of the enactment, the legislature has in Chapter IX incorporated miscellaneous provisions. Section 39 thereto deserves to be extracted and reads thus : Chapter IX MISCELLANEOUS 39 Guidelines for child to take assistance of experts, etc.- Subject to such rules as may be made in this behalf, the State Government shall prepare guidelines for use of non- governmental organisations, professionals and experts or persons having knowledge of psychology, social work, physical health, mental health and child development to be associated with the pre-trial and trial stage to assist the child. 18. The provisions of Section 39 of the Act enables a

State Government to prepare guidelines which would be subject to rules made in this behalf for use of non-governmental organizations, professionals and experts or persons having knowledge of Criminal Reference No.2 of 2016 Page 10 of 40 psychology, social work, physical health, mental health and child development only for the purposes of being associated with the pre-trial and trial stages to assist the child.

19. It is specially important to note that Section 39 does not envisage any assistance to be given by any person to the police conducting the investigation or the Magistrate recording the statement. The section contemplates only guidelines for the child to take assistance.

20. The role of the persons detailed in Section 39 read with Section 26 of the POCSO Act is limited to their presence during recording of the statement of a child victim to ensure that the child victim is comfortable and strengthened while recording the incident to the police.

21. Mr. Dayan Krishnan, Id. Senior Counsel and amicus curiae has also drawn our attention to paras 35 and 36 of the United Kingdoms Guidelines on prosecuting cases of childrens sexual abuse issued by the Director of Public Prosecution, which elucidate even the instances as to when a video recording would not be appropriate, say for instance, when the abuse of the victim has been filmed. These guidelines give practical guidance on how to visually record the statement, even to the extent of the angle of the camera which should be used. Multiplicity of terms for counsellors/personnel interacting with the child 22. Before proceeding in this matter, it is necessary to understand as to who is a counsellor. We are unable to find any Criminal Reference No.2 of 2016 Page 11 of 40 legislative definition for this expression either in the POCSO Act or under the Juvenile Justice (Care and Protection of Children) Act, 2015 or under the Rules framed under either of the enactments.

23. The counsellor may be covered under professional and experts or the persons having knowledge of psychology, social work, physical health, mental health and child development as elaborated in Section 39 which enables the State Government to prepare guidelines.

24. Though not used anywhere in the Act, we find that the legislature has adverted to counselling in two places in the Rules of 2012. Rule 4 makes provisions for care and protection of the children and the role of the Special Juvenile Police Unit or the local police. Clause (e) of sub-rule 2 makes a reference to counselling and reads as follows : 4. Care and Protection - xxx xxx xxx (2) Where an SJPU or the local police, as the case may be, receives information in accordance with the provisions contained under sub-section (1) of section 19 of the Act in respect of an offence that has been committed or attempted or is likely to be committed, the authority concerned shall, where applicable, - xxx xxx xxx (e) inform the child and his parent or guardian or other person in whom the child has trust and confidence of the availability of support services including counselling, and assist them in contacting the persons who are responsible for providing these services and relief; Criminal Reference No.2 of 2016 Page 12 of 40 xxx xxx xxx 25. We find a reference to counselling also in the provisions relating to provision of emergency medical care contained in Rule 5 to a child against whom an offence has been committed who is in need of urgent medical care and protection under POCSO Act. Clause (v) of sub-rule (4) of Rule 5 reads as follows : Emergency medical care - xxx xxx xxx The registered medical practitioner rendering (4) emergency medical care shall attend to the needs of the child, including - xxx xxx xxx (v) wherever necessary, a referral or consultation for mental or psychological health or other counselling should be made. In exercise of the power conferred by the statute under 26. Section 45 of the POCSO Act, the Central Government has notified the Protection of Children from Sexual Offences Rules, 2012. In the definition clause contained in Rule 2, the legislature has defined the expression expert (Rule 2(c)); special educator (Rule 2(d)); person familiar with manner of communication (Rule 2(e)). The Rules have given recognition to yet another category of persons and assigned the nomenclature of support persons which has been defined in sub-rule (f).

27. Given the importance of the issued under consideration, we may extract the provisions of Rule 2(c),(d),(e) and (f) which read thus : Criminal Reference No.2 of 2016 Page 13 of 40 Definitions.- xxx xxx xxx include learning challenges with (c) Expert means a person trained in mental health, medicine, child development or other related discipline, who may be required to facilitate communication with a

child whose ability to communicate has been affected by trauma, disability or any other vulnerability. (d) Special educator means a person trained in communication with children with special needs in a way that addresses the child's individual differences and needs, which and communication, emotional and behavioural disorders, physical disabilities, and developmental disorders; (e) Person familiar with the manner of communication of the child means a parent or family member of a child or a member of his 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; (f) Support person means a person assigned by a Child Welfare Committee, in accordance with sub-rule (8) of rule 4, to render assistance to the child through the process of investigation and trial, or any other person assisting the child in the pre-trial or trial process in respect of an offence under the Act; 28. Neither the POCSO Act nor the J.J.

