

HIGH COURT OF JAMMU AND KASHMIR
(Office of the Registrar General at Srinagar)

**Subject:- PROTOCOL FOR RECORDING EVIDENCE OF
VULNERABLE WITNESSES.**

NOTIFICATION

No: 42


Dated: 29/5/2019

The Chief Justice of High Court of Jammu and Kashmir is pleased to frame the following protocol for recording evidence of vulnerable witnesses in the State of Jammu and Kashmir:-

PREAMBLE

The purpose of this protocol is to present guidelines and mandatory recommendations, to improve the response of the justice dispensation system to vulnerable witnesses¹

This protocol prescribes guidelines while recording depositions of vulnerable witnesses in order to enable them to give their best evidence in criminal proceedings. Each witness is unique and is to be handled accordingly. Some of the most challenging cases handled by judges during the course of their careers are those involving vulnerable witnesses as, what happened to or was witnessed by them, impact significantly on their quality of deposition and potentially outcome of a trial.

 ¹The UN Model Law on Justice in matters involving child victims and witnesses of crime published by the UN Office on Drugs and Crime, Vienna, UN, New York 2009 and 'Guidelines for recording of evidence of vulnerable witnesses in criminal matters' issued by the Delhi High Court.

Vulnerable witnesses, find the criminal justice system, and particularly the courtroom experience, intimidating. Under these circumstances, a vulnerable witness would provide weak testimony and contribute less information than should have been elicited. Further, the lengthy process of navigating, the formal and adversarial criminal justice system can affect the vulnerable witnesses psychological development and disable this sensitivity in significant and long-lasting, even permanent, ways.

To respond effectively to the needs of vulnerable witnesses the criminal justice system needs to respond proactively with sensitivity in an enabling and age appropriate manner, so that the trial process is less traumatic for them.

The judicial system has to strike a balance between protecting the accused person's right to a fair trial, and ensuring that witnesses who give evidence in the case are enabled to do so, to the best of their ability.

OBJECTIVES OF THIS PROTOCOL

This protocol, intended to further the ends of Justice, is designed with the following broad objectives:

1. To elicit and secure complete, accurate and reliable evidence from vulnerable witnesses; and
2. To minimize the harm or secondary victimization of vulnerable witnesses in anticipation and as a result of participation in the criminal justice system and to ensure their security; and
3. To ensure that the accused person's right to a fair trial is maintained.

1. Short Title, Applicability and Commencement-

- (i) This Protocol shall be called, — "Protocol for Recording Evidence of Vulnerable Witnesses".
- (ii) Unless otherwise provided, this Protocol shall govern the examination of vulnerable witnesses during trial who are victims or witnesses in any case. They shall apply to every court in Jammu and Kashmir.
- (iii) The application of this protocol shall commence from the date of notification of this Protocol.

2. Construction & Interpretation of the protocol - This protocol shall be liberally construed and interpreted, in view of the extant laws, to uphold the interests of vulnerable witnesses and to promote their maximum accommodation without prejudice to the right of the accused to a fair trial and to further the ends of justice.

3. Definitions –

(a) **Vulnerable Witness**- means and includes:-(i) any child witness who has not completed 18 years of age, (ii) any victim of sexual violence, (iii) any material witness in a dangerous crime (iv) such other witness as may be deemed vulnerable by the trial court for reasons therefor to be recorded in writing.

(b) **Support Person** –Means and includes a guardian *ad litem*, a legal aid lawyer, facilitators, interpreters, translators and any other person appointed by court to provide support, accompany and assist the vulnerable witness to testify or to attend judicial proceedings.

(c) **Best Interests of the Child** – Means circumstances and conditions most congenial to security, protection of the child and most encouraging to his physical, psychological and emotional development and shall also include available alternatives for safeguarding the growth and development of the child.

(d) **Development Level** – Development level refers to the specific growth phase in which most individuals, are expected to

behave and function in relation to the advancement of their physical, socio economical, cognitive and moral abilities.

(e) **In-Camera Proceedings** – means criminal matters involving sexual violence or part thereof, criminal and civil cases wherein the public and press are not allowed to participate, for good reason as adjudged by the court or by law.

