CRITICAL ANALYSIS OF WITNESS PROTECTION IN INDIA

A DISSERTATION TO BE SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENT FOR THE AWARD OF DEGREE OF MASTER OF LAWS

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7. Gobarayyayaz v Emperor, AIR Nagpur 242

8. G. S. Bakshi v State AIR 1979 SC 569

9. Gura Singh v State of Rajasthan AIR 1979 SC 569

10. Gurbachan Singh v State of Bombay &Another AIR 1952 SC 221

11. Kartar Singh v State of Punjab 1994 SCC (3) 569

12. Kartik Malhar v State of Bihar 1996 Cri. L.J 899 (891) (S.C.)

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20. Phoolan Devi v Shekhar Kapoor& Others 1995 (32) DRJ 142

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ABBREVIATIONS

1. Anr. ...Another
2. AD …Anno Domini
3. AIR ….All India Reporter
4. BPRD …Bureau Of Police Research & Development
5. Cr LJ ….Criminal Law Journal
6. Cr PC … Criminal Procedure Code
7. Ed. … Edition
8. ICC … International Criminal Court
9. ICS …Indian Civil Service
10. IPC . ....Indian Penal Code
11. NHRC . ..National Human Rights Commission
12. POTA …Prevention of Terrorism Act
13. PUCL ... People's Union of Civil Liberties
14. SC ...Supreme Court
15. SCC …Supreme Court Cases
16. SCR …..Supreme Court Report
17. Sec ....Section
18. UP ...Uttar Pradesh
19. Vol. ...Volume
20. WPP ...Witness Protection Programme

21. WPPA …Witness Protection Programme Act

Chapter I

INTRODUCTION

The concept of a fair trial is a constitutional imperative recognized in Articles 14, 19, 21, 22 and 39-A of the Constitutional of India as well as by The Code of Criminal Procedure, 1973 (hereinafter referred as the Cr. P.C., 1973). 'A criminal case is decided on the basis of sufficiency of evidence admissible in law, whether it may be direct or circumstantial. [1] In *Maneka Gandhi's case*,[2] the Apex Court while referring to *Satwant Singh Sawhney's*[3] case held that the procedure established by law should be fair, just and reasonable, not arbitrary.

A law which prescribes fair and reasonable procedure for curtailing or taking away the rights enshrined in Article 21 of the Constitution of India[4] has still to meet a possible challenge under the other provisions of the Constitution. A trial should be fair in the context of accused as well as for the prosecution and the victim.[5]So the prospective of the witnesses to give evidence without any greed ,inducement or threat from either party gathered importance .In a criminal trial, the prosecution is required to first lead evidence. The defence has the right to cross-examine the prosecution witnesses to test the veracity of the prosecution case. So, a detailed legal framework to record the evidence of witness in a criminal case has been laid down in The Indian Evidence Act, 1872 and the Cr. P.C. 1973.

[1]*Swaran Singh* v. *State of Punjab*, 2000 Cri. L.J. 2780.
[2]Maneka Gandhi v Union of India, AIR 1978 SC 597
[3]Satwant SinghSawhney v D. Ramarathnam Assistant Passport Officer, Government of India, New Delhi &Ors., AIR 1967 SC 1836
[4]H.M.Seervai, Constitutional Law of India; A Critical Commentary, N.M. Tripathi Pvt. Ltd., Bombay, Vol. II (4th edn., 2015) p. 56-57
[5]M.P .Jain , Indian Constitutional Law(2020) , N.M. Tripathi Pvt. Ltd., Bombay. p 222-23

According to Bentham, "*Witnesses are the eyes and ears of justice*". So each and every statement of witness is too important because it has the full force to reverse the direction of the whole case.[6] The condition of witnesses, however, remains precarious one. In *Swaran Singh v. State of Punjab*[7] Wadhwa *Judge* had expressed his opinion about the adverse conditions faced by the witnesses. All such adverse circumstances for the witnesses prove to be a blessing for the accused.

Crimes and acts of terrorism take place in public view and still the public who has seen the same do not come forward to give evidence out of fear and on account of frustrating Court procedures. The net result of the unwilling attitude of the public is that the accused invariably manages to get off the hooks and the criminal justice fails. In such circumstances and scenario in recent past a deep concern was expressed in different quarters for suitable legislation and measures for bold witness protection[8]. Under Section 39 of the Cr. P.C., 1973, citizens are legally and morally duty bound to give information about crime and criminals. It is, however, a harsh reality that willing cooperation and support from public and independent witnesses is hardly available. Police investigations are tardy and do not reflect the truth. Police efforts are not to bring the truth before the Court but to prepare a strong prosecution case on behalf of the State. Thus, the statement of the complaint, true or false, becomes very important. Securing conviction rather than unearthing truth is considered to be the yardstick to judge the professional competency of a police investigating officer in police circles. The prosecution agency has not grown to function independently and the prosecutors believe that proving the police story in the Court is their sole responsibility.[9] Therefore, in most of the cases, what is produced and stated before the Court is not a true account of what has happened and what the distort

[6]Vikas Gandhi, Judicial approach in criminal justice system in India: an experience of criminal justice system, Roadworthy publications (P) Ltd.

[7]Supra note 1

[8]Tr. T. Bala Sundaram, *Need for Witness Protection*, Criminal Investigation Department Review –April 2007.

[9]R.V. Kelkar's Criminal Procedure, R.V. Kelkar, Supreme Court Cases, K. N. Chandrasekharan Pillai, Edition 7, revised, Eastern Book Company , 1993 , p. 54-56

facts to suit the prosecution story. Witnesses watch the interest of those who have called them and the prosecution agency overlooks the truth by not going beyond what has been written by the police on the case file. Under these circumstances, the Court hardly gets an opportunity to see the truth through the State agents. Keeping in mind these ground realities; it would be relevant and timely to examine the need and importance of a 'Witness Protection Programme' in India.[10]Witness Protection Bill, 2015 and Witness Protection Scheme, 2018 has been formulated but there are some drawbacks in that scheme.

Man is a peace-loving animal. He wants to lead a tension free life and has learnt the art of compromising with situations to purchase mental peace for himself and for his kith and kin. 'Forget and forgive' is relevant phrase which most of us follow in our day-to-day life. This happens in criminal proceedings also especially in cases of petty offences.[11]The prevalent position of law makes witnesses to vacillate during trial. Vacillating witnesses have always been a stumbling block to the flow of justice and a vexing problem for the Courts of law. Deposition before a Court is recorded at the stage of trial, often years after the occurrence. By then the memory of the witnesses has already faded. The police on the other hand records statement of witnesses, as a part of investigation, soon after the occurrence and it places extracts before the concerned Court. Under Section 161and Section 162 of the Cr. P.C., 1973 if such statement of witness is recorded the same should not be under oath; nor be got signed by the witness. The purpose is to avoid manipulations at the hands of the police who have potential to extract even false statements of their choice and to pin the witness down during prospective trials. Pressures and influences involving money power, threat, political interference etc. may contribute to this eventuality. It is not merely the illiterate and the poor who yield to such pressures, even VIPs and politicians succumb to them. Faced with severe threats to life of self or

[10]Dr. K.P. Singh, IPS, Urgent Need for Witness Protection, Human Rights wing of the Institute of Social Sciences, VasantKunj , N. Delhi
[11]ibid

dear ones, or under substantial tempting offers, an ordinary person would be inclined even to give an untrue version before the Court because he does not stand to lose much thereby. A witness is troubled because of his presence at the place where the crime was committed. So it is our responsibility to provide him the best as he is helping the administration of justice. Various rules or guidelines for protection of witnesses have been laid but they are not sufficient until a special statute is framed on the subject.

According to Justice Madan B. Lokur, physical protection of a witness has become necessary not only in cases involving serious offences, hardened criminals and other bad characters, but also in less serious cases and cases where the accused are socially acceptable persons wielding influence.[12]Although there are some provisions e.g. Section 327(2) of the Cr. P.C., 1973, Section 228A of The Indian Penal Code, 1860 (hereinafter referred as IPC, 1860), Section 146(3) of The Indian Evidence Act, 1872 etc. and some special Acts, which work for the protection of witness and also the Supreme Court has repeatedly emphasized on the issue of witness protection but they are not adequate and it is required that a comprehensive law is framed for the same. In absence of such a comprehensive law the problem of witnesses gets increased as they feel increased because of no remedy given to them. Generally the reason is the unholy combination of money and muscle power, intimidation and monetary inducement. Sometimes the social pressure works and the complainant and witnesses agree not to support the prosecution case.

1.1 IMPORTANCE OF WITNESS

The importance of witness is given in the *New Testament which provides that*: *"Thou shalt do no murder, thou shalt not commit adultery, thou shalt not steal, and thou shalt*

[12]Access to Justice: Witness Protection & Judicial Administration , Delhi Judicial Academy (Quarterly Journal) , Volume 3 (Issue I) , 2004

not bear false witness." The importance of the witnesses to the trial process could be seen in the statement of an eminent thinker *Bentham* which provides that "*Witnesses are the eyes and ears of justice*." A witness is an important party in addition to the complainant and the accused.

He has to give all the information correctly otherwise he will have to face the trial under Section 190 of the Indian Penal Code and thereafter may be penalized under Section 193-195 of the same for the aforesaid offence. Once again in *Zahira Habibulla H.Shiekh and Another V. State of Gujarat and others*[13]**.**

"For a Fair trial, there should be not be any biasness against the accused or the witness. The witness should not be threatened to give false evidence. There should not be any failure to hear material witness on the part of the court." The Supreme Court identified the witnesses' important position with reference to the fair trial:

A number of factors have led to increased attention on the role of witnesses in criminal proceedings, not only in India, but also at the international level.