Act defines counsellors anywhere. Even the enactments do not use the term counsellors.

29. As is evident from above, although the term counsellor is not defined or mentioned in these Rules, the role of a counsellor can fit into any of the above definitions - counsellors can be Criminal Reference No.2 of 2016 Page 14 of 40 persons trained in child development and used to effectively communicate with the child; they can be persons familiar with the child's communication (for instance, if the child has had prior contact with the police); and they can also fulfill the role of empowering the child by explaining the legal processes involved. In fact, this multiplicity of roles and the lack of a specific definition has created ambiguity on the role of the counsellor during the pre-trial investigation phase and has contributed to the present practice of counsellors recording the statement of the child and preparing a report, (often with their observations), that forms part of the chargesheet.

30. There is therefore, complete lack of clarity as to which category the counsellors will fall. If clarified, they could come under Rule 2(c) which defines an expert or under Section 2(f) as a support person. Though the reference stands

made to counselling, the contours thereof have not got any statutory clarity. Absence of any qualifications described for counsellors 31. We find that the POCSO Act or the Rules framed thereunder contain no prescriptions for qualifications of counsellors unlike for interpreters and translators. Rule 3(1) enjoins upon the District Child Protection Unit (DCPU) to maintain a register with the names, addresses and other contact details of interpreters, translators and special educators for the Act which are to be made available to the police/Special Juvenile Police Unit (SJPU) or the special court as and when required. Criminal Reference No.2 of 2016 Page 15 of 40 Pertinently no such register is required to be maintained for counsellors.

32. Even though Rule 3(1) is concerned only with interpreters, translators and special educators, Rule 3(2) states that qualifications and experience of interpreters, translators, special educators and experts engaged for the purposes of Section 19(4), Section 26(3) & (4) and Section 38 shall be provided. Rule 3(4) provides that interpreters and translators engaged under sub-rule (1) should have functional familiarity with language spoken by the child as well as the official language of the state.

33. We may also advert to the requirements of Section 38 of the POCSO Act which enables the court to take the assistance of an interpreter or an expert while recording evidence of the child which reads thus : 38. Assistance of an interpreter or expert while recording evidence of child.- (1) Wherever necessary, the Court may take the assistance of a translator or interpreter having such qualifications, experience and on payment of such fees as may be prescribed, while recording the evidence of the child. (2) 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, having such qualifications, experience and on payment of such fees as may be prescribed to record the evidence of the child. 34. Rule 3(5) requires that the sign language interpreters, Special educators and experts entered in the register under sub- rule (1) should have relevant qualifications in sign language or Criminal Reference No.2 of 2016 Page 16 of 40 special education, or in the case of an expert, in the relevant discipline, from a recognized University or an institution recognized by the

Rehabilitation Council of India. However, Rule 3(1) does not refer to experts.

35. Rule 3(9) further adds an expert or other person familiar with the manner of communication with the child to the list of persons who can be involved in proceedings under Section 38.

36. The statutory scheme however, provides no clarity as to whether the POCSO Act recommends any qualifications for counsellors in so far as it remains indeterminate as to whether they could fall in the category of experts mentioned in Rules (3)&(5). POCSO Model Guidelines of September, 2013 37. Mr. Dayan Krishnan, Id. Senior Counsel and amicus curiae has placed before this court, the POCSO Model Guidelines which have been suggested by the Ministry of Woman and Child Development under Section 39 of the POCSO Act. As noted above, the law confers jurisdiction on the State Government to frame guidelines under Section 39 which have to comport to the requirements of the Rules framed by the Central Government under Section 45 of the enactment. At best, these guidelines therefore, are the suggestions to the State Government to follow. These model guidelines are also unclear so far as the source of qualifications of counsellors is concerned.

38. The guidelines inter alia contain information on interview of the child, role of medical and health professionals, psychologists Criminal Reference No.2 of 2016 Page 17 of 40 and mental health experts, social workers and support persons as well as the child development experts. However, there are several areas where there is incoherence in the structure and substance as well as interplay with the provisions of POCSO Act and POCSO Rules, 2012.

