

# HIGH COURT OF ORISSA, CUTTACK

## NOTIFICATION

No. 678 Date 09/03/2022

With the objective of ensuring a safe and conducive environment for recording the evidence of Vulnerable Witnesses in the light of the directions issued by the Supreme Court of India in ***Smruti Tukaram Badade Vs. State of Maharashtra & Anr.*** in Miscellaneous Application No. 1852 of 2019 in Criminal Appeal No. 1101 of 2019, the High Court of Orissa, do hereby, formulate the following Scheme:

### Part - I

1. **Short Title and Commencement.-**

This scheme may be called as "The High Court of Orissa Vulnerable Witnesses Deposition Centres (VWDC) Scheme, 2022" and it shall apply to the Courts sub-ordinate to the High Court of Orissa from such date as the Chief Justice of the High Court of Orissa may notify in this behalf.

2. **Applicability.-**

The provisions of this Scheme shall apply to any Vulnerable Witness in any criminal proceeding before any Court, regardless the party, who seeks to examine such a witness.

3. **Definitions and Meanings.-**

In this Scheme, unless the context otherwise requires-

- i. "Court" means any Court trying criminal cases, which is sub-ordinate to the High Court of Orissa;
- ii. "Descriptive Aids" mean 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;
- iii. "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-economic, cognitive and moral abilities;

- iv. **“Judge”** means the Presiding Officer of the Court;
- v. **“Re-victimization”** means a situation in which a person suffers more than one criminal incident over a period of time;
- vi. **“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;
- vii. **“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;
- viii. **“Support Person”** means and includes guardian *ad litem*, legal aid lawyer, facilitator, interpreter, translator and any other person appointed by the Court to provide support and assist the Vulnerable Witness to testify or attend judicial proceedings;
- ix. **“Testimonial Aids”** mean and include screens, live links, images and/or voice altering devices or any other technical devices;
- x. **“Video Conferencing”** means the technology by which interaction between two or more persons may take place through use of computers, network, audio-video equipment and ancillary devices and shall include video calling;
- xi. **“Vulnerable Witnesses”** mean and include the following:
  - a) Child witnesses, who have not completed 18 years of age;
  - b) Age neutral victims of sexual assault read with Sections 273 and 327 of the Code of Criminal Procedure, 1973 and Section 354 of the Indian Penal Code, 1860;
  - c) Gender neutral victims of sexual assault read with Section 2(d) of the Protection of Children from Sexual Offences Act, 2012 (32 of 2012);

- d) Age and gender neutral victims of sexual assault under Section 377 of the Indian Penal Code, 1860 read with paragraph 34(1) of the decision in *Sakshi Vs. Union of India* [(2004) 5 SCC 518];
  - e) Witnesses suffering from “mental illness” as defined under Section 2(s) of the Mental Healthcare Act, 2017 read with Section 118 of the Indian Evidence Act, 1872;
  - f) Any witness deemed to have a threat perception under the Witness Protection Scheme, 2018 of the Union Government as approved by the Supreme Court in *Mahendra Chawla Vs. Union of India* [ (2019) 14 SCC 615];
  - g) Any speech or hearing impaired individual or a person suffering from any other disability who is considered to be a Vulnerable Witness by the competent Court;
  - h) Any other witnesses deemed to be vulnerable by the Court for reasons to be recorded in writing.
- xii. **“Vulnerable Witnesses Deposition Centre”** means and consists of rooms or chambers not being conventional Court rooms that create a barrier free environment, where deposition of a Vulnerable Witness can be recorded through video conferencing freely without constraining limitations, both physical and emotional;
- xiii. **“Video Linkage Room”** means the deposition room, where the witness being accompanied by a support person (if engaged by the Court) records his deposition through video conferencing;
- xiv. **“Vulnerable Witnesses Waiting Room”** means a room or hall for Vulnerable Witnesses where they can wait for their turn to record their deposition in the video linkage room. It shall be provided with toys, books, television etc. which may aid in lowering the anxiety of Vulnerable Witnesses and make the Vulnerable Witnesses comfortable.