The importance of a witness has been acknowledged basically in crimes such as terrorist attack, drugs trafficking and organized crime. So, The European Union has adopted a Resolution[14]Protection of witnesses in the fight against International Organized Crime. The difficulties faced by the witnesses include life-threatening threat given to them as well as their families. Where such witnesses are police informers or police officers, further investigations and crime prevention activities are hampered due to the inadequacy of witness protection. In addition to it, other witnesses such as witness to crime within the family or close community, sexual offences witnesses also face difficulties.[15] The prosecution mainly relies on the oral evidence of the witnesses for proving the case

[13](2004) 4 S.C.C. 158
[14]Dated 23 November 1995, 95/C 32704
[15]The Scottish Executive Central Research Unit, Briefing Paper on Legal Issues and Witness Protection in Criminal Cases by Mark Mackerel, Fiona, Ratt and Susan Moody , Department of Law , University of Dundae

against the accused. It is because of this reason that witnesses should be given a special treatment in such cases.

1.2 Connotation of Witness: Indian Scenario

In a criminal trial a witness plays a very important role. Then also the word "*witness*" has not been defined either in The Code of Criminal Procedure, 1973 or in the Indian Evidence Act, 1872. So we have to see the meaning of the term witness in different dictionary.

The ordinary meaning of the term "*witness" is a person present at some place where the crime is committed and able to give information about it*. In other words, a witness is a person whose presence is necessary in order to prove a thing or an incident. Witness is "*a person who sees an event taking place*," defines *Concise Oxford English Dictionary*.He gives sworn testimony to a court of law or the policemen. There is a witness box in the court from where the witness gives evidence in a court.

1.3 Connotation of Witness Protection: Indian Scenario

Leaving certain scattered provisions, no complete definition of "protection" is provided in domestic law. Sec. 327(1) Cr.P.C provides that a trial should take place in an open court and Sec. 327 (2) provides for that the offences involving rape under Sec.376 IPC and under Sec.376 A to 376 D of the IPC should be held in camera. Sec. 273 Cr. P.C provides that the evidence should be taken in the presence of the accused. Sec. 299 provides that if it is proved in the court that an accused person has absconded and there is no hope of his arrest, the competent court may examine the witness in the absence of the accused and the accused may be denied his right to cross-examine a prosecution witness in open court. Further, under Sec.173 (6) the police officer forms an opinion that any part of the statement recorded under Sec.161 of a person on which the prosecution proposes to examine its witness need not be disclosed to the accused if is essential in the interests of

justice or is inexpedient in the public interest then the Magistrate will not provide that part of the statement to the accused. Sec. 228A IPC prescribes punishment for the publication of the identity of the rape victim. Similarly, Sec. 74 of the Juvenile Justice (Care and Protection of Children) Act, 2015 prohibits publication of the name, address and other particulars which relating to the identity of the witnesses of crime. Sec. 33 of the Evidence Act provides that in certain exceptional cases, where cross examination is not possible, previous deposition of the witness can be considered relevant in subsequent proceedings. Section 151 and 152 of the Evidence Act prohibits indecent, scandalous, offensive questions, and questions which intend to annoy or insult them from being asked from witness[16].

1.4 NEED OF THE STUDY

Witnesses are considered as the foundation of well-doing criminal justice systems as their cooperation with law enforcement and judicial authorities is necessary to prosecute criminals successfully. In order to uphold the rule of law, witnesses should be protected from physical and mental threat by the crime suspects. Protecting witnesses from intimidation or physical threats from crime suspects is therefore a requirement to uphold the rule of law. The Supreme Court in the case of *Krishna Mochi v. State of Bihar'*[17]observed that society not only suffers by wrong convictions but also due to wrong acquittals. The main problem faced by criminal Justice System is the threat or greed of victims or witnesses due to which they revert back from giving evidence and thus lead to the collapse of trial. In *Krishna Mochi*[18]case the Supreme Court pointed out many reasons due to which the witnesses are not coming forward to depose in the court or their testimony is not found credible. The reasons may be they do not have courage to depose against an accused due to threats to their life and families. They are more frightened when the offenders are habitual criminals or holding high position in the

[16]Summary of Consultation paper on Witness Protection available at www.lawcommissionofindia.nic.in
[17]AIR 2003 SC 886
[18]Id.

Government or having power which may be political, economical or other powers including muscle power.[19] Keeping all these points in view, present study has been undertaken to identify the lacunae in the protection of witnesses under domestic law. Need of the study has arisen when we see that inspite of the high rate of crime and low rate of conviction, there is no strong legal framework in India to protect witnesses in cases. The lack of these laws has helped in further strengthening the criminals and offenders. In the absence of adequate protection the witnesses turn hostile. This hostility of witnesses has made the problem more complex. Witness Protection Bill, 2015 and Witness protection scheme, 2018 has been formulated in 2018. But there are some shortcomings in both of them.

1.5 STATEMENT OF PROBLEM

The present study intends to focus upon the problems faced by the witnesses in the country due to the lack of sufficient legal framework and mechanism in the Criminal Justice System to protect the witnesses. By the help of Doctrinal method of research, attempts have been made to know the reasons and the circumstances in which the witnesses turn hostile. Why they don't appear in Court for giving their testimony in the case? What are the existing legal safeguards in India to protect the witnesses? A systematic research has been made in this study to answer these questions. A Witness Protection Bill, 2015 and Witness Protection Scheme, 2018 has been formulated in India on the lines of the Witness Protection Programmes of different countries. But they can't be implemented effectively till now.

1.6 RESEARCH OBJECTIVE

The conviction rate in India is low and acquittal rate is high due to insufficiency of legal framework to protect the witnesses which is against the interest and the betterment of the

[19]Id

society. In order to find out the solution to this problem, the present study has been undertaken to achieve the following objectives:-

1. To understand the meaning of the term 'witness protection' and how to achieve it successfully.
2. To understand the historical background relating to witness protection in India.
3. To study the problem from International perspectives and analyse the possibility of incorporation of any international provision into Indian law.
4. To critically analyse the witness protection law in India from the legislative and judicial point of view.
5. To analyse the concept of "Hostile Witness" and forthcoming challenges and issues concerning the same.
6. To analyse and discuss the rights of accused vis-à-vis the witnesses protection.
7. To study the Commissions and Committees on witness in Criminal Justice System
8. To analyse Witness Protection Bill, 2015 and Witness Protection Scheme,2018 and its shortcomings.

1.7 HYPOTHESIS

The following hypotheses would be examined in this study:

1) The principal assumption of the study is that the present legal framework and mechanism are not sufficient to provide adequate protection to witnesses in India.
2) The Hostile witnesses is the main cause for the high acquittal rate and low conviction rate in India.
3) The Witness Protection Bill, 2015 and Witness Protection Scheme, 2018 has been formulated but there are some drawbacks in it?

1.8 RESEARCH METHODOLOGY

In this research, researcher has adopted the Doctrinal method of research confining her to the library. The method adopted is doctrinal, analytical and descriptive. Various books on witness protection and criminal justice reform have been gone through by the researcher. The researcher mainly depended on the primary sources like Statutes and Research Committee Report and secondary sources like books, articles, journals, case laws and websites. Opinions of research scholars, professors, experts in respective fields and opinions of advocates who have dealt with this subject are used as real contribution to this work. Internet has provided with a major contribution of most relevant and latest information on the web which has helped the researcher to explore the subject through various dimensions.

1.9 PRIMARY AND SECONDARY SOURCES

For the reason of this research, the researcher has consulted a number of literature, some of commemorative lectures delivered by renowned public figures and jurists, various judgments delivered by Hon'ble Supreme Courts and High Courts, Law commission Report, Police Commission Report, Committees on reforms of criminal justice system, Journals, Commentaries of renowned jurists, daily newspapers, collected significant data from published and unpublished sources, discussed the topic with eminent academicians and legal luminaries. The researcher also relied on the international documents relating to the witness protection in different countries, AIR, SCC, Cr.L.J. etc. The recognised doctrines of law and historical facts have also been incorporated. The researcher also took the help of internet websites where relevant material is provided. The names of such books, reports, journals, internet websites etc. are mentioned in the bibliography.

1.10 REVIEW OF LITERATURE

This review of literature aims to summarize a few recent works on witness protection and the problems in the implementation of WPPs. In doing so, international instruments, national law commission reports, judicial pronouncements, research papers and articles were studied. The current programmes on witness protection in developed and developing nations point towards an urgent need for legislation in India in this regard. This warrants a thorough analysis of literature available on applicable law in India. The outcome of the review is as follows—

In 2003, the Malimath Committee in its report on the Reforms in Criminal Justice System observed that our criminal justice system is about to collapse as the common people are losing their faith in the system. The committee has attributed many factors to it such as the delay in proceedings and backlog of cases. The committee pointed out that our system emphasis strongly upon the rights of accused person before, during and after the trial. The criminals are not afraid of committing crime as they are confident of their impunity. However, the Committee curiously chose not to discuss witness protection.

The Constitution of India provides important safeguards for the protection of rights of accused. The Code of Criminal Procedure provides for procedural safeguards to the accused person such as fair trial, right to consult, right to cross examine and right to compensation in case of false allegations .