39. Framing of guidelines have been suggested by the Central Government in September, 2013 based whereon the State Government are expected to frame more extensive and specific guidelines as per their needs. While seven States/Union Territories are stated to have formulated/accepted the guidelines for various stakeholders, there is no such acceptance or formulation thereof by the Delhi Government.

40. In Chapter 5, the Model guidelines answer the question of Who can be appointed as a Counsellor and state that the Integrated Child Protection Scheme [ICPS]. envisages the development of a cadre of counsellors to provide professional counselling services under the Scheme.

41. Para 2.2 then lists the following organizations by whom counselling may be provided under the ICPS Scheme (and not the POCSO Act): CHILDLINE Service Counsellors appointed by the District Child protection Society (DCPS), who will report to the Legal-cum-Probation Officer and will be responsible for providing counselling support to all children and families coming in contact with the DCPS. NGOs and other voluntary sector organizations [Emphasis Supplied]. Criminal Reference No.2 of 2016 Page 18 of 40 42. Para 2.3 of the Chapter discusses the criteria for the engagement of a counsellor and states thus in order to enable the engagement of counsellors from outside the ICPS, including senior counsellors for the more aggravated cases, the DCPU in each district shall maintain a list of persons who may be appointed as counsellors to assist the child. These could be mental health professional employed by Government or private hospitals and institutions, as well as NGOs and private practitioners outside the ICPS mechanism, chosen on the basis of objective criteria. 43. It then provides an indicative criteria for qualification of such a counsellor, being a graduate degree, preferably in Sociology/Psychology (Child Psychology)/ Social Work in addition to at least 2-3 years work experience in counselling children in need of care and protection and training on handling of cases of sexual abuse. [Ref.: Chapter 5, Psychologists and Mental Health Experts in the Model guidelines, pages 36-37].

44. Before us, the respondents have not been able to explain or indicate the process being adopted to appoint counsellors, their qualifications or the manner in which their progress of counselling is being monitored by the State. Even though there is not any formal system of appointing counsellors, we have not been informed as to whether their work is being monitored in any manner. Criminal Reference No.2 of 2016 Page 19 of 40 45. We may note the extensive research undertaken by Mr. Dayan Krishnan, Id. Senior Counsel and amicus curiae and Mr. Trideep Pais, Advocate and amicus curiae who after examination of the provisions from all over the world have placed before us the code formulated by the State of

Iowa in the United States of America known as the Iowa Code.

46. 915.20 of the Iowa Code is concerned with the presence of victim counsellors. It falls within Chapter 915 - which is concerned with victim rights.

47. In 915.20 of the Iowa Code, a victim counsellor is defined as a person who is engaged in a crime victim center, is certified as a counsellor by the crime victim center, and is under the control of a direct services supervisor of a crime victim center, whose primary purpose is the rendering of advice, counselling, and assistance to the victims of crime. To qualify as a victim counsellor under this section, the person must also have completed at least twenty hours of training provided by the center in which the person is engaged, by the Iowa organization of victim assistance, by the Iowa coalition against sexual assault, or by the Iowa coalition against domestic violence, which shall include but not be limited to, the dynamics of victimization, substantive laws relating to violent crime, sexual assault, and domestic violence, crisis intervention techniques, communication skills, working with diverse populations, an overview of the state criminal justice system, information regarding pertinent hospital procedures, and Criminal Reference No.2 of 2016 Page 20 of 40 information regarding state and community resources for victims of crime.

48. These Iowa guidelines also refer to the victim counsellor privilege and the manner in which the same can be waived.

49. Guidance could be taken from the stipulations in this Code and the experience of working of this Code while framing appropriate guidelines.

50. Inasmuch as extensive submissions have been made by Mr. Dayan Krishnan, Id. Senior Counsel and amicus curiae on the lack of clarity in the Model POCSO Guidelines suggested by the Central Government as well as contradictions with the provisions of the statute and Rules, it would be appropriate to discuss these briefly hereafter.

51. The model guidelines, framed by the Central Government in the year 2013 have not been accepted or notified by the Government of NCT of Delhi.

52. While formulating general binding principles, the Model Guidelines conclude that the child's right to be treated with dignity and compassion means that efforts should also be made to reduce the number of professionals interviewing the child. However, while laying down Guidelines on interviewing a child, page 12 of the Model Guidelines conclude that since interviewing of children is a specialized skill, if possible, it should be conducted by a trained professional. 53. The problem with these seemingly contradictory guidelines further gets exacerbated on considering that the Guidelines propose Criminal Reference No.2 of 2016 Page 21 of 40 that at the interview stage, there should be an assessment that goes beyond the medical history of the child and seeks information directly related to the alleged sexual abuse, such as the details and frequency of the assault, including the time and place, the description of clothing worn etc. Such interviews are not therapeutic but forensic.