## Part - II

### 4. Competence of Vulnerable Witness & Assessment. -

a. Every Vulnerable Witness shall be competent to testify unless the Court considers that he or she is prevented from understanding the questions put to him or her, or from giving rational answers to those questions due to tender age, unsoundness of mind, disease, or any other cause of the like nature.

**Explanation:** A mentally unsound person may be held competent to testify unless he or she is prevented by such unsoundness of mind from understanding the questions put to him or her and giving rational answers to the same.

b. The Court may, *suo motu* or upon receiving any application in this behalf from defence or prosecution, conduct a competency assessment of the Vulnerable Witness before recording the testimony of such witness.

c. In making such assessment, the Court shall have due regard to clause (4)(a) and the circumstances of the case.

d. Whenever a Court proceeds to make an assessment as to whether a Vulnerable Witness is competent to testify, it shall record a specific finding 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.

e. The process of competency assessment shall involve the following persons:

- i) the Judge and such Court personnel deemed necessary and specified by the Judge in writing;
- ii) the counsel for the parties;
- iii) the support person;
- iv) the accused, unless the Court determines that competence requires

to be and can be fully evaluated in his absence;

- v) any other person, who in the opinion of the Court can assist in the competence assessment.

Provided that the competence assessment of a Vulnerable Witness, who is a child shall be conducted only by the Judge.

**5. Questions to be put during assessment.-**

The questions asked to assess the competency of the child or any other like Vulnerable Witness shall be appropriate to the age and developmental level of the child and such any other Vulnerable Witness, shall not be related to the issues at trial; and shall focus on his ability to remember, communicate, distinguish between truth and falsehood, and appreciate the duty to testify truthfully.

**6. 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.

**7. Prior Visit of Vulnerable Witnesses to the Court.-**

Vulnerable Witnesses, for reasons to be recorded by the Court, may be allowed a pre-trial Court visit along with the support person (if any) to enable such witnesses to familiarize them with the environment of the Court and may also include 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).

**8. Meeting the Judge.-**

The Judge may meet a Vulnerable Witness *suo motu* for reasons to be recorded or on an application of either party in presence of the prosecution and defence lawyer or in their absence before he gives evidence, for explaining the Court process in order to help him understand the procedure and give his best evidence.

**9. Appointment of Guardian *ad litem* in case of a Child Witness.-**

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 programmes and child development, giving preference to the parents of the child, if qualified. The guardian *ad litem* may be a practicing advocate except a person, who is a witness in any proceeding involving the child.

**10. 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 suggestions 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 the witness;
- iii) explain in a language understandable to the Vulnerable Witness, all legal proceedings, including police investigations, in which the witness is involved;
- iv) assist the Vulnerable Witness and his family in coping with the emotional effects of the crime and subsequent criminal or

non-criminal proceedings in which the witness is involved;

- v) remain with the Vulnerable Witness while such witness waits to testify.

**11. Legal Assistance to Vulnerable Witness.-**

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 interest 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 motion.

**12. Court to allow presence of support persons.-**

- a) A Court shall allow *suo motu* or on request, verbal or written, the witness testifying in a judicial proceeding to have the presence of one person of his/her own choice to provide him support, who shall render permissible support within its view and if the need arises, may permit him to accompany the witness to the Video Linkage Room provided that such support person shall not in any manner prevent the witness 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 such measures to provide emotional support to such witness in course of the proceedings;
- c) The Court shall ensure that the support person does not prompt, sway or influence the Vulnerable Witness during his testimony;
- 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. Only in exceptional circumstances, keeping the condition of the Vulnerable Witness in mind, the Court should appoint either of the parents as a support person.

**13. Testimony of support person to be recorded prior to Vulnerable Witness.-**

Wherever the support person himself/herself is a witness in the same

case with respect to the Vulnerable Witness for whom he is assigned, his/her testimony shall be recorded prior to the testimony of the Vulnerable Witness in such case.

