

(Email)

THE GAUHATI HIGH COURT AT GUWAHATI
(THE HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)

HC.XI-06/2018/61/RC dated 25.07.2018

From: Smti. Aparna Ajitsaria,
Registrar (Judicial),
Gauhati High Court, Guwahati.

To,

The District and Sessions Judge,
Kamrup (Metro), Guwahati/ Kamrup, Amingaon/ Nalbari/ Barpeta/
Bongaigaon/ Dhubri/ Kokrajhar/ Goalpara/ Darrang, Mangaldoi/ Udalguri/
Sonitpur, Tezpur/ Lakhimpur, North Lakhimpur/ Dhemaji/ Dibrugarh/
Tinsukia/ Jorhat/ Sivasagar/ Golaghat/ Nagaon/ Morigaon/ Cachar,
Silchar/ Karimganj/ Hailakandi/ Chirang/ Karbi Anglong/ Dima Hasao/
Baksa.

**Sub: Guidelines for Recording of Evidence of Vulnerable witnesses in
criminal matters.**

Madam/ Sir,

In enclosing herewith a copy of the "Guidelines for Recording of Evidence of Vulnerable witnesses in criminal matters", approved by the Gauhati High Court, pursuant to the Order dated 24.10.2017 passed by the Hon'ble Supreme Court of India in Criminal Appeal No. 1820/2017 (*State of Maharashtra Vs. Bandu @ Daulat*); I am directed to request you to circulate the same in all the Courts under your respective jurisdiction and ensure compliance.

Yours faithfully,

Encl: As stated.

25.7.18

REGISTRAR (JUDICIAL)

25.07.18

**Guidelines for recording of evidence of vulnerable
witnesses in criminal matters**

Preamble

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

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.

Vulnerable witnesses, find the criminal justice system intimidating, particularly the courtroom experience. Under these circumstances, a vulnerable witness may be a poor witness, providing weak testimony and contributing 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 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.

Judges have to strike a balance between protecting the accused'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.

(The 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 has provided valuable insight and has been a major reference in formulating these guidelines and to enable compliance with international standards on the subject.)

OBJECTIVES OF THESE GUIDELINES

1. To elicit and secure complete, accurate and reliable evidence from vulnerable witnesses;
2. To minimize harm or secondary victimization of vulnerable witnesses in anticipation and as a result of participation in the criminal justice system;

3. To ensure that the accused's right to a fair trial is maintained.

Applicability

Unless otherwise provided, these guidelines shall govern the examination of vulnerable witnesses during criminal trial who are victims or witnesses to crime.

1. **Short Title, extent and commencement-**

These guidelines shall be called, —Guidelines for recording evidence of vulnerable witnesses in criminal matters.

They shall apply to the criminal courts under the jurisdiction of the Gauhati High Court. Their application shall commence from the date notified by the Gauhati High Court.

2. **Construction of the guidelines.** These guidelines shall be liberally construed 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.

3. **Definitions -**

- a. **Vulnerable Witness** – is a child who has not completed 18 years of age.

- b. **Support Person** – Means and includes guardian *ad litem*, legal aid lawyer, facilitators, interpreters, translators and any other person appointed by court or any other person appointed by the court to provide support, accompany and assist the vulnerable witness to testify or 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 child¹.

- d. **Development Level** – Development level refers to the specific growth phase in which most individual are expected to behave and function in relation to the advancement of their physical, socio economical, cognitive and moral abilities².

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

- 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

¹ Section 327 (2) Cr PC

² Sec 228A IPC. Sec 21 of the Juvenile Justice (Care and Protection of Children) Act, 2000

identification of the witness³.

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 lunacy to understand questions⁴.

i. **Court House Tour** – A pre-trial tour of court room to familiarize a vulnerable witnesses with the environment and the basic process of adjudication and roles of each court official⁵.

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 courtroom⁶ 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.

³ Sec. 228A IPC. Sec. 21 of the Juvenile Justice (Care and Protection of Children) Act, 2000

⁴ Section 118 Evidence Act

⁵ Alternative pre-trial and trial processes for child witnesses in New Zealand’s criminal justice system, Issue Paper, Min. of Justice, New Zealand Govt. 2010

⁶ Sec 275 Cr.P.C. Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses; CJSHI; UK

p. **Waiting Room** – A safe place for vulnerable witnesses where they can wait. It shall have toys, books, TV, etc. which can help them lower their anxiety⁷.

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 normally continue in effect until the proceedings are concluded, thus enabling the witness to know what assistance to expect.

5. **Applicability of guidelines 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 the 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 and this should be made clear by the judge at the time of passing order in terms of these guidelines to the parties when the vulnerable witness is examined and when the final judgment is pronounced.

7. **Identification of Stress causing factors of adversarial Criminal Justice System-**

Factors which cause stress on child witness, 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.

⁷ Alternative pre-trial and trial processes for child witnesses in New Zealand

- (viii) Face-to-face contact with the accused.
- (ix) Practices 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 child.
- (xiii) Placement that exposes the child 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 personnel⁸.