54. According to the Model Guidelines need to be conducted by a variety of trained professionals, which would include the police or investigative agencies. The Model Guidelines thus seem to suggest that even counsellors and other trained professionals can conduct these interviews, although without disclosing the statutory basis of such a conclusion. (Ref. Chapter 3 on Guidelines on Interviewing a Child : Forensic Interview Protocol at page 12 of the Model Guidelines).

55. The model guidelines are further unclear on the role of the counsellor and how it is distinct from other support persons and experts.

56. While discussing the role of psychologists and mental health experts, the Model Guidelines identify Rules 4(2)(e) and 5(4)(v) as the relevant rules that deal with counselling. Para 2.1 identifies the Role of Counsellors as : To understand the child's physical and emotional state To resolve trauma and foster healing and growth. To hear the child's version of the circumstances leading to the concern. To respond appropriately to the child when in crisis. Criminal Reference No.2 of 2016 Page 22 of 40 To provide counselling, support, the group-based programs to children referred to them. To improve and enhance the child's overall personal and social development, and his/her health and wellbeing. To facilitate the reintegration of the child into his/her family/community. (Ref. : Chapter 5,

Psychologists and Mental Health Experts in the Model Guidelines, Pages 36-38) 57. It is thus clear that the duty of the counsellor is to work in the best interests of the child and clearly to assist the child, and not assist in the investigation.

58. We find however, while discussing the role of Child Development Experts, the Model Guidelines concludes that while interviewing a child to gather evidence, a child development expert may therefore have to be involved in the management of the process. This is premised on the idea that interviewing children in the scope of an investigation requires professional and specialized training and knowledge of child development, the psychological impact of sexual abuse on children, and an understanding of police investigative procedures. Police officers using adult interrogation techniques are thus viewed as compromising the ability of the evidence collected from the child. The Model Guidelines in Chapter 7, Child Development Experts in the Model Guidelines, pages 61-63, consider child development experts under the definition of Expert in Rule 2(c) and seems to conflate them with Criminal Reference No.2 of 2016 Page 23 of 40 experts appointed under Rule 3 to help children in the need of translation, interpretation, or children with disabilities.

59. We find that the Model Guidelines further recognize that a social worker or probation officer or NGO or any other person found fit by the CWC may assist the Child Welfare Committee (CWC) or conduct an inquiry on whether the child needs to be taken out of the custody of their family or shared household in accordance with Rules 4(3)-(5) of the POCSO Rules.

60. The Model Guidelines further elaborate on the role played by a support person as an intermediary between the authorities and the child under Rules 4(2)(e), 4(7), 4(9) and 4(10). The fact that a counsellor can also be appointed as a support person is clear from the following list of Support Persons identified in the Guidelines: 3.1 The DCPU and the CWC shall maintain a list of persons/NGOs who may be appointed as support person to assist the child. This court include the following: Persons working in the field of child rights/child protection. NGO or other organization working in the field of child rights/ child protection, including Child line and its support organizations Officials of a childrens home or shelter home

Persons employed the in DCPU, including: Legal-cum-Probation officer Social worker (i) (ii) (iii) Outreach worker (iv) Counsellor 61. Thus, a counsellors role at this stage requires them to interact with the police and other authorities, as per Chapter 6, Criminal Reference No.2 of 2016 Page 24 of 40 Social Workers and Support Persons in the Model Guidelines (pages 47-48, 50-51).

62. Finally, according the Model guidelines, an NGO worker is included in the term person of trust and confidence and their presence can be requested at the time of making a statement to the police or Magistrate [Section 26(1)]., at the time of medical examination [Section 27(3)]., in Court [Section 33(4) and 33(7)]., and to act as a support person for assistance the child during the pre-trial and trial procedure and for proceedings under the Act [Rule 4(7) and proviso]. (Ref.: Chapter 6, Social Workers and Support Persons in the Model guidelines, page 58). This interpretation does not have any statutory basis, inasmuch as an NGO member is unlikely to be someone in whom the child already has trust and confidence.

63. Thus care would require to be taken to ensure that the guidelines comply with the requirements of the statute. Confidentiality of any statement made by a child to a counsellor/expert/support person/any person familiar with the manner of communication of the child 64. Though making of a statement to anybody other than the police officer or the magistrate is not envisaged by law, however, statutory recognition stands given to experts and other persons, as noted above which includes experts, special educators, persons familiar with the manner of communications of the child victim and support persons. Criminal Reference No.2 of 2016 Page 25 of 40 65. A very important aspect of the matter which requires to be considered is the permissibility of public disclosure of a statement made by a child to any person or authority referred to in the POCSO Act or the Rules of 2012. So far as any interpreter, translator, special educator or expert appointed under the Act or the Rules are concerned, Rule 3(10) explicitly says that they shall be bound by the Rules of confidentiality as prescribed under Section 127 read with Section 126 of the Indian Evidence Act, 1872.

