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Regional Office for  
South Asia

**Standard Operating Procedures (SOP)  
for Prosecutors to  
Combat Human Trafficking**

2009

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# PREFACE

Trafficking of women and children is one of the grave organized crimes, extending beyond boundaries and jurisdictions. Combating and preventing human trafficking requires holistic approach by all stakeholders and integrated actions on prosecution, prevention and protection. Keeping this philosophy in mind, Project IND/SI6 of the United Nations Office on Drugs and Crime, which is a joint initiative of UNODC and the Government of India, with support from the US Government was launched in April 2006 in India. This project is focused on “Strengthening the law enforcement response in India against trafficking in persons, through training and capacity building”. The major activities in the project are training of police officials and prosecutors, setting up Integrated Anti Human Trafficking Units, establishing networks among law enforcement agencies and civil society partners as well as developing appropriate tools including Protocols, Manuals, Standard Operating Procedures (SOP) and other training aids.

Successful conviction of offenders, redressal of grievances of victims and consequent prevention of crimes of human trafficking is possible when the entire law enforcement machinery, that is, the police, the public prosecutors and the judicial officers perform their tasks diligently. In this process, prosecution of crimes assumes an important role.

Appropriate tools, no doubt, are essential to empower the public prosecutors to carry out prosecution in a professional manner. In this context this SOP is a tool for the public prosecutors to address the crimes of human trafficking. This SOP has been developed based on the regular feedback from the public prosecutors who have undergone training facilitated by UNODC, those who have conducted the trial of these crimes as well as feedback from the civil society partners. The available literature on trafficking has also been taken into consideration in the various segments.



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# ACRONYMS

|        |  |
|--------|--|
| AIR    | All India Reporter   |
| All    | Allahabad  |
| AP     | Andhra Pradesh   |
| BLR    | Bombay Law Reporter  |
| BLSAA  | Bonded Labour System (Abolition) Act, 1976                   |
| Bom    | Bombay   |
| Cal    | Calcutta   |
| Cr PC  | Criminal Procedure Code                                      |
| Cr. LJ | Criminal Law Journal   |
| CSE    | Commercial Sexual Exploitation                               |
| CWC    | Child Welfare Committee                                      |
| DLT    | Delhi Law Times  |
| DM     | District Magistrate  |
| FIR    | First Information Report                                     |
| HC     | High Court   |
| IPC    | Indian Penal Code  |
| ITPA   | Immoral Traffic (Prevention) Act, 1956                       |
| JJ Act | Juvenile Justice (Care and Protection of Children) Act, 2000 |
| JJB    | Juvenile Justice Board                                       |
| LJ     | Law Journal  |
| LR     | Legal Reporter   |
| Mad    | Madras   |
| Mum    | Mumbai   |
| NGO    | Non Governmental Organization                                |
| Raj    | Rajasthan  |
| RI     | Rigorous Imprisonment  |
| S.     | Section  |
| SC     | Supreme Court  |
| SCC    | Supreme Court Cases  |
| SDM    | Sub Divisional Magistrate                                    |
| Sec.   | Section  |
| SOP    | Standard Operating Procedures                                |
| SPO    | Special Police Officer                                       |
| TPO    | Trafficking Police Officer                                   |
| u/S.   | Under Section  |
| UNODC  | United Nations Office on Drugs and Crime                     |
| v.     | Versus   |



# Contents

## CHAPTER - 1

|                           |   |
|---------------------------|---|
| <b>Introduction</b> ..... | 1 |
|---------------------------|---|

## CHAPTER - 2

|  |    |
|--|----|
| <b>General principles</b> .....  | 3  |
| A. Definitions   | 3  |
| ▪ The United Nations Trafficking Protocol  | 3  |
| ▪ Juvenile Justice (Care and Protection of Children) Act, 2000                               | 3  |
| ▪ Immoral Traffic (Prevention) Act, 1956   | 5  |
| ▪ Child Labour (Prohibition and Regulation) Act, 1986  | 6  |
| ▪ Bonded Labour System (Abolition) Act, 1976   | 6  |
| ▪ The Transplantation of Human Organs Act, 1994  | 7  |
| B. Background, introduction and offences under<br>The Immoral Traffic (Prevention) Act, 1956 | 7  |
| ▪ Offences punishable under ITPA   | 8  |
| ▪ Indian Penal Code - related offences   | 12 |

## CHAPTER - 3

|  |    |
|--|----|
| <b>Pre Trial</b> .....   | 17 |
| A. First Information Report  | 19 |
| B. Complainant   | 21 |
| C. Production before a Magistrate  | 22 |
| D. Procedure subsequent to production before Magistrate  | 22 |
| E. Procedure in case of children/ minors - Juvenile Justice<br>(Care and Protection of Children) Act, 2000 | 23 |
| F. Age verification  | 24 |
| G. Custody applications  | 25 |
| H. Bail/ opposing bail   | 26 |
| I. Absconding accused  | 28 |
| J. Identity disclosure laws  | 30 |
| K. Statements under Sec. 164 of the Cr.PC  | 30 |
| L. Rights of a victim  | 31 |

## CHAPTER - 4

|   |    |
|---|----|
| <b>Trial</b> .....  | 34 |
| A. Trial and the role of prosecutors within a trial                           | 34 |
| B. Framing of charges   | 34 |
| C. Amendment/ addition of charges   | 34 |
| D. Preventing secondary victimization / re-victimization                      | 35 |
| E. Video conferencing   | 37 |
| F. Private pleaders   | 38 |
| G. Evidence in a trial  | 39 |
| H. The trial process  | 41 |
| i. Victim pre-preparation   | 41 |
| ii. Duties to the court and client  | 41 |
| iii. Using Sec. 161 Cr.PC - police statements to refresh a<br>victim's memory | 42 |
| iv. Non-appearance of a witness   | 43 |
| v. Compensation   | 43 |
| vi. Interim relief  | 44 |
| I. TheVictim-Witness protection programme                                     | 44 |
| i. Pre trial  | 45 |
| ii. During trial  | 46 |
| iii. Post trial   | 46 |

## CHAPTER - 5

|                        |    |
|------------------------|----|
| <b>PostTrial</b> ..... | 48 |
|------------------------|----|

## CHAPTER - 6

|   |    |
|---|----|
| <b>Possible alternative methods in tackling human trafficking</b> .....                                   | 49 |
| A. Closure of brothels and eviction of offenders from a brothel   | 49 |
| ▪ Eviction before conviction  | 49 |
| ▪ Eviction after conviction   | 50 |
| ▪ Suspension/ cancellation of hotel license   | 50 |
| B. Attachment and forfeiture of property under Sec. 105-D to Sec. 105-J<br>of the Criminal Procedure Code | 50 |
| C. Seizure of suspicious property   | 53 |
| D. Bond Proceedings   | 53 |
| E. Notification of address of previously convicted offenders  | 54 |

# Introduction

*"[it is] as much the duty of the prosecutor as of the court to ensure that full and material facts are brought on record so that there might not be miscarriage of justice." Supreme Court (in Shakila Abdul Gafar Khan vs. Vasant Raghunath Dhobale, (2003) 7 SCC 749)*

In plain terms human trafficking is the buying and selling of human beings for profit. At the initial stage a trafficker may use a wide range of methods and means to procure or induce or coerce a person for purposes of exploitation. The methods vary from drugging, blackmailing, confining, abducting, kidnapping, rape, varying degrees of assault, hurt or grievous hurt. The most inconspicuous and commonly used method is the slow and consistent luring of a woman/ child through a process of friendship and love. Traffickers do not generally function in isolation. Often at source areas they are broadly divided into three categories i.e. individuals, small gangs or syndicates. Traffickers are always supported by buyers, financiers, transporters, clients, etc<sup>1</sup>. Trafficking generates very high economic gains through exploiters/ abusers indulging in commercial sexual exploitation, bonded/ exploitative/ forced labour, camel jockeying, trafficking of human organs, groups selling young girls as brides in areas where unequal sex ratios exist or insurgency groups recruiting child soldiers.

Trafficking as a crime is so rampant that it finds itself among the top three transnational organized crimes. The other two being drug trafficking and arms smuggling. As recorded by UNODC "human trafficking alone accounts for trafficking of persons in 127 countries for exploitation in 137 countries<sup>2</sup>". Human trafficking is a growing organized crime that specialises in commercial exploitation to ensure a continually high degree of profitability during the lifetime of its victims. India serves as a source, transit and destination country in the global context on human trafficking. Apart from the problem of internal trafficking, cross border trafficking from Nepal, Bangladesh and other bordering nations is also widely prevalent.

Human trafficking syndicates have significant influence and financial leverage over their operations and victims. They are often able to access the best possible legal advice it's not uncommon for prosecutors in cases of human trafficking to face some of the finest legal minds at every stage of the trial. Human trafficking syndicates also have a high degree of success in tampering with victims once they are rescued by the police. They also demonstrate significant ability to manipulate or tamper with the evidence in the case. An attempt to tamper takes place at every stage of a case within the criminal justice system in cases of human trafficking. Prosecutors play a vital role in the justice delivery system in ensuring conviction of offenders/ traffickers. They can also play a critical role in advising the police

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<sup>1</sup> Information based on field experience of various Non-Governmental Organizations.

<sup>2</sup> Trafficking of Persons: Global Patterns, UNODC, April 2006

on the legal provisions and procedures during the course of investigations, undertaking the state arguments on bail and remand, undertaking the criminal trial, supporting the applications for rehabilitation on behalf of the victims and recommending to the court measures for victim protection during trial. Prosecutors also support the law enforcement officials in various ancillary proceedings such as closure of premises where commercial exploitation occurs, attachment and seizure of criminal assets, contesting appeals filed by the accused against the state regarding their bond proceedings and other such matters and finally they are involved in the process of responding to writs and criminal appeals filed by the accused.

The Standard Operating Procedures (SOP) is a focused attempt to bring together in one exhaustive document a recording of all available statutes, case laws, good practices and legal procedures on human trafficking, as a resource for prosecutors in India. The document acknowledges the extensive expertise that exists within the fraternity of prosecutors in India and hopes to benefit from their feedback and constructive input to make this document a handy, helpful tool in ensuring sharing of lessons and availability of new tools in combating human trafficking.

## General Principles

### A. Definitions

#### The United Nations Trafficking Protocol<sup>3</sup>

| ACTIVITIES<br>(any of these)  | MEANS/METHODS<br>(any of these)                 | PURPOSE/INTENTION<br>(any of these)     |
|---|---|---|
| Recruitment   | Threat  | For the purpose of exploitation         |
| Transportation  | Force   | Prostitution of others                  |
| Transfer  | Other forms of coercion                         | Other forms of sexual exploitation      |
| Harbouring  | Abduction                                       | Forced labour or services               |
| Receipt<br>... of persons   | Fraud   | Slavery or practices similar to slavery |
|   | Deception                                       | Servitude                               |
|   | Abuse of:<br>Power<br>Position of vulnerability | Removal of organs                       |
|   | Giving or receiving of<br>payments of benefits  |   |
| The 'consent' of a victim of trafficking shall be irrelevant where any of the means set forth above have been used. 'Consent' is irrelevant in case of children even if this does not involve any of the means set forth above. |   |   |

#### Juvenile Justice (Care and Protection of Children) Act, 2000

1. “Juvenile” or “Child” means a person who has not completed eighteenth year of age<sup>4</sup>.
2. “Begging” means - soliciting or receiving alms in a public place or entering into any private premises for the purpose of soliciting or receiving alms, whether under any pretence<sup>5</sup> exposing or exhibiting with the object of obtaining or extorting alms, any sore, wound, injury, deformity or disease, whether of himself or of any other person or of an animal<sup>6</sup>.
3. “Fit institution” means a governmental or a registered non-governmental organisation or a voluntary organisation prepared to own the responsibility of a child and such organisation is found fit by the State Government on the recommendation of the competent authority<sup>7</sup>.
4. “Fit person” means a person, being a social worker or any other person, who is prepared to own the responsibility of a child and is found fit by the competent authority to receive and take care of the child<sup>8</sup>.

<sup>3</sup> The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, 2000, supplementing the United Nations Convention against Transnational Organized Crime

<sup>4</sup> S.2 (k)

<sup>5</sup> S.2 (b) (i)

<sup>6</sup> S.2 (b) (ii)

<sup>7</sup> S.2 (h)

<sup>8</sup> S.2 (i)

5. "Guardian" in relation to a child, means his natural guardian or any other person having the actual charge or control over the child and recognised by the competent authority as a guardian in course of proceedings before that authority<sup>9</sup>.
6. "Place of safety" means any place or institution (not being a police lock-up or jail), the person in charge of which is willing temporarily to receive and take care of the juvenile and which, in the opinion of the competent authority, may be a place of safety for the juvenile<sup>10</sup>.
7. Child Welfare Committee (CWC) - The State Government may constitute for every district, one or more Child Welfare Committees for exercising the powers and to discharge the duties conferred on such Committees in relation to child in need of care and protection. The Committee will have the power to deal exclusively with all proceedings under this Act relating to children in need of care and protection. The Committee shall function as a Bench of Magistrates and shall have the powers conferred by the Code of Criminal Procedure, 1973 on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of the first class<sup>11</sup>.
8. Juvenile Justice Board (JJB) The Board is constituted to deal with cases of juveniles below the age of 18 years who are in conflict with law. In case there are children who are involved at any stage in the crime of trafficking then all proceedings with regard to them will be dealt with by the JJB<sup>12</sup>. "Victims" that are rescued from places of exploitation are not to be produced before the JJB as they are not "accused" of any crime. The powers conferred on the Board by this Act may also be exercised by the High Court and the Court of Session, when the proceedings comes before them in appeal, revision or otherwise<sup>13</sup>.
9. A 'child in need of care and protection'<sup>14</sup> means a child<sup>15</sup> -
  - who is found without any home or settled place or abode and without any ostensible means of subsistence.
  - who is found begging or who is either a street child or a working child.
  - who resides with a person (whether the child's guardian or not) and such person has threatened to kill or injure the child and there is a reasonable likelihood of the threat being carried out, or has killed, abused or neglected some other child or children and there is a reasonable likelihood of the child in question being killed, abused or neglected by that person.
  - who is mentally or physically challenged or ill children or children suffering from terminal disease or incurable diseases having no one to support or look after.
  - who has a parent or guardian and such parent or guardian is unfit or incapacitated to exercise control over the child.

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<sup>9</sup> S.2 (j)

<sup>10</sup> S.2 (q)

<sup>11</sup> S.29 of JJA, 2000 paraphrased

<sup>12</sup> S.4 of the JJA, 2000 paraphrased

<sup>13</sup> S.6 (2)

<sup>14</sup> S.2 (d)

<sup>15</sup> Paraphrased from the section, not verbatim reproduction of the Act

- who does not have a parent and no one willing to take care of or whose parents have abandoned or surrendered or who is missing and run away child and whose parents cannot be found after reasonable inquiry.
- who is being or is likely to be grossly abused, tortured, or exploited for the purpose of sexual abuse or illegal acts.
- who is found vulnerable and likely to be inducted into drug abuse or trafficking.
- who is being or is likely to be abused for unconscionable gains.
- who is victim of any armed conflict, civil commotion or natural calamity.

## **Immoral Traffic (Prevention) Act, 1956 (ITPA)**

10. “Child” means a person who has not completed the age of sixteen years<sup>16</sup>.
11. “Minor” means a person who has completed the age of sixteen years but has not completed the age of eighteen years<sup>17</sup>.
12. “Major” means a person who has completed the age of eighteen years<sup>18</sup>.
13. “Brothel” includes any house, room, conveyance, or place or any portion of any house, room, conveyance, or place, which is used for purposes of sexual exploitation or abuse for the gain of another person or for the mutual gain of two or more prostitutes<sup>19</sup>.
14. “Prostitution” means the sexual exploitation or abuse of persons for commercial purposes and the expression 'prostitute' shall be construed accordingly<sup>20</sup>. Prostitution generally means the indiscriminate bartering of sexual favours without any emotional attachment and for monetary considerations<sup>21</sup>.
15. “Special Police Officer” means a police officer appointed<sup>22</sup> by or on behalf of the State Government to be in charge of police duties within a specified area for the purposes of the ITPA<sup>23</sup>.
16. “Trafficking Police Officer” means a police officer appointed by the Central Government under sub-section 4 of Section 13 of the ITPA<sup>24</sup>.
17. “Public place” means any place intended for use by, or accessible to the public and includes any public conveyance<sup>25</sup>.

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<sup>16</sup> S.2 (aa) of the ITPA, 1956

<sup>17</sup> S.2 (cb)

<sup>18</sup> S.2 (ca)

<sup>19</sup> S.2 (a)

<sup>20</sup> S.2 (f)

<sup>21</sup> In re Ratanmala, AIR 1962 Mad 31, 1962 Cr. LJ 162 (Madras High Court 1962)

<sup>22</sup> The Special Police Officer need not be appointed by name, but may be appointed by reference to a particular position. Sindhi Lohana Choithram v.State of Gujarat, AIR 1967 SC 1532; 1967 Cr. LJ 1396

<sup>23</sup> S.2 (j)

<sup>24</sup> S.2 (j). Sec 13 (4) of the ITPA states, “The Central Government may, for the purpose of investigating any offence under this Act or under any other law for the time being in force dealing with sexual exploitation of persons and committed in more than one state, appoint such number of police officers as Trafficking Police Officers and they shall exercise all the powers and discharge all the functions as are exercisable by Special Police Officers under this Act with the modification that they shall exercise such powers and discharge such functions in relation to the whole of India”.