8. Competency of vulnerable witness:-

- (i) 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

9. Persons allowed at competence assessment.— Only the following are allowed to attend the competence assessment:

- (i) the judge and such court personnel deemed necessary and specified by

⁸ Breaking the Cycle of Violence : Recommendations to improve the Criminal Justice Response to Child Victims and Witnesses, US Deptt of Justice.

⁹ (a) Section 118 Evidence Act, (b) Ratan Singh Vs. State, AIR 2004 SC 23) and (c) Virender Vs. State – full reference CrI.A. No.121/08 decided on 29.9.09.

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. **Conduct of competence assessment.**— The assessment of a child as to his competence as a witness shall be conducted only by the judge.

11. **Developmentally appropriate questions.**— The questions asked to assess the competency of the child shall be appropriate to the age and developmental level of the child; shall not be related to the issues at trial; and shall focus on the ability of the child 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 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 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)¹⁰.

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 and defence lawyer 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 appoint any person as guardian *ad litem* as per law to a witness who is a victim of, or a witness to a crime 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 child development, giving preference 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 child.

16. Duties of guardian *ad litem*:

It shall be the duty of the guardian *ad litem* so appointed by court to:

- (i) attend all depositions, hearings, and trial proceedings in which a vulnerable witness participates.
- (ii) make recommendations to the court concerning the welfare of the vulnerable witness keeping in view the needs of the child and observing the impact of the proceedings on the child.
- (iii) explain in a language understandable to the vulnerable witness, all legal proceedings, including police investigations, in which the child is involved;
- (iv) assist the vulnerable witness and his family in coping with the emotional effects of crime and subsequent criminal or non-criminal proceedings in which the child is involved;
- (v) remain with the vulnerable witness while the vulnerable witness waits to testify;

¹⁰ Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses. UK)
Safeguarding Children as Victims and witnesses: UK)

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 child, 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 motion.

18. Court to allow presence of support persons

- (a) A court shall allow *suo motu* or on request, verbal or written, to child 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 child to the witness stand, provided that such support person shall not completely obscure the child from the view of the opposing party or the judge.
- (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:

A testimony of such support person if he also happens to be a witness shall be recorded, ahead of the testimony of the child.

20. Court to appoint facilitator.

- (i) 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.

(ii) 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.

(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 criminal 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) 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 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 child victim or witness are conducted in language that is simple and comprehensible to a child.
- (ii) if a child needs the assistance of interpretation into a language or mode that the child understands, an interpreter shall be provided free of charge.
- (iii) if, in view of the child's age, level of maturity or special individual needs, which may include but are not limited to disabilities if any, ethnicity, poverty or risk of revictimization, the child requires special assistance measures in order to testify or participate in the justice process, such measures shall be provided free of charge.

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.

24. Duty to provide comfortable environment

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, child witnesses, support persons, guardian *ad litem*, facilitator, and court personnel. The child may be allowed to testify from a place other than the witness chair. The witness chair or other place from which the child testifies may be turned to facilitate his testimony but the opposing party and his counsel must have a frontal or profile view of the child even by a video link, during the testimony of the child. The witness chair or other place from which the child testifies may also be rearranged to allow the child 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 robes¹¹.

¹¹ Virender vs. State of NCT Delhi- decided by Hon'ble Delhi High Court in CrI.A No. 121/08 dt 29 09 09

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 need.

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

(1) At the request of a child victim or witness, his or her parents 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 child, may order one or more of the following measures to protect the privacy and physical and mental well-being of the vulnerable witness child 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 child;
- (b) forbidding the defence lawyer and persons present in court room from revealing the identity of the child or disclosing any material or information that would tend to identify the child;
- (c) ordering the non-disclosure of any records that identify the child, until such time as the court may find appropriate;
- (d) assigning a pseudonym or a number to a child, 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 child giving testimony or to prevent distress or harm to the child, including testifying:
 - (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 children with hearing, sight, speech or other disabilities;
 - (f) holding closed sessions;
 - (g) if the child refuses to give testimony in the presence of the accused or if circumstances show that the child may be inhibited from speaking the truth in that person's presence, the court shall give orders to temporarily remove 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 child, and the 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 child and the rights of the accused.
- (2) Any information including name, parentage, age, address, etc. revealed by the child victim or witness which enables identification of the person of the child, 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 child victim or witness shall be only by the pseudonym assigned in the case.

28. **Directions for Criminal Court Judges**¹² -

- (i) Vulnerable witnesses shall receive high priority and shall be handled as expeditiously as possible, minimizing unnecessary delays and continuances. (Whenever necessary and possible, the court schedule will be altered to ensure that the testimony of the child victim or witness is recorded on sequential days, without delays.)
- (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.

¹² Virender vs. State of NCT Delhi Cr.I.A. No.121/08 decided by Delhi High Court on 29.09.09.