The Law Commission in its 198th Report has suggested comprehensive `Witness Identity Protection' and `Witness Protection' programmes to prevent witnesses from turning hostile under threat from the accused and to ensure that criminal trials do not end in unjustified acquittals. However, the report has not exhaustively dealt with the problems of witnesses.

The Witness Protection Bill, 2015 and Witness Protection Scheme, 2018 contains provisions for the witness protection.

Pandurang Vaman Kane, History of Dharmasastra has given detailed account of the Ancient Hindu Law and the administration of justice in Hindu Law. The author has done an extensive research of all the smritis and other vedic documents explaining the criminal procedure applied in the ancient Hindu law. It has given a detailed law relating to witnesses, his qualifications and disqualifications, procedure for the giving testimony and also the penalties for giving false testimony or for refusal to give testimony.

B. Guru Rajah Rao, in Ancient Hindu Judicature talks about the ancient judicial system. The book gives a detailed account of the ancient legal system in India which covers the administration of justice in civil and criminal matters. The legal system as existed in early Hindu law and in the medieval period, predominantly Mohammedan law relating to witnesses was established in a way that would arouse confidence and faith in the minds of not only the victims but also witnesses and the accused. The cordial treatment given to witnesses in the courts might be one of the reasons that could have attracted the witnesses to participate in the administration of criminal justice in those days.

1.11 SCHEME OF THE RESEARCH

The following Dissertation is divided into 7 Chapters which address different dimensions of the problem. These are:-

The first chapter is the Introductory Chapter which covers the importance of witness, Witness protection in Indian Law, Need of the study, Statement of problem, Research Objective, Hypothesis, Literature Review and Plan of study.

The second chapter deals with the Origin and role of Witness in Criminal Trials which deals with the origin and historical progressive jurisprudence regarding role of witnesses

in ancient times, medieval times and in modern period as well as some provisions of the Indian Evidence Act.

The third chapter deals with the Witness Protection Programs -A Contemporary Study of Programs in Different Countries which covers overview of the legal provisions relating to witness protection in various developed as well as developing countries. It provides various international legal instruments dealing with the witness protection.

The fourth chapter deals with the hostile witness and Statutory Protection to Witness under Indian Law which covers the concept of hostile witness provided in Indian Evidence Act, Cr .P.C., I.P.C., judicial decisions and factors responsible for witness turning hostile and analysis of various Legislations enacted in India dealing with the witness protection. i.e. Cr .P.C., Indian Evidence Act, Terrorist and Disruptive Activities Act, Juvenile Justice (Care and Protection of Children)Act, 2015, National Investigation Agency ,2008, The Whistle Blower Act, 2011 etc.

The fifth chapter deals with the Protection of Identity of Witness V Right of Accused which covers the judicial decisions in which the judiciary analysed the need for witness protection.

The sixth chapter deals with the Commissions and Committee on Witness in Criminal Justice System which covers different Commissions and Committees relating to witness protection such as 14th Report of Law Commission(1958), 4th Report of the National Police Commission (1980), 154th Law Commission Report on Protection and Facilities of the Witness, 178th Report of the Law Commission (2001), Malimath Committee Report on the Witness Protection(2003) , Research under B.P.R.D , Report of the Law Commission (2006), Witness Protection Bill, 2015 and Witness Protection Scheme, 2018 etc.

The last chapter deals with the conclusion and suggestion which provides about the drawbacks of the Witness Protection Scheme, 2018 and suggestions for the effective implementation of the Witness Protection Scheme, 2018 and other remedies for the Protection of Witness.

Chapter II

ORIGIN AND DEVELOPMENT OF ROLE OF WITNESS IN CRIMINAL TRIALS

2.1 INTRODUCTION

The following Chapter deals with the development of the law relating to the protection of witnesses in different periods, i.e. Ancient Hindu Period, Muslim Period, Modern Period. In ancient period, the literary sources such as Manusmriti, Vasisthasutra, Gautama sutra, Vishnu purana, Naradsmriti contains provisions relating to witness protection. The ancient Hindu Law laid emphasis on the eye witness and excluded hearsay evidence. The Ancient literary texts also provides the criteria for being a witness. Certain privileges were also given to the witness in ancient time

The Mohammedan law deals with oral, documentary, direct and hearsay evidence, admission including confession. Leading Questions were not allowed as a practice but allowed in exceptional circumstances. The concept of incompetent witness was also there in Mohammedan Law.

In Modern Period, the Halsbury's Law of India provided different types of witnesses. In British Period, different Acts provide about the witness protection i.e. Lord Denman's Act, 1843, Lord Broughams Act, 1843 and 1853, Act XIX of 1834 etc. .The Indian Evidence Act, 1872 provides about the competency, compellability, privileges and quantity of witnesses required for judicial decisions.

In ancient scriptures various means of proof were classified as human and divine. The human means of proof were sub – divided into documents, possession and witnesses. The

famous work of Yajnavalkya[20] enumerates three means of proof. It also directs even for the comparison of handwriting.[21] However, in order to understand the role played by the witness in Indian Criminal Justice System we have to trace the history of Law of Evidence in the country. For this we have to study the subject referring to three different periods, namely:-

a) Witness in Ancient Hindu period
b) Witness during Muslim Rule
c) Witness in Modern Period

2.2 WITNESS IN HINDU PERIOD[22]

The history of jurisprudence tell us that our judicial system did not come to us in a day ,but it is the result of accumulated experience .Rash Bihari Ghosh observed indeed all law may be said to be compromise of the past and present[23]. Therefore an attempt has been made to here to assess the legal importance of the witnesses in the ancient Hindu judicial system which was strictly based on the legal code formulated by the erudite jurists.

The literary source[24] of the information including Manusmriti, Vasistha sutra, Gautama sutra. Vishnu Purana ,Naradsmriti etc. focus welcome light on the ancient aspect of the ancient Hindu judicial system which dealt with various aspect of justice and ancient Hindu courts . Juristic speculation of "purana " and "vyavahara ";witness ,their definition ,their grounds of competency and incompetency, kinds of witnesses , number of

[20]Yajnvalkya, II, 22(100 A.D.); Kane, History of Dharmasastra, Vol. 3, P. 304
[21] Vishnu, VIII,12; M.K. Sharan, Court Procedure in Ancient India,(1978) P. 96
[22]"ROLE OF WITNESSES FROM ANCIENT TO PRESENT TIMES" By vijaygovind published in ILI Vol. 15, 1973
[23]Herbert Spencer , principle of sociology , SS 224-233; also Mahabharata shantipara, 59-67;law originated due to an urgent sociological necessity
[24]Vii manusmriti 62-113, ivsukranitisara 690-724. Iii kaustikisura ii/32-66,iv/415-17;vasisthathadharmasutra

witnesses .oath and divine ordeals for witnesses ,cross examination of witnesses perjury and many other details about to the role of witnesses in ancient judicial system.

Among the Smritis, Manusmritis regarded as one of the authenticated source of information. **Henry Maine** choose it to describe Manusmriti as twelve tables of the Rome and like Leviticus where rules and laws unlike English and Mohammad laws were based on moral percepts ,similarly Manusmriti was also based on moral percepts. It states that the king must save the weak from the grip of strong and must constantly watch his subjects' by imparting justice to them. Manusmriti mentions that the king must give opportunity to the hearing to the subjects and also must pronounce early judgments.

The literary source[25] reveals to the declaration that in disputes, truth has to be ascertained by the means of witnesses, who may be examined by the king or the learned Brahmans. The ancient law excludes hearsay evidences .This is implied by the very word sakshi which means the man who himself eye witnesses the incident or hears directly about the transaction. As regards the competency of the witness sukra states that a witness is as person than a party, having direct knowledge of the dispute by witnessing it or by hearing about it through indirect sources. other literary source also testifies this definition[26].

However Panini does not attach any legal importance to the hearsay direct knowledge about any transaction, but attach more importance to eye witness of the incident .an exception is laid down in the Vishnu Dharmsutra and Sukrasmritisara that hearsay or indirect knowledge about any dispute can only be treated as legally acceptable when the real witness associated with the dispute is absent or if he has conferred an authority upon somebody either before going abroad or before his death.[27]

[25]Ii sacred books of the east ,chapter xiii,p-26 ;Gautama ,chap xiii.p-245;
[26]Viii manusmriti 74;viii vishnudharmasutra 13;iv sukranitissara;64-68;
[27]V Panini 2/91

It is laid down in literary texts that a person can become a witness, when he is sincere in his work, trustful having an offspring, religious minded, god fearing, simple follows the directness of Smritis and dharmashastras. Manu states that the idea of having an offspring or becoming a witness, seems to have been inspired by the fact that the witness may not speak lie, while giving evidence out of fear of losing his offspring, however generally three witnesses were employed to give evidence in dispute.[28]

While dealing with the kinds of witnesses, Naradsmriti refers to two krta and akrta ,the former being further subdivided into five categories

1)Likhit ; one who can write his name himself 2)Smarta ; one who has been asked to witness a transaction and remind about it every time 3)Yadrichadgata ; one who has casually come out at the time of the transaction4)Uttarakshi ; one who has asked by the plaintiff to hide himself in some place .

The category of casual witness includes village head, judges, and king's .one who has been authorized to perform any act on behalf of the person disputed by the plaintiff and lastly the members of the family In the matter affecting family 'fall.