<sup>25</sup> Sec 2 (h)

## **Child Labour (Prohibition and Regulation) Act, 1986**

18. “Child” means a person who has not completed his fourteenth year of age<sup>26</sup>.

## **Bonded Labour System (Abolition) Act, 1976**

19. “Bonded labour system” means the system of forced, or partly forced, labour under which a debtor<sup>27</sup> enters, or has, or is presumed to have, entered into an agreement with the creditor<sup>28</sup> to the effect that -

- in consideration of an advance obtained by him or by any of his lineal ascendants or descendants (whether or not such advance is evidenced by the document) and in consideration of the interest, if any, due on such advance, or
- in pursuance of any customary or social obligation, or
- in pursuance of an obligation devolving on him by succession, or
- for any economic consideration received by him or by any of lineal ascendants or descendants, or
- by reason of his birth in any particular caste or community,

he would -

- render, by himself or through any member of the family, or any person dependent on him, labour or service, to the creditor, or for the benefit of the creditor for a specified period or for an unspecified period, either without wages or for nominal wages, or
- forfeit the freedom of employment or other means of livelihood for a specified period or for an unspecified period, or
- forfeit the right to move freely throughout the territory of India, or
- forfeit the right to appropriate or sell at market value any of his property or product of his labour or the labour of a member of his family or person dependent on him.

and includes the system of forced, or partly forced, labour under which a surety for a debtor enters, or has, or is presumed to have, entered into an agreement with the creditor to the effect that in the event of the failure of the debtor to pay his debt, he would render the bonded labour on behalf of the debtor<sup>29</sup>.

20. “Agreement” means an agreement (whether written or oral or partly written and partly oral) between a debtor and creditor, and includes an agreement providing for forced labour, the existence of which is presumed under any social system prevailing in the concerned locality<sup>30</sup>.

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<sup>26</sup> Sec. 2 (ii) of the Child Labour (Prohibition and Regulation) Act, 1986

<sup>27</sup> Debtor is a defined term for a person pursuant to Sec 2 (a) of the Bonded Labour System (Abolition) Act, 1976

<sup>28</sup> Creditor is a defined term for a person pursuant to Sec 2 (a) of the BLSAA, 1976

<sup>29</sup> Sec 2 (g) of the BLSAA, 1976

<sup>30</sup> Section 2 (b)



21. “Advance” means an advance, whether in cash or in kind, or partly in cash or partly in kind, made by one person (hereinafter referred to as the creditor) to another person (hereinafter referred to as the debtor)<sup>31</sup>.

### **The Transplantation of Human Organs Act, 1994**

22. “Donor” means any person, not less than eighteen years of age, who voluntarily authorises the removal of any of his human organs for therapeutic purposes under sub-section (1) or sub section (2) of section (3) of the Act<sup>32</sup>.
23. “Human organ” means any part of a human body consisting of a structured arrangement of tissues which if wholly removed, cannot be replicated by the body<sup>33</sup>.
24. “Transplantation” means the grafting of any human organ from any living person or deceased person to some other living person for therapeutic purposes<sup>34</sup>.

## **B. Background, Introduction and Offences under the Immoral Traffic (Prevention) Act, 1956**

The Suppression of Immoral Traffic in Women and Girls' Act, 1956 (SITA) was passed consequent to signing of the Convention of the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. 1950. This legislation was amended in 1986 and was renamed The Immoral Traffic (Prevention) Act, 1956 or ITPA. The purpose (object) of the Act (as stated in its Statement of Objects and Reasons) is to “inhibit or to abolish commercialized vice, namely the traffic in persons for the purposes of commercial sexual exploitation as an organized means of living”. The ITPA is a special law dealing with the commercial sexual abuse and exploitation of persons.

A crucial challenge in the implementation of the ITPA came from the interpretation of Sec. 7 and 8 of the ITPA which led to the arrest of the trafficked women and girls who were themselves 'victims' as 'accused' for soliciting, etc. “A careful scrutiny of the ITPA clearly reveals that the Act was aimed at the suppression of commercialized vice and not at the penalization of the individual prostitute or prostitution itself”<sup>35</sup>. The Action Research conducted by the National Human Rights Commission, during 2002 - 2004<sup>36</sup> demonstrated that more often trafficked women have been arrested and penalized as 'soliciting persons' to the extent that around 85 to 90 percent of the arrested persons under the ITPA are women and most of them are victims of trafficking. This by itself causes a grave violation of human rights of the victims and causes 're-victimization'.

Various actors in the criminal justice system must take into consideration the legislative intent behind the framing of the ITPA and ensure that the 'victim' should not be treated as an 'accused'. If the

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<sup>31</sup> Section 2 (a)

<sup>32</sup> Sec 2 (f) of The Transplantation of Human Organs Act, 1994

<sup>33</sup> Sec 2 (h)

<sup>34</sup> Sec 2 (p)

<sup>35</sup> Ratnamala, In re. AIR 1962 Mad 31 at p.33

<sup>36</sup> Trafficking in Women and Children in India, 2005, Orient Longman, New Delhi

Prosecutor comes across a situation wherein he finds that trafficked victims have been charged as accused then he may make an application to the court, bearing all facts in mind, to discharge the victims from being charged as accused persons. The ITPA mandates rehabilitation of victims of commercial sexual exploitation in Protective Homes<sup>37</sup> (Government or NGO run), providing them with care, treatment, maintenance, training and instruction<sup>38</sup>.

## **Offences punishable under ITPA**

### **Sec.3 - For keeping a brothel or allowing premises to be used as a brothel**

Under this provision anyone keeping a brothel or allowing premises to be used as a brothel, whether as tenant, occupier or lessee or person in charge of premises, or anyone who lets another use such premises which is a brothel or anyone who is the owner or landlord lets the same with the knowledge that it would be used as a brothel is liable of being convicted of this offence. Any lease or agreement for the premise becomes void and inoperative with effect from the date of a conviction under this section.

The standard of proof that the Prosecutor needs to establish for a conviction under this offence is that there was knowledge that the property was being used as a brothel. The Prosecutor can introduce witnesses from the vicinity and neighbours who can testify to the fact that the owner, tenant, lessee or occupier had knowledge of the illegal activity being carried on in the concerned premise. Brothels more often than not are run on rented properties; thus, to convict the owner, tenant, lessee, or the occupier the Prosecutor must establish knowledge. The mere fact that an accused comes to collect rent from such a property is not sufficient to prove guilt under this section<sup>39</sup>. If a report is published in a newspaper having circulation in the area where the accused person resides stating that the premises or part of it is used as a brothel as a result of a search under ITPA 1956 or if a copy of the list of things found on such a premises is given to the person accused u/S. 3 then it shall be presumed until proven contrary that the tenant, lessee, occupier or the owner, lessor or landlord of the premises is knowingly allowing such premises to be used for prostitution or has knowledge that the premises is being used as a brothel<sup>40</sup>.

### **Sec.4 - Living on the earnings of prostitution**

Any person, over the age of 18 years, who knowingly lives on the earnings of prostitution of any other person, is punishable under this section. If the victim of Commercial Sexual Exploitation (CSE) is a child or a minor then the punishments prescribed under the Act are higher. The term 'living on the earnings of a person' implies a parasitical existence, which is fuelled by the earnings of the commercial sexual abuse and exploitation of another person. The term thus, implies economic dependency. As per Sec. 4 (2), any person above 18 years of age proven to be living with or habitually in the company of a victim

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<sup>37</sup> Set up under Sec.21 of ITPA

<sup>38</sup> Sec.23 (2) (vii) of ITPA

<sup>39</sup> Bhula Mia v. State, AIR 1969 Cal 416 at 417: 1969 Cr. LJ 1533. Also to be noted is an interesting case in Amina v. State (Delhi Admin), 1996(1) Chand Cr. Cases 407 (Delhi). The prosecution case fell because of procedural lapses such as non-corroborative evidence. Failure in correctly recording evidence resulted in the case falling through at the stage of an appeal to the High Court.

<sup>40</sup> Sec.3 (2A)

of CSE or having control, direction or influence over the victim in a manner that shows that the person is aiding, abetting or compelling the victims' prostitution or is acting as a tout or pimp on behalf of the victim shall be presumed to be knowingly living off the earnings of the victim until the contrary is proved.

Often brothels have meticulously maintained log books/ accounts books. These books document the daily earnings of the victims who are exploited there and the subsequent expenditure to maintain the brothel. Recovery of such documentary evidence accompanied by corroborative evidence to substantiate it, will lead to convictions in such cases.

### **Sec.5 - Procuring, inducing, or taking of persons for prostitution**

This provision includes procuring or inducing persons for prostitution, or attempting several acts with respect to the process of trafficking and subsequent sexual abuse and exploitation. An offence under this provision may be tried u/S.5 (3) at the source-transit-destination areas of the process of trafficking. The activities during the trafficking process occur across several places. Since they are all a part of the same transaction, cognizance of the offence may be taken at any place where or through which the victim may have been taken.

Consent is immaterial and is no defence but is a factor that may be taken into consideration in awarding punishment<sup>41</sup>.

The term 'procure' means to obtain (women and girls) for the purposes of prostitution. It implies the use of persuasion, solicitation, encouragement and assistance in achieving the unlawful purpose<sup>42</sup>. To 'induce' means to lead into, leading a woman or girl in some direction in which she would have not gone otherwise<sup>43</sup>. The word 'take' means to cause, to go, to escort or to get into possession. When the accused takes the minor, whether she is willing or not the act of 'taking' is complete and the condition is satisfied<sup>44</sup>. The Prosecutor must bear in mind that the intimacy of the accused, his/ her relation with the victim and power to control the victim, any representations made from the accused, are admissible and can be relied on to establish this offence.

### **Sec.6 - Detaining person in premises where prostitution is carried on**

The section is applicable in situations wherein persons are detained in brothels or upon any premises with the intent that they may have sexual intercourse with another person. The term 'detain' is said to include withholding of property, jewellery and the like. In cases where minors or children are found in brothels then all that is required is medical proof of sexual abuse, to raise a presumption, until the contrary is proved that the child or minor has been detained in the brothel for purposes of prostitution or has been sexually exploited for commercial purposes (Sec. 6 (2A)). The second presumption is provided in Sec.6 (3), under which a person shall be presumed to detain a woman or girl with intent to compel or induce her to remain there. In doing so the accused person detains any

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<sup>41</sup>Wali Mohammed v.Emperor (1926) 27 Cr. LJ 1018

<sup>42</sup>Where the woman allured or invited to the assigned place starts her journey the offence is complete. Sanders v.State, 129 S.W.605

<sup>43</sup>Allahrakhio v.Emperor, AIR 1934 Sind 164 at p. 168

<sup>44</sup>Khalandersaheb, In re, 1955 Cr. LJ 581

property, jewellery, clothes or money of the victim or threatens the victim with legal proceedings if she takes away any of her property, jewellery, money, clothes supplied or lent to the victim by the accused person or under the direction of the accused person.

### **Sec. 7 - Prostitution near or in public places**

This section makes provision for punishing customers/ clients or any other person for engaging in CSE of another person.

When customers/ clients are produced in court, a common practice is that the offence is compounded and they are released at the earliest instance. The Prosecutor in such cases may pray to the court for medical forensic examination and age verification tests of the victims or to direct the Investigating Officers to undertake efforts to secure the verified birth certificate or school leaving certificate of the victim. If the age verification tests confirm that the victims are children/ minors then the punishment will be much higher for those that engage in CSE u/S. 7 (1A).

The section also targets keepers of public places and those who let their places out with the knowledge that the premises will be used as a place of commercial sexual exploitation. If a hotel is used for CSE then the licence may be suspended / cancelled under the Act.

### **Sec. 9 - Seduction of a person in custody**

Anyone having custody/ charge/ care of or a position of authority over another person and causes, aids or abets the seduction for prostitution of that person shall be held culpable under this provision. The term 'seduction' is defined as any act on the part of the person to lead a woman astray from the path of rectitude, and if it is followed by sexual intercourse it will be seduction for illegal intercourse<sup>45</sup>.

### **Provisions that may be invoked against the “customer”/“client”**

Sec. 7 (1) of ITPA provides punishment to a person who “carries on prostitution” and the “person with whom such prostitution is carried on”. A customer/ client may be deemed to be a 'person with whom such prostitution is carried on'. Punishments under this provision are mentioned in the table below.

A customer/ client can also be charged u/S. 5 (1) (d) of ITPA under which any person who “causes or induces a person to carry on prostitution” shall be punishable.

Making customers/ clients criminally liable along with traffickers is an important step towards curtailing the “demand” for trafficked victims<sup>46</sup>. A customer/ client found in the company of a child/ minor should also be charged u/S. 375 Clause Sixthly of IPC (with or without her consent, when she is under sixteen years of age) and/ or Sec. 376 (2) (f) (commits rape on a woman when she is under twelve years of age).

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<sup>45</sup> Rabinarayan Das v. State, 1992 Cr. LJ 269, 273 Orissa; Also see Ramesh v. State of Maharashtra, AIR 1962 SC 1908 : (1963) 1 Cr. LJ 16

<sup>46</sup> Article 5 of UN Trafficking Protocol: States Parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the **demand** that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.

In a particular case<sup>47</sup> customers were charged for wrongful confinement and rape under IPC provisions along with Sec. 5 of ITPA. The Bombay High Court refused to grant bail to customers who were influential people on the grounds that there was prima facie the possibility that they may tamper with the prosecutrix and alter the course of justice.

A table outlining the punishments for offences under the ITPA, 1956 may be referred below.

| Sections of ITPA, 1956 | Offence   | Punishment upon First Conviction  | Punishment upon Subsequent Conviction   | Punishment when the offences are committed in respect of a child / minor   |
|------------------------|---|---|---|--|
| Sec. 3                 | Punishment for keeping a brothel or allowing premises to be used as a brothel | RI for not less than 1 year and not more than 3 years <b>AND</b> fine which may extend to two thousand rupees           | RI for not less than 2 years and not more than 5 years <b>AND</b> with fine which may extend to two thousand rupees |  |
| Sec. 4                 | Punishment for living on the earnings of prostitution                         | Imprisonment for a term which may extend to 2 years <b>OR</b> with fine which may extend to one thousand rupees or both |   | Imprisonment for not less than 7 years and not more than 10 years  |
| Sec. 5                 | Procuring, inducing or taking person for the sake of prostitution             | RI for not less than 3 years and not more than 7 years <b>AND</b> with fine which may extend to two thousand rupees     |   | Child - RI for not less than 7 years but may extend to life<br>Minor - RI for not less than 7 years and not more than 14 years |
| Sec. 6                 | Detaining a person in premises where prostitution is carried on               | Imprisonment for not less than 7 years but which may be for life <b>OR</b> imprisonment up to 10 years <b>AND</b> fine  |   |  |

<sup>47</sup> Shaikh Jaffar, Mirza Baig, Kaiser, Yusuf Khan, Dileep, Shivaji and Dulba v. State of Maharashtra, through the Police Inspector, Kranti Chowk Police Station, Crime Investigation Department, Aurangabad: 2007 Indlaw Mum 716

|        |   |  |  |  |
|--------|---|--|--|--|
| Sec. 7 | Prostitution in or in the vicinity of public places | Imprisonment which may extend to 3 months  |  | Imprisonment for not less than 7 years but which may be for life OR imprisonment up to 10 years AND fine |
| Sec. 9 | Seduction of a person in custody                    | Imprisonment for not less than 7 years but which may for life OR imprisonment up to 10 years <b>AND</b> fine |  |  |

## Indian Penal Code - Related Offences

### **Section 366: Kidnapping, abducting or inducing woman to compel her marriage**

The section envisages punishment for kidnapping and abducting a woman for marriage against her will or for forced intercourse. For such an act the person is liable to be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Kidnapping involves taking (not necessarily by force actual or constructive) or enticing of a woman less than eighteen years of age. The girl's consent is immaterial<sup>48</sup>. Abduction implies forceful compulsion or inducement by deceitful means. The going to some place of a person should be the objective<sup>49</sup>. The term 'deceitful' includes a misleading statement. Sec. 366 requires any two of these categories, firstly having intent/ knowledge/ or forcing or seducing a girl to illicit intercourse; secondly inducing a woman to go to any place with the intent or knowledge that she will be forced or seduced to illicit intercourse. The word 'force' is used in its ordinary dictionary sense and imputes force by stress of circumstances<sup>50</sup>.

It is not uncommon for missing women and children to be rescued from brothels. In this situation the introduction of the missing persons report as additional documentary evidence of the kidnapping or abduction for commercial sexual exploitation of the victim may serve as a corroborative piece of evidence.