(f) **Concealment of Identity of witness** – Means and includes any condition prohibiting publication of the name, address and other particulars which may lead to the identification of the witness.

(g) **Comfort Items** –Comfort items mean any article which shall have a calming effect on a vulnerable witness at the time of deposition and may include stuffed toy, blanket or book.

(h) **Competence of a *vulnerable* Witness** –Every vulnerable witness shall be 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 tender years, disease, either of body or mind, or any other cause of the same kind.

Explanation: A mentally ill person may also be held competent unless he is prevented by his mental condition to understand questions.

(i) **Court House Tour** – A pre-trial tour of court room to familiarize a *vulnerable witness* with the environment, the basic process of adjudication and roles of each court official.

(j) **Descriptive Aids**–A human figure model, anatomically correct dolls or a picture or anatomical diagrams or any other aids deemed appropriate to help a *vulnerable witness* to explain an act or a fact.

(k) **Live Link** – Live link means and *includes* a live television link, audio-video electronic means or other arrangement whereby a witness, while absent from the courtroom is nevertheless present in the court room by remote communication using technology to give evidence and be cross-examined.

(l) **Special Measures** –mean and include the use of any mode, method and instrument, etc, considered necessary for providing assistance in recording deposition of vulnerable witnesses.

(m) **Testimonial Aids** –means and includes screens/ live links, image and/or voice altering devices or any other technical devices.

(n) **Secondary Victimization** –means victimization that occurs not as a direct result of a criminal act but through the response of institutions and individuals to the victim.

(o) **Revictimization** – means a situation in which a person suffers more than one criminal incident over a period of time.

(p) **Waiting Room** – A safe place for vulnerable witnesses where they can wait before being called to depose. It shall have toys, books, TV, etc. which can help them lower their anxiety.

4. Special Measures Direction - The court shall direct as to which special measure will be used to assist a particular eligible witness in providing the best evidence. Directions may be discharged or varied during the proceedings, but will normally continue in effect until the proceedings are concluded, thus enabling the witness to know what assistance to expect.

5. Applicability of protocol to all vulnerable witnesses. - For the avoidance of doubt, it is made clear that these guidelines are to apply to any vulnerable witness including a child party, regardless of which party is seeking to examine such witness.

6. No adverse inference to be drawn from special measures. - The fact that a witness has had the benefit of a special measure to assist them in deposition shall not be regarded in any way whatsoever as being adverse to the position of the other side. This should be made clear to the parties by the judge at the time of passing order in terms of this protocol when the vulnerable witness is examined as also when the final judgment is pronounced.

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7. Identification of Stress causing factors of adversarial Criminal Justice System-Factors which cause stress on witnesses, rendering them further vulnerable witnesses, and impeding complete disclosure by them shall, amongst others, include:

- (i) Multiple depositions and not using developmentally appropriate language.
- (ii) Delays and continuances.
- (iii) Testifying more than once.
- (iv) Prolonged/protracted court proceedings.
- (v) Lack of communication between professionals including police, doctors, lawyers, prosecutors, investigators, psychologists, etc.
- (vi) Fear of public exposure.
- (vii) Lack of understanding of complex legal procedures.
- (viii) Face-to-face contact with the accused.
- (ix) Practices that are insensitive to developmental needs.
- (x) Inappropriate cross-examination.
- (xi) Lack of adequate support and victims services.
- (xii) Sequestration of witnesses who may be supportive to the vulnerable witness.

- (xiii) Placement that exposes the vulnerable witness to intimidation, pressure, or continued abuse.
- (xiv) Inadequate preparation for fearless and robust testifying.
- (xv) Worry about not being believed especially when there is no evidence other than the testimony of the vulnerable witness.
- (xvi) Formality of court proceedings and surroundings including formal dress of members of the judiciary and legal personnel.

8. Competency of vulnerable witness: - Every vulnerable witness shall be presumed to be qualified as a witness unless prevented by the following-

- (a) age.
- (b) physical or mental disability leading to recording a finding of doubt regarding the ability of such witness to perceive, remember, communicate, distinguish, truth from falsehood or appreciate the duty to tell the truth, and/or to express the same.