In ancient judicial system the people felt it their moral duty to reveal the truth and enjoyed the privilege of becoming a witness in the ancient Indian judicature

2.3 WITNESS IN MUSLIM PERIOD

Often there is no true conception especially in the South of the highly developed Muslim rules of evidence, and prejudice prevails[29] Muslim rules of evidence can be gathered from the classics on the subject, viz., Sir Abdur Rahim's "Muslim Jurisprudence", Wahed Husain's "Administration of Justice during the Muslim Rule in India" (University of

[28]Viii vishnudharmasutra 5;
[29]Woodroffe, Sir john and Syed Amir Ali, "**Law of Evidence**", Vol.-1 17th Edition , New Delhi: Butterworths India, 2002,P. 19

Calcutta Publication) and M. B. Ahmad, I.C.S. on, "Administration of Justice in Medieval India" (Aligarh Historical Research Institute Publication). The Al-Quran lays great stress on justice. It holds that the creation is founded on justice and that one of the excellent attributes of God is "just". Consequently, the conception of Justice in Islam is that the administration of justice is a divine dispensation. Therefore, the rules of evidence are advance and modern[30].

The Muhammadan law-givers deal with evidence under the heads of oral and documentary, the former being sub-divided into direct and hearsay. There was a further classification of evidence in the following order of merit, viz., full corroboration, testimony of a single individual and admission including confession. In regard to oral evidence, the Quran enjoins truthfulness**.** It says:

*"*o *true believers, observe justice when you appear as witnesses before God, and let not hatred towards any induce you to do wrong: but act justly: this will approach nearer unto piety, and fear God, for God is fully acquainted with what you do."*[31]

*"*o *you who believe, be maintain of justice when you bear witness for God's sake, although it be against yourselves,* or *your parents,* or *your near relations; whether the party be rich* or *poor, for God is most competent* to *deal with them both, therefore do not follow your low desire in bearing testimony, so that you may swerve from justice, and if you swerve* or *turn aside, then surely God is aware of what you do."*[32]

Witnesses were examined and cross-examined separately out of the hearing of the other witnesses. Leading questions were not allowed on the ground that this would lead to the suspicion that the court was trying to help one party to the prejudice of the other; but if a witness was frightened or got confused, the judge could put such questions so as to

[30]Law of Evidence by V. Krishnamachari Publisher Asia Law House, 1991,p22
[31]Holy Quran , Chapter 5, Verse 8
[32]Holy Quran, Chapter 4, Verse 135

remove the confusion, though they may be leading questions. It was enjoined that the questions should be put in such a manner as not to make the judge liable to the charge of partiality and that he was pouring questions in order to get answers to facts which should be proved by the witness. Certain classes of witnesses were held to be incompetent witnesses, viz., very close relatives in favour of their own kith and kin, or of a partner in favour of another partner. Certain classes of men, such as professional singers and mourners, drunkards, gamblers, infants or idiots, or blind persons in matters to be proved by ocular testimony were regarded as unfit for giving evidence.

2.4 WITNESSES IN MODERN TIMES

The Halsbury's Laws of India classified witnesses into different categories viz;

- Eye witnesses,
- Natural witnesses,
- Chance witnesses,
- official witnesses
- Sole witnesses
- Injured witnesses,
- Independent witnesses,
- Interested, related and partisan witnesses,
- Inimical witnesses,
- Trap witnesses,
- Rustic witnesses,
- Child witnesses,
- Hostile witnesses,
- Approver, accomplice etc.

2.4.1 BRITISH PERIOD

Before the introduction of Indian Evidence Act, there was no systematic enactment on this subject. The English rules of evidence were always followed in the courts established by the royal charter in the presidency towns of Calcutta, Madras and Bombay. "Such of these rules, as were contained in the Common Law and the Statutory Law, which prevailed in England before 1726, were introduced in Presidency towns by the Charter"[33]. The British rulers, though they do not have any codified or consolidated law of evidence in their country, thought fit to frame some rules to be followed by the courts in India. During the period of 1835 to 1853 A.D., a series of Act were passed by the Indian legislature introducing some reforms of these Acts which superficially dealt with the law relating to the witness are summarized as follow: outside the presidency towns there were no fixed rules of evidence. The law was vague and indefinite and had no greater authority than the use of custom. However, a practice had grown to follow. Some rules of evidence on the basis of customs and usages of Muslims.

(i) Lord Denman's Act[34]

(ii) The same Act provides that no witness should be schedule from giving evidence either in person or by deposition by reason of "incapacity for crime interest".[35]

(iii) Lord Broughams Act declares that the parties to the proceedings , their wives or husband and all other person capable of understanding the nature of oath and the duty to speak truth, as competent witnesses in the country courts. [36]

(iv) Lord Broughams Act of 1853 [37]declared that the parties and the person on whose behalf any suit, action or proceeding may be brought or defended, are competent as well as compellable to give evidence in any court of justice.

[33]Bunwaree V. Het Narain 7, MIA 148
[34]6 &7 Vic. C. 85 of 1843
[35]9 & 10 Vic. C.95 of 1843
[36]14 and 15 Vic C. 95 of 1843
[37]6 and 17 Vic. C.83 of 1852

(v) Act XIX of 1834 abolished the incompetence of the witness by reason of a correction for criminal offences made the husbands and wives of the parties to the records competent and compellable witnesses. Sec 4 of the Evidence (further amendment) Act of 1869 removes the disability attached to the atheist and such infidels (i.e. on Christians) as were atheist to be and to testify they were declared competent witness to testify. These reforms had a great impact on the working of the courts in British India. However, despite of these reforms the administration of Law of Evidence in the Mofussil Courts was far from satisfactory. The courts were still governed by the customary laws which were mostly vague and indefinite. Though the Acts XIX of 1853 and II of 1855 made the law followed by the Presidency Courts applicable to the Mofussil Courts but these rules were not enough to force the problems relating to hostile witness and evidence of an accomplice. Thus in the year 1870, Sir James Stephen prepared a new bill which was passed by the parliament in 1872 which codified consolidated the rules relating to admissibility of fact competency of witness, examination and cross-examination of the witness.

2.4.2 WITNESS UNDER INDIAN EVIDENCE ACT, 1872

Chapter IX titled "OF WITNESSES" of the Indian Evidence Act, 1872 consists of seventeen Sections spreading from Sections 118 to 134 deals with

i. Competency;

ii. Compellability;

iii. Privileges; and

iv. Quantity of Witnesses required for judicial decisions

Sections 118 to 121 and Section 133 of this Act provide for competency of witnesses whereas Section 121 (Judges and Magistrates) and Section 132 (Witness not excused from answering on the ground that answer will criminate) refers to the compellability of the witnesses. Privileges of the various witnesses find place in various forms in Section 122 to 131 of this Act. Section 134 of the Indian Evidence Act 1872 envisages that no

particular number of witnesses is required for proof of any fact. The last Section 134 of the Chapter IX enshrines the well-recognized maxim that Evidence has to be weighed and not counted.

2.5 CONCLUSION

The concept of witness has been developing from the ancient to modern period but except under Indian Evidence Act, there is no provision relating to the witness protection.

Chapter III

WITNESS PROTECTION PROGRAM – A COMPARATIVE STUDY OF PROGRAMS IN VARIOUS COUNTRIES

3.1 INTRODUCTION

Around the world most witness protection programs are managed by police forces. Witness intimidation is usually perpetrated by criminal organizations..

Among the countries with Witness Protection Programs (WPP) that were reviewed (United States of America, Australia, Canada, South Africa, China, Germany) this study found that most WPPs were managed by national or regional police forces, most programs were legislatively based, and that the level of risk faced by a witness dictated the nature and extent of the protective measures that are taken. For instance, most WPPs had a requirement that a serious risk to the witness be established before protection services be offered. In regards to witness intimidation, this study found that in most cases, witness intimidation was perpetuated by individuals linked to criminal organizations. The majority of protected witnesses were criminally involved police informants or criminal associates of defendants; the protection of non-criminal witnesses or victims in WPPs was very rare.

This report also found that there was little public, credible research on witness intimidation and failed prosecutions resulting from the intimidation or suppression of witnesses. Further research could be accomplished by gathering data from the police or prosecutorial files, as well as through interviews with prosecutors. The experience of

criminal investigators in using informants and agents and securing their cooperation is also an area deserving further attention. In particular, the authors identified the need to review existing threat assessment practices in various police forces.

3.2 UNITED STATES

United States unlike India, the law in the United States is far more developed in the field of 'protection of witnesses'. on the other hand, the law in the United States is so advanced and is at such a stage that the Congress has come up with the organized Crime Control Act way back in 1970 and since then, their Courts have only been trying to perfect by addressing as many lacunae as possible.

In the late 1960s, the United States Department of Justice recognized that victim and witness intimidation had become a serious impediment to obtaining testimony in organized crime cases. In response Congress enacted the organized Crime Control Act of 1970, which laid the basis for the Federal Witness Protection Program.