### **Section 366A: Procurement of minor girl**

It is substantially the same in principle as above, however the offence in this category is inducement with a particular object. Inducing a girl under eighteen years to go to any place with the intent/ knowledge that she will be forced or seduced to illicit intercourse with a person is punishable u/S.

<sup>48</sup> Manktelow (1835) 6 Cox 143

<sup>49</sup> Profulla Kumar Bose AIR 1930 Cal 209

<sup>50</sup> Profulla Kumar Bose AIR 1930 Cal 209

366A<sup>51</sup>. Any reason given by the accused to move the girl from one place to another is sufficient for inducement. In offences dealing with this provision, where the procurement is for illicit intercourse with another, it is important that in the victim's deposition, the fact that she was sexually abused by another person must be brought out.

### **Section 366B: Importation of girl from foreign country**

Whoever imports into India from any other country (or from the State of Jammu and Kashmir) any girl under the age of twenty-one years with intent that she may be, or knowing it likely that she will be forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years and shall also be liable to fine.

### **Section 368: Wrongfully concealing or keeping in confinement, kidnapped or abducted person**

In order to understand the elements of this section we may lay reliance on Sec. 346 IPC, which deals with wrongful confinement in secret - wrongfully confining any person in such manner as to indicate an intention that the confinement of such person may not be known to any person interested in the person so confined or to any public servant or that the place of such confinement may not be known to, or discovered by, any such person or public servant. The other elements of the section namely kidnapping and abduction are mentioned within other provisions of the IPC.

### **Section 372: Selling minor for purposes of prostitution**

Whoever sells, lets to hire, or otherwise disposes of any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

The presumption that this section carries is that when a minor is disposed to a 'prostitute'<sup>52</sup> or to a person who keeps or manages a brothel then it will be presumed the same is done with the intention that the person disposed will be used for prostitution. Illicit intercourse within this section means sexual intercourse between individuals not married to each other<sup>53</sup>.

When the defence is raised that the girl was not going to be immediately introduced to prostitution, but introduced at the age of 18 years also does not hold good<sup>54</sup>. This section applies to married as well as unmarried women under the age of 18 years<sup>55</sup> as well as where the girl concerned is a member of the dancing girl caste<sup>56</sup>. A full bench of the Madras High Court held that the term 'dispose of' has many

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<sup>51</sup> In the case of Bhawani Giri v. State of Rajasthan, 1995 Cr. LJ 983 (Raj)

<sup>52</sup> Verbatim reproduction of the word as it appears in Explanation I of Sec. 372

<sup>53</sup> Explanation II of Sec. 372

<sup>54</sup> Rammana (1889) 12 Mad 273

<sup>55</sup> Kammu (1878) PR No 12 of 1879

<sup>56</sup> Ramanna (1899) 12 Mad 273



meanings. It denotes 'to bestow' for an object or a purpose, to make a change in the circumstances. It does not necessarily imply that there has been a transfer of possession, nor indeed do the terms 'sell' or 'hire' connote a present or immediate transfer of possession, and whereas is no doubt generally the case, a transfer of possession is contemplated, the offence is complete on proof of the sale or hiring and without any proof of the transfer of possession<sup>57</sup>. The dedication of girls less than eighteen years to the service of a temple as 'dasis' will amount to a disposal of such minors, knowing it likely that they will be used for the purpose of prostitution, within the meaning of Sec. 372 of the IPC<sup>58</sup>.

### **Section 373: Buying minor for purposes of prostitution**

Whoever buys, hires or otherwise obtains possession of any person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse or for any unlawful or immoral purpose shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

A presumption that is inbuilt into the section is that any 'prostitute'<sup>59</sup> or any person keeping or managing a brothel, who buys, hires or otherwise obtains possession of a female under the age of eighteen years shall, until the contrary is proved, be presumed to have obtained possession of such female with the intent that she shall be used for the purpose of prostitution.

It is not necessary that to constitute an offence under this section there is a need for two parties. It does not specify the nature, duration intensity of the possession. Possession only has to be consistent with purpose, intention, knowledge of prostitution or illicit intercourse<sup>60</sup>. An accused 'A' brought a girl from Kashmir with the consent of her husband to Bombay at the expense of a brothel keeper who was accused 'B'. On being brought to Mumbai she was kept in a brothel and her earnings were split between both 'A' and 'B'. It was held by the Court that what took place in Kashmir was only preparation for the offence, which was completed in Bombay and the accused were guilty u/S. 373 and 114 of IPC<sup>61</sup>.

### **Section 375: Rape**

Rape is defined in Sec. 375, and punishments are provided in Sec. 376 (1). Additionally, Sec. 376 prescribes punishments for rape committed by a police officer, or a public servant, or a staff member of a jail, remand home, children's institution, hospital, or a person who commits rape on a woman when she is below twelve years of age. A person who commits rape shall be punished with imprisonment between seven to ten years, which may even be extended to life imprisonment along with fine. Rape of a woman or a child below twelve years of age, under the circumstances as mentioned in sub-section (2) of Sec. 376, shall be punishable with fine and rigorous imprisonment for a term, which shall not be less than ten years but which may extend to life imprisonment.

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<sup>57</sup> (1881) 1 Weir 359,362 (FB); Marakatham (1881) 1 Weir 364. See Noor Jan (1870) 14WR (Cr) 39

<sup>58</sup> (1881) 1 Weir 359 (FB); Dasi Marimuthu (1884) 1 Weir 364; Padmavati (1870) 5 MHC 415; Srinivasa v. Annsami (1891) <sup>15</sup> Mad 41; Public prosecutor v Kannammal (1913) MWN 207; Baku (1899) 24 Bom 287; 1 Bom LR 678.

<sup>59</sup> Term as is used in Explanation I of Sec. 373

<sup>60</sup> Gordhan Kalidas (1941) 43 Bom LR 847. Also Vitha Bai Shukha (1928) 30 Bom LR 613

<sup>61</sup> Butubai Ganeshu AIR 1928 Bom 336; (1928) Bom 29 Cri LJ 465 (Bom).



Sec. 375 Clause Sixthly is an important clause. It simply declares that an act even though committed with the consent of a child then less than sixteen years of age would be rape, her consent and precocity being both immaterial<sup>62</sup>.

The Supreme Court has held that rape is a crime that is violative of the victims most cherished fundamental rights, namely, the right to life enshrined in Article 21 of the Constitution of India<sup>63</sup>. Whenever a victim is rescued from sexual exploitation who is under the age of 16 years, the male traffickers/ customers should be treated as accused and should be charged under the provisions of rape as defined in the IPC. Sexual intercourse with a child who is under the age of 16 comes under the ambit of 'statutory rape', the defence that she consented has no meaning under this circumstance<sup>64</sup>. In crimes of commercial sexual exploitation of women and girls, multiple rapes are committed upon the victims by the traffickers and the "customers"/"clients". Sec.375 Clause Sixthly can be extensively used against traffickers/ abusers/ "customers"/ "clients" when sexual crimes are committed against children.

The victim of trafficking/ rape stating under oath that she was subjected to forcible sexual intercourse or that the act was done without her consent has to be believed and accepted like any other testimony unless there is material available to draw an inference as to her consent or else her testimony be such as is inherently improbable. Absence of injuries on the person of the prosecutrix is not necessarily an evidence of falsity of the allegation or an evidence of consent on the part of the prosecutrix. It will depend on the facts and circumstances of each case<sup>65</sup>. The Criminal Law (Amendment) Act, 1983 has inserted Sec. 114A in the Evidence Act 1982, which provides that in a prosecution for rape crimes under sub section (2) of Sec. 376, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the women alleged to have been raped and she states in her evidence before the court that she did not consent, the court shall presume that she did not consent<sup>66</sup>. Therefore, consent of the victim/ prosecutrix is no defence if the victim has been proved to be less than sixteen years of age<sup>67</sup>.

The absence of injuries either on the accused or on the prosecutrix shows that the prosecutrix did not physically resist but absence of injuries is not by itself sufficient to hold that the prosecutrix was a consenting party. May be, being frightened, she was unnerved or for fear of being assaulted she had not resisted<sup>68</sup>. It is no doubt true that in law the conviction of an accused on the basis of the testimony of the prosecutrix alone is permissible, but that is in a case where the evidence of the prosecutrix inspires confidence and appears to be natural and truthful<sup>69</sup>. It is now a well settled principle of law that conviction can be sustained on the sole testimony of the prosecutrix, if it inspires confidence<sup>70</sup>. The

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<sup>62</sup> Gour Dr.Sir Singh Hari, PENAL LAW OF INDIA, (10<sup>th</sup> Edition), Vol. I, Law Publishers (India) Private Limited: Allahabad, 1996. p.15.

<sup>63</sup> Bodhisattwa Gautam v.Subhra Chakraborty AIR 1996 SC 922:(1996) 1 SCC 490

<sup>64</sup> Sec. 375 IPC (Clause Sixthly)

<sup>65</sup> State v.NK AIR 2000 SC 1812;2000 Cri.LJ 2205 (SC).

<sup>66</sup> Bodhisattwa Gautam v.Subhra Chakraborty AIR 1996 SC 922:(1996) 1 SCC 490

<sup>67</sup> State v.NK AIR 2000 SC 1812;2000 Cri.LJ 2205 (SC).

<sup>68</sup> State v.Mange Ram AIR 2000 SC 2798

<sup>69</sup> Vimal Suresh Kamble v.Chaluverapinake (2003) 3 SCC 175

<sup>70</sup> State v.Biram Lal 2005 Cri.LJ 2561 (SC)

main evidence in all such cases is the victim herself. The prosecutrix of a sex offence is a victim of a crime<sup>71</sup>. In a given case even if the doctor who examined the victim does not find sign of rape it is no ground to disbelieve the sole testimony of the prosecutrix<sup>72</sup>. When a victim objects to intercourse and she is forced into submission, then it could be considered that she is raped. Many times the victims are put under fear of death or hurt. This too comes within the meaning of rape<sup>73</sup>. Thus, in cases of commercial sexual exploitation it is not uncommon to come across instances of women and children being repeatedly raped for commercial gains. Proclaimed 'consent' of such victims is therefore, no consent at all.

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<sup>71</sup> Ranjit Hazarika (1998) 8 SCC 635; Roop Singh Cri.LJ 353 (Utt)

<sup>72</sup> Om Prakash 2006 Cri.LJ 2913 (SC)

<sup>73</sup> Section 375 IPC (Clause Thirdly)

## Pre Trial

The role of the Prosecutor is very limited at this stage of the legal process, since a large part of the work that is required to be done by the police will come within the ambit of the Prosecutor's work, only when the accused is/ are produced before the Magistrate. Below is a brief description of the procedures followed by the police when performing functions under the ITPA<sup>74</sup>. Note that the Prosecutor will not be involved in these pre-trial procedures under the ITPA. They are however, illustrative of what process may have taken place before a victim/ accused are produced before the appropriate Magistrate/ Court.

- Information is conveyed to the Special Police Officer (SPO) that any offence punishable under this Act is being committed on any person<sup>75</sup>.
- The SPO records the grounds of his belief and then enters and searches such premises without a warrant, if search of the premises cannot be made without undue delay<sup>76</sup>.
- Two respectable inhabitants (one of whom shall be a woman) from the locality of the place to be searched shall attend and witness the search. The woman witness need not be from the locality where the search will be done<sup>77</sup>.
- The SPO shall be entitled to remove all the persons found in the place where search has been carried out u/S. 15 (1) of ITPA<sup>78</sup>.
- The SPO shall produce all the rescued persons before an appropriate Magistrate (Metropolitan Magistrate, Judicial Magistrate of the First Class, District Magistrate or Sub-Divisional Magistrate)<sup>79</sup>.
- After producing the rescued persons before the Magistrate, a registered medical officer shall examine the persons for:
  - Determination of age.
  - Detection of any injuries as a result of sexual abuse.
  - Presence of any sexually transmitted diseases<sup>80</sup>.
- The SPO shall be accompanied by two women police officers for a search under the ITPA<sup>81</sup>.

<sup>74</sup> Also see; Standard Operating Procedures (SOP) on Investigating Crimes of Trafficking for Commercial Sexual Exploitation, UNODC, 2007.

<sup>75</sup> Sec. 15(1) ITPA

<sup>76</sup> Sec. 15(1) ITPA

<sup>77</sup> Sec. 15(2) ITPA

<sup>78</sup> Sec. 15(4) ITPA

<sup>79</sup> Sec. 15(5) ITPA

<sup>80</sup> Sec. 15(5-A) ITPA

<sup>81</sup> Sec. 15(6-A) ITPA

- Interrogation/ interview shall be conducted by a woman police officer and if no woman police officer is available the interview shall only be done in the presence of a female member of a recognized welfare institution/ organization<sup>82</sup>.
- In case the person rescued u/S. 15(4) of ITPA cannot be produced before the appropriate Magistrate then the nearest Magistrate can pass orders for the safe custody of the person for ten days till the person is produced before the appropriate Magistrate<sup>83</sup>.
- The appropriate Magistrate shall cause an inquiry to be made by a Probation Officer appointed under the Probation of Offenders Act, 1958, with respect to the age, character, antecedents, personality of the victim(s) the suitability of husband/ guardian/ parents taking charge; nature of the influence that the victim's home has on her and the prospects of his/ her rehabilitation<sup>84</sup>.
- Pending inquiry of the Probation Officer, the Magistrate may remand a rescued victim for a period of three weeks in safe custody<sup>85</sup>.
- When the Magistrate is satisfied with the inquiry by the Probation Officer and determines that the victim is in need of care and protection then the Magistrate may order that the victim be sent to a Protective Home for a period of one to three years for rehabilitation<sup>86</sup>.
- The Magistrate may give directions about the care, guardianship, education, training, medical and psychiatric treatment of the victim as well as supervision by a person appointed by court, during the victim's stay at the Protective Home<sup>87</sup>.
- The Magistrate may take the assistance of an advisory committee consisting of five persons three of who shall be women to assist him and for this purpose may keep a list of experienced social worker in the field of anti human trafficking<sup>88</sup>.

**Sec. 16 of the ITPA** - A Magistrate (Metropolitan Magistrate, Judicial Magistrate of the First Class, District Magistrate or Sub-Divisional Magistrate) is empowered under this provision to take cognizance of an offence under the ITPA, on information received from the police or any person authorized by the State Government in this behalf or any source. In a matter before the court, it was held that no defence can be raised, that cognizance of an offence under the ITPA cannot be taken except upon a report submitted to the Special Police Officer<sup>89</sup>. Upon receipt of information that a person is being made to carry out prostitution in a brothel, the Magistrate may direct a police officer not below the rank of a sub-inspector to rescue and produce that person before him. If such a matter is brought to the notice of the Prosecutor, then he can ensure in-camera or chamber proceedings to ensure anonymity of the place that is to be searched.

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<sup>82</sup> Sec. 15(6-A) ITPA

<sup>83</sup> Sec. 17(1) ITPA

<sup>84</sup> Sec. 17(2) ITPA

<sup>85</sup> Sec. 17(3) ITPA

<sup>86</sup> Sec. 17(4) ITPA

<sup>87</sup> Sec. 17(4) ITPA

<sup>88</sup> Sec. 17(5) ITPA

<sup>89</sup> Shakila v. State, AIR 1962 All 633.

**Sec. 17 of the ITPA** This provision provides for powers of the Magistrate to grant interim custody of rescued persons. The principle guiding the Magistrate in making orders for safe custody is to ensure that the rescued person is not restored or placed in the custody of another person who may exercise a harmful influence over the rescued person. Hence, interim custody has to be read within the power which has been conferred on the Magistrate to make an inquiry<sup>90</sup>. The Magistrate exercising powers u/S. 17 is a tribunal of limited jurisdiction and has to act strictly within the four corners of the statute creating such a tribunal. The Magistrate has no inherent jurisdiction to pass any order on the ground that the acts involved relate to public morality<sup>91</sup>.

**Sec. 19 of the ITPA** - A victim of commercial sexual exploitation may herself make an application to the Magistrate (Metropolitan Magistrate, Judicial Magistrate of the First Class, District Magistrate or Sub-Divisional Magistrate) to place her in a Protective Home or be provided care and protection by the court. There are several instances where victims seek state protection, when they do not have any form of ostensible support. In such cases the Prosecutor may petition the court to provide the victim with safe shelter. The victim is required to be present before the court and an order directing that the victim be kept in the Protective Home may be passed.

## A. First Information Report

The role of the First Information Report (FIR) is very important in preliminary proceedings and more often than not it is this document that can make or break the case. A common belief is that only a form filled under Sec. 154 of the Cr.PC is an FIR. In many cases the courts have held that entries in police station diaries may constitute an 'FIR' within the meaning of the Cr. PC<sup>92</sup>. Further any written document that records information disclosing the commission of a cognizable offence can serve as an FIR<sup>93</sup>.

### Challenges

#### I. Adding Charges and Severity of Charges

FIR is a preliminary assessment of the nature of crime allegedly committed. Any time before judgment charges may be added or altered<sup>94</sup>. When the Prosecutor feels that during the trial there are other charges that can be made out against the accused based on the depositions and evidence exhibited, he may petition the court to add charges. The alteration of charges can take place as many times as the court deems fit<sup>95</sup>.

