

**2018 (4) TLNJ 193 (Civil)****A Legal Spectrum on  
'WITNESS', 'DEFAMATION' AND 'MALICIOUS  
PROSECUTION'****(By Justice M.VENUGOPAL)****Preamble:**

At the outset, it is to be borne in mind that any one can set the 'Law of the Land' in motion when there is no legal impediment in this regard. To put it precisely, the 'Locus of a Person' cannot be assailed in a whimsical and cavalier fashion. The Judicial Magistrates either under Criminal Procedure Code or under Criminal Rules of Practice do not have power to return the complaint, merely because they subjectively opine that it suffers from defects. However, there is no fetter in Law on their part to provide a reasonable opportunity/an option to the Complainant in carrying out trivial/formal defects.

A complainant or a witness can testify about the happening of an occurrence with necessary/relevant piece of information. A co-accused is a competent witness. The Criminal Law stands for 'Retribution'. The principle in Criminal Jurisprudence is that 'Crime Never Dies'.

According to Edwin Sutherland and Donald R. Cressy Criminology 335 (1974), undoubtedly, 'Criminals' deserve to suffer.

Section 2(wa) Cr.P.C. speaks of 'Victim'. A deposition of a complainant and his witnesses enable a Court of Law to arrive at the truth/conclusion in regard to the existence of facts hotly

disputed by the respective parties. Sections 118 to 121 and 133 of the Indian Evidence Act, 1872 pertains to the Competency of Person who can appear as a witness. By and large, 'Competency of Witness' is the rule and incompetency is an exception. A competent witness may be compelled by a Court of Law but the Law may not coerce him to elicit answers to certain queries.

### **2. Identity protection:**

The TADA (Prevention) 1987 Act, POTA Act, Juvenile Justice Act and Section 44 of Unlawful Activities [Prevention] Amendment, 2004 provides for Witness Identity Protection.

### **3. Lodging of complaint:**

A complaint in a civil case can be filed setting out such allegations which may be false, but which may not be impossible. There is no fetter for the Judicial Magistrate in taking cognizance of an offence which he may be of the opinion/view to have been committed by an individual, whose matter is earlier pending in Civil Court. The Criminal and Civil Proceedings are separate and can proceed parallelly. It is to be aptly pointed out that 'Cause of action' which is non-existent /absent in a complaint cannot be substituted by later evidence to be tendered/adduced in a given case. Any tinge of unwanted sexual conduct is good enough to attract the aspect of Sexual Harassment for lodging a complaint. A sexual harassment, an inappropriate conduct either physical or verbal etc. carries a scar on one's face till one gets a clean chit in this regard.

### **4. Complaint for False Evidence:**

Indeed, Section 195-A of Criminal Procedure Code spells out a procedure for lodging a complaint before a Judicial

Magistrate, by a witness or any other person on his behalf, if he is threatened by any other individual to tender false evidence.

### **5. Condonation Delay:**

The power to condone delay in filing complaint/initiating civil action by the concerned Court is to be pressed into service by means of jurisdiction when *bona fide*, genuine and reasonable reasons are assigned to its subjective satisfaction. After all, the Court is to protect the victim and not to throw his/her complaint at the nascent stage, by adopting a wooden approach.

### **6. Bundle of Facts:**

The words 'Cause of Action' means every fact which it would be necessary for a Plaintiff to establish, if traversed with a view to lend assistance in respect of his rights, to the issues involved in a case. It will include some act of the particular Defendant. A Presiding Deity of a 'Court of Law' can peruse the averments/allegations in Plaintiff and if they do not disclose a 'Cause of Action', then, he/it can throw out the 'Plaint' as an Irresponsible, Frivolous or Vexatious one. However, if the averments/allegations in Plaintiff are 'Mixed Question of Fact and Law', then, the Plaintiff may not be rejected especially when triable issues are involved in the proposed suit. Further, such issues require an adducing of oral and documentary evidence by examining witnesses as the case may be. Generally, a Court of Law will be hazy in invoking the ingredients of Order 7 Rule 11 of the Civil Procedure Code. Moreover, a Plaintiff in a suit ought not to be rejected in view of the fact that it was drafted not in a 'strong manner' from the point of view of Defendant(s). Ordinarily, legal issues can be raised at any time in a suit even though no such pleas are there in the pleadings of the parties,

because of the reason that there is no 'Estoppel against a Statute'.