**14. Court to appoint facilitator.-**

The Court shall allow use of facilitators to assist the Vulnerable Witness in effectively communicating at various stages of trial and/or to coordinate with it so also with the stakeholders, such as, police, medical practitioner, prosecutor, psychologist and defence counsel.

The Court may *suo motu* or upon an application presented by either party or a support person of a Vulnerable Witness appoint a facilitator, if it finds that such witness is having difficulty in understanding or responding to the questions asked.

**Explanation:**(i)The facilitator may be an interpreter, a translator, child psychologist, psychiatrist, social worker, guidance counsellor, teacher, parent, or relative of such witness who shall be under oath to pose questions according to the meaning intended by the counsel;

(ii) If the Court appoints a facilitator, the respective counsel for the parties shall pose questions to the Vulnerable Witness only through the facilitator, either in the words used by the 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 the counsel.

**15. Right to be informed.-**

A Vulnerable Witness, his or her parents or guardian, his or her counsel, the support person, if engaged 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 the Vulnerable Witness, the importance, the timing and manner of testimony and the ways the proceeding shall be conducted during the trial;

- b) Existing support mechanism for a Vulnerable Witness when participating in the proceeding including making available the support person to provide assistance;
- c) Specific time and place of hearing;
- d) Availability of protective measures;
- e) Relevant rights of child victims and witnesses pursuant to the applicable laws, the Convention on the Rights of 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<sup>th</sup> 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.

### **Part - III**

#### **Procedure of Recording Testimony and Ancillary Matters**

- 16. Establishment of Vulnerable Witness Deposition Centres.-**
- i. Every District Judge shall set up at least one permanent Vulnerable Witnesses Deposition Centre (VWDC) in the establishment of the District Court (or Additional Sessions Court establishment);
  - ii. The VWDC shall be equipped with features and facilities as may be necessary to adhere to the provisions of this Scheme.
- 17. Vulnerable Witness Court Room.-**
- i. It shall be comprised of:
    - a) Main Court Room;
    - b) Accused area separated by a tinted glass mirror or like material through which the accused can watch the Court proceedings;
    - c) Video Linkage Room i.e. Vulnerable Witness Deposition Room.
  - ii. The Vulnerable Witness being accompanied by the support person (if engaged by the Court) shall only be allowed entry inside the Video Linkage Room for the purpose of the recording of his evidence;

- iii. The Vulnerable Witness shall hear questions from the Court Room through Video Conferencing and his answers can be heard in the Court Room directly;
- iv. The accused can see through the tinted glass mirror the proceedings of the Court but, he shall not be visible to the Vulnerable Witness. The Vulnerable Witness can see the accused only if allowed by the Judge, like at the stage of identification of the accused;
- v. Witness's T.V. screen replica (in the Video Linkage Room) shall be placed on the dais of the Judge so that the Judge can see when the accused is visible on the screen of the Vulnerable Witness;
- vi. In the main Court room, one large T.V. screen shall be installed in such a place that it shall be visible to the accused through the tinted glass mirror but shall not be visible to the Vulnerable Witness;
- vii. The Judge if feels appropriate in the interest of the Vulnerable Witness, may allow the witness to see the proceedings of the Court;
- viii. The entry and exit route of the Vulnerable Witness shall be separate from the entry and exit of the accused so that at no point of time they both come face to face. As far as practicable, the entry and exit of persons other than the Vulnerable Witness and the support person (if any) shall be prohibited through such entry/exit route;
- ix. The support person (if engaged) shall accompany the Vulnerable Witness to the Waiting Room where the Vulnerable Witness shall wait and on the matter being called out shall proceed to the Video Linkage Room with the Vulnerable Witness to record his evidence.

**18. Duty to provide comfortable environment.-**

It shall be the duty of the Court to ensure congenial atmosphere 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. While deciding to ensure such an environment, the Judge may be dispensed with from wearing his judicial robes.