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<sup>90</sup> Prem v. District Magistrate, Meerut, AIR 1959 All 206 at p.207

<sup>91</sup> Ram Devi (Smt) v. State, 1963 All LJ 894

<sup>92</sup> H.N. Rishbud and Inder Singh v. State of Delhi, 1955 AIR (SC) 196 (Supreme Court 1954), paragraph 5

<sup>93</sup> Superintendent of Police, C.B.I. and Others v. Tapan Kr. Singh, 2003 AIR (SC) 4140, 2003 (6) SCC 175 (Supreme Court 2003), paragraphs 16 and 20

<sup>94</sup> Suren Bannerjee v. State 69 CalWN 741

<sup>95</sup> Kapildeo v. State, AIR 1954 All 557

A most common defence raised in courts is that the FIR does not lay out in absolute terms the details of the crime. However, there is no requirement that an FIR should be an exhaustive document. Further, “only the essential or broad picture need be stated in the FIR and all minute details need not be stated therein. It is not a verbatim summary of the prosecution case”<sup>96</sup>. The FIR is a report that sets the law in motion and at the stage of investigation further details can be gathered and filled up<sup>97</sup>.

## 2. Quashing of FIR

Another common method used in trafficking cases by defence lawyers is petitioning the courts to quash the FIR. Prosecutors will rarely find an FIR that is water tight and thus, situations where in an attempt is made to quash proceedings are not out of the ordinary. “The legal position is well settled that if an offence is disclosed the court will not normally interfere with an investigation into the case and will permit investigation into the alleged offence to be completed. If the FIR, prima facie, discloses the commission of an offence, the court does not normally stop the investigation, for, to do so would be to trench upon the lawful power of the police to investigate into cognizable offences.”<sup>98</sup>

The Prosecutor must make attempts to ensure that cases run their natural course rather than consenting to quashing of proceedings at the preliminary stages.

## 3. Delay

Mere delay in filing FIR is no ground to doubt the case of the prosecutrix that evidence given by her should not be accepted. Delay in lodging the FIR cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same solely on the grounds of delay in lodging the FIR. Delay has the affect of putting the court on guard to search if any satisfactory explanation has been offered for the delay<sup>99</sup>. Often victims speak up and come forth with details which may constitute offences after long periods of time and particularly after intensive psychosocial counseling<sup>100</sup>. “It has to be remembered that law has not fixed any time for lodging the FIR. Hence a delayed FIR is not illegal<sup>101</sup>. Delay in filing of FIR is an irregularity that the Prosecutor can adequately explain. However, failure of prosecution to explain the extraordinary delay in lodging FIR is viewed with suspicion by the courts<sup>102</sup>. The FIR is expected to reflect the occurrence truly, without embellishment or fabrication. Thus, to save the report from any kind of attack and also to derive assurance and authenticity to the facts stated in this report, compliance of the provisions of the Criminal Procedure Code is essential<sup>103</sup>. If an FIR passes the tests mentioned above then there is no reason for it suffer from any defects merely on the ground that there has been a time gap between the occurrence of the crime and the filing of the complaint.

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<sup>96</sup> Baldev Singh and Another v.State of Punjab, AIR 372 SC 1996

<sup>97</sup> State v. Aru Pradhan, Accused Convict, 91 Cr.LJ 161 Orissa HC 1985

<sup>98</sup> Satvinder Kaur v.State (Govt.of NCT of Delhi) and Another, Cr.LJ 4566 (SC 1999)

<sup>99</sup> Gian Chand AIR 2001 SC 2075; Dildar Singh (2006) Cr.LJ 3914 (SC)

<sup>100</sup> For further details see: Journey to Justice A Manual on Psychosocial Intervention, UNODC, 2008

<sup>101</sup> Ravinder Kumar and Another v.State of Punjab, 7 SCC 690 2001

<sup>102</sup> Raji Surjya and Another v. State of Maharashtra, Cr. LJ 1105 (SC 1983). Also see, Nalli Alias Nallianna Gounder v. State, 99 Cr. LJ 1409 (Madras High Court 1993)

<sup>103</sup> NAVictor Immanuel and Others v.State, 97 Cr.LJ 2014 (Madras HC 1991)

#### 4. **Crimes committed outside territorial jurisdiction**

Human trafficking more often than not involves an element of intra and inter-state and inter-country participation. With the entire chain of events sometimes being strung across a large geographical region, the Prosecutor dealing with trafficking cases will have to deal with crimes which may have implications extending to regions beyond the jurisdiction of the court before which the matter may be. If the investigating officer arrives at the conclusion that the crime was not committed within the territorial jurisdiction of the police station, then FIR can be forwarded to the police station having jurisdiction over the area in which the crime is committed. But this would not mean that in a case which requires investigation, the police officer can refuse to record the FIR and/ or investigate it. Under Sec.5 (3) of the ITPA an offence committed under the Act shall be triable at the source or transit or destination areas through which a trafficked person is moved.

### **B. Complainant**

Complaints are lodged either at the instance of Non Government Organizations (NGO), the police or victims. Instances of victims filing complaints are few and far. The Prosecutor may bear in mind that there is nothing in the definition of 'complaint' in Sec. 2 (d) Cr. PC which requires it to be made by a person who is actually aggrieved ... anyone can set the law in motion and no specific authorization is necessary to file the complaint. The complaint is made with the object that the Magistrate should take action. Sec. 16 (1) of the ITPA also provides for making of a complaint by any person before the Magistrate.

#### **Challenge: Trafficker not found at Scene of Crime**

Many times the traffickers are not found at the scene of crime and more often than not in sex trafficking offences the brothel keeper, cook, cleaning maid are the ones that get arrested. There is a tendency of not arresting those that are a part of the crime yet are not present at the scene of the crime. Theories of liability may be raised when those that conspire, abet, act as accomplice or that share common intention to commit the crime are not found at the scene of crime. Criminal conspiracy can be proved either by direct evidence or by circumstantial evidence or by both<sup>104</sup>, and it is a matter of common experience that direct evidence to prove conspiracy is rarely available. Therefore, the circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused. The Supreme Court stated that, "there is no difference between the mode of proof of the offence of conspiracy and that of any other offence; it can be established by direct or circumstantial evidence. For common intention even if it is not charged, an accused may be punished. Mentioning an unknown accused (such as a customer, brothel manager, etc.) at the time of filing an FIR is possible based on the preliminary statement that the victims give at the time of filing of FIR<sup>105</sup>."

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<sup>104</sup> V.C. Shukla v. State (Delhi Admn.) 1980 SCC (2) 665

<sup>105</sup> Esher Singh v. State of Andhra Pradesh 2004, AIR SC 3030

## **C. Production before a Magistrate**

After a person is arrested in accordance with the provisions of Cr. PC, he/ she must be produced before an appropriate Magistrate. Both the Cr. PC and ITPA state this requirement. Under the ITPA, whenever the Special Police Officer (SPO) or the Trafficking Police Officer (TPO), has reasonable grounds for believing that an offence punishable under the Act has been/ or is been committed in respect of a person living in any premises, and that search of the premises with warrant cannot be made without undue delay, such officer may, after recording the grounds of his belief, enter and search such premises without a warrant. In such cases, after removing persons from a location searched, the SPO or TPO shall forthwith produce them before the appropriate Magistrate [Sec. 15(5)]. The Schedule to ITPA identifies the appropriate Magistrate for Sec. 15 (5) as being a Metropolitan Magistrate, a Judicial Magistrate of the First Class, a District Magistrate or a Sub-Divisional Magistrate.

All the victims removed from the place of exploitation must be produced before the Magistrate. If it appears that the rescued victims are clearly below the age of minority or suspected to be minors, then they may be produced before the Child Welfare Committee within 24 hours<sup>106</sup>. If at the time of first remand, the Prosecutor notices that there are no victims being produced, then a question must be raised before the court, as to what procedure has been undertaken for their production before the Magistrate.

## **D. Procedure Subsequent to Production before Magistrate**

In ITPA cases, a key element of production of victims before a Magistrate is the ordering of a medical examination. Sec. 15(5A) of ITPA directs that any person who is produced before a Magistrate u/S. 15(5) shall be examined by a registered medical practitioner for the purposes of determination of the age of such person, or for the detection of any injuries as a result of sexual abuse, or for the presence of any sexually transmitted diseases.

When rescued persons are produced before the appropriate Magistrate under the provisions of Sec. 15 (5) or Sec. 16, the person shall be given an opportunity of being heard by the Magistrate. The Magistrate u/S. 17 (2) shall also cause an inquiry to be made of the:-

- age,
- character,
- antecedents of the rescued person,
- suitability of the parents, guardian or husband for taking charge of the rescued person,
- nature of influence of the conditions of the home of the rescued person.

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<sup>106</sup> Sec. 32, JJ Act, 2000



The Magistrate may summon a panel of five respectable persons to assist him in discharging his functions u/S. 17 (2), three of whom wherever practicable, shall be women social welfare workers.

## **E. Procedure in case of children/ minors - Juvenile Justice (Care and Protection of Children) Act, 2000**

After the rescued persons are produced before a Magistrate, they are as a standard practice, sent for age verification so that the appropriate course of action may be determined for them. The victims if verified as minors/ children (as defined in the ITPA) are to be immediately produced before the Child Welfare Committee (CWC) under the JJ Act and not before a Judicial Magistrate. The Bombay High Court has given a harmonious construction to both the Juvenile Justice Act, 2000 and the ITPA, 1956<sup>107</sup>.

The JJ Act in Sec. 2(d) defines a 'child in need of care and protection'. A child that is subject to or likely to be commercially sexually exploited or is vulnerable to trafficking falls into one or more categories of 'child in need of care and protection'. All actions with respect to such children shall be taken by the CWC. Whenever, minor/ child victims are produced before the court, the court may be informed by the Prosecutor, that it cannot exercise jurisdiction over such persons. If a victim is of age 18 years and below and is produced before a Magistrate not empowered under the JJ Act, the Magistrate shall record his opinion and forward the child without delay to the competent authority under the JJ Act (Sec.7).

Prerna v/s State of Maharashtra<sup>108</sup> was a Public Interest Litigation filed to protect children and minor girls rescued from the flesh trade against the pimps and brothel keepers keen on reacquiring possession of the girls. In this case, the Mumbai High Court passed the following directions which are of great significance for the children rescued from brothels:-

- No Magistrate can exercise jurisdiction over any person under 18 years of age whether that person is a 'juvenile in conflict with law' or a 'child in need of care and protection', as defined by Sections 2 (1) and 2 (d) of the JJ Act, 2000. At the first possible instance, the Magistrate must take steps to ascertain the age of a person who seems to be under 18 years of age. When such a person is found to be under 18 years of age, the Magistrate must transfer the case to the Juvenile Justice Board if such a 'juvenile is in conflict with law', or the Child Welfare Committee if such a person is a 'child in need of care and protection'.
- Any juvenile rescued from a brothel under the ITPA, 1956 or found soliciting in a public place should only be released after the Probation Officer has completed an inquiry.
- The said juvenile should be released only to the care and custody of a parent / guardian after such parent / guardian has been found fit by the Child Welfare Committee, to have the care and custody of the rescued juvenile.

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<sup>107</sup> Prerana v. State of Maharashtra 2003 (2) BLR 562, 2003 (2) Mh. LJ 105

<sup>108</sup> 2003 (2) Mah LJ 105

- If the parent / guardian is found unfit to have the care and custody of the rescued juvenile, the procedure laid down under the JJ Act, 2000 should be followed for the rehabilitation of the rescued child.

## F. Age verification

All persons found during search and rescue conducted u/S. 15 and 16 of ITPA must be produced forthwith before the appropriate Magistrate<sup>109</sup>. Victims often don't know their own exact age and/ or may have been tutored by the offenders to proclaim themselves as adults. Age of the victim is a major factor in determining whether the case will be handled by the Judicial Magistrate or the CWC. Therefore, the correct age of the victim needs to be addressed at the earliest instance. Upon production of the rescued person, the Magistrate shall order for an age verification of the victim u/S. 15 (5A) or 17 (2) of ITPA. Child/ minor victims are to be produced before the CWC under the JJ Act, 2000.

**Challenge:** The age verification reports and medical examinations usually place the victims in an 'age bracket'. Thus, the report may state that the victim is between 17-19 years old. There is a plethora of police records where the age of the rescued girls is recorded as “appears to be of 17-19 years of age”. In such cases, the Prosecutor may pray the court for the victim's age to be considered as 17 years so that all proceedings and actions with reference to the victim to be carried out before CWC.

**Challenge:** The age verification report states that the victim is a minor but it seems as though this may not be a correct estimation. The Prosecutor in these situations can ask the court to order re-age verification at a different medical facility. The age of the victim is a crucial factor in offences dealing with trafficking.

- If it is determined that the alleged victim is a child/ minor, the question of **consent** of the victim becomes immaterial.
- The ITPA provides for more stringent **penalties** if offences under it are committed in respect of a child/ minor.
- All actions with respect to rescued persons under 18 years of age will be taken under the JJ Act.

Thus, verifying the age of the victim is a crucial step in cases of commercial sexual exploitation and in such cases the burden of proof is always on the prosecution<sup>110</sup>.

<sup>109</sup> If a victim is a minor then she should be produced before the Child Welfare Committee. No Judicial Magistrate may pass an order with regard to a child/ minor victim.

<sup>110</sup> Chattu v. State 1973 All Cr.R 391, Madho Singh v. State of Rajasthan 1997 Cr.LJ 2641 (Raj)

The following documents serve as authentic proof of age:-

**A. Municipal Records:** A birth entry in the municipal record is the best piece of evidence that can be produced regarding a victim's age<sup>111</sup>. It is not necessary for the official who made the entry in the record to be examined if the entry was made by the concerned official in the discharge of his official duties<sup>112</sup>.

**B. Testimony of the Father:** In the absence of a birth certificate, the testimony or an affidavit from the father of the victim is often considered the most persuasive evidence regarding the victim's age<sup>113</sup>. However, other corroborative evidence is helpful and often necessary<sup>114</sup>.

**C. School Records:** Entries in school registers are admissible evidence to prove the age of the person concerned<sup>115</sup>. The statement contained in the admission register of a school, as supplied by the father, guardian, or close relative of the person in question is a good proof of age unless it is shown by unimpeachable contrary material that it is inherently improbable<sup>116</sup>. However, it must be shown that the person who made the entry in the register had some 'special means of knowledge' regarding the date of birth to establish the age beyond a reasonable doubt<sup>117</sup>.

**D. Horoscope:** Though not the most scientific of documents or the easiest to decrypt, the horoscope has served as a tool of determining when the person whose name is mentioned in the horoscope was born. Among all documents that are capable of being used for determination of age the least persuasive is the horoscope<sup>118</sup>.

## **G. Custody Applications**

It is not uncommon to see genuine/ fake “family members” suddenly surface to try and obtain custody of victims once they have been rescued from commercial sexual exploitation (CSE)/ forced labour. The Prosecutor must ensure that the victim is not handed over to the first person who turns up to seek custody of the rescued victim. Conducting of inquiry as mentioned in Sec. 17 (2) of ITPA is mandatory for deciding on the future course of action regarding placement of rescued persons.

When a 'child in need of care and protection' is produced before the Child Welfare Committee (CWC) u/S. 32 of the Juvenile Justice Act 2000, the CWC shall hold an inquiry regarding any further orders to be passed in respect of such a child.

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<sup>111</sup> Joginder Singh v. State of Punjab 1975 Cr.LJ 1604

<sup>112</sup> Harpal Singh v. State of Himachal Pradesh, AIR 1981 SC 361 (Supreme Court 1980) (The court ruled that the evidence was clearly admissible without examination under Section 35 of the Indian Evidence Act, 1872)

<sup>113</sup> State v. Babu Lal, AIR 1965 Raj 90; 1965 (1) Cr.LJ 483

<sup>114</sup> Mohd. Ikram Hussain v. State, AIR 1964 SC 1625

<sup>115</sup> Harpal Singh v. State of Himachal Pradesh, AIR 1981 SC 361

<sup>116</sup> State of Punjab v. Mohinder Singh (Supreme Court of India) 2005(2) KLT 126, 130

<sup>117</sup> Rakesh and Another v. State of Rajasthan, 1998 (104) Cr.LJ 1434, 1997 Indlaw Raj 14 (Rajasthan High Court 1997) (such “special means” can include the student's application for admission).

<sup>118</sup> State of Punjab v. Mohinder Singh, 2005(2) KLT 126, 130 (Supreme Court 2005) - this case held that horoscope is a weak form of evidence and the person making it must have special knowledge i.e. he must know of when the person whose horoscope is being made was born.