66. So why the reference of Sections 126 and 127 of the Indian Evidence Act is made in Rule 3(10)? It would be useful to extract the provisions of these statutory provisions which read thus : 126. Professional communications.-No barrister, attorney, pleader or vakil shall at any time be permitted, unless with his clients express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment: Provided that nothing in this section shall protect from disclosure- (1) Any such communication made in furtherance of any illegal purpose; illegal purpose;" (2) Any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment. It immaterial is Criminal Reference No.2 of 2016 Page 26 of 40 whether the attention of such barrister, pleader, attorney or vakil was or was not directed to such fact by or on behalf of his client. in Explanation.-The obligation stated continues after the employment has ceased. this section Illustrations (a) A, a client, says to B, an attorney-I have committed forgery, and I wish you to defend me. As the defence of a man known to be guilty is not a criminal purpose, this communication is protected from disclosure. (b) A, a client, says to B, an attorney-I wish to obtain possession of property by the use of a forged deed on which I request you to sue. This communication, being made in furtherance of a criminal purpose, is not protected from disclosure. (c) A, being charged with embezzlement, retains B, an attorney, to defend him. In the course of the proceedings, B observes that an entry has been made in As account-book, charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment. This being a fact observed by B in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.

67. Mr. Dayan Krishnan, Id. Senior Counsel and amicus curiae has extensively placed the privilege attached to the statement which includes the express consent of the client (the victim of sexual assault in the present reference), and cases

where the communication is made in furtherance of an illegal purpose. In this context, it might be crucial to examine whether the child victim should be permitted to waive the privilege of the counsellor. Criminal Reference No.2 of 2016 Page 27 of 40 68. A similar obligation has been placed on the support person identified under the Rules, who is bound to maintain confidentiality of all information pertaining to the child to which he has access under Rule 4 (8) of the POCSO Rule which reads thus : 4. Care and Protection - xxx xxx xxx (8) The support person shall at all times maintain the confidentiality of all information pertaining to the child to which he has access. He shall keep the child and his parent or guardian or other person in whom the child has trust and confidence, informed as to the proceedings of the case, including available assistance, judicial procedures, and potential outcomes. He shall also inform the child of the role he may play in the judicial process and ensure that any concerns that the child may have, regarding his safety in relation to the accused and the manner in which he would like to provide his testimony, are conveyed to the relevant authorities. 69. Mr. Dayan Krishnan, Id. Senior Counsel and amicus curiae has explained that Section 126 of the Indian Evidence Act, unlike Section 124 of the Indian Evidence Act, provides for waiver of the privilege by the victim/client. Considering the provision such a waiver by the victim under Section 126 of the Indian Evidence Act, it should be examined if such waiver would be in the interest of the child victim and if such a waiver is being made voluntarily and knowingly. It is further submitted that the reasons for accepting such a waiver by the child victim should be recorded in writing in an order which is amenable to challenge under Section 482 of the Cr.P.C. Criminal Reference No.2 of 2016 Page 28 of 40 70. The POCSO Act and the Rules 2012 do not contemplate any report to be made by a counsellor or any observations of the counsellor which were made part of the police file or could be placed on record of the trial court.

71. There is even more stringent requirement in Section 99 of the Juvenile Justice (Care and Protection of Children) Act, 2015 which reads as follows : 99. Reports to be treated as confidential.

1. All reports related to the child and considered by the Committee or the Board shall be treated as confidential: Provided that the Committee or the Board, as the

case may be, may, if it so thinks fit, communicate the substance thereof to another Committee or Board or to the child or to the child's parent or guardian, and may give such Committee or the Board or the child or parent or guardian, an opportunity of producing evidence as may be relevant to the matter stated in the report.

2. Notwithstanding anything contained in this Act, the victim shall not be denied access to their case record, orders and relevant papers. 72. Clearly, the reports relating to a child which were placed for consideration before the Child Welfare Committee or with regard to the child in need of care and protection or before the Juvenile Justice Board with regard to a child in conflict with law are required to be treated as confidential. The substance thereof only can be communicated in terms of the proviso to Section 99(1). The confidentiality thus attached to the report by any person or expert is absolute. So far as the victim is concerned, other than the police Criminal Reference No.2 of 2016 Page 29 of 40 or the magistrate, no person or authority is authorized to take any forensic interviews. For this reason as well, it would be the grossest illegality for any of the person, experts and authorities under the POCSO Act or the JJ Act to make reports which could have any bearing on the case.