Explanation: The court shall conduct a competency examination before recording the testimony of such witness, or on an application of either prosecution or defence or *suo motu*.

9. Persons allowed at competency assessment.— Only the following persons are allowed to be in attendance for the competency assessment:

- (i) the judge and such court personnel deemed necessary and specified by order of the judge concerned;
- (ii) the counsel for the parties;
- (iii) the guardian *ad litem*;
- (iv) one or more support persons for the child; and

(v) the accused, unless the court determines that competence requires to be and can be fully evaluated in his absence.

(vi) any other person who in the opinion of the court can assist in the competence assessment.

10. Conducting of competence assessment — The assessment of a person as to his competence as a witness shall be conducted only by the presiding judge.

11. Developmentally appropriate questions.—The questions asked to assess the competency of the person shall be appropriate to his age and developmental level; shall not in any manner be related to the facts or issues at trial; and shall focus on the ability of the person to remember, communicate, distinguish between truth and falsehood, and appreciate the duty to testify truthfully.

12. Continuing duty to assess competence — The court has the duty of continuously assessing the competence of the vulnerable witnesses throughout their testimony and to pass appropriate orders, as and when deemed necessary.

13. Pre-trial visit of Witnesses to the Court -Vulnerable witness shall be allowed a pre-trial court visit along with the support person to enable such witnesses to familiarise themselves with the layout of the court, and may include visit to and explanation of the following:

- (i) the location of the defendant/ accused in the dock;
- (ii) court officials (what their roles are and where they sit);
- (iii) who else might be in the court, for example those permitted in the public gallery;
- (iv) the location of the witness box;

(v) a run-through of basic court procedure;

(vi) the facilities available in the court;

(vii) discussion of any particular fears or concerns with the intermediaries, prosecutors and the judge to dispel the fear, trauma and anxiety in connection with the prospective deposition at court.

(viii) demonstration of any special measures applied for and / or granted, for example practising on the live link and explaining who will be able to see them in the courtroom, and showing the use of screens (where it is practical and convenient to do so).

14. Meeting the judge - The Judge may meet a vulnerable witness *suo motu* on reasons to be recorded or on an application of either party in the presence of the prosecution/plaintiff and defence lawyer/defendant or in their absence before they give evidence, for explaining the court process in order to help them in understanding the procedure and giving their best evidence.

15. Appointment of Guardian *ad litem* - The court may, in an appropriate case, appoint any person as a guardian *ad litem*, as per law to a witness who is a victim of or a witness to a crime or in any case having regard to his best interests after considering the background of the guardian *ad litem* and his familiarity with the judicial process, social service programs, and human development. If the witness is a child, preference would be given for appointment of a guardian *ad litem* to the parents of the child, if qualified. The guardian *ad litem* may be a member of bar / practicing advocate, except a person who is a witness in any proceeding involving the vulnerable witness.

16. Duties of guardian *ad litem* - It shall be the duty of the guardian *ad litem* of the vulnerable witness who is so appointed by court to:

(i) attend all depositions, hearings, and trial proceedings in which the vulnerable witness participates.

(ii) make recommendations to the court concerning the welfare of the vulnerable witness keeping in view the needs of the witness and observing the impact of the proceedings on him.

(iii) explain in a language understandable to the vulnerable witness, all legal proceedings, including police investigations, in which he is involved;

(iv) assist the vulnerable witness and his family in coping with the emotional effects of participating in any case/proceedings, especially a crime and subsequent criminal or non-criminal proceedings in which the witness is involved;

(v) remain with the vulnerable witness while the vulnerable witness waits to testify;

17. Legal assistance - A vulnerable witness may be provided with legal assistance by the court, if the court considers the assignment of a lawyer to be in the best interests of the *witness*, throughout the justice process in the following instances:

- (a) at the request of the support person, if one has been designated;
- (b) pursuant to an order of the court on its own motion²

18. Court to allow presence of support persons -

(a) A court shall allow *suo motu* or on request, verbal or written, to a *vulnerable witness* testifying at a judicial proceeding to have the presence of one person of his own choice to provide him support who shall within the view and if the need arise may accompany the *witness to the witness stand*, or in the deposition room, provided that such support person shall not completely obscure the *witness* from the view of the opposing party or the judge³.