## H. Bail/ Opposing bail

The law governing bail is found in Chapter XXXIII of the Criminal Procedure Code, Sec. 436-450. The primary provisions regarding bail are Sec. 436-439. Sec. 436 pertains to bail for those accused of bailable offences for which bail can be claimed as a matter of right<sup>119</sup>. Sec. 437 pertains to bail for those accused of non-bailable offences, for which a court has discretion whether or not to grant bail to the accused. Sec. 438 regards bail for those apprehending arrest, otherwise known as anticipatory bail<sup>120</sup>. Sec. 439 pertains to the special powers of the High Court and the Court of Sessions regarding bail matters<sup>121</sup>. Sec. 440-450 are minor provisions that further define bail law principles and procedure established u/S. 436-439. All ITPA offences that involve minors are non-bailable. The remaining ITPA offences are classified as bailable or non-bailable, depending on the number of years with which the offence is punishable.

The primary considerations that the courts take into their notice while determining bail are:

- Likelihood that the accused will flee justice<sup>122</sup>.
- Likelihood that the accused will tamper with witnesses and evidence.
- Magnitude of the charge<sup>123</sup>.
- Severity of the punishment which the conviction will entail.
- Evidence in support of the accusation.
- Position and status of the accused with reference to the victim<sup>124</sup>.
- Nature of offence.
- Likelihood of committing similar offences/other offences<sup>125</sup>.
- Health, age and sex of accused<sup>126</sup>.
- Length of trial<sup>127</sup>.

### ***Bail opposition by the Public Prosecutor***

The failure to give heightened sensitivity to cases involving sexual abuse against women and children risks a danger to the collective interests of society<sup>128</sup>. If perpetrators are released on bail or acquitted

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<sup>119</sup> Ratilal Bhanji Mithani v. Assistant Collector of Customs, 1967 (73) Cr.LJ 1576 (Supreme Court 1967)

<sup>120</sup> Anticipatory bail is an order by the court that, in the event of arrest, entitles a person to immediate release on bail. It is applicable only before arrest. Balchand Jain v. State of Madhya Pradesh, 1977 (83) Cr.LJ 225 (Supreme Court 1976)

<sup>121</sup> Sec. 439 gives the Court of Sessions and the High Court concurrent jurisdiction to grant bail as if the bail application was being presented for the first time. Generally, the accused will not petition the Court of Sessions or High Court for bail until after the original petition has been rejected by a Magistrate. In the same way, the Court of Sessions and the High Court have power to impose or change conditions or cancel a bail order granted by a lower court altogether. Guruharan Singh v. State (Delhi Administration), 1978 (84) Cr.LJ 129 (Supreme Court 1977)

<sup>122</sup> Guruharan Singh v. State (Delhi Administration), 1978 (84) Cr.LJ 129 (Supreme Court 1977)

<sup>123</sup> Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh, 1978 (84) Cr.LJ 502 (Supreme Court 1977)

<sup>124</sup> Guruharan Singh v. State (Delhi Administration), 1978 (84) Cr.LJ 129 (Supreme Court 1977). This consideration to deny bail plays an important part when the accused are powerful and the trafficked victims are vulnerable.

<sup>125</sup> Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh, 1978 (84) Cr.LJ 502 (Supreme Court 1977).

<sup>126</sup> See Cr.PC, first Proviso to Section 437(1).

<sup>127</sup> Gyan Prakash v. State of Rajasthan, 1991 (97) Cr.LJ 1176

<sup>128</sup> See State of Punjab v. Ramdev Singh, 2004 AIR (SC) 1290 (Supreme Court 2003)

on minor technicalities, it reinforces the unwarranted stigma of the victim and allows criminals to walk free within the community<sup>129</sup>. Decency and morality in public life can be promoted and protected only by dealing sternly with those who violate societal norms, such as committing sexually-motivated crimes<sup>130</sup>. The perpetrator of trafficking crimes against women and children if released on bail can revert back to committing similar crimes against other vulnerable women and children. The chances of an accused disappearing after grant of bail are also a high possibility. One of the most important reasons to oppose bail in matters involving trafficking of women and children is to ensure that the accused do not intimidate/ harass the victims, once they are out on bail.

### ***Declarations from the sureties u/s. 44 I A Cr. PC***

Under the provision of Sec. 44 I -A of Cr. PC, every person standing surety to an accused person for his release on bail, shall make a declaration before the Court as to the number of persons to whom he has stood surety including the accused, giving therein all the relevant particulars. The court before which these individuals stand as surety is required to ascertain the sufficiency of fitness of these persons. The sureties may file affidavits for determining their fitness or sufficiency<sup>131</sup>.

### **Challenge: Ensuring Safety of Victims upon Release of accused on bail**

When an accused is released on bail it becomes pertinent to ensure that the victims' safety is not compromised. Making sure that the accused don't gain access to the very victims they have allegedly exploited is of paramount importance. The imposition of conditions in the Court's order granting bail will ensure that the victim cannot be approached and evidence shall not be tampered with. Sec. 437 (3) of Cr. PC provides for statutory conditions that may be placed by a Court upon a person whilst granting bail. Upon grant of bail, conditions that restrain the accused from establishing contact with the prosecutrix, may be made<sup>132</sup>. Further, if there is a violation of the conditions that were laid out in the bail order the Public Prosecutor must petition the Court of Sessions or High Court for cancellation of bail u/S. 439(2) of Cr. PC.

The following table lists out offences under the ITPA and provides information on the punishments as well as whether the offences areailable or non-ailable. Notwithstanding the provisions of the Criminal Procedure Code (Cr. PC), 1973, all offences punishable under the ITPA, 1956 shall be deemed to be cognizable offences as per Sec. 14 of the ITPA, 1956.

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<sup>129</sup> State of Punjab v. Gurmit Singh, 1996 AIR (SC) 1393 (Supreme Court 1996)

<sup>130</sup> State of Maharashtra v. Chandraprakash Kewalchand Jain, 1990 AIR (SC) 658 (Supreme Court 1990)

<sup>131</sup> Moti Ram v. State M.P. (1978) 4 S.C.C 47

<sup>132</sup> Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh, 1978 (84) Cr.LJ 502 (Supreme Court 1977) (In this case the court had imposed a condition that the accused shall stay out of the village of Gonegondla, where many of the witnesses resided. The Court allowed the accused to enter the village one day a week in order to oversee their agricultural business, but they had to report to the police station when they arrived and left the village.)

| Sections  | Punishment (imprisonment)               | Bailable/ Non-Bailable |
|---|---|------------------------|
| Sec. 3 (1)  | 1 <sup>st</sup> conviction 1 to 3 years | Bailable               |
| Sec. 3 (1)  | 2 <sup>nd</sup> conviction 2 to 5 years | Bailable               |
| Sec. 3 (2)  | 1 <sup>st</sup> conviction 2 years      | Bailable               |
| Sec. 3 (2)  | 2 <sup>nd</sup> conviction 5 years      | Non - Bailable         |
| Sec. 4 (if victim is an adult)                        | 2 years                                 | Bailable               |
| Sec. 4 (if victim is a child or minor)                | 7 to 10 years                           | Non Bailable           |
| Sec. 5  | 3 to 7 years                            | Non - Bailable         |
| Sec. 5 (offence committed against will of any person) | 7 to 14 years                           | Non - Bailable         |
| Sec. 5 (if victim is a child)                         | 7 years to life imprisonment            | Non - Bailable         |
| Sec. 5 (if victim is a minor)                         | 7 to 14 years                           | Non - Bailable         |
| Sec 6.  | 7 to 10 years to life imprisonment      | Non - Bailable         |
| Sec. 7 (1)  | 3 months                                | Bailable               |
| Sec. 7 (1) (if victim is child or minor)              | 7 to 10 years to life imprisonment      | Non - Bailable         |
| Sec. 7 (2)  | 1 <sup>st</sup> conviction 3 months     | Bailable               |
| Sec. 7 (2)  | 2 <sup>nd</sup> conviction 6 months     | Bailable               |
| Sec. 8  | 1 <sup>st</sup> conviction 6 months     | Bailable               |
| Sec. 8  | 2 <sup>nd</sup> conviction 1 year       | Bailable               |
| Sec. 9  | 7 to 10 years to life imprisonment      | Non - Bailable         |

## I. Absconding accused

An absconder is someone who hides himself to evade the process of law<sup>133</sup> or one who intentionally makes himself inaccessible to the processes of law<sup>134</sup>. To be an 'absconder' in the eye of law, it is not necessary that a person should have run away from his home, it is sufficient if he hides himself to evade the process of law, even if the hiding place be his own home.

In many instances the accused abscond to frustrate witnesses who are prepared to testify and thwart the victim's pursuit of justice.

<sup>133</sup> Kartarey v. State of Uttar Pradesh (Criminal Appeal No. 153 of 1973), the Supreme Court has held that an absconder is one who makes himself willfully unavailable to the process of law.

<sup>134</sup> State of Mysore v. Sanjeeva, 1956 AIR (Mys) 1, 1956 Cr. L.J. 77, paragraph 14 (Mysore High Court 1955)

**Challenge:** Proceeding with a trial in the absence of an accused. Willful delay on the part of the accused to ensure that victim's testimony is weakened.

The Cr. PC makes provisions for the court to record evidence in the absconder's absence. Sec. 299(1) Cr. PC provides that the court may examine prosecution witnesses in absence of the accused and record their depositions, if it is proved that the accused has absconded and that there is no immediate prospect of arresting him. This provision may be effectively utilized when trials get delayed due to the absence of the accused. This provision may be relied upon by the Prosecutor to counter long trials and extended periods of time which victims are made to spend at Government/ NGO run Shelter Homes pending their depositions. Depositions recorded u/S. 299 (1) may be given in evidence against the accused if the deponent is:-

- dead, or
- incapable of giving evidence, or
- his/ her presence cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

Further, Sec. 317(1) (2) Cr. PC which provides for provisions of dispensing with the attendance of the accused may be read into situations of accused absconding. Laying reliance on this provisions it may be stated that, if an accused is not present during criminal proceedings, the court may, if it thinks fit: (i) adjourn the proceedings or (ii) order that the case of the absent accused be taken up or tried separately. However, while doing this the court must record clearly and in detail reasons for the order.

The Madras High Court held that Sec. 317(2) Cr. PC gives power to every judge and magistrate to split up a case against an accused if their personal attendance is necessary, but they have absconded and or failed to participate in the trial. The trial against an absconding accused can be split, whether or not they are represented by a pleader<sup>135</sup>.

Relevant provisions of the Cr. PC with respect to an accused who has absconded are represented in the table below.

| Sec. Cr. PC | Particulars  |
|-------------|--|
| 82          | Proclamation for person absconding.                                      |
| 83          | Attachment of property of person absconding.                             |
| 84          | Claims and objections to attachment.                                     |
| 85          | Release, sale and restoration of attached property.                      |
| 205         | Magistrate may dispense with personal attendance of accused.             |
| 299         | Record of evidence in absence of accused.                                |
| 317         | Provisions for inquiries and trial being held in the absence of accused. |

<sup>135</sup> In Re Duraisingam, 1983 CrLJ 1765, paragraph 5 (Madras High Court 1983)



## J. Identity Disclosure Laws

The Juvenile Justice (Care and Protection of Children) Act, 2000 (JJ Act) vide Sec. 21 stipulates that details of inquiry of 'juvenile in conflict with law' and 'child in need of care and protection' may not be published in any form. Even surrogate details such as name/ address/ school or any other particular which may lead to the identification of the child/juvenile should not be published. The Prosecutor must ensure protection of the identity of trafficked victims in the first instance when they are brought to the court. Anyone who contravenes this provision shall be liable to pay a fine which may extend to twenty five thousand rupees. Sec. 21 in the JJ Act has been affirmed in *Jose Maveli v. State of Kerala*<sup>136</sup>. The IPC also provides within Sec. 228-A for a prohibition on the disclosure of identity of victims of certain offences. Punishment may be imposed if details such as name, address and photographs of victims of rape within the meaning of Sec. 376, 376-A, 376-B, 376-C or 376-D<sup>137</sup> are published.

An alternate strategy to keep a check over media agencies is the Press Council of India. The Prosecutor can make a complaint against news agencies that fail to adhere to protect the identity of victims of rape and sexual assault<sup>138</sup>.

**Challenge:** Protecting victims identity during trial from the media and press

The Press Council of India<sup>139</sup>, a statutory quasi-judicial body, has adopted guidelines cautioning against the identification of victims of rape or sexual assault. These Guidelines clearly state that the identities of victims of sexual abuse/ assault is not to be revealed. Disclosure of identity of a victim either through publishing or printing may have repercussions on matters connected with the repatriation of foreign victims. Disclosure of identity may lead to permanent branding of these victims<sup>140</sup>.

## K. Statements under Sec. 164 of the Cr.PC

Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under the Cr.PC or under any other law, or at any time before the commencement of the inquiry or trial.

Any statement (other than a confession) shall be recorded in the manner provided for the recording of evidence which in the opinion of the Magistrate is best fitted to the circumstances of the case the Magistrate has the power to administer oath to the persons whose statement is so recorded. The

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<sup>136</sup> 2007 Indlaw Ker 175; 2007 (2) KIT 762

<sup>137</sup> In the case of *State of Karnataka v. Puttaraja*, 2004 AIR (SC) 433 (Supreme Court 2003) the SC clearly laid out guidelines on this issue and stated of how it sought to promote protection of the identity of victims of rape. These guidelines may be read into and applied across the board to cases of all other form of sexual abuse.

<sup>138</sup> In *Shri Jayanta Deka & others v. The Editor Sadin Guwahati Sr. No. 37 (F No. 14/139/03-04 PCI)*, the Indian Press Council held that while reporting crime involving rape or sexual assault of children, the names, photographs of victims or other particulars leading to their identity should not be published. It reasoned that while publication of information that discloses victim identity serves no legitimate public purpose, "it may bring social opprobrium to the victims and social embarrassment to their relations, family, friends, community, religious order or the institution to which they belong."

<sup>139</sup> <http://presscouncil.nic.in>

<sup>140</sup> Norm 6 of the Press Council of India Norms states that "while reporting crime involving rape, abduction or kidnap of women/females or sexual assault on children, or raising doubts and questions touching the chastity, personal character and privacy of women, the names, photographs of the victims or other particulars leading to their identity shall not be published."



statement thus recorded shall be forwarded to the Magistrate before whom the case is to be inquired or tried.

In a trafficking related matter, if the Prosecutor feels that a rescued victim is in a position to give a statement which will further strengthen the case then he may make an application to the court to take a statement of the victim u/s. 164 Cr. PC. These statements can be used during bail hearings and other pre-trial hearings. If there is a situation wherein the victims become subsequently unavailable then these statements become relevant in attaining convictions. The statement of the victim/ witness cannot be discarded merely because they were recorded u/s. 164 of Cr. PC. But their evidence should be approached with caution as the witnesses feel tied to their previous statement given on oath and have but a theoretical freedom to depart from the earlier version<sup>141</sup>. A statement of a witness recorded by a Magistrate u/s. 164, Cr. PC is a public document and it does not require any formal proof it is not necessary to summon the Magistrate recording the prior statement to prove the contents thereof<sup>142</sup>.

## **L. Rights of a Victim**

Victims of human trafficking are entitled to all rights granted to each person under the Constitution of India. Their rights are therefore, to be protected at every stage of the criminal justice system by the police, the prosecutors and the judiciary. An enumeration of some of the victim's rights during rescue, post rescue and during trial is provided below. The prosecutor may not necessarily have a role to play at the stage of rescue of the victims. However, post rescue and during trial the prosecutors need to ensure protection of victims' rights.

### ***During Rescue***

1. The rescued persons are to be treated as 'victims' and not as 'offenders/ accused'. Victims should be treated with compassion, respect and dignity.
2. Victims are entitled to access to justice and prompt redress, as provided for by national legislations, for the crimes of trafficking inflicted upon them and the resultant abuse and exploitation.
3. All procedural formalities as outlined in the ITPA and other laws need to be complied with during search and rescue of victims.
4. The victims are to be segregated from the offenders as soon as they are rescued to prevent the offenders from threatening them.
5. During rescue, the victim should be allowed time to collect her children and belongings<sup>143</sup>.

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<sup>141</sup> Balak Ram v. State of UP, AIR 1974 SC 2165

<sup>142</sup> Guruvindappali Anna Rao v. State of AP, (2003) 2 Crimes 72

<sup>143</sup> For further details see Standard Operating Procedures on Investigating Crimes of Trafficking for Commercial Sexual Exploitation, UNODC, 2007

## **Post Rescue**

1. The victims are not to be treated as accused/ offenders.
2. The victims are not to be placed in the same room/ transport along with the offenders, as there is a possibility that the victim would undergo trauma at the sight of the perpetrators or that they may be threatened.
3. The statement of the victim is to be taken in the presence of a social worker or any woman police official<sup>144</sup>.
4. The Investigation Officer should not pressurize the victim, if the victim is not in a position to give evidentiary statement<sup>145</sup>.
  - a. It is imperative that the victim's statement should be recorded at the earliest instance. However, if it seems that the victim is in a state of mental shock then it is inadvisable to coerce her to give a statement. In such cases, as an alternative the police authorities can be requested/ instructed to take the statement of the girl when she is in the rehabilitation/ Shelter Home. Under Sec. 160 of the Cr. PC (power to summon a victim to attend a police station) there is a proviso that a female witness or male witness less than 15 years has the right to give their statement at their place of residence rather than being compelled to attend a police station<sup>146</sup>.
  - b. Many states have enacted rules that set out the procedures to be followed for minor victims. For ex. Sec. 8 (3) in Chapter III of the Rules framed by the Maharashtra Government under the JJ Act, 2000 lays down that a 'child in need of care and protection' shall not be kept in the police station and shall be kept in a place of safety till they are produced before the CWC. Other states have formulated similar provisions.