### **7. Counter Claim:**

The ingredients of Order 8 Rule 6A of the Civil Procedure Code permits filing of Counter Claim by the Defendant [of course in accordance with Law].

### **8. Continuous Offence:**

Time has come to treat a Sexual Harassment offence as a continuing one, providing a fresh limitation till the continuance of offence.

### **9. Need for Cr.P.C. Amendment:**

Since 468 Cr.P.C. Law expects a person to be vigilant and not to be a Ripwan Winkle or not to be in slumber like Kumbakarna. A Law Court may not take cognizance of an offence as per Sub-section 2 of Section 468 Cr.P.C. This limitation period is not to be made applicable to Women Harassment Cases [both at work place and outside work place].

### **10. Removal of Bar:**

The requirement of filing complaint within 3 months of an occurrence of an offence in accordance with 2013 Law on Prevention of Sexual Harassment must be done away with.

### **11. Exception to Limitation:**

Like Section 473 Cr.P.C., a provision is to be pondered over in respect of Sexual Harassment matters with a view to bring an exception to the rule of limitation as per Section 468 Cr.P.C.

## **12. An Appraisal:**

It is to be remembered that in Law a cognizance is taken of an 'offence' only and not an 'offender'. A Sexual Harassment/Malevolent Conduct is a perception/oriented offence involving moral turpitude. A Court of Law can go into the aspect whether there was a consensual sexual silence etc.

## **13. Observations of Apex Court:**

(1) In ***Swaran Singh V. State of Punjab, AIR 2000 SC 2017***, the Hon'ble Supreme Court observed that "Not only that a witness is threatened, he is maimed, he is done away with or even bribed and that there is no protection for him".

(2) The Hon'ble Supreme Court in ***Vineet Narain V. Union of India, 1998 (1) SCC Page 226*** emphasised the need for witness protection programmes in our country.

## **14. A Glimpse of Decisions:**

(a) In the decision ***M.Palani V. Meenakshi*** (arising under the ***Domestic Violence Act, 2005***), ***AIR 2008 Madras 162***, at para 18, it is, among other things, observed that '***.... a conjoint reading of both Sections 12 and 26 will make it clear that when a Magistrate passes an order, he shall receive the report from the Protection Officer but whereas such a report is not contemplated, when an order is passed by the Civil Court or by the Family Court.***'

(b) In ***Dr.Punita K. Sodhi V. Union of India and others, 2011-I-LLJ-371 (Del.)***, it is observed that the approach of the Expert Committee was Limited and Narrow and that the Committee failed to consider the context in which the complaint was made and the incidents of continued harassment which the Petitioner was alleged to have faced at the hands of

the 6<sup>th</sup> Respondent. Further, while accepting the Petitioner's criticism for constitution of Experts Committee, the Court had not sustained the report of the said Committee on the complaint of the 6<sup>th</sup> Respondent against the Petitioner and resultantly, allowed the Writ Petitions. Added further, it was opined that '... In any event, the MHFW (Ministry of Health and Family Welfare – Government of India) will ensure that such Committee is constituted strictly in accordance with the Vishaka Guidelines as well as the instructions under the CCS Rules etc.'

(c) In the decision of the Hon'ble Supreme Court ***D.S.Grewal V. Vimmi Joshi, (2009) 2 Supreme Court Cases 210***, the aspect of retaliatory allegations and inadequacy in adhering the 'Vishaka Guidelines' while causing an enquiry into a complaint of 'Sexual Harassment' was borne in mind.

### **15. Foreign Decisions:**

(i) In the decision ***Ellison V. Brady***, the Court of Appeal of United States of America, Ninth Circuit 924 F.2d 872 (1991) opined that '*Courts should consider the victim's perspective and not stereotyped notions of acceptable behaviour*'.