²Section 41 of the Jammu & Kashmir Protection of Children from Sexual Violence Act, 2018 (Governor's Act No. XXXVI of 2018)

³Section 34 (4) of the Jammu & Kashmir Protection of Children from Sexual Violence Act, 2018 (Governor's Act No. XXXVI of 2018)

(b) The court may allow the support person to hold the hand of the vulnerable witness or take other appropriate steps to provide emotional support to the vulnerable witness in the course of the proceedings.

(c) The court shall instruct the support persons not to prompt, sway, or influence the vulnerable witness during his testimony. The support person shall also be directed that he/she shall in no circumstances discuss the evidence to be given by the vulnerable witness.

(d) Where no other suitable person is available, only in very rare cases should another witness in the case be appointed as a support person. The court shall ordinarily appoint a neutral person, other than a parent, as a support person. It is only in exceptional circumstances keeping the condition of the vulnerable witness in mind, that the court should appoint a parent as a support person.

19. The testimony of support person to be recorded prior - Testimony of such support person if the support person also happens to be a witness shall be recorded, ahead of the testimony of the vulnerable witness .

20. Court to appoint facilitator. To assist the vulnerable witnesses in effectively communicating at various stages of trial and or to coordinate with the other stake holders such as police, medical officer, prosecutors, psychologists, defence counsels and courts, the court shall allow use of facilitators.

The court may, *suo motu* or upon an application presented by either party or a support person of vulnerable witnesses, appoint a facilitator if it determines that such witness is finding it difficult to understand or respond to questions asked.

Explanation: (i) The facilitator may be an interpreter, a translator, child psychologist, psychiatrist, social worker, guidance counselor, teacher, parent, or relative of such witness who shall be

under oath to pose questions according to meaning intended by the counsel, or the court.

(ii) If the court appoints a facilitator, the respective counsels for the parties shall pose questions to the vulnerable witness only through the facilitator, either in the words used by counsel or, if the vulnerable witness is not likely to understand the same, in words or by such mode as is comprehensible to the vulnerable witness and which convey the meaning intended by counsel.

21. Right to be informed - A vulnerable witness, his or her parents or guardian, his or her lawyer, the support person, if designated, or other appropriate person designated to provide assistance shall, from their first contact with the court process and throughout that process, be promptly informed by the Court about the stage of the process and, to the extent feasible and appropriate, about the following:

- (a) procedures of the justice process including the role of vulnerable witnesses, the importance, timing and manner of testimony, and the ways in which proceedings will be conducted during the trial;
- (b) existing support mechanisms for a vulnerable witness when participating in proceedings, including making available appropriate person designated to provide assistance;
- (c) specific time and places of hearings and other relevant events;
- (d) availability of protective measures;
- (e) where the vulnerable witness is a child, of the relevant rights of child victims and witnesses pursuant to applicable laws, the Convention on the Rights of the Child and other international legal instruments, including the Guidelines and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly in its resolution 40/34 of 29 November 1985;

(f) the progress and disposition of the specific case, including in a criminal case the apprehension, arrest and custodial status of the accused and any pending changes to that status, the prosecutorial decision and relevant post-trial developments and the outcome of the case.

22. Language, interpreter and other special assistance measures

(i) the court shall ensure that proceedings relevant to the testimony of a *vulnerable witness* are conducted in language that is simple and comprehensible to *the witness*.

(ii) if vulnerable witness needs the assistance of interpretation into a language or mode that the witness understands, an interpreter shall be provided free of charge⁴.

(iii) if, in view of the child's age, level of maturity or special individual needs of a witness which may include but are not limited to disabilities if any, ethnicity, poverty or risk of revictimization, the witness requires special assistance measures in order to testify or participate in the justice process, such measures shall be provided free of charge⁵.

23. Waiting area for vulnerable witness - The courts shall ensure that a waiting area for vulnerable witnesses with the support person, lawyer of the witness facilitation, if any, is separate from waiting areas used by other persons. The waiting area for vulnerable witnesses should be furnished so as to make a vulnerable witness comfortable.