## **Victim Rights during Medical Examination**

The prosecutor may pray to the court to ensure the following when the victim is sent for age verification/ medical examination:-

1. The victim is accompanied at all times by a woman police official or female representative of an NGO.
2. The accused and the victim should be segregated whilst being sent for their respective medical examinations.
3. The victim has a right to be examined only in the presence of trained medical staff and that the presence of those who are not essential to the process should be avoided.

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<sup>144</sup> Sec. 15 (6A) of ITPA

<sup>145</sup> For further details refer, 'Journey to Justice' Manual on Psychosocial Intervention by UNODC, 2008

<sup>146</sup> Under the amendments to the Cr. PC, 2008 - In section 157 of the principal Act, in sub-section (1), after the proviso, the following proviso shall be inserted, namely:- "Provided further that in relation to an offence of rape, the recording of statement of the victim shall be conducted at the residence of the victim or in the place of her choice and as far as practicable by a woman police officer in the presence of her parents or guardian or near relatives or social worker of the locality."

4. The victim has a right to refuse invasive tests. However, there may be times when it is required that a test for determination of sexual abuse be conducted. In these situations the NGO representative/ counselor may counsel the victim appropriately.
5. The victims are to be taken to a Shelter Home/ Protective Home/ Children's Home after medical examination.
6. Testing for HIV/AIDS must not be done without the persons' consent. Willingness of the victim is mandatory and if such tests have been already undergone, then their status and their identity is a subject matter of confidentiality<sup>147</sup>. The National AIDS Control Organization (NACO) guidelines<sup>148</sup> may be referred to by Prosecutors.

The rights of a victim during trial will be discussed in the subsequent segment dealing with trial.

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<sup>147</sup> Public at large v.State of Maharashtra (Suo Moto Writ Petition No. 112 of 1996)

<sup>148</sup> [http://www.nacoonline.org/guidelines/guideline\\_10.pdf](http://www.nacoonline.org/guidelines/guideline_10.pdf)

## Trial

### A. Trial and the role of prosecutors within a trial

Convicting those that indulge in trafficking is a major part of what goes into attaining justice for the victims of trafficking. Existing literature reveals that the percentage of convictions in trafficking cases is less and thus, more often than not victims feel vulnerable to future retribution from their exploiters. Further, the traffickers almost immediately begin to replenish their “stock of human victims” once they are freed of their charges. *The cycle is systemic and endless. The only way to break this vicious cycle is by way of effective prosecution the prosecutor's role is to prosecute however, in doing so he protects other victims from being abused and prevents the re-occurrence of these crimes.*

### B. Framing of Charges

The process of framing of charges is an important part of how the trial is to proceed. Using multiple statutes and effectively filtering the ones that clearly fall into the given set of facts is of utmost significance. Proceeding with a weak set of charges is more often than not going to lead to acquittal. At the initial stage of framing of charges, the prosecution evidence does not commence. The Court has, therefore, to consider the question of framing the charges on general considerations of the material placed before it by the investigating agency. At this stage, the truth, veracity and effect of the judgment which the prosecution proposes to adduce are not to be meticulously judged<sup>149</sup>.

### C. Amendment/Addition of Charges

Under Sec. 216 of Cr. PC, the Court may alter or add a charge any time before the judgment is pronounced. This process must be explained to the accused and if it causes no prejudice to the accused then the trial will proceed immediately and if in the eyes of the judge there is no prejudice then the trial will progress normally. What is relevant in this entire process is that there must be no prejudice caused to the accused or the prosecutor in the conduct of the case. Whenever a charge is altered the Prosecutor or the accused will be allowed to recall any of the witnesses and re-examine them, however, this will have to be limited to the scope of the altered charge<sup>150</sup>.

When there is addition/ amendment of charges and the defence summons the victim to be re-examined, the prosecutor needs to ensure that questions that have been earlier asked and answered

<sup>149</sup> Supdt. and Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja, AIR 1980 SC 52

<sup>150</sup> Sec.217 Cr.PC

are not repeated again. The victims are often fearful and anxious of the court and legal procedures. The process of re-examination may cause trauma to the victim. The prosecutor must therefore, explain the process to the victim to assuage her apprehensions.

## **D. Preventing Secondary Victimization / Re-victimization**

It is often stated that a woman who is raped undergoes two crises – the rape, and the subsequent trial. While the first seriously wounds her dignity, curbs her individuality, destroys her sense of security and may often ruin her physically the second is no less potent of mischief, in as much as it not only forces her to re-live through the traumatic experiences, but also does so in the glare of publicity in a totally alien atmosphere, with the whole apparatus and paraphernalia of the criminal justice system focused upon her<sup>151</sup>. The same is true of trafficking victims when faced with the criminal justice system.

Expressing concern particularly about the treatment of victims of sexual offences in the courts during their cross-examination, in *State of Punjab v/s Gurmit Singh and Others*<sup>152</sup>, the Supreme Court observed: “There has been lately, a lot of criticism of the treatment of the victims of sexual assault in the court during their cross-examination. The provisions of the Evidence Act regarding relevancy of facts notwithstanding, some defence counsels adopt the strategy of continual questioning of the prosecutrix as to the details of the rape. The victim is required to repeat again and again the details of the rape incident not so much as to bring out the facts on record or to test her credibility but to test her story for inconsistencies with a view to attempt to twist the interpretation of events given by her so as to make them appear inconsistent with her allegations. The court, therefore, should not sit as a silent spectator while the victim of crime is being cross-examined by the defence. It must effectively control the recording of evidence in the court. While every latitude should be given to the accused to test the veracity of the prosecutrix and the credibility of her version through cross-examination, the court must also ensure that cross-examination is not made a means of harassment or causing humiliation to the victim of crime. A victim of crime, it must be remembered, has already undergone a traumatic experience and if she is made to repeat again and again, in unfamiliar surroundings what she had been subjected to, she may be too ashamed and even nervous or confused to speak and her silence or a confused stray sentence may be wrongly interpreted as 'discrepancies and contradictions' in her evidence”.

There are various ways in which victims are put through “Secondary Victimization” during investigation and prosecution:-

- Insensitive and adverse questioning by the police and the lawyers, who may harbour a 'guilty victim syndrome' a feeling that the victim has somehow “asked” to be victimized
- Embarrassing and intimidating questions.

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<sup>151</sup> 84<sup>th</sup> Law Commission Report on RAPE AND ALLIED OFFENCES: SOME QUESTIONS OF SUBSTANTIVE LAW, PROCEDURE AND EVIDENCE, 1980. Chapter 1, para 1.2

<sup>152</sup> (1998) 2 SCC 384 Para 22

- Uncomfortable and insecure or hostile environment at the police stations and courts often involving close proximity to the offender (whether related or a stranger).
- Lack of clear, simple explanation of proceedings and decisions to the victim.
- Fear resulting from intimidating threats, and acts by the traffickers.

A court may therefore, order special directives for preventing re-victimization and protecting a trafficking victim from trauma, shame and embarrassment while testifying. In fact, to most effectively elicit the truth, it is “absolutely necessary” that the environment in which a victim/ witness testifies is a “free environment without any embarrassment<sup>153</sup>.” Some defence counsels try and negate these special procedures available for the victims of sex trafficking by laying reliance on natural justice. The rights of an accused to have all allegations/proceedings held in his presence must be measured against the victims without compromising the truth. In cases where it will not obstruct the truth-finding capabilities of a trial, a court may order measures that protect the victim/witness from unnecessary trauma, shame and embarrassment while testifying<sup>154</sup>.

Sec. 327(1) Cr. PC warrants that proceeding ought to be held in open court. However, in sub clause (2) the section makes a special provision whereby the trial may be held *in camera* in crimes of rape. Sec. 273 of the Cr. PC states that except where otherwise provided, all evidence taken in the course of criminal proceedings shall be taken in the presence of the accused or his pleader. This allows the accused to challenge evidence, note the demeanour of the witness and confront witnesses making statements against him or her<sup>155</sup>.

However, in trials of trafficking crimes, especially when children are victims, the mere sight of the accused may cause an element of extreme fear in the mind of the victim/ witness or put her in a state of shock. The victim will not be able to testify fully to the details of the incident, which inhibits the truth-finding process, and may result in the miscarriage of justice<sup>156</sup>. Rules of procedure are meant to facilitate, and not obstruct, the truth-finding process. Therefore, a court may enlarge or expand rules of criminal procedure to accommodate victims during testimony in order to elicit the truth and do justice to the parties<sup>157</sup>. In the absence of legislation, Supreme Court decisions have begun to define permissible accommodations. In the Sakshi case the following directions were passed with respect to child victims:

- The *in camera* provisions of Section 327(2) should be applied to Sec. 354 of IPC (assault or criminal force to woman with intent to outrage her modesty), and Sec. 377 of IPC (voluntary carnal intercourse against the order of nature with a man, woman or animal).
- The questions put in cross-examination on behalf of the accused, insofar as they relate

<sup>153</sup> Sakshi v. Union of India, 2004 (5) SCC 518 (Supreme Court 2004)

<sup>154</sup> Sakshi v. Union of India

<sup>155</sup> Dharmanand Pant v. State of Uttar Pradesh, AIR 1957 SC 594

<sup>156</sup> Sakshi v. Union of India

<sup>157</sup> Sakshi v. Union of India

directly to the incident, should be given in writing to the Presiding Officer of the court who may put them to the victim or witnesses in a language, which is clear and is not embarrassing.

- The presiding judge should also allow the victim of child abuse or rape, sufficient breaks as and when required while giving testimony in court.
- A screen or some such arrangement can be made where the victim or witnesses do not have to undergo the trauma of seeing the body or the face of the accused.

Soon after the judgment in the Sakshi case, the Delhi High Court passed a judgment wherein it laid down further parameters with respect to the conduct of trial in a child sexual abuse case<sup>158</sup>. The Court held that the child could give evidence in an environment outside the Court if he / she were uncomfortable going to the Court. It further held that in all these cases, the child would be entitled to get a support person with him / her during the trial, and this support person could also be the parent of the child.

The prosecutor should make effective use of the above quoted judgments in all trials involving child/ minor victims of trafficking.

In another case, it has been held that, in cases of sexual assault against women, a court should consider assigning a female judge so that the witness can testify with greater ease and assist the court to properly discharge its duties<sup>159</sup>.

## E. Video Conferencing

Recording of evidence by way of video-conferencing vis-à-vis Sec. 273 Cr. P. C. has been held to be permissible by the Supreme Court in the case of State of Maharashtra v/s Dr. Praful B. Desai<sup>160</sup>. The Supreme Court observed: “The evidence can be both oral and documentary and electronic records can be produced as evidence. This means that evidence, even in criminal matters, can also be by way of electronic records. This would include video-conferencing. Video-conferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away, with the same facility and ease as if he is present before you i.e. in your presence. Thus, it is clear that so long as the accused and/ or his pleader are present when evidence is recorded by video-conferencing, that evidence is recorded in the “presence” of the accused and would thus fully meet the requirements of Section 273 Criminal Procedure Code. Recording of such evidence would be as per “procedure established by law”. The advancement of science and technology is such that now it is possible to set up video- conferencing equipments in the court itself. In that case evidence would be recorded by the Magistrate or under his direction in the open court”.

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<sup>158</sup> Sheba Abidi v/s State of Delhi and Another, 113 (2004) DLT 125

<sup>159</sup> State of Punjab v. Gurmit Singh, 1996 (102) Cr.LJ 1728 (Supreme Court 1996)

<sup>160</sup> (2003) 4 SCC 601 p.603

Another order by the High Court of Delhi on video conferencing can be effectively utilized by prosecutors. The High Court delivered this order<sup>161</sup> in a petition filed by an NGO - Prajwala of Hyderabad. Due to the intervention of the Delhi High Court, girls rescued from the brothels in Delhi were repatriated and rehabilitated to their hometowns in several parts of India including Andhra Pradesh. The rehabilitation work was carried out by the Andhra Pradesh government with the involvement and participation of the NGO, Prajwala. Many of these girls who had been rehabilitated to districts like Nellore were summoned by the trial court in Delhi for providing evidence against the exploiters. Since these girls were repatriated after spending considerable time in the rescue home in Delhi, ideally speaking, their statements should have been recorded by the trial court during that period. However, due to the delays in the trial, this was not done and these girls were called to Delhi. The government agencies in Andhra Pradesh tried their best to get in touch with these girls. As their efforts failed, Prajwala was asked to step in again. The NGO realized that these girls were reluctant and unwilling to go to Delhi mainly because they did not want to undergo any trauma and agony again. It was decided to move the Trial Court for facilitating the recording of evidence from these girls in their hometowns. However, the court did not approve of this for want of the required infrastructure.

The matter was therefore taken up with the Delhi High Court which directed the government counsel to look for alternatives. The counsels for the government and the NGO with the assistance of the Andhra Pradesh government found that a video - conferencing facility was available in Andhra Bhawan, New Delhi. The state government agreed to provide this facility from Delhi and the concerned district headquarters in Andhra Pradesh. The High Court confirmed the availability of these facilities at Andhra Bhawan and then gave orders for recording the evidence of the victim through video - conferencing.

## **F. Private Pleaders**

It is the discretion of the Court to grant permission to the party who desires to be represented before the Court by a private person who is not an advocate<sup>162</sup>. When Sec. 301 (2) of the Cr.PC authorizes a private counsel to act in a case under the direction of the Public Prosecutor, he may do everything in the case provided that it is done under the direction and control of the Public Prosecutor<sup>163</sup>. The word “conduct” in Sec. 301(2) of the Cr. PC conveys the idea of leading and guiding; and the person conducting the prosecution determines all important questions of policy involved in the course of the trial and the attitude to be adopted by the prosecution towards all material witness or demands made by the accused with respect to the evidence. So long as the Public Prosecutor leads and guides, in the above sense the pleader of the complainant, no objection to such a procedure could be entertained<sup>164</sup>. If a lawyer instructed by a private person feels that the trial is not conducted fairly it will be open to him to draw the attention of the court in that regard. If the court feels that some assistance is necessary on

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<sup>161</sup> Cr.L.M. 1467/04 in Cr.L.W.532/1992

<sup>162</sup> Harishankar Rastogi Vs Girdhari Sharma S.C. 1979 Cr.L.J 778; AIR 1978 SC 1019 Section 32 of the Advocates Act 1961 also empowers the Court to permit any person to appear before it.

<sup>163</sup> Sama Ram v.State of Rajasthan,(2002) 2 Raj LW 1302:2002 Cr.LJ 3134(3137) (Raj)

<sup>164</sup> Sama Ram v.State of Rajasthan



a point rising before it, it may appoint such lawyer or any other lawyer as amicus curiae<sup>165</sup>. With the permission of the court the person so appointed can submit written arguments<sup>166</sup>.

Using the services of private pleaders to research the law and to assist in trial can prove to be effective in human trafficking cases. However, the onus of the entire case will be upon the Public Prosecutor.

## G. Evidence in a Trial

While establishing human trafficking offences, proving abuse and exploitation (physical, sexual, etc.) is an important part of the trial. Several types of documents can be produced during a trial on trafficking for proving charges against the accused.

**I. Medical Records:** Medical documents are the best and most potent tool for establishing physical, sexual and other forms of abuse/ exploitation. It is well settled that non-examination of doctor and non-production of the medical report would not be fatal to the prosecution case if the evidence of the prosecutrix and other witnesses is worthy of credence and inspires confidence<sup>167</sup>. If the other side challenges the veracity of a medical certificate, the burden lies on the party producing it to prove the correctness of the statements made therein. In the absence of any challenge, it should be accepted as correct<sup>168</sup>. Medical certificates cannot be rejected simply because they are not printed on plain paper if an adequate explanation is given for why the proper form was not used<sup>169</sup>.