73. Further, it is reiterated that the question of the scope and contents of such a Report, including any observations made by the counsellor, does not arise inasmuch as the Act does not even mandate the existence of such a report, which can be part of the police file.

74. Mr. Dayan Krishnan, Id. Senior Counsel and amicus curiae has also placed the confidentiality provisions framed by the State of Iowa in 915.20A (1) (a) (d) of the Iowa Code talks about Victim Counsellor Privilege and 915.20A(2) clarifies that a victim counsellor shall not be examined or required to give evidence in any civil or criminal proceeding as to any confidential communication made by a victim to the counsellor unless there is an express waiver by the victim or a court orders the disclosure. 915.20A of the Iowa Code then details the situations under which this privilege does not apply (for instance in the matters of proof concerning the physical appearance of the victim at the time of injury) and the cases and

procedure under which the court can compel disclosure (for instance after requiring the counsellor claiming privilege or the victim or both to disclose the information in the judges chambers to decide whether it merits disclosure). Criminal Reference No.2 of 2016 Page 30 of 40 75. The aforesaid provisions of Acts make it explicitly clear that counselling report/notes of the counsellor (as well as any person or expert recognized under the POCSO Act and Rules of 2012 and the JJ Act) are confidential in nature and the same cannot be made a part of the chargesheet.

76. The counsellor at best has the duty of facilitating the victim and disclosure of any kind made by the victim to the counsellor is confidential in nature. The notes prepared during the counselling by the counsellor as well as his report are completely confidential and cannot be made part of the chargesheet or the record of the trial court in a case under POCSO Act, 2012. The first question is answered as above. Q. No.2- answered 77. The second part of the reference is concerned with the issue of multiple statements of a victim being recorded by the police during investigation and the problems caused thereby.

78. The dynamics of child sexual abuse are the same internationally. First and foremost, it is essential to understand the manner in which the children recount. Children do not disclose in one go but do so in piece meal. To accord the same treatment to a child as one would to an adult would result in grave injustice.

79. It needs no elaboration that the children would be reluctant and unlikely to disclose an entire adverse experience in proper detail in their first statement to the police, let alone the necessary Criminal Reference No.2 of 2016 Page 31 of 40 details. The fear for themselves or their family; an apprehension that they would be disbelieved; inability to identify themselves as victims; pressure or threats from the perpetrator; relationship to the perpetrator; fear of embarrassment, shame or self-blame; fear of stigmatization; lack of trust with the investigating agency amongst other would be some of the reasons which would act as barriers to a child making a disclosure of a complete incident in a single meeting.

80. There is great variation in how disclosure is defined and studied. Disclosure is rarely a spontaneous event and it is more likely to occur:-

" slowly over time as part of a process. For some it is a process that reoccurs and is never finished. Children and young people disclose abuse in many different ways ranging from direct verbal statements to more subtle indirect methods. Some children will tell purposefully yet others will do so indirectly or only after being encouraged by others to talk Non- verbal disclosures are more common among young children and can come about through letter writing, role playing or drawing Bodily or physical signs of abuse can include stomach aches, encopresis , enuresis, adverse reactions to yoghurt or milk, or soreness in the genitals Emotional signs of abuse include fear, anxiety, sadness, acting out without immediate cause, mood swings and reluctance to visit the perpetrator Behavioural signs can include sexualised playing with dolls, sexual experimentation, excessive masturbation, or drawing sexual acts. However, such behaviours need to be considered in the context of individual, family and wider societal dynamics in which they occur Various models or stages of disclosure have been proposed including Criminal Reference No.2 of 2016 Page 32 of 40 staged, social exchange and social cognitive models. The models agree that disclosure is an interactive and dynamic process that is influenced by the way children conceptualise and make decisions about whom to tell and the reactions they might receive.¹ 81. Children may disclose spontaneously (disclosure as an event) or indirectly and slowly (disclosure as a process). The child's type of disclosure may be influenced by their developmental features, such as their age at the onset of abuse and/or their age at time of disclosure. For instance, younger children are more likely to spontaneously disclose than older children (Lippert, Cross, & Jones, 2009; London et al., 2005; Shackel, 2009). Understanding disclosure of abuse as a process may help adults to be patient and allow the child or young person to speak in their own way and their own time (Sorensen & Snow, 1991). It also helps adults maintain an awareness of any changes in behaviour or emotions that may indicate abuse is occurring or increasing. If you have suspicions that abuse is occurring, even if you are unsure, it is better to report your suspicions than to do nothing.² 82. Some children and young people may disclose when asked or after participating in an intervention or education program (Shackel, 2009). Others may initially deny that they have been abused if asked directly, or say that they forget, only to disclose later. Children and young people may disclose, only to retract what 1 Child Sexual

Abuse and Disclosure- NSW Government - Family and Community Service - Dr Catherine Esposito, Practice Research Office of the Senior Practitioner Programs and Service Design - Chapter 2: Definitions, typologies and models of disclosure.