⁴Section 39(1) of the Jammu & Kashmir Protection of Children from Sexual Violence Act, 2018(Governor's Act No. XXXVI of 2018)

⁵Section 39(2) of the Jammu & Kashmir Protection of Children from Sexual Violence Act, 2018(Governor's Act No. XXXVI of 2018)

24. Duty to provide comfortable environment for deposition. It shall be the duty of the court to ensure comfortable environment for the *vulnerable witness* by issuing directions and also by supervising, the location, movement and deportment of all persons in the courtroom including the parties, their counsel, *vulnerable witnesses*, support persons, guardian *ad litem*, facilitator, and court personnel. The *vulnerable witness* may be allowed to testify from a place other than the witness chair. The witness chair or other place from which the *vulnerable witness* testifies may be turned to facilitate his testimony but the opposing party and his counsel must have a frontal or profile view of the *vulnerable witness* even by a video link, during the testimony of the *vulnerable witness*. The witness chair or other place from which the *vulnerable witness* testifies may also be rearranged to allow the *vulnerable witness* to see the opposing party and his counsel, if he chooses to look at them, without turning his body or leaving the witness stand. While deciding to make available such environment, the judge may be dispensed with from wearing his judicial robes.

25. Testimony during appropriate hours -The court may order that the testimony of the vulnerable witness should be taken during a time of day when the vulnerable witness is well-rested.

26. Recess during testimony -The vulnerable witness may be allowed reasonable periods of relief while undergoing depositions as often as necessary depending on his developmental need⁶.

27. Measures to protect the privacy and well-being of vulnerable witnesses.

(1) At the request of a vulnerable witness, parents of child witness or guardian, his or her lawyer, the support person, other appropriate person designated to provide assistance, or the court on its own motion, taking into account the best interests of the *vulnerable witness*, may order one or more of the following measures to protect the privacy and physical and mental well-being

⁶Section 39(3) of the Jammu & Kashmir Protection of Children from Sexual Violence Act, 2018(Governor's Act No. XXXVI of 2018)

of the *vulnerable witness* and to prevent undue distress and secondary victimization:

- (a) expunging from the public record any names, addresses, workplaces, professions or any other information that could be used to identify the *vulnerable witness*;⁷
- (b) forbidding the defence lawyer and persons present in court room from revealing the identity of the *vulnerable witness* or disclosing any material or information that would tend to identify the *vulnerable witness*;
- (c) ordering the non-disclosure of any records that identify the *vulnerable witness*, until such time as the court may find appropriate;
- (d) assigning a pseudonym or a number to a *vulnerable witness*, in which case the full name and date of birth of the child shall be revealed to the accused within a reasonable period for the preparation of his or her defence;
- (e) efforts to conceal the features or physical description of the *vulnerable witness* giving testimony or to prevent distress or harm to the vulnerable witness, including testifying⁸:
 - (i) behind screen;
 - (ii) using image- or voice-altering devices;
 - (iii) through examination in another place, transmitted simultaneously to the courtroom by means of video link;
 - (iv) through a qualified and suitable intermediary, such as, but not limited to, an interpreter for *vulnerable witness* with mental, hearing, sight, speech or other disabilities;

⁷Section 34(7) of the Jammu & Kashmir Protection of Children from Sexual Violence Act, 2018(Governor's Act No. XXXVI of 2018)

⁸Section 37(2) of the Jammu & Kashmir Protection of Children from Sexual Violence Act, 2018(Governor's Act No. XXXVI of 2018)

- (f) holding closed sessions;
 - (g) if the *vulnerable witness* refuses to give testimony in the presence of the opposite party or the accused or if circumstances show that the *vulnerable witness* may be inhibited from speaking the truth in that person's presence, the court shall give orders to temporarily remove the opposite party or the accused from the courtroom to an adjacent room with a video link or a one way mirror visibility into the court room. In such cases, the defence lawyer shall remain in the courtroom and question *the vulnerable witness*, and the opposite party's or accused's right of confrontation shall thus be guaranteed.
 - (h) taking any other measure that the court may deem necessary, including, where applicable, anonymity, taking into account the best interests of the *vulnerable witness* and the rights of the accused.
- (2) Any information including name, parentage, age, address, etc. revealed by the *vulnerable witness* which enables identification of the person of the *vulnerable witness*, shall be kept in a sealed cover on the record and shall not be made available for inspection to any party or person. Certified copies thereof shall also not be issued. The reference to the *vulnerable witness* shall be only by the pseudonym assigned in the case.