Below is a list of documents that a Prosecutor may deal with during a trial:

- Age verification certificates
- Sexually Transmitted Disease (STD) certificate
- Medical records of pregnancies/ abortion
- Medical records of accused
- Medical documentation of sexual assault

### Age Provisions in Various Statutes

| Law                   | Section/ Provision                       | Girls | Boys |
|-----------------------|--|-------|------|
| Constitution of India | Article 24                               | <14*  | <14  |
| Indian Penal Code     | 361- Kidnapping from lawful guardianship | <18   | <16  |
|                       | 366A- Procurement of a minor girl        | <18   | -    |

<sup>165</sup> Manharlal Shah v. Yogeshkumar Kanaiyalal Saraia, 1988 920 Crimes 13, 16 (Guj-DB)

<sup>166</sup> Asaram Dadaro Giram v. State of Maharashtra, 1995 (4) Crimes 34 (Bom)

<sup>167</sup> State v. Dayal Sahu (2005) Cr.LJ 4375: AIR 2005 SC 3570

<sup>168</sup> Ratanlal at 551, citing Navnitlal v. Hasmukhlal, AIR 1988 Guj 34

<sup>169</sup> Ammini and others v. State of Kerala, 1998 AIR (SC) 260, 1998 (104) Cr.LJ 481 (Supreme Court)

|                                 |  |       |       |
|---------------------------------|--|-------|-------|
|                                 | 366B- Importation of girl from foreign country | <21   | -     |
|                                 | 372- Selling minor for prostitution            | <18   | <18   |
|                                 | 373- Buying minor for prostitution             | <18   | <18   |
|                                 | 375 (6)- Rape with or without consent          | <16   | -     |
|                                 | 376 (2)- Rape punishable by 10 years to life   | <12   | -     |
| ITPA                            | 2 (ca)- Major                                  | >18** | >18   |
|                                 | 2 (cb)- Minor                                  | 16-18 | 16-18 |
|                                 | 2 (aa)- Child                                  | <16   | <16   |
| Juvenile Justice Act            | 2 (k)- Juvenile or child                       | <18   | <18   |
| Child Labour Act                | 2 (ii)- Child                                  | <14   | <14   |
| Children Pledging of Labour Act | 2  | <15   | <15   |
| Factories Act                   | 2 (a) Adult                                    | > 18  | >18   |
|                                 | 2 (b) Adolescent                               | 15-18 | 15-18 |
|                                 | 2 (c) Child                                    | <15   | <15   |
| Minimum Wages Act               | 2 (bb) - Child                                 | <14   | <14   |
|                                 | 2 (a) - Adolescent                             | 14-18 | 14-18 |
| Mines Act                       | 2 (b) - Adult                                  | <18   | <18   |
| Motor Transport Workers Act     | 2 (a) Adolescent                               | 14-18 | 14-18 |
|                                 | 2 (b) - Adult                                  | <18   | <18   |
|                                 | 2 (c) Child                                    | <14   | <14   |

\* < denotes less than

\*\* > denotes more than

**2. Photographs:** Contemporaneous photographs of an alleged incident are admissible as evidence. The accuracy of photographs must be established by oral evidence given by either the photographer or of any other person who has knowledge regarding the accuracy of the photograph<sup>170</sup>.

**3. Video Evidence:** Audio and video tape recordings are admissible if proper safeguards are taken to ensure their reliability<sup>171</sup>. Tape records possessing evidentiary value, are documents as defined in Sec. 3 of the Evidence Act<sup>172</sup> and are on no different footing than photographs; both are

<sup>170</sup>Yusuf Ali Nagree v.State of Maharashtra 1968AIR (SC) 147, 1968 (74) Cr.LJ 103

<sup>171</sup> Ram Singh v.Col.Ram Singh, 1986AIR (SC) 3 (Supreme Court 1985)

<sup>172</sup> Sec. 3 states that a document means "any matter expressed or described upon any substance, by means of letters, figures, or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording the matter."

admissible as primary<sup>173</sup> or secondary evidence<sup>174</sup>.

All audio evidence must pass the following tests:

- 1) The voice on the record must be identified;
- 2) The accuracy must be proved by satisfactory evidence, either direct or circumstantial;
- 3) Every possibility of tampering with the tape must be ruled out;
- 4) It must be relevant;
- 5) The tape must be carefully sealed and kept in safe or police custody; and
- 6) The voice should be clearly audible<sup>175</sup>.

Even in cases in which tape records are illegally obtained, such records may still be admitted as evidence. Regardless of the means or manner in which the document is obtained, even if by improper or illegal means, it will not be a bar to its admissibility as long as it is relevant and trustworthy<sup>176</sup>. However, the way in which the evidence was obtained will be a factor in assessing its genuineness.

## H. The Trial Process

### i. Victim pre-preparation

There is little defined law that governs the code of conduct when preparing witnesses or victims for trial. The Bar Council of India has defined a general code of professional conduct and etiquette<sup>177</sup>, which gives general guidelines of duties that the advocate owes to the client and to the court. The Prosecutor may involve NGOs that have had experience in dealing with trials of trafficking and in counseling victims. These organizations can serve as facilitators and can help in extending support services to the Prosecutor.

### ii. Duties to the court and client

The advocate owes a duty to the client to fearlessly uphold the interests of the client by all fair and honorable means<sup>178</sup>. However, at the same time, an advocate owes a duty to the court to not influence

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<sup>173</sup> See Indian Evidence Act, 1872, Sec. 62 ("Primary evidence means the document itself produced for the inspection of the Court."). See also N. Sri Roma Reddy, v. V.V. Giri, 1971 (1) SCR 399 (Supreme Court 1970) - holding that the tape recording itself is "primary and direct evidence admissible as to what has been said and picked up by the recorder." See also R.M. Malkani v. State of Maharashtra AIR 1973 SC 157 and State of Maharashtra v. Prakash Vishnurao Mane (1977) 79 Bom LR 217

<sup>174</sup> See Indian Evidence Act, 1872, Sec. 63(2) ("copies made from the original by mechanical process which in themselves ensure the accuracy of the copy"). Illustration (a) under Sec. 63 states that "a photograph of an original is secondary evidence of its content, though the two have not been compared, if it is proved that the thing photographed is the original." See also State of Maharashtra v. Prakash Vishnurao Mane (1977) 79 Bom LR 217

<sup>175</sup> Ram Singh v. Col. Ram Singh, 1986 AIR (SC) 3 (Supreme Court 1985) Copies of the tape record must be given to the accused pursuant to Cr.PC Sec. 173(5). But see State of Maharashtra v. S.P. Munje, 1999 Cr.LJ 1510 (Bombay High Court 1998) (holding that the actual tape cassettes did not have to be given, but only the transcripts of the cassettes).

<sup>176</sup> Magraj Patodia v. R.K. Birla, 1971 AIR (SC) 1295, 1970 (2) SCC 888. The SC held that even though files that contained correspondence against the accused may have been obtained improperly, the evidence was still admissible as long as its relevance and genuineness was proven. Malkani v. State of Maharashtra, 1973 AIR (SC) 157, 1973 (79) Cr. LJ 228 The SC held that evidence obtained by secretly taping the accused person's conversation was not illegal; the court affirmed the principle that even if evidence is illegally obtained, it is still admissible.

<sup>177</sup> [http://lawmin.nic.in/la/subord/bci\\_index.htm](http://lawmin.nic.in/la/subord/bci_index.htm)

<sup>178</sup> Bar Council Rules of India, Part VI, Chapter II, Section II, Rule 15

a decision by any illegal or improper means<sup>179</sup>. An advocate appearing for the prosecution must not conduct the prosecution so as to lead to the conviction of the innocent and shall scrupulously avoid suppression of material capable of establishing the innocence of the accused<sup>180</sup>. Based on these principles, an advocate has wide discretion in preparing a witness as long as it is done by “fair and honourable means,” does not influence the court improperly, and does not suppress evidence that exonerates the accused.

Accordingly, it seems acceptable to<sup>181</sup>:

1. Seek to put the victim-witness at ease about the ordeal of giving evidence.
2. Explain to the victim-witness court procedures, the role of the prosecutor, defence counsel, judge and witnesses in a court proceeding, the layout of the court and the order in which people will speak.
3. Explain to the victim-witness the special procedures which may be requested. For example, a petition for an *in camera* hearing or a screen, if necessary, to put the witness at ease.
4. Organize for the victim-witness to visit a court and to observe an ongoing trial.
5. Allow the victim-witness to refresh her memory with a contemporaneous note (if Sec. 159 Indian Evidence Act applies) when giving evidence in court.
6. Advice about the manner in which the victim-witness should give evidence, such as: speak loudly and slowly, address the judge, answer the question, keep answers short, try to keep composure under cross-examination, listen carefully to questions and to speak up if s/he does not understand or cannot remember.
7. Ask the victim-witness possible questions that may be asked during direct and cross examination. However, the Prosecutor must be careful not to influence what the victim-witness might say.

Conversely, it does not seem acceptable to:

- 1) Tell the victim-witness what she should say.
- 2) Question the victim-witness with a motive to encourage her to change her view or obscure her recollection.

### **iii. Using Sec. 161 Cr.PC - police statements to refresh a victim's memory**

It is not permissible to prepare a victim-witness by using a police statement obtained u/s. 161 Cr.PC<sup>182</sup>. Generally, a victim-witness may refresh her memory during examination by referring to *any* writing which she made at the time the transaction occurred or immediately afterwards (the Court must

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<sup>179</sup> Bar Council Rules of India, Part VI, Chapter II, Section I, Rule 3

<sup>180</sup> Bar Council Rules of India, Part VI, Chapter II, Section II, Rule 16

<sup>181</sup> These are observations/ practices which have been deemed to be good practices, established after consultations held with several NGOs working on the issue of anti human trafficking.

<sup>182</sup> Cr.PC Section 161 states:“(a) Any police officer making an investigation...may examine orally any person supposed to be acquainted with the facts and circumstances of the case... (c) The police officer may reduce into writing any statement made to him during the course of examination; and if he does so he shall make a separate and true record of the statement of each such person whose statement he records.”

consider it likely that the statement was made when the subject matter was still fresh in the witness' memory)<sup>183</sup>. However, Sec. 162 Cr.PC states that a police statement obtained by police u/s. 161 Cr.PC may not be used to refresh the memory of the witness while *testifying at trial*. The use of statements that come within Sec. 161 Cr. PC should not be used to prepare a witness. “Preparing” and not “tutoring” is the key to the truth in all trials. It would be both unethical and unacceptable for any Public Prosecutor to place words in a victim's mouth. The duty that all advocates owe to the courts warrants that there should be no form of tutoring to the victim-witness. However, the law does not forbid anyone from preparing a victim-witness for putting the victim-witness at ease, going over the process and preparing the person of what twists and turns to expect. This will go a long way in ensuring that the testimony of the victim-witness is accurate, consistent and cogent.

#### **iv. Non-appearance of a witness**

Sec. 299 of Cr.PC allows for the recording of evidence where the accused has absconded and there is no immediate prospect of his arrest and where the offender is unknown. In the first instance the Court may record depositions of prosecution witnesses. These can be offered at trial when the accused is arrested in the following situations: if the witness/ deponent is dead; if the witness/ deponent is incapable of giving evidence; or if the attendance would cause unreasonable delay, expense and inconvenience. Secondly, where the offender is unknown and the offence is punishable with death or imprisonment for life, the High Court or the Session's Judge may direct any Magistrate of the First Class to record prosecution evidence. Depositions so recorded may be used at the trial if the witness is dead, or incapable of giving evidence, or is beyond the limits of India.

This section can be used in the frequent event of the accused persons absconding and thus evading the course of justice in cases involving trafficking of persons. This will also help expedite the repatriations of trafficking victims especially, if they belong to different nationalities. For the application of this section there should be a definite finding to the effect that witnesses died at the time of trial or became incapable of giving evidence<sup>184</sup>.

Many times the repatriation of the victim-witness takes place pending the final decision of trials. Sometimes the process is not accurately documented, which causes difficulties in finding out addresses of such victim-witness for sending summons. In situations like this the likelihood of a conviction reduces. However, this is not to say that it is impossible to obtain convictions in these situations. The depositions of all the other participants of the raid/ rescue operation become prominent. If a statement of the victims is taken u/S. 164 Cr. PC and its contents are corroborated by other witnesses then this too can lead to a conviction.

#### **v. Compensation**

Under Sec. 357 of Cr.PC an order for compensation can be passed when a Court imposes a sentence of fine or a sentence of which fine forms a part. Such compensation may be ordered when passing

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<sup>183</sup> Indian Evidence Act, Sec. 159. In addition, the witness may use a document created by another person, and read by the witness, at the time of the transaction or immediately afterwards. Furthermore, a witness may u/s. 160 testify to facts mentioned in such a document, even though he or she may not actually remember the facts themselves, if the witness knows that the facts were correctly recorded at the time they were drafted.

<sup>184</sup> Nirmal Singh v. State of Haryana, AIR 2000 SC 1416:2000 Cr.LJ 1803

judgment, by the trial court, Appellate Court, the High Court or a Court of Session when exercising its powers of revision. The compensation may be ordered, inter-alia:-

a) for meeting expenses properly incurred for the prosecution; and b) to any person, who has suffered loss or injury by the offence, when the compensation can be recovered in a civil court. Sec. 357 (3) empowers the court to order compensation to a person who has suffered any loss or injury, even in cases where the substantive sentence of imprisonment only is awarded, of which fine does not form a part.

The power of courts to award compensation is not ancillary to other sentences but it is in addition thereto. Awarding of compensation to a trafficked victim provides the basis for an effective rehabilitation. The Supreme Court has recommended to all courts to exercise this power liberally so as to meet the ends of justice<sup>185</sup>.

A Prosecutor may pray to the Court in all trials involving trafficking to exercise the powers vested in it u/S. 357. Prosecutors can also guide the victims to obtain compensation awarded by some state governments, even before the trial<sup>186</sup>.

#### **vi. Interim relief**

The Supreme Court has stated in a case<sup>187</sup>: “If the court trying an offence of rape has jurisdiction to award the compensation at the final stage, there is no reason to deny to the court the right to award interim compensation which should be provided in the scheme.” The jurisdiction to pay interim compensation can be treated to be part of the overall jurisdiction of the courts trying offences of rape.

In the heinous crime of gang rape repeatedly committed upon a Bangladeshi national, by the Indian railway employees, the SC granted her compensation holding that 'rape' is an offence which is violative of the Fundamental Rights of a person guaranteed under Article 21 of the Constitution of India; even those who are not citizens of this country will be entitled to the protection of their lives in accordance with the Constitutional provisions. The court also applied the doctrine of vicarious liability of the state<sup>188</sup>. A Prosecutor may refer to this precedent in praying for compensations to trafficked victims who are foreign nationals.

## **I. The Victim-Witness Protection Programme<sup>189</sup>**

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children<sup>190</sup>,

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<sup>185</sup> Jacob George v. State of Kerala, 1994 SCC (Cri) 774; Harikishan and State of Haryana v. Sukhbir Singh, AIR 1988 SC 2127; Balraj v. State of U.P. AIR 1995 SC 1935; Mangilal v. State of Madhya Pradesh, AIR 2004 SC 1280; Suganthi Suresh Kumar v. Jagdeeshan AIR 2002 SC 681.

<sup>186</sup> For instance, the Andhra Pradesh government has made orders granting interim relief/ compensation to rescued trafficked victims even before the commencement of a trial. Other states may have similar practices.

<sup>187</sup> Bodhisattwa Gautam v. Subhra Chakraborty AIR 1996 SC 922: (1996) 1 SCC 490:

<sup>188</sup> Chairman, Railway Board v Chandrima Das (2000) 2 SCC 465: AIR 2000 SC 988

<sup>189</sup> Inputs taken from SARIQ - Regional Victim/Witness Protection Protocol to Combat Trafficking, Commercial Exploitation and Sexual Abuse of Women and Children in South Asia, 2005

<sup>190</sup> Supplementing the United Nations Convention Against Transnational Organized Crime, 2000

states vide Article 2 (b), that one of the purposes of the Protocol is to “*protect and assist the victims of trafficking with full respect for their human rights*”.

#### **i. Pre Trial**

The period between post-rescue and pre-trial is very crucial for the rescued victim. A Prosecutor may not have a full-fledged role to play at this stage, but he may whenever possible, liaise with the Investigating Officer to ensure that certain steps are taken towards ensuring victim-witness protection measures.

The suggested good practices are<sup>191</sup>:

1. The victim must be separated and segregated from the accused from the point of rescue to the point of appeal (if any by the accused)<sup>192</sup>.
2. Immediate counseling will help the victim comply with the 'new situation' and also prepare her/him to give statement before the police<sup>193</sup>.
3. The presence of the representative of an NGO or a counselor at the time of interviewing the victim by the police will help relax the victim.
4. The statement of the victim should be taken when the victim is ready to give the statement.
5. If the victim does not speak the local language, an interpreter may be arranged.
6. The prosecutor may, based on the inputs of the NGO / counselor draw a list of the questions to be asked to the victim.
7. The Prosecutor may pray to the court to ensure timely medical examination and age verification of the victim.
8. Providing safe custody to the victim post rescue is of critical importance. A formal plan as to where the victim is to be kept pending inquiry and final determination of best alternative for the victims may be formulated and presented to the appropriate magistrate so that he may authorize it.
9. The Prosecutor may pray to the court to order for Home Investigation Report u/S. 17 (2), 17A of ITPA, 1956 or u/S.33 of the Juvenile Justice Act, 2000.
10. The Prosecutor may pray to the Court for imposition of conditions u/S. 437 (3) of Cr. PC whilst granting bail to an accused. The Prosecutor should also ensure that the surety who stands for the accused furnishes a declaration to the court, regarding the number of persons for whom he has earlier stood surety, including traffickers (s.44 I A Cr. PC).

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<sup>191</sup> These are merely indicative and not exhaustive.