(ii) In the decision ***Dianna Janzen and Tracy Govereau V. Platy Enterprises Limited, 1989 SCC OnLine Can SC 49 : [1989] 1 SCR 1252***, the facts are that two waitresses at a 'Restaurant' made a complaint of Sexual Harassment and both the Human Rights Commission and the Court of Queen's Bench, Manitoa, Canada had held in complainants' favour. But the Court of Appeal observed that there was no discrimination on the basis of sex and as such, the Employer was not liable in regard to the Sexual Harassment by its Employee. However, when the

matter was taken up for further Appeal, the Canadian Supreme Court set aside the verdict of the Court of Appeal and it was pointed out that Section 19 of the 'Human Rights Code' overtly prohibited sexual discrimination at work place.

### **16. Defamation:**

(i) The term 'Defamation' is defined in the decision **Scott V. Sampson (1882) Q.B.D. 491** as a 'false statement about a man to discredit'. Any one person may be defamed. An individual man hold property but he can have a 'Good Character' and 'Respectability'. It is apt to recollect and recall the William Shakespeare's words in 'Othello' (Act III, Scene 3, 167) which runs as under:

"Good name in man and woman, dear my lord,  
Is the immediate jewel of their souls;  
Who steals my purse, steals trash; 'tis something, nothing;  
'Twas mine, 'tis his, and has been slave to thousands;  
But he that filches from me my good name,  
Robs me of that which not enriches him,  
And makes me poor indeed."

(ii) In Civil Law, for defamation one may seek a 'Declaratory Relief', 'Injunctions', 'Compensation/Damages'. In Civil Wrong, the probable defences that can be taken are (a) Limitation (b) Consent (c) Previous Orders/Judgments etc. Further, the special defences are: (i) Truth or Justification (ii) Absolute Privilege or Qualified Privilege (iii) Fair Comment.

(iii) If an imputation is '*Ex facie*' defamatory, it is for the concerned person to exhibit before a Court of Law that he comes within any of the exceptions in Law which come to his aid. In this

connection, it is worth to cite the decision ***Dixon V. Holden (1869) 7 E.Q. 483 at page 492*** wherein it is observed that 'a person's reputation is his property and, if possible more valuable than other property'.

### **17. Burden of Proof:**

The onus of proof by a person who relies on the exception(s) to Sec. 499 I.P.C. is that he ought to exhibit that he had acted in 'Good Faith' and by the principle of 'reasonable preponderance of probabilities', his deposition substantiates his version.

### **18. Accused-Witness:**

An Accused can examine himself as a 'Defence Witness'. Further, when he has special knowledge about certain facts, then, he is bound to expound the same, as per Section 106 of the Indian Evidence Act, 1872.

### **19. Definition of Witness:**

In the words of '*Jeremy Bentham*', the term witness is defined as 'Those who are accustomed to reflect on ideas, know well how much idea depend on words. According to him, the word witness is employed to mark two different individuals or the same individual in two different situations; the one that of perceiving witness, that is of one who has seen or heard or learned by senses the fact concurring which he can give information when examined and the other that of a deposing witness, who states in a court of justice the information which he has acquired. The term witness then may be applied to the parties themselves who have an interest in the case as well as to all those whom it is commonly employed to designate'. [ 'A

*Treatise on Judicial Evidence' 88 (M. Dumont Ed; Messrs Baldwin Cradock and Joy Paternoster – Row, 1825)].*

### **20. Harm:**

The word 'Harm' is nowhere defined in Indian Penal Code. Contextually, the term 'Harm' in Section 499 I.P.C. is the reputation of an affected individual. As a matter of fact, the word 'Harm' in Section 95 of the Indian Penal Code takes within its fold (i) Financial Loss; (ii) Loss of Reputation; (iii) Mental Worry or even an apprehension of an injury.

### **21. Payment of Compensation:**

Section 237 Cr.P.C. relates to the payment of compensation to the victims of Crime by the Court of Session in a defamation matter. Section 250 Cr.P.C. deals with 'Payment of Compensation' to an accused when he is acquitted or discharged by Court in a case based on no reasonable grounds for starting/commencing the prosecution. Section 358 Cr.P.C. speaks of 'compensation being paid to persons who were arrested based on no valid/intangible grounds'.

### **22. Arrears of Land Revenue:**

The amount of compensation so awarded can be recovered as arrears of Land Revenue under the Land Revenue Act as per Sections 421 and 431 Cr.P.C. [vide **Rajendran V. Jose** reported in **2002 Cr.L.J. 3911, 3912 (Ker.)**].