28. Directions for Judges -

- (i) Vulnerable witnesses shall receive high priority and shall be handled as expeditiously as possible, minimizing unnecessary delays and continuances to avoid repeated appearance of the witness in the Court. (Whenever necessary and possible, the court schedule will be altered to ensure that the testimony of the *vulnerable witness* is recorded on sequential days, without delays.)⁹

⁹Section 34(5) of the Jammu & Kashmir Protection of Children from Sexual Violence Act, 2018(Governor's Act No. XXXVI of 2018)

(ii) Judges and court administrators should ensure that the developmental needs of vulnerable witnesses are recognized and accommodated in the arrangement of the courtroom.

(iii) Separate and safe waiting areas and passage thereto should be provided for vulnerable witnesses.


(iv) Judges should ensure that the developmental stages and needs of vulnerable witnesses are identified recognized and addressed throughout the court process by requiring usage of appropriate language, by timing hearings and testimony to meet the attention span and physical needs of such vulnerable witnesses by allowing the use of testimonial aids as well as interpreters, translators, when necessary.

(v) Judges should be flexible in allowing the vulnerable witnesses to have a support person present while testifying and should guard against unnecessary sequestration of support persons.

(vi) Hearings involving a vulnerable witness may be scheduled on days/time when the witness is not inconvenienced or is not disruptive to routine/ regular schedule of vulnerable witness.

29. Allowing proceedings to be conducted in camera

(i) When a vulnerable witness testifies, the court may order the exclusion from the courtroom of all persons, who do not have a direct interest in the case including members of the press. Such an order may be made to protect the right to privacy of the vulnerable witness or if the court determines on the record that requiring the vulnerable witness to testify in open court would cause psychological harm to him, hinder the ascertainment of truth, or result in his inability to effectively communicate due to embarrassment, fear, or timidity.

 (ii) In making its order, the court shall consider the developmental level of the vulnerable witness, the nature of the crime, the nature of his testimony regarding the crime, his

relationship to the accused and to persons attending the trial, his desires, and the interests of his parents or legal guardian.

(iii) The court may, *motu proprio*, exclude the public from the courtroom if the evidence to be produced during trial is of such character as to be distressing, personal, offensive to decency or public morals.¹⁰

30. Live-link television testimony where the vulnerable witness is involved –

(a) Any party in the case, a prosecutor, counsel or the guardian *ad litem* may apply for an order that the testimony of the *vulnerable witness* be taken in a room outside the courtroom and be televised to the courtroom by live-link television.¹¹

(b) In order to take a decision of usage of a live-link the judge may question the vulnerable witness in chambers, or in some comfortable place other than the courtroom, in the presence of the support person, guardian *ad litem*, prosecutor, and counsel for the parties. The questions of the judge shall not be related to the issues at trial but to the feelings of the vulnerable witness about testifying in the courtroom.

(c) The court on its own motion, if deemed appropriate, may pass orders in terms of (a) or any other suitable directions for recording the evidence of a vulnerable witness.

31. Provision of screens, one-way mirrors, and other devices to vulnerable witness from accused/opposite party.

- The court may *suo motu* or on an application made even by the prosecutor or the guardian *ad litem* order that the chair of the vulnerable witness or that a screen or other device be placed in the courtroom in such a manner that the vulnerable witness cannot see the opposite party/accused while testifying and at the same time ensuring that the opposite party/accused is in a position to hear the

¹⁰Section 38 of the Jammu & Kashmir Protection of Children from Sexual Violence Act, 2018(Governor's Act No. XXXVI of 2018)

¹¹Section 37(2) of the Jammu & Kashmir Protection of Children from Sexual Violence Act, 2018(Governor's Act No. XXXVI of 2018)

statement of the vulnerable witness and communicate with his advocate. The court shall issue an order stating the reasons and describing the approved courtroom arrangement.¹²

32. Factors to be considered while considering the application under Guidelines 30 & 31 - The court may order that the testimony of the vulnerable witness be taken by live-link television if there is a substantial likelihood that the vulnerable witness would not provide a full and candid account of the evidence if required to testify in the presence of the accused/opposite party, his counsel or the prosecutor as the case may be.