<sup>192</sup> For further details see: Standard Operating Procedures on Investigating Crimes of Trafficking for Commercial Sexual Exploitation, UNODC, 2007 and Standard Operating Procedures on Investigating Crimes of Trafficking for Forced Labour, UNODC, 2008

<sup>193</sup> For further details see: Journey to Justice: Manual on Psychosocial Intervention, UNODC, 2008



11. The Prosecutor may explore links with the NGOs working on anti human trafficking and get a victim familiarized with court procedures and the nature of the trial.
12. The Prosecutor through his timely intervention may ensure that the identity of a victim of trafficking is not revealed and that anonymity is maintained. In this regard Sec. 21 Juvenile Justice Act and Sec. 228 A of IPC are relevant. An interpretation of both these provisions ensures statutory prohibition on the disclosure of identity of trafficked victims.

## ii. **During Trial**

1. The victim should be protected at all times and separated from the accused.
2. *In-camera* trials should be facilitated.
3. The Prosecutor should ensure non-disclosure of identity of a victim.
4. Reasonable breaks may be given to the victim, especially child victims during the period of cross examination<sup>194</sup>.
5. Questions may be put to the victim, especially child victim, during cross-examination through the medium of the Presiding Officer of the court<sup>195</sup>.
6. The Prosecutor may pray to the Court for providing an interpreter if the victim does not speak the local language.
7. The Prosecutor may also pray that police or NGOs be directed to provide periodic reports of the victim during the pendency of the trial. This will act as cross check on the progress of the victim's rehabilitation process.
8. The Prosecutor may also pray to the Court to order the police for identification, seizure and attachment of unlawfully acquired property by the accused (S. 105 D and E of Cr.PC).

## iii. **Post Trial**

The role of the Prosecutor especially with the victim-witness protection program at the post trial stage will be limited. However, ensuring the inclusion of substantial conditions in the final order/ judgment will ensure that the victim is protected, rehabilitated and reintegrated into society.

**Challenge:** Continuing victim-witness protection after acquittal of accused

This is a significant factor to be considered by a Public Prosecutor. In cases of acquittal of the accused, for any reason whatsoever, the Public Prosecutor may pray to the court to mention specific details of procedures that may be adopted towards victim-witness protection. For e.g. a prayer may be made to the court that the accused should be directed not to initiate contact with the victim; that the accused may be restrained from coming within the vicinity of the victim's location. If the accused has been

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<sup>194</sup> Sakshi v. Union of India, 2004 (5) SCC 518 (Supreme Court 2004)

<sup>195</sup> Sakshi v. Union of India



convicted, appropriate orders may be taken from the court u/S. 106 of Cr.PC. These orders will ensure that the victims are not susceptible to any threat/ harm or re-trafficking from the accused traffickers.

In cases of conviction, the Prosecutor may also pray the Court for procedures to be initiated u/S. 18 of the ITPA for closure of brothels and eviction of offenders in cases of sex-trafficking. In cases of trafficking for labour the provisions of the Criminal Procedure Code or the Criminal Law Amendment Ordinance, 1944 may be utilized for closure of the illegal factories and cancellation of registration of legal factories/ places of work.

### **Confiscation of assets of traffickers**

The Prosecutor should cause investigation into the assets from the crime acquired by the traffickers and other offenders in accordance with the procedure in Sec. 105 A L of Cr. PC. The Criminal Law Amendment Ordinance 1944, the Prevention of Money Laundering Act, 2002, etc. should be utilized as and when applicable.

## Post Trial

The post-trial stage is the last stage of prosecution which begins immediately after the trial ends with either conviction or acquittal of the accused and the passing of sentence upon conviction. This stage usually comprises of appeal against or revision of the sentence passed in the trial stage.

### Appeals

Chapter 29 Cr.PC gives out details of the procedure to be followed for appeals.

|         |   |
|---------|---|
| Sec.374 | Appeals from Convictions                                  |
| Sec.375 | No appeals when accused pleads guilty                     |
| Sec.378 | Appeal in case of acquittal                               |
| Sec.379 | Appeal against conviction by High Court in certain cases. |

Sec. 386 of Cr.PC provides for powers of the Appellate Court in cases of conviction or acquittal of the accused.

Appellate powers also include setting aside an order of acquittal or enhancement of sentence<sup>196</sup>. The Supreme Court has held, “It is open to a High Court in revision to set aside an order of acquittal even at the instance of private parties, though the State may not have thought fit to appeal; but this jurisdiction should in our opinion be exercised by the High Court only in exceptional cases, when there is some glaring defect in the procedure or there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice”<sup>197</sup>. An Appellate Court may enhance a sentence (after giving show cause) when the sentence given by the trial court is “wholly unsatisfactory, irrelevant, unreasonable or perverse”<sup>198</sup>.

<sup>196</sup> Sec. 401 (I) in reference to Sec. 386 Cr.PC

<sup>197</sup> K. Chinnaswamy Reddy v. State of Andhra Pradesh, 1962 AIR (SC) 1788.

<sup>198</sup> George Thomas v. State of Kerala, 1995 Cr.LJ 3645 (3646) (SC)

# 6

## Possible alternative methods in tackling human trafficking

### A. Closure of brothels and eviction of offenders from a brothel

#### Eviction before conviction

- Under Sec. 18 (1) ITPA power lies with a Magistrate (District Magistrate (DM) or Sub-Divisional Magistrate (SDM)) to order eviction of places of commercial sexual exploitation. This process can be initiated by the DM or SDM on receipt of information from the police, any other persons or otherwise. This eviction u/s. 18 (1) ITPA is possible even before conviction in the case and even without an FIR. Eviction order will be passed upon satisfaction of the Magistrate and after hearing the person concerned. The order should be complied within seven days of its passing.
- **No appeal a stringent provision in law:** Orders passed by the Magistrate u/S. 18 (1) ITPA, for eviction of places of CSE shall not be subject to appeal and shall not be stayed or set aside by the order of any civil or criminal court (vide s. 18 (3) ITPA). Prior permission of the Magistrate needs to be taken before letting out such premises again for a period of one year wherein major girls have been recovered and three years wherein minor girls have been recovered under a search carried out u/S. 15<sup>199</sup>.
- **Preventive action:** U/s. 133 (1) (b) Cr. PC the District Magistrate/ SDM/ or any other Executive Magistrate has the power to pass a conditional order on any person who conducts any occupation which is injurious to the health or physical comfort of the community, to desist from carrying on such trade.

Under Sec. 18(1), a summary procedure for closing down places of prostitution, without going through a detailed process of a criminal prosecution is provided. It is a quick acting mechanism, for closing down a place of exploitation. It deals with the premises and it is not required for the prosecution to establish intention or knowledge<sup>200</sup>.

A significant ruling was given in a case by the Supreme Court<sup>201</sup>. The question that was raised before the Supreme Court was whether the notification issued by the state of Maharashtra empowering the

<sup>199</sup> Sec. 18(1) (b) ITPA

<sup>200</sup> A.C Aggrawal, Sub divisional Magistrate, Delhi v. Ram Kali, AIR 1968 SC 1 and Chitan Vaswani v. State of West Bengal, AIR 1975 SC 2473

<sup>201</sup> AN Roy v. Suresh Sham Singh, (Cri) Appeal 702 of 2006

Commissioner of Police, with the powers of District Magistrate for the purposes of Sec. 18 and 20 of the ITPA, had been validly made. The Supreme Court considered the purpose for which the appointment was made and while harmoniously interpreting legislations held that the government was capable of appointing the Commissioner of Police as an Executive Magistrate who can exercise the powers of a District Magistrate.

### **Eviction after conviction**

Under Sec. 18 (2) ITPA, a court which convicts a person of an offence u/S. 3 (keeping a brothel or allowing premises to be used as a brothel) or u/S. 7 (prostitution in or in the vicinity of public places) of ITPA may pass orders to close the brothel and/ or evict offenders **without any notice** to any convicted person. Therefore, upon conviction of a person u/S. 3 or 7 ITPA, the Prosecutor should immediately move the court for an order of closure/ eviction u/S. 18 ITPA.

**Note:** The order passed by a judicial authority u/S. 18 (2) ITPA cannot be stayed or set aside or appealed against, vide s. 18 (3) ITPA.

### **Suspension/ cancellation of hotel licence**

Under Sec. 7 (2) ITPA licence for carrying on business of a hotel (where CSE is being conducted) may be **suspended** for a period of 3 months to 1 year. If offences under this provision are committed against a 'child' or 'minor', licence of such hotel may also be **cancelled**.

## **B. Attachment and forfeiture of property under Sec. 105-D to Sec. 105-J of the Criminal Procedure Code**

Property that may be attached or forfeited u/S. 105-D to Sec 105-J of the Criminal Procedure Code is as follows:-

1. Property and assets of any kind whether owned by an individual, group of individuals, Hindu Undivided Family or by a corporate entity.
2. The property could be movable or immovable. i.e. cars, flats etc.
3. Property that can be described clearly i.e. the car or flat is owned by the prime accused or which can't be entirely or clearly described such as "benami"<sup>202</sup> properties or property owned jointly by other individuals or which can't be easily measured.
4. Any title deed such as leave or licence papers, registration papers for a flat or a car or a legal document showing the financial interest of the accused person in any property or asset.
5. The property may be obtained as a result of the crime i.e. cash or belongings or valuable items of a trafficked victim, which has been detained by the accused.

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<sup>202</sup> Under The Benami Transactions (Prohibition) Act, 1988 "Benami transaction" means any transaction in which property is transferred to one person for a consideration paid or provided by another person

6. The property may be used in the crime i.e. mobile phones used by pimps or traffickers, vehicles or other transport vehicle used in the crime.
7. The property may also be purchased from the proceeds of the crime, i.e. often the perpetrators or accused persons in trafficking related offences purchase movable or immovable properties from the earnings accumulated through the earnings of the exploitation of the victim.

## Jurisdiction

The provisions of Sec. 105-D to 105-J can be applied within India<sup>203</sup> and also outside India where there exists a bilateral agreement<sup>204</sup>. International requests for attachment may also be undertaken when the Central Government receives a request from overseas that criminal assets are located in India<sup>205</sup>.

The procedure to be followed for attachment or forfeiture of unlawfully acquired property or assets is as follows:

### STEP I. Identifying the property:

The court based on an application or information from a police officer, Investigating Officer, Prosecutor or any person that convinces the court that certain assets or property has been used in a crime, obtained from a crime or from the proceeds of a crime will order the police officer to do the following:

1. Tracing and identifying the property: Tracing a property will require the police officer to determine the nature of the property i.e. what kind of property it is, movable or immovable.
2. Secondly, what is the source of the property i.e. past and present owners and the funds that they used to purchase the assets and where does the monetary trail come from?
3. Thirdly, the disposition and movement of the property i.e. what state the property is in currently, for example in case of perishables. The term movement is associated with the attempts made by the accused persons to sell the property or transfer the property especially when they know that there is a high degree or chance of the property being attached.
4. Fourthly, the title and ownership of the property and the connection in case of *benami* properties to the accused person.
5. After tracing the property the police officer must gather evidence or proof that establishes as a prudent man would establish that the property was used in the crime or obtained as a result of the crime or derived from the proceeds of the crime.
6. The police officer may undertake or implement the directions in a court order of identifying criminal assets in the form of an inquiry, investigation or survey.

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<sup>203</sup> Sec. 105-C (1)

<sup>204</sup> Sec. 105-C (2)

<sup>205</sup> Sec. 105-C (3)

7. The inquiry, investigations or survey may involve any person, place, property, assets, documents, books of accounts in any bank or public financial institutions or any other relevant matters required to identify and trace a criminal asset<sup>206</sup>.

**STEP 2: Attempt to conceal, transfer, or dispose the property during an inquiry, investigations or survey of a property:**

The property concerned should be the object of the inquiry, investigation or survey by the police officer. The officer can make an order to seize such property or where it is not possible to seize the property i.e. in case of a house or any immovable property then an order of attachment can be served on the concerned person who is making an attempt to conceal, transfer or dispose off the property.

The order of attachment will stipulate that the concerned person cannot transfer or deal with the property without the prior permission of the police officer. The police officer on his/her part must confirm the order with an order of the court within 30 days of making an order of seizure or forfeiture that authorised the police officer to undertake the inquiry, investigation or survey<sup>207</sup>.

**STEP 3: Management of properties seized or forfeited**

The court may appoint the District Magistrate of the area or any other officer nominated by the DM to manage the properties seized under the provisions of section 105C to 105-J<sup>208</sup>.

**STEP 4: Show Cause Notice:**

If during the inquiry, investigations, or survey the police officer brings forth evidence that convinces the court that all or any of the properties are from the proceeds of the crime then a show cause notice is issued to the person concerned.

The person affected by the notice will within 30 days of receiving the written notice provide evidence to the contrary and unless the court is satisfied otherwise, it will proceed to declare the assets as proceeds of crime.

In the case the property is held in trust on behalf of the person affected or if it's a *benami* property then the person who holds the property on behalf of the person affected shall also be served with a copy of the notice by the court<sup>209</sup>.

**STEP 5: Final Order:**

After notifying the person affected and giving the person the right to a fair hearing or a reasonable opportunity to be heard the court shall record its finding whether all or any of the properties shall be declared as proceeds of crime. If the person affected does not appear before the court within 30 days

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<sup>206</sup> Sec. 105-D(2) (3)

<sup>207</sup> Sec. 105-E (1) (2)

<sup>208</sup> Sec. 105 F

<sup>209</sup> Sec. 105-G (1)(2)

of issuing the show cause notice of attachment and forfeiture then the court has the powers to pass an ex-parte judgement based on the evidence placed before the court.

The property shall be forfeited to the Central Government free of any encumbrances. In the event of the assets being in the nature of shares of a company the Central Government shall be registered as the transferee of the shares<sup>210</sup>.

#### **STEP 6: Fine in lieu of forfeiture**

After the court has passed orders forfeiting any property to the Central Government and it is a case where the source of only a part of such property has not been proved to the satisfaction of the court, then the court may after giving the person affected an opportunity to be heard ask the person affected to pay a fine in lieu of the forfeiture. After payment of the fine the declaration of forfeiture shall stand revoked and the property will be released to the person affected<sup>211</sup>.

Once an order is passed u/S. 105-E or notice is issue u/S. 105-G, then any subsequent transfer of property made by the person affected shall be null and void once the declaration of forfeiture is made to the Central Government<sup>212</sup>.

### **C. Seizure of suspicious property**

In addition to the powers u/S. 105-C to 105-J, a police officer also has the powers u/S. 102 of Cr. PC to seize any property which may be found in circumstances which create suspicion of the commission of any offence.

If the seizing officer is below the rank of an officer in charge of a police station he/she shall immediately report the seizure to the concerned officer. The seizure shall be reported immediately to the Magistrate within whose jurisdiction the property was seized. The court shall give further directions on the disposal of the property. Sec. 102 is wide enough to cover offences either in the Indian Penal Code or any penal statute but the key is that the property must be either suspected to be stolen or be found under circumstances which leads suspicion of an offence having being committed. The property that has been seized or frozen should have some nexus with the alleged offence which is under investigation of the police officer concerned. This would cover chance recovery under a special Act such as Immoral Traffic (Prevention) Act, 1956 provided the procedures are properly followed.

### **D. Bond Proceedings**

Chapter VIII (Security for Keeping the Peace and for Good Behaviour) of Cr. PC, especially Sec. 109 and 110 read with 116 should be initiated for ensuring that the accused person does not continue to commit fresh offences after the first crime against a trafficked person.

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<sup>210</sup> Sec. 105-H (1) to (4)

<sup>211</sup> Sec. 105-I

<sup>212</sup> Sec. 105-J

## **E. Notification of address of previously convicted offenders**

Sec. 11 of the ITPA provides that when a person once convicted in India of an offence punishable under ITPA or punishable u/S. 363, 365, 366, 366-A, 366-B, 367, 368, 370, 371, 372 or 373 of the IPC with imprisonment for a term of two years or upwards OR once convicted in any country of a like offence is, within a period of five years of release is again convicted of the aforesaid offences, the court may at the time of passing the sentence of imprisonment on such a person also order him to notify his/ her residence or absence from residence or change of residence for a period not exceeding five years in accordance with prescribed rules of the concerned state.

A person ordered u/S. 11 of ITPA to notify his/ her address shall immediately after release from prison, report at the police station having jurisdiction over the place of his/ her residence and leave his/ her correct address there. When the offender intends to change his/her place of residence, he/she must notify such intention to the police officer and also furnish the correct address of the intended place of residence. The police officer shall communicate the intended change of residence together with full particulars of the offender to the police station having jurisdiction over the intended place of residence. The offender must report to the police station once a month till the expiry of the period during which he is required to notify his/her address. Temporary absence must also be reported at the police station as soon as the offender returns to the usual place of residence. Once a conviction is obtained the Prosecutor can petition u/S. 11 of the ITPA that the detailed information of the offender is made known to the police and also seek conditions for the offender's presence. This is an effective way of keeping a track of those who habitually deal in trafficking of women and children.



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