2 Responding to children and young peoples disclosures of abuse CFCA Practitioner Resource- March 2015 Australian Government- Australian Institute of Family Studies Criminal Reference No.2 of 2016 Page 33 of 40 they have said later; however, this is relatively uncommon. The child or young person might say he or she made a mistake, lied, or that the abuse actually happened to another child. In cases with a higher likelihood of actual abuse, recantations are low (4-9%; London et al., 2005). However, the stress of disclosing and receiving potentially negative responses from caregivers may lead some children to recant in an attempt to alleviate the stress (Hershkowitz, Lanes, & Lamb, 2007).

3 83. A recent qualitative study of disclosure among 60 young men and women in the United Kingdom observed eight forms of disclosure: direct, indirect verbal, partial verbal, accidental direct/verbal, prompted, non-verbal/behavioural, retracted and assisted. Partial disclosures were characterised by minimisation of the abuse, disclosing abuse of another person or disclosing other forms of abuse such as physical assault. Prompted disclosures were made in response to a direct inquiry about abuse while assisted disclosures involved a young person disclosing to another young person with the help of a friend. The authors note that children use a variety of techniques to disclose including direct or ambiguous verbal statements and non-verbal disclosure in the form of writing letters, reenacting abuse type situations or drawing pictures for adults. Physical or bodily signs of child sexual abuse can include stomach aches, encopresis, enuresis, adverse reactions to yoghurt or milk (due to resemblance to semen), or soreness in the genitals

3 Responding to children and young peoples disclosures of abuse CFCA Practitioner Resource- March 2015 Australian Government- Australian Institute of Family Studies Criminal Reference No.2 of 2016 Page 34 of 40 (Jensen, 2005). Emotional signs can encompass fear, anxiety, and sadness, acting out without immediate cause, mood swings and reluctance to visit the perpetrator. Behavioural signs include sexualised playing with dolls, sexual experimentation, excessive masturbation, or drawing sexual acts (Finkelhor, 1994; Jensen, 2005).

4 84. Where children are concerned, the disclosure normally would tend to be a process, rather

than a single incident or episode. It would take multiple interviews for an investigator or an interviewer to even establish trust in the mind of the child. Unfortunately, we have been unable to evolve any guidelines with regard to investigation and prosecution of cases of child sexual abuse which are the subject matter of POCSO Act, 2012, though the Central Government has suggested the following in the POCSO Model Guidelines : The dynamics of child sexual abuse are such that often, children rarely disclose sexual abuse immediately after the event. Moreover, disclosure tends to be a process rather than a single episode and is often initiated following a physical complaint or a change in behaviour. In such a situation, when the child finally discloses abuse, and a report is filed under the POCSO Act, 2012 more information will have to be gathered so that the child's statement may be recorded. Information so obtained will become part of the evidence.

4 Child Sexual Abuse and Disclosure- NSW Government - Family and Community Service - Dr Catherine Esposito, Practice Research Office of the Senior Practitioner Programs and Service Design - Chapter 2: Definitions, typologies and models of disclosure. (Allnock & Miller, 2013). Criminal Reference No.2 of 2016 Page 35 of 40

However, given the experience that the child has gone through, he is likely to be mentally traumatised and possibly physically affected by the abuse. Very often, law enforcement officers interview children with adult interrogation techniques and without an understanding of child language or child development. This compromises the quality of evidence gathered from the child, and consequently, the quality of the investigation and trial that are based on this evidence.