The Federal Witness Protection Program was authorized by the organized Crime Control Act of 1970[38]. originally, the program was formulated to purchase and maintain housing

[38]*Organized Crime Control Act of 1970*, Pub. L. No. 91-452, §§ 501- 504, 84 Stat. 922, 933-34 (1970). Title V authorizes the United States Attorney General to protect and maintain federal or state organized crime witnesses and their families. Sections 501 through 504 provide:
Sec. 501 - The Attorney General of the United States is authorized to provide for the security of Government witnesses, potential Government witnesses, and the families of Government witnesses and potential witnesses in legal proceedings against any person alleged to have participated in an organized criminal activity. Sec. 502 - The Attorney General of the United States is authorized to rent, purchase, modify, or remodel protected housing facilities and to otherwise offer to provide for the health, safety, and welfare of witnesses and persons intended to be called as Government witnesses, and the families of witnesses and persons intended to be called as Government witnesses in legal proceedings instituted against any person alleged to have participated in an organized criminal activity whenever, in his judgment, testimony from, or a willingness to testify by, such a witness would place his life or person, or the life or person of a member of his family or household, in jeopardy. Any person availing himself of an offer by the Attorney General to use such facilities may continue to use such facilities for as long as the Attorney General determines the jeopardy to his life or person continues.
Sec. 503. As used in this title, "Government" means the United States, any State, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof. The offer of facilities to witnesses may be conditioned by the Attorney General upon reimbursement in whole or in part to the United States by any State or any political subdivision, or any department, agency, or instrumentality thereof of the cost of maintaining and protecting such witnesses. Sec. 504.

facilities for protected witnesses, but that approach was discarded.[39] The legislative intent was twofold: to create an incentive for persons involved in organized crime to become informants[40] and to recognize "a felt moral obligation to repay citizens who risk life by carrying out their duty as citizens to testify.[41] Again, as originally formulated, services were to be limited to witnesses of organized crime, but in its current form, the program provides protective services to witnesses and family members in cases involving organized crime "or other serious offense, if the Attorney General determines that an offence involving a crime of violence directed at the witness is likely to be committed. [42]Those services may be provided as long as the danger to the protected individual continues.[43]

Prior to admission into the program, an evaluation of the individual's suitability must be performed and the individual also must undergo a psychological examination[44]. Further, the individual must execute a memorandum of understanding that outlines his duties, obligations and responsibilities--to testify in and provide information to law enforcement concerning the criminal proceedings, to refrain from committing any crime, to avoid detection and to cooperate with all reasonable requests of those protecting the person. The Attorney General may terminate protection if the protected person "substantially breaches" the memorandum of understanding, or provides false information. Physical protection for those who enter the program is provided by the United States Marshal's office.[45]

There is hereby authorized to be appropriated from time to time such funds as are necessary to carry out the provisions of this title. Id. §§ 501-04.

[39]See, Franz v United States, 707 F. 2d 582, 586-87(D.C.Cir. 1983)
Available at http://www.law.harvard.edu/publications/evidenceiii/cases/frye.htm

[40]Id. at 586

[41]See, Garcia v United States, 666 F. 2d 960,963(5th Cir. 1982) https://www.casetext.com/case/garcia-v-us-14

[42]See, Organised Crime Control Act, $ 501

[43]18 U.S.C . $ 3521 (a)(1)(2000)

[44]18 U.S.C. $ 3521 (c)

[45]United States Marshals Service,28 C.F.R. $ 0.111(2001)

3.3 AUSTRALIA

In Australia, the Supreme Court of Victoria in Jarvie (1995) approved of non-disclosure of the names and addresses of informers and undercover police officers as well as other witnesses whose personal safety would be endangered by the disclosure of their identity. S.2A (1) (b) of the Australian Evidence Act, 1989 deals with special witnesses who are suffering from trauma or likely to be intimidated.

The witness protection program constituted under the Witness Protection Act 1991 is an extremely comprehensive system and nearly everything has been contemplated while enacting the legislation. The definition of witness itself is wide in its ambit and is not seen merely in the strict sense of a witness with regard to a statement before a criminal court under oath. S.4(2)(d) include the flexible phrase of "a person who, for any other reason, may require protection or other assistance under this Act."

3.4 CANADA

In Canada [46] the courts have granted more importance to the exception of 'innocence at stake' rather than the needs of administration of justice. In other words, anonymity of witnesses is treated as a privilege granted under the common law unless there is a material to show that it will jeopardize the proof of innocence of the accused.

Canada's Witness Protection Programme Act (WPPA) was enacted in June 1996. The act aims "to provide for the establishment and operation of a program to enable certain persons to receive protection in relation to certain inquiries, investigations or prosecutions".

In Section 2 of the Act, it defines "witness" as a person and/or their families who are at risk and need protection as a result to his/her testimonies or participation to an inquiry,

[46]Canada (1996).Witness Protection Programme Act(WPPA)

investigation or prosecution of an offence. It defines "protection" to include relocation, accommodation and change of identity as well as counselling and financial support for those or any other purposes in order to ensure the security of the protectee or to facilitate the protectee's re-establishment or becoming self-sufficient.

The Act calls for the establishment of a "witness-protection program" which shall be

administered by the Commissioner of the Force or the Royal Canadian Mounted Police. It is the Commissioner's responsibility to determine whether a witness is qualified for the program and what specific protection program shall be afforded to him/her. on emergency cases, when witnesses need urgent protection and yet devoid of protection agreement, the Commissioner may provide witness protection to witnesses for the maximum of 90 days .

3.5 SOUTH AFRICA[47]

S.153 of the South Africa Criminal Procedure Code permits criminal proceedings to be held in camera to protect privacy to the witness. S.154 gives discretion to the court to refuse publication of the name of the accused. The South African courts have permitted the witness to give evidence behind closed doors or to give witness anonymity

South Africa's Witness Protection Act 112 of 1998 was adopted for the purposes of establishing the structures, rules and procedures for the protection of witnesses.

This Act was amended by the Prevention and Combating of Corrupt Activities Act 12 of 2004 and the Criminal Law (Sexual offences and Related Matters) Amendment Act 32 of 2007; and, further amended by Independent Police Investigative Directorate Act 1 of 2011.

[47]Republic of South Africa. (1998). Government Gazette Volume 401, No. 19523. Cape Town.

It must be noted that even before the promulgation of the 1998 Witness Protection Act, South Africa had experiences of witnesses put under 'protective custody' when deemed necessary by virtue of the Criminal Procedure Act of 1977. In 1995, under the office of the Minister of Justice, the Directorate for Witness Protection was created as a precursor to the Witness Protection Act of 1998 whereby the office of Witness Protection is established.

The office of Witness Protection is under the Department of Justice. It is headed by a Director appointed by the Minister of Justice who shall perform functions and carry out duties conferred upon, assigned to or imposed upon him/her by the Act subject to the controls and directions of the Minister. The Director "may be helped by designated officers of the Department of Justice; witness protection officers; security officers; other officers who may have been seconded to the office; and any other person employed by the office because of their necessary skills" (Summary of the Witness Protection Act, 2008). The Director-General of Justice can ask the Secretary of Defence; the National Commissioner of the South African Police Service; the Director-General of the National Intelligence Agency; the Director-General of the South African Secret Service; or the Commissioner of Correctional Services to second a member of its service as a security officer to assist the office. The Director-General of Justice, subject to the laws governing the public service, appoints Witness Protection officers as heads of the branch offices for Witness Protection. These Witness Protection officers may exercise the powers and must perform the functions or carry out the duties conferred upon, assigned to or imposed upon him or her by the Director or under the Act.

3.6 CHINA[48]

"In China, during a telephone call from police in search of change in 1994, Hong Kong Police launched a Witness Protection Programme. A similar plan was introduced in 1998

[48]Article by Ms. Aditi Sharma, Mody University, School of Law

under the Independent Commission against Corruption (ICAC). In 2000, the Protection ordinance was enacted to provide a basis for the protection & other assistance of witnesses & persons associated with witnesses. This same rule provides for similar mechanisms for the use of Witness Protection Programs established by the Hong Kong Police & the ICAC."[49]

3.7 GERMANY[50]

"In Germany, there were no specific legal provisions to protect witnesses against organized crime. There was however a large no. of laws aimed at protecting witnesses. Witness Protection Programs have been in existence in Germany since the mid 1980. They were first used in Hamburg for gang related offence. In the following years, they worked orderly with other Germans and the Crime Police office. In 1998, the Witness Protection Act was promulgated. The law included provisions governing criminal proceedings. And in 1998, the Criminal Police Task Force developed a concept of witness protection that one outlines the objectives & measures to be used by organizations that include witness protection. That has led to issuance of standard guidelines for the protection of vulnerable witnesses by state and local agencies. Until the adoption of the Law on the Protection of Risk Witness, 2001, guidelines served as a major basis for the witness protection program in Germany. With the adoption of the Harmonize Act for the protection of evidence in 2001, the Legislature established the legal basis for certain steps to protect witnesses, which is why the statutory security in this role. The legislature has chosen not to limit the area of application in the fields of organized crime & terrorism. Section 2 subs2 Rule 2 of the Harmonize Witness Protection Act contains a special clause that the means of protecting witnesses in accordance with the Act so that Harmonize Witness Protection is ultimately considered only in cases of serious crime. The 2001 law was introduced to harmonize the legal

[49]ibid
[50]Article by Ms. Aditi Sharma, Mody University, School of Law

environment with the process of witness protection at both the federal and state levels. In May 2003, the guidelines were complied with the statutory provisions of the law and now serve as the provisions of the Act at all witness protection offices in Germany."[51]

3.8 INTERNATIONAL INSTRUMENTS RELATING TO WITNESS PROTECTION

There are a number of international instruments which recognize the need to protect witnesses from intimidation, threats and harm. These include:

1. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power which was adopted by the UN General Assembly in 1985. According to the Declaration, states should take measures to "minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation"[52]
2. The UN Convention against Transnational organized Crime of 2000 and its three Protocols. States Parties are required to take appropriate measures to "provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings" who give testimony concerning offences covered by the Convention (money laundering, corruption, trafficking in persons, smuggling of migrants etc) and for their relatives and other persons close to them[53]
3. The UN Convention against Corruption of 2003. States Parties shall take appropriate measures in accordance with their domestic legal system and within their means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences covered by the Convention (money laundering, bribery of public officials, embezzlement or misappropriation by

[51]ibid
[52](Art. 6(d)) of The Declaration of Basic Principles of Justice For Victims of Crime and Abuse of power, 1985
[53](Art. 24) of The UN Convention against Transnational Organized Crime of 2000

a public official, abuse of functions, illicit enrichment etc.) and for their relatives and other persons close to them[54].