### **23. Decision of Supreme Court:**

In the decision of the Hon'ble Supreme Court in **Rudul Sah V. State of Bihar, AIR 1983 SC 1086**, a compensation was granted to the victim who spent many years 'Behind Bars' without reason.

**24. Refund of Expenses:**

Section 359 Cr.P.C. deals with an order passed by the Court in respect of refund expenses spent by the complainant in commencing the prosecution and resulting in conviction for a non-cognizable case.

**25. Malicious Prosecution:**

(i) In a Malicious Prosecution, the onus of proof is on Plaintiff to prove 'want of reasonable and probable cause'. An essence of action for the prosecution is damages suffered by plaintiff. In a suit for malicious prosecution, it is for the Plaintiff to prove that the prosecution was frivolous and baseless and added further, the Plaintiff suffered loss on account of prosecution. A damage claim for Malicious Prosecution is distinct form of Civil Tort, from a claim for damages for defamation. If the Criminal Proceedings result in 'Acquittal' or 'Discharge' of an 'Accused', it will not prove 'Malice' on the part of concerned.

(ii) A right to claim Malicious Prosecution is a personal one to an individual wrong committed upon a person. In short, it does not extend to the death of a person before filing the suit against a Tort – Feasor, his 'Legal Heirs', 'Executors' or 'Administrators' and therefore, those persons cannot maintain an action in this regard for the same relief.

(iii) A claim of compensation for damages for malicious prosecution will fall under specific Article 23 of the Limitation Act, 1963 and not under Article 2 which applies to the matters where the defendants acted under the colour of a Statute. Needless to point out that an interest for damages for compensation can be claimed from the 'Date of Claim' and not from the 'Date of Order/Judgment' as the case may be.

**26. Guideline No.4 :**

The Guideline No.4 of the *Vishaka's* case runs to the effect that 'In particular, it should ensure that victims, or witnesses are not victimized or discriminated against while dealing with complaints of Sexual Harassment. ***The victims of Sexual Harassment should have the option to seek transfer of the perpetrator or their own transfer***'.

**27. An Appropriate Efficacious Forum:**

The Competent Forum for the victims of Sexual Harassment/ Misconduct(s) / Misdeed(s) matters is the 'National Commission For Women' for airing and redressal of their grievances/complaints. The internal Complaint's Committees are mandated to be formed by the concerned organisations under the Sexual Harassment of Women at work place (Prevention, Prohibition & Redressal Act, 2013). The Commission's e-mail I.D. [Sexual Harassment Electronic (SHE)] Box may be utilised by the victims to send written complaints for reaping benefits at the optimum level.

The Government of Maharashtra as well as the Delhi Government had already come out with a Witness Protection Scheme in the year 2014 and 2013 respectively.

**Conclusion:**

Considering the fact that a 'Witness' is a centric figure in a Civil and Criminal action, it is right time for the Union Government to speed up the process of finalising the 'Protection of Witness Scheme' which will go a long way in providing assistance to the needy litigants and the 'Prosecuting Agency' and to bring out the same as expeditiously as possible, taking into consideration of the prevailing surcharged atmosphere.

Added further, in view of the rise in revelations of the Lewd/inappropriate conduct/misdeeds of the deviants including an unwelcome advance of harassment make the 'powers that be' to tinker and tamper with the existing laws on sexual harassment and to bring out a new legislation by inserting necessary amendments, in a Lock Stock and Barrel fashion [with a view to protect the hapless victims, to place them on par with men and to punish the offenders, because of the reason that nearly two decades have rolled by, ever since the *Vishaka* Guidelines were enunciated by the Hon'ble Supreme Court on 13.08.1997 – ***Vishaka and others V. State of Rajasthan, AIR 1997 Supreme Court 3011***]. The composition of Committee may be expanded with members drawn from Legal Fraternity/Women Activists /National Commission for Women who may deliberate, discuss and ruminate over the prevailing laws and to bring out suitable changes so as to make the new Women Harassment Act, a vibrant, awesome and draconian one. Soon after the commission submitting its report to the Government and based on the recommendations, the Government can take diligent follow up action as it deems fit and proper.

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