of and process disclosure therefore have The interviewing of such a child to gather evidence thus demands an understanding of a range of topics, such as the child-centred developmentally-sensitive interviewing methods, including language and concept formation. A child development expert may the management of this process. The need for a professional with specialized training is identified because interviewing young children in the scope of an investigation is a skill that requires knowledge of child development, an understanding of the psychological impact sexual abuse has on children, and an understanding of police investigative procedures. to be involved in Such a person must have knowledge of the dynamics and the consequences of child sexual abuse, an ability to establish rapport with children and adolescents, and a capacity to maintain

objectivity in the assessment process. In the case of a child who was disabled/ physically handicapped prior to the abuse, the expert would also need to have specialised knowledge of working with children with that particular type of disability, e.g. visual impairment, etc. 85. Mr. Dayan Krishnan, Id. Senior Counsel and amicus curiae has also placed the Guidelines on Prosecuting Cases of Child Sexual Abuse issued by the Director of Public Prosecutions, Criminal Reference No.2 of 2016 Page 36 of 40 Crown Prosecution Services, in October, 2013 which contains the following guidelines : The statement taking stage 35. Particular care should be given when deciding how to take the victim's statement. A video recorded interview (and subsequent use of the live link in court) is often the most appropriate means but may not always be so. For example, if the abuse of the victim has been filmed and the victim does not want to be videoed as a consequence. xxx xxx xxx 38. A victim of child sexual abuse may not give their best and fullest account during their first recorded (ABE) interview or statement. This may be for a variety of reasons: they could have been threatened; they might be fearful for themselves or their family; the offending may have been reported by others and they may be reluctant to cooperate at that stage. They might not have identified themselves as a victim or they could be fearful that the police will not believe their allegations. They may initially distrust the police and could well use the interview to test the credibility of the police.

39. The account given may take a number of interviews, with the child or young person giving their account piecemeal, sometimes saving the 'worst' till last, having satisfied themselves that they can trust the person to whom they are giving their account. 86. There is no reason why the same practice cannot be followed in India. This leaves the question of how to interpret the multiple statements made by the witness/victim. Criminal Reference No.2 of 2016 Page 37 of 40 87. In para 40 of the above guidelines, the Crown Prosecution Services (CPS), has taken the following view : 40. Carefully thought out patient intervention by the police and other agencies can ultimately disrupt and break the link to the offender(s). A seemingly contradictory initial account is therefore not a reason in itself to disbelieve subsequent accounts given by the victim and these contradictory accounts should instead be seen as at least potentially symptomatic of the abuse. 88. The law allows the investigating agencies to record multiple statements of the

victims. There is no prohibition on recording multiple statements by the police.

89. We may at this stage also advert to the provisions of Section 164 (5)(A) of the Cr.P.C. which mandates that the statement of a victim under Section 354, 354A-D, 376(1) and (2) as well as Section 376A-E or Section 509 of the IPC shall be recorded as soon as the commission of the offence is brought to the notice of the police.

90. A seemingly contradictory initial account is not a reason in itself to disbelieve the subsequent accounts by the victims. The multiple statements placed by the investigating agency should be carefully scrutinized by the Trial Courts in order to ensure that complete justice is done. The second question is accordingly answered. Criminal Reference No.2 of 2016 Page 38 of 40 Result Q.No.1: What is the legality of recording a statement or version of the incident enumerated by a victim of sexual offence by an NGO or a private counsellor and filing of such statement or counselling report along with a chargesheet before the trial court under Section 173 of the Cr.P.C.?. (i) A statement under the POCSO Act can be made only to a police officer or a magistrate, and; (ii) Provisions of the POCSO Act or the JJ Act do not contemplate any report to be made by a counsellor. It further makes it explicitly clear that counselling report/notes of the counsellor (as well as any person or expert recognized under the POCSO Act and Rules of 2012 and the JJ Act) are confidential in nature and the same cannot be made a part of the chargesheet or otherwise on the trial court record. Q.No.2: What is the permissibility and legality of recording of multiple statements/versions of a victim of sexual assault, both women and children, by an investigating officer/judicial officer?. (i) The law allows the investigating agencies to record multiple statements of the victims. There is no prohibition on recording multiple statements by the police. (ii) A seemingly contradictory initial account is not a reason in itself to disbelieve the subsequent accounts by the victims. The multiple statements placed by the investigating agency should be carefully scrutinized by the Trial Courts in order to ensure that complete justice is done.

91. The reference stands answered in above terms. The TCRs shall be returned forthwith.

92. Let a copy of this order be circulated to all judicial officers in Delhi. Criminal Reference No.2 of 2016 Page 39 of 40 93. We may note the extremely well researched and deeply analysed written notes by Ms. Aakash Lodha, Ms. Manvi Priya and Ms. Vrinda Bhandari, Advocates, which have been placed by Mr. Dayan Krishanan, Senior Counsel and Mr. Trideep Pais, Advocate, who appear as amici curiae in this matter. ACTING CHIEF JUSTICE AUGUST04 2018/aj ANU MALHOTRA, J Criminal Reference No.2 of 2016 Page 40 of 40

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