4. The UN Economic and Social Council Resolution 2005/20 adopts Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime. These Guidelines (in the Annex to the Resolution) contain provisions ensuring that children involved in the criminal justice process as victims and witnesses are treated fairly and are subject to special protection, including protection from intimidation, threats or harm.
5. The United Nations office on Drugs and Crime (UNoDC) in 2008 launched a manual on "Good Practices in the Protection of Witnesses in Criminal Proceedings Involving organized Crime". The publication aims at assisting UN Member States develop comprehensive programs for the protection of victims and witnesses of crime.[55]

3.9 INTERNATIONAL CRIMINAL TRIALS

Experience in international criminal trials for gross violations of human rights has highlighted the need to arrange for the protection of victims and witnesses who appear before them. Each of the statutes of the major international criminal tribunals made provision for witness protection.[56] Witness protection can be particularly difficult when the court is located in the country where the breaches of international law allegedly took place (such as the Special Court for Sierra Leone). Witness protection in international trials can also be costly, and the best methods are still being determined by the judges who preside over these international criminal tribunals.

[54](Arts. 32, 37(4)) of The UN Convention against Corruption of 2003
[55]http://www.unodc.org/unodc/en/press/releases/2008-02-13-2.html
[56]Statute of the International Criminal Tribunal for the former Yugoslavia (Art. 22);Statute of the International Criminal Tribunal for Rwanda (Art. 21);Rome Statute of the International Criminal Court (Arts. 43(6) and 68); Statute of Special Court for Sierra Leone (Art. 16(4)), and the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (Art. 33).

However, according to the UN0DC manual "Good Practices for the Protection of Witnesses in Criminal Proceedings Involving organized Crime", there are several common elements of the protection programs of the International Criminal Court, the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda.

3.9.1 Special witness protection units: These tribunals have special units under the authority of the court registrar to provide protection to witnesses. This includes physical protection and security, as well as counselling, medical and psychosocial care and assistance for victims and witnesses who are at risk because of their testimony.

3.9.2 Responsibility for witness protection measures: The special units are responsible for implementing witness protection measures under the authority of the registrar (non-procedural measures) or the judge or chambers itself (procedural measures). At the International Criminal Tribunals for the former Yugoslavia and Rwanda, the units make independent determinations in relation to the needs of witnesses and the measures to be used. The unit at the International Criminal Court provides its services in consultation with the office of the Prosecutor. The services offered by all of the units are available equally to prosecution and defence witnesses.

3.9.3 Co-operation of States: The international tribunals do not have territorial jurisdiction or their own law enforcement capacity, and rely on the cooperation of States to ensure close protection measures before and during trial. After testimony is given, the units can arrange for the resettlement of witnesses, including relocation to another country, if other States have agreed to receive witnesses.[57]

[57]WITNESS PROTECTION IN COUNTRIES EMERGING FROM CONFLICT INPROL Consolidated Response (07-008), 5 Dec 2007;http://www.inprol.org/node/2376

The Rome Statute that created the International Criminal Court (ICC) – which India has not signed - has recognised this problem and mandated the protection of witnesses; otherwise, it would be impossible to gather evidence even for mass crimes. The ICC has established a separate unit that provides support to the witnesses and responds immediately if witnesses receive threats or intimidation. Moreover, the protection and support services are provided not only during the trial stage, but if required, at all stages of the criminal proceedings, from investigation to post-trial. It is true the ICC has more resources available than most criminal justice systems; nevertheless, putting victim and witness protection measures in place is inextricably linked to the dispensation of justice anywhere.

3.10 CONCLUSION

There are different international laws relating to witness protection and number of International instruments relating to witness protection. India should enact its Central Act taking into account the provisions of these WPPP suitable to its conditions and infrastructure. An attempt could also be made, perhaps in collaboration with countries with similar WPPs, to develop some standard performance indicators for WPP in India.[58]

[58]Dandurand, Yvon, and Kristin Farr. (2010) *A Review of Selected Witness Protection Programs*. Ottawa, ON: Public Safety Canada

Chapter IV

HOSTILE WITNESS AND STATUTORY PROTECTION TO WITNESS UNDER INDIAN LAW

4.1 INTRODUCTION

The following chapter deals with the concept of hostile witness. Though the term Hostile Witness is not expressly used in Indian Evidence Act but certain sections deals with the situation where witness turns hostile. For e.g. Section 154, 141,142 ,145 ,157etc. The Chapter also provides cases in which Supreme Court has tried to define the term hostile witness. The leading cases relating to hostile witness has also been quoted.

This Chapter further deals with the statutes in which provisions relating to witnesses are provided. The Statutes in witness is given protection are Criminal Procedure Code, Indian Penal Code, Indian Evidence Act, Terrorist and Disruptive Activities Act, 1987 , The Unlawful Activities (Prevention) Amendment Act, Amended 2004, The Whistle Blower Act, 2011, The Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act,1989, The Juvenile Justice (Care and Protection of Children Act, 2015) etc.

4.2 HOSTILE WITNESS: MEANING

Generally a witness is labeled as hostile, when he furnishes a certain statement on his knowledge about commission of a crime before the police but refutes it when called as witness before the court during the trial. The term 'hostile witness' does not find any explicit or implicit mention in any Indian laws, be it Indian Evidence Act or the Code of Criminal Procedure or any other law. The Wikipedia Encyclopedia defines 'Hostile witness' as a witness in a trial who testifies for the opposing party or a witness who

offers adverse testimony to the calling party during direct examination. A witness called by the opposing party is presumed hostile. A witness called by the direct examiner can be declared hostile by a judge, at the request of the examiner, when the witness' testimony is openly antagonistic or clearly prejudiced to the opposing party.[59]Hostile witness, is also called as adverse witness, who weakens the case of the side he or she is supposed to be supporting i.e. instead of supporting the prosecution who has presented him as a witness in the court of law, the witness either with his evidence or statement became antagonistic to the attorney and thus "ruin the case" of the party calling such witness. In such a case, moreover, it is the attorney who asks the judge to declare the witness a hostile witness.

Thus, it is the court and no other than the court that has authority to declare a witness a hostile witness. It has to be remembered here that the court cannot by itself declare a witness a hostile witness but it can do so only on the request made by the prosecution attorney. If a witness has been declared a hostile witness, by the court of law, the attorney then has greater freedom in questioning the hostile witness. In other words, if a witness has been declared as hostile witness the prosecution may question the witness as if in cross-examination i.e. he or she may ask leading questions to the witness declared hostile and this is the basic difference between the status of a witness declared hostile and the witness who has not been declared hostile or who is a common or favourable witness.

The word “hostile witness” is not defined in the Indian Evidence Act, 1872. The draftsmen of the Indian Evidence Act, 1872 were not unanimous with regard to the meaning of the words “adverse”, “unwilling”, or “hostile”, and therefore, in view of the conflict, refrained from using any of those words in the Act. The matter is left entirely to the discretion of the court. A witness is considered adverse when in the opinion of the

[59]3 Bose Suprio, “Hostile Witness: A Critical Analysis of Key Aspects Hitherto Ignored in Indian Law” www.Legalserviceindia.com/article/host.htm

judge, he bears a hostile animus to the party calling him and not merely when his testimony contradicts his proof.[60]

Section 154(1) of the Indian Evidence Act, 1872 provides about the hostile witness. It says that The Court in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross- examination by the adverse party.

Section 154(2) of the Indian Evidence Act, 1872 provides that Nothing in this section shall disentitle the person so permitted under sub-section (1) to rely on any part of the evidence of such witness.

In Sat Pal V. Delhi Administration[61]the Hon'ble Supreme Court tried to define hostile witnesses and laid that to steer clear controversy over the meaning of hostile witness, adverse witnesses, unfavourable witness which had given rise to considerable difficulty and conflict of opinions, the authors of the Indian Evidence Act, 1872 seem to have advisedly avoided the use of any of those terms so that in India the grant of permission to cross-examine his own witness by party is not conditional on the witness being declared adverse or hostile .

In *Gura Singh V. State of Rajasthan*[62] In the Indian context, the principles dealing with the treatment of hostile witnesses are encompassed in Section 154 of the Indian Evidence Act, 1872 , defined hostile witness as one "who is not desirous of telling the truth at the instance of one party calling him".