The order granting or denying the use of live-link television shall state the reasons therefor and shall consider the following:

- (i) the age and level of development of the vulnerable witness;
- (ii) his physical and mental health, including any mental or physical disability;
- (iii) any physical, emotional, or psychological harm related to the case on hand or trauma experienced by the vulnerable witness;
- (iv) the nature of the alleged offence/case and circumstances of its commission;
- (v) any threats against the vulnerable witness;
- (vi) his relationship with the accused or opposite party;
- (vii) his reaction to any prior encounters with the accused/opposite party in court or elsewhere;
- (viii) his reaction prior to trial when the topic of testifying was discussed with him by parents or professionals;
- (ix) specific symptoms of stress exhibited by the vulnerable witness in the days prior to testifying;
- (x) testimony of expert or lay witnesses;

¹²Section 37 of the Jammu & Kashmir Protection of Children from Sexual Violence Act, 2018 (Governor's Act No. XXXVI of 2018)

- (xi) the custodial situation of the *vulnerable witness* and the attitude of the members of his family regarding the events about which he will testify; and
- (xii) other relevant factors, such as court atmosphere and formalities of court procedure.

33. Mode of questioning -To facilitate the ascertainment of the truth the court shall exercise control over the questioning of vulnerable witness.

- (i) ensure that questions are stated in a form appropriate to the developmental level of the vulnerable witness;
- (ii) protect vulnerable witness from harassment, undue embarrassment, character assassination, aggressive questioning and ensure that dignity of the witness is maintained at all times during the trial¹³
- (iii) avoid waste of time by declining questions which the court considers unacceptable due to their being improper, unfair, misleading, needless, repetitive or expressed in language that is too complicated for the witness to understand.
- (iv) the court may allow the *vulnerable witness* to testify in a narrative form.
- (v) questions shall be put to the witness only through the court.¹⁴

34. Rules of deposition to be explained to the Witnesses. -

The court shall explain to a vulnerable witness to listen carefully to the questions and to tell the whole truth, by speaking loudly and not to respond by shaking head in yes or no and also to specifically state that the witness does not remember where he has forgotten something and to clearly ask when the question is not understood.

¹³Section 34(6) of the Jammu & Kashmir Protection of Children from Sexual Violence Act, 2018(Governor's Act No. XXXVI of 2018)

¹⁴Section 34(2) of the Jammu & Kashmir Protection of Children from Sexual Violence Act, 2018(Governor's Act No. XXXVI of 2018).

A gesture by a vulnerable witness to explain what had happened shall be appropriately interpreted and recorded in the vulnerable witness' deposition.

35. Objections to questions - Objections to questions should be couched in a manner so as not to mislead, confuse, frighten a vulnerable witness.

36. Allow questions in simple language - The court to allow the questions to be put in simple language avoiding slang, esoteric, jargon, proverbs, metaphors and acronyms. The court must not allow the question carrying words capable of two-three meanings, questions having use of both past and present in one sentence, or multiple questions which is likely to confuse a witness. Where the witness seems confused instead of repetition of the same question, the court should direct for its re-phrasing.

Explanation: (i) The reaction of vulnerable witness shall be treated as sufficient clue that the question was not clear so it shall be rephrased and put to the witness in a different way.

(ii) Given the witness developmental level, excessively long questions shall be required to be rephrased and thereafter put to witness.

(iii) Questions framed as compound or complex sentence structure; or two part questions or those containing double negatives shall be rephrased and thereafter put to witness.

37. Testimonial aids. - The court shall permit a *vulnerable witness* to use testimonial aids as defined in the definition clause.