**19. Booking of slot for examination of Vulnerable Witnesses in VWDC.-**

On receipt of requisitions from different Presiding Officers of the Courts relating to examination of Vulnerable Witnesses in the VWDC, the Officer in-charge of the VWDC shall book date and time slot for such examination, enter the slot-booking in a register to be maintained by him/her and communicate to the Presiding Officers of the concerned Courts well ahead of the same.

**20. Breaks during testimony.-**

The Court may, if it considers necessary and expedient, permit frequent breaks for the Vulnerable Witnesses during the recording of evidence.

**21. Directions for Criminal Court Judges.-**

- (i) Vulnerable Witnesses shall receive top priority and shall be handled as expeditiously as possible, minimizing unnecessary delays. (Whenever necessary and possible, the Court schedule shall be altered to ensure that the testimony of the Vulnerable Witnesses is recorded on sequential days without delay and that the witness is not called repeatedly to testify in the Court);
- (ii) The Judge and the Officer in-charge of VWDC should ensure that the developmental needs of the Vulnerable Witnesses are duly taken care of.

**22. Mode of questioning.-**

To facilitate the ascertainment of the truth, the Court shall exercise control over the questioning of Vulnerable Witness to-

- (i) ensure that questions are stated in a form appropriate to the developmental level of the Vulnerable Witness;
- (ii) protect Vulnerable Witness from harassment or undue embarrassment;
- (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) allow the child witness to testify in a narrative form;
- (v) ask the counsel to communicate the questions to be put to the

witness to the Court in appropriate cases which shall in turn put those questions to the witness.

**23. Objections to questions.-**

Objections to questions should be couched in a manner so as not to mislead, confuse, frighten a Vulnerable Witness.

**24. Allow questions in simple language.-**

The Court shall allow the questions to be put in simple language avoiding slang, esoteric jargon, proverbs, metaphors and acronyms. The Court shall not allow the questions carrying words capable of more than one meaning, questions having use of both past and present in one sentence, or multiple questions which is likely to confuse a witness. Where the witness appears 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 question was not clear so that 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 the witness.

**25. Protection of privacy and safety.-**

**a) Confidentiality of Records.-** Any record regarding a child victim 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 deposition of the Vulnerable Witness

recorded by video link shall not be video recorded except under reasoned order requiring the special measures by the Judge. However, where any video or audio storage device is used for recording the evidence of a Vulnerable Witness, 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) Audio/Video recordings may be viewed only by the parties, their counsel, their expert witness and the guardian *ad litem*;
- (iii) No person shall be granted access to such recordings, 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 High Court of Orissa;
- (iv) Each of such 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) and (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 recording or any portion of it shall be made, handed over, sold or shown to any person without prior Court order. Any person violating such protective order is subject to the contempt power of the High Court of Orissa and other penalties prescribed by law;

- (v) No recording shall be given, 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/institution and other information that could endanger his personal safety or his family. The Court may, however, require the Vulnerable Witness to testify regarding personal identifying information in the interest of justice.

**d) Destruction of video and audio storage device.-** Any video or audio recording of the evidence of a witness produced under the provisions of the Scheme or otherwise made part of the Court record shall be dealt with as per rules framed from time to time by the High Court of Orissa.

**26. Protective measures.-**

At any stage in the justice process where the safety of a witness is deemed to be at risk, the Court shall arrange to have protective measures put in place for such witness.

Such measures may include the following:

- i) avoiding direct or indirect contact between the witness and the accused at any point in the justice process;
- ii) restraint orders, in the facts and circumstances of the case, as deemed necessary;
- iii) protection for a witness by the police or other agencies and safeguarding the whereabouts of the witness from disclosure;
- iv) any other protective measures that the Judge may consider appropriate.

**27. Residual Provisions.-**

Matters concerning which no express provision is made in the Scheme shall be decided by the Court consistent with the interest of the Vulnerable Witnesses without prejudice to the rights of the accused to a fair trial.

**By Order of the High Court of Orissa**

09/03/2022  
Registrar General