Hostile witness is one who from the manner in which he gives evidence shows that he is not desirous of telling the truth to the court. Within which is included the fact that he is

[60]Vikas Gandhi, Judicial Approach in criminal justice system in India: an experience of criminal justice system, Roadworthy Publications (P) Ltd.
[61]1976 AIR 294
[62]G.S.Bakshi V. State, A.I.R. 1979 S.C. 569

willing to go back upon previous statements made by him [63] A witness is not necessarily hostile if he is speaking the truth and his testimony goes against the interest of the party calling him. A witness's primary allegiance is to the truth and not to the party calling him. Hence, unfavourable testimony does not declare a witness hostile. Hostility is when a statement is made in favour of the defence due to enmity with the prosecution[64]. The inference of the hostility is to be drawn from the answer given by the witness and to some extent from his demeanour. So, a witness can be considered as hostile when he is antagonistic in his attitude towards the party calling him or when he conceals his true sentiments and does not come out with truth and deliberately makes statements which are contrary to what he stated earlier or is expected to prove. When a prosecution witness turns hostile by stating something which is destructive of the prosecution case, the prosecution is entitled to request the Court that such witness be treated as hostile.[65]

4.2.1 Indian Evidence Act, 1872

Certain provisions of the Indian Evidence Act, 1872, govern the use of such statements in a criminal trial, and thereby merit our attention. Section 141 of the Indian Evidence Act, 1872 defines leading questions, whereas Section 142 requires that leading questions must not be put to witness in an examination-in chief, or in a re-examination, except with the permission of the Court.[66] The court can however permit leading questions as to the matters which are introductory or undisputed or which in its opinion have already been sufficiently proved.

[63]PanchananGogoi v Emperor, A.I.R. 1930 Cal. 276 (278)
[64]R.K.Dey v State of Orissa , A.I.R . 1977 S.C. 170
[65]G.S.Bakshi v State , A.I.R. 1979 S.C. 569
[66]Ratanlal&Dhirajlal's the Law of Evidence(Act 1 of 1872), RatanlalRanchoddas, DhirajlalKeshavlalThakore, M.N.Venkatachalaiah , Edition 23 ,Lexis NexisButterworthsWadhwa, Nagpur ,2019 , p. 89

Section 154(1) of the Indian Evidence Act ,1872 provides about the hostile witness. It says that The Court in its discretion , permit the person who calls a witness to put any questions to him which might be put in cross- examination by the adverse party.

Section 154(2) of the Indian Evidence Act, 1872 provides that Nothing in this section shall disentitle the person so permitted under sub-section (1) to rely on any part of the evidence of such witness.

Thus, Section 154 authorizes the court in the discretion to permit the persons who call a witness to put any quest to him which might be put in cross examination by other party.

Such questions will include:-

- Leading questions (Section 143 of Evidence Act)
- Questions relating to his previous statements (Section 145 of Evidence Act)
- Questions, which tend to test his veracity to discover who he is and what his position in life or to shake his credit (Section 146 of Evidence Act)

It is to be taken into account that the courts are under a legal obligation to exercise the discretion vested in them in a judicious manner by proper application of mind and keeping in view the attending circumstances. Furthermore the permission of cross-examination Under Section 154 of the Evidence Act cannot and should not be granted at mere asking of a party calling the witness. If we analyse the language of Section 154 following points come into picture:-

- Firstly, the provision (Section.154 of the Indian Evidence Act, 1872) only talks about permitting "such questions as may be asked in cross examination."
- Secondly, the law nowhere mentions, the need to declare a witness as hostile, before the provision can be invoked.

- Thirdly, the judicial consideration (under Section154) is only to be invoked when the court feels that 'the attitude disclosed by the witness is destructive of his duty to speak the truth.

All that law seeks to do is elicit hidden fact from the witnesses for the sole purpose of determining the truth. Ultimately it is the court, which has to use its discretion in granting the permission to ask such questions as referred in Sec 154 of the Indian Evidence Act.[67]

Section 145 of this Act prescribes one of the most effective modes for impeaching the credit of a witness. This section allows for the cross-examination of any witness as to any previous statement made by him in writing. The previous statement made by the witness can be used for the purpose of contradiction of the witness, under this section, as long as his attention is taken to those parts of the writing that are to be relied on for such purpose. Section 145 statutorily incorporates one significant use of previous statements made by witnesses and assumes prominence especially in the context of the general principle that such statements cannot be used as substantive evidence. The other relevant provision is Section 157 of the Act, which states that any former statement made by a witness relating to the same fact, before any authority legally competent to investigate the fact, can be used to corroborate the oral testimony.

4.3 HOSTILE WITNESS: Recent Judicial Pronouncements

4.3.1 Best Bakery case[68]

Best Bakery trial is the glaring example of miscarriage of justice where the witnesses turned hostile due to external pressures by the rich and powerful accused. The first track trial began on May 9 and was completed on 29 June, 2003. Twenty one persons were

[67]PandeySharanBrisketu, "Hostile Witnesses in Our Criminal Justice System", 2005 Cr. L. J(Jour.)17
[68]State vsSidharthaVashisht And Ors 2001 Cri .L.J. 2404 Zahira
Habibulla H Sheikh And Anrvs State Of Gujarat AndOrs . (2004) 4 SCC 158

named accused in the case and the prosecution mainly depended on the testimony of the survivor Zahira Sheikh. Before the newly instituted court, she refused to identify any of the accused and was contrary to her previous statement before the police and the National Human Rights Commission. The court recorded a verdict that the prosecution had failed to prove the charges. Later Ms. Sheikh asserted that she had lied to the court under threat and fear for her life.

4.3.2 The Case of Jessica Lal[69]

On April 29, 1999, leading socialite Bina Ramani organized a party at her restaurant, Tamarind Court Cafe. Several youngsters and models were serving drinks at the 'once upon a time' bar, including Jessica Lal and her friends Malini Ramani and Shyan Munshi.

At about 02:00 hours when the party was almost over, Manu Sharma with his friends Amardeep Singh, Alok Khanna, Amit Jhingan and Vikas Yadav, allegedly entered the restaurant and demanded liquor from Jessica. Since the bar was being closed, Jessica told Sharma that no more drinks would be served. After some altercation, Sharma lost his temper and fired his gun -once in the air and the second time at Jessica. The bullet struck her temple and she died on the spot. Sharma fled from the restaurant, leaving his car which was later moved by his friends. Then on 3rd August1999, Delhi police filed the charge sheet in the court of metropolitan magistrate, where Manu Sharma was named the main accused charged under section 302, 201, 120(b) and 212 of Indian penal code and sections27,54 and 59 of arms act. While other accused, like Vikas Yadav, Coca-Cola Company officials Alok Khanna and Amardeep Singh Gill (destroying evidence of the case and conspiracy); were all charged variously under sections 120(b), 302, 201 and 212 of the IPC (for giving shelter to the accused and destroying evidence).

[69]State vsSidharthaVashisht And Ors 2001 Cri .L.J. 2404

The case went up for trial in August 1999. Four of the witnesses who had initially said they had seen the murder happen eventually turned hostile. ShayanMunshi , a model and friend who was serving drinks beside Jessica Lal, changed his story completely; as for earlier testimony recorded with the police, he said that the writing was in Hindi, a language he was not familiar with, and it should be repudiated. Also, it appears that the cartridges used in the murder were altered. Although the gun was never recovered, these cartridges were for some reason sent for forensic evaluation, where it turned out that they had been fired from different weapons. This led to a further weakening of the prosecution's case.

After extensive hearings with nearly a hundred witnesses, a Delhi trial court headed by Additional Sessions Judge S. L. Bhayana, acquitted 9 accused in Jessica Lal Murder case, on 21 February 2006. Those acquitted were, Manu Sharma,Vikas Yadav, Manu's uncle Shyam Sundar Sharma, Amardeep Singh Gill and Alok Khanna, both former executives of a multinational soft drinks company, cricketer Yuvraj Singh's father Yograj Singh, Harvinder Chopra, Vikas Gill and Raja Chopra. The judgment faulted the police for deciding on the accused first and then collecting evidence against him, instead of letting the evidence lead them to the murderer. Since the prosecution had failed to establish guilt beyond doubt, all nine accused were acquitted.

After an immense uproar, hundreds of thousands e-mailed and sms their outraged on petitions forwarded by media channels and newspapers to the president and other seeking remedies for the alleged miscarriage of justice. On 25 March 2006, the Delhi High Court admitted an appeal by the police against the Jessica Lal murder acquittals, issuing non-bailable warrants against prime accused Manu Sharma and eight others and restraining them from leaving the country. This was not a re-trial, but an appeal based on evidence already marshalled in the lower court.

On 19 April 2010, the Supreme Court of India has approved the life sentence for the guilty. The two judge bench upholding the judgement of the Delhi high court stated that, "The prosecution has proved beyond reasonable doubt the presence of Manu Sharma at the site of the offence.[70]

4.3.3 Phoolan Devi Case[71]

An eye-witness in the Phoolan Devi murder case turned "hostile" by claiming that his earlier testimonies against prime accused Sher Singh Rana and others were given under police pressure. Kalicharan, the personal assistant of the slain bandit turned politician, who in 2005 had told the court that he could identify the assailants, was declared hostile by the prosecution after he resiled from his statements saying the accused had "muffled up" their faces at the time of crime. "In fact, I was shown the photographs of Rana and others at the police station and was threatened to identify them in the court at the time of recording of my testimony," he said before Additional Sessions Judge V K Bansal. Earlier, he had testified in court that though he did not see the faces of Phoolan's killers but going by the height and built of the accused, it was clear that Rana alias Sheru alias Pankaj was firing at the MP while his accomplice was firing at Balender, personal security officer (PSo) of the leader. The witness, who had earlier said that a recovery memo, bearing his and accused Rana's signatures, was prepared at 44, Ashoka Road residence of the MP, found himself in a peculiar situation when special public prosecutor S K Saxena asked about the veracity of the documents. "Which of your statements is correct", Saxena asked saying once he told that accused signed at the memo in his presence and later gave an opposite statement controverting his earlier utterances. My recent statement is correct, Kalicharan said claiming that his earlier testimonies were recorded under police pressure.