38. Protection of privacy and safety-

(a) Confidentiality of records.—Any record regarding a vulnerable witness shall be confidential and kept under seal. Except upon written request and order of the court, the record shall only be made available to the following:

- (i) Members of the court staff for administrative use;
- (ii) The Public Prosecutor for inspection;
- (iii) Defence counsel for inspection;
- (iv) The guardian *ad litem* for inspection;
- (v) Other persons as determined by the court.

(b) Protective order.—The depositions of the vulnerable witness recorded by videolink shall be video recorded except under reasoned order requiring the special measures by the judge. However where any video or audio recording of a vulnerable witness is made, it shall be under a protective order that provides as follows:

- (i) A transcript of the testimony of the vulnerable witness shall be prepared and maintained on record of the case. Copies of such transcript shall be furnished to the parties of the case.
- (ii) Recording may be viewed only by parties, their counsel, their expert witness, and the guardian *ad litem*.
- (iii) No person shall be granted access to the recording , or any part thereof unless he signs a written affirmation that he has received and read a copy of the protective order; that he submits to the jurisdiction of the court with respect to the protective order; and that in case of violation thereof, he will be subject to the contempt power of the court.
- (iv) Any recording , if made available to the parties or their counsel, shall bear the following cautionary notice:

"This object or document and the contents thereof are subject to a protective order issued by the court in (case title), (case number). They shall not be examined, inspected, read, viewed, or copied by any

person, or disclosed to any person, except as provided in the protective order. No additional copies of the tape or any of its portion shall be made, given, sold, or shown to any person without prior court order. Any person violating such protective order is subject to the contempt power of the court and other penalties prescribed by law."

(v) No recording shall be given, loaned, sold, or shown to any person except as ordered by the court.

(vi) This protective order shall remain in full force and effect until further order of the court.

(c) Personal details during evidence likely to cause threat to physical safety of vulnerable witness to be excluded—A vulnerable witness has a right at any court proceeding not to testify regarding personal identifying information, including his name, address, telephone number, school, and other information that could endanger his physical safety or his family. The Court shall ensure the protection of this right of the witness. The court may, however, require the vulnerable witness to testify regarding personal identifying information in the interest of justice.¹⁵

(d) Destruction of video and audio recording —Any video or audio recording of a vulnerable witness produced under the provisions of these guidelines or otherwise made part of the court record shall be destroyed as per rules formed by the Jammu and Kashmir High Court.

39. Protective measures - At any stage in the justice process where the safety of a vulnerable witness is deemed to be at risk, the court shall arrange to have protective measures put in place for the vulnerable witness. Those measures may include the following:

(a) avoiding direct or indirect contact between a vulnerable witness and the accused/opposite party at any point in the justice process;

¹⁵Section 34(7) of the Jammu & Kashmir Protection of Children from Sexual Violence Act, 2018(Governor's Act No. XXXVI of 2018)

- (b) restraint orders;
- (c) a pre-trial detention order for the accused in a criminal case or with restraint or "no contact" order in any case or bail conditions which may be continued during trial;
- (d) protection for a vulnerable witness by the police or other relevant agencies and safeguarding the whereabouts of the vulnerable witness from disclosure;
- (e) any other protective measures that may be deemed appropriate.

(Sanjay Dhar)
Registrar General

No: 5241-96/RS

Dated: 29/5/2019

Copy of the above forwarded to:

1. Principal Secretary to Hon'ble the Chief Justice High Court of J&K.
2. Secretary to Hon'ble Mr/Mrs Justice _____
.....for information of their Lordships.
3. Chief Secretary Government of Jammu and Kashmir.
4. Secretary to Government of J&K, Department of Law, Justice & Parliamentary Affairs.
5. Registrar Vigilance, High Court of J&K, Srinagar.
6. Registrar Rules, High Court of J&K, Srinagar
7. Member Secretary, J&K State, Legal Services Authority, Srinagar
8. Registrar Judicial, High Court of J&K, Jammu/Srinagar.
.....for information.
9. All Principal District and Sessions Judges of the State.
.....for information and with the request to circulate amongst all the Judicial Officers for its strict implementation.
10. CPC e-Courts J&K High Court Jammu for information and with the request to upload the Notification on the official website of the High Court.
11. Manager, Government Press, Srinagar for publication in the next issue of Government Gazette.

Registrar General