[70]SidharthaVashisht @ Manu Sharma V. State (NCT Of Delhi) Bench: P. Sathasivam, Swatanter Kumar
[71]Phoolan Devi vsShekharKapoorAndOrs. 1995 (32) DRJ 142: *articles.timesofindia.indiatimes.com*

The Law Commission of India 154th Report[72] observed that the allowances paid to witness for appearing in Court are inadequate, and called for a prompt payment, no matter whether they are examined or not. Section 312 of the Cr. P.C. says that "subject to any rules made by the State Government, any Criminal Court may "if it thinks fit, order payment, on the part of Government, of the reasonable expenses of any complainant or witness attending for the purpose of any inquiry, trial or other proceeding before such Court under this Code". However, in most cases proper diet money is not paid to the witnesses.

The legislature has taken a significant step to prevent the evil of witnesses turning hostile, by enacting Criminal Law (Amendment) Act, 2005. There has been inserted section 195-A in the Indian Penal Code. It provides

"whoever threatens another with any injury to his person, reputation or property or to the person or reputation of any one in whom that person is interested, with intent to cause that person to give false evidence shall be punished with imprisonment of either description for a term which may extended to seven years, or with fine, or with both; and if innocent person is convicted and sentenced in consequence of such false evidence with death or imprisonment for more than seven years , the person who threatens shall be punished with the same punishment and sentence in the same manner and to the same extent such innocent person is punished and sentenced".

The new provision provides for deterrent punishment for threatening any person to give false evidence. Similarly, in the Indian Evidence Act, 1872, by the same Amendment Act, Sub-section (2) has been inserted in section 154 which states:

"Nothing in this section shall disentitle the person so permitted under sub-section (1) to rely on any part of the evidence of such witness".

[72]Law Commission of India, The Code of Criminal Procedure,1973 (Act No. 2 of 1974), 154th Report, Fourteenth Law Commission under the Chairmanship of Mr. Justice K.J. Reddy 1995-1997, in 1996

The time has come that the malaise of 'hostile witnesses' is to be taken seriously and redressed immediately. The only solution to the problem of hostile witness is to bring the proposed changes in the existing laws and to enact a special legislation to protect the rights of witnesses so that they may depose freely and without intimidation. Punitive and deterrent actions are required to weed out the menace of hostility of the witnesses which has become common these days as there is no fear of punishment. Appropriate measures must be taken for the protection of witnesses who appear before the courts to testify so as to render a helping hand in dispensation of justice. Dearth of funds should never be an excuse, if our society fails to be alive to the reality, the plight of an honest witness will be catastrophic and calamitous

4.4 STATUTORY PROTECTION TO WITNESS: POSITION UNDER INDIAN LAW

Criminal law in India was codified by the British Government with the sole purpose of facilitating repression of Indians and to prevent the 'natives' from acting against the colonial masters. Within this scheme of things a witnesses' perspective would have been a misfit. Independent India inherited and has continued to use a substantial body of criminal law as was codified by the British Parliament. Therefore, rights of witnesses and provisions relating to their protection barely features under the existing criminal laws.[73]The provisions for the protection of witnesses exist in various legislations and are not consolidated in a separate legislation whereas in the other jurisdictions there are separate legislations to deal with the 'protection of witnesses'.

[73]Uma Saumya, " Towards a legal regime for protecting the rights of victim and witnesses" Combat Law, Vol. 2,Issue5, Dec-Jan 2004

4.5 CODE OF CRIMINAL PROCEDURE, 1973

The Code of Criminal Procedure, 1973 provides for trial in open court[74] and also provides for in- camera trials[75] for offences involving rape[76]. If a trial is conducted in camera it would help the victim/witness to give her testimony comfortably. The presence of the public and the media produces a sense of shyness in the mind of the victim/witness and she may not give testimony freely.

Further, for ensuring a fair trial, elaborate provisions have been made in Section 207 (supply of copies of police report and other documents to the accused), Section 208 (supply of copies of statements and documents to accused in other cases triable by Court of Sessions). Section 273 provides that evidence to be taken in the presence of accused. In many cases especially cases relating to women and children, victims are hesitant to speak freely in presence of the offenders'[77]. In this regard the Law Commission of India[78] has recommended the insertion of a proviso to Section 273 to the effect that where the evidence of a person below 16 years who is alleged to have been subjected to sexual assault is to be recorded, the Court may take appropriate measures to ensure that such a person is not confronted by the accused.

Section 299 refers to the right of the accused to cross-examine the prosecution witnesses. These provisions are intended to guarantee an open public trial with a right to the accused to know the evidence gathered by the prosecution and also a right to cross-examination to safeguard the interest of the accused. This is so particularly because the accused is presumed to be innocent unless proved guilty beyond reasonable doubt. Record of evidence in absence of the accused may be taken under Section 299 of the Code. No

[74]Sec. 327
[75]Sec 327 (2)
[76]Sec.376 and Sec.376 A to 376 D of the Indian Penal Code, 1861
[77]http://shodhganga.inflibnet.ac.in/bitstream/10603/8788/7/07 _ contents.pdf
[78]Law Commission of India 172 nd report on review of rape laws march,2000

doubt, this Section empowers the Magistrate to record the deposition of certain witnesses in the absence of the accused. Such recording of evidence in absence of an accused has been provided only where an accused person has absconded and there is no immediate prospect of arresting him. In such cases, the competent court may examine the witnesses produced on behalf of the prosecution and record their depositions and such depositions may be given in evidence against him on the inquiry into or trial for the offence with which the accused is charged, if the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

Section 177 of the Code says that in order to secure impartial evidence from the witness the witness on his way to court shall not require to accompany a police officer and shall not subject to unnecessary restraint or inconvenience, or required to give any security for his appearance if needed.

Section 200(1) of the Code of Criminal Procedure provides that a Magistrate shall examine upon oath the complainant and the witnesses present, if any. Under Section 202 (2) of the Code of Criminal Procedure, in an inquiry, the Magistrate may, if he thinks fit, take evidence of witnesses on oath.

Moreover, Section 204 (2) of the Code provides that no summons or warrant shall be issued against accused unless a list of the prosecution witnesses has been filed. For the examination of witnesses, the Magistrate shall fix a date under Section 242 in case of warrant cases instituted on police report and under Section 244 in cases other than those based on police report. Further, as to right of cross-examination by the accused, it would be evident on a reading of Section 299 of the Code that while the right to cross examine the prosecution witnesses is normally guaranteed, there are certain exceptional circumstances in which an accused may be denied his right to cross-examine a witness of the prosecution in open court.

In addition to Section 299 of the Code, reference may be made to subsection (6) of Section 173 of the Code. Section 173 which deals with the report of the police officer on completion of investigation, provides under sub-Section (5) (b), that the police officer shall forward to the Magistrate along with his report the statements recorded under Section 161 of all the persons whom the prosecution proposes to examine as its witnesses. However, sub-Section (6) of Section 173 provides that if the police officer is of opinion that any part of any such statement is not relevant to the subject matter of the proceeding or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from copies to be granted to the accused and stating his reasons for making such request[79].

Thus, while the requirement of providing information to the accused is the rule, the exception to the extent permitted as above under Section 173 (6) is limited only to a part of the statement made under Section 161 of the Code and not to the entire statement deposed to by any person including a prosecution witness under Section 161 of the Code. Procedure for examination and cross-examination of witnesses is specified in the Code. Section 231(2) of the Code provides that at the trial in the Court of Session, the prosecution may produce its evidence on the date fixed and the defence may cross examine or the date of cross examination may be deferred. Section 242(2) permits cross-examination by accused in cases instituted on police report and trial under warrant procedure is by magistrates. Section 246(4) provides for cross-examination of prosecution witness in trials of warrant cases by Magistrates in cases instituted otherwise than on police report. But witnesses can now be examined by video conference procedure as per the judgment of the *Supreme Court in Praful Desai's case.*[80]

[79]R.V. Kelkar's Criminal Procedure, R. V. Kelkar, Supreme Court Cases, K. N. Chandrasekharan Pillai, Edition 7, revised , Eastern Book Company , 2002 , p. 65
[80]The State of Maharashtra v Dr. Praful B. Desai Appeal (cri.) 477 of 2003

4.5.1 Power to issue commission for examination of witness in prison[81]

The provisions of this Chapter shall be without prejudice to the power of the Court to issue, under section 284, a commission for the examination, as a witness, of any person confined or detained in a prison; and the provisions of Part B of Chapter XXIII shall apply in relation to the examination on commission of any such person in the prison as they apply in relation to the examination on commission of any other person.

4.5.2 Evidence to be taken in presence of accused[82]

Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader.

4.5.3 Remarks respecting demeanour of witness[83]

When a presiding Judge or Magistrate has recorded the evidence of a witness, he shall also record such remarks (if any) as he thinks fit it material respecting the demeanour of such witness whilst under examination.

4.5.4 Parties may examine witnesses[84]

1. Sub section 1 of this section provides that the parties to any proceeding under this Code in which a commission is issued may respectively forward any interrogatories in writing which the Court or Magistrate directing the commission may think relevant to the issue, and it shall be lawful for the Magistrate, Court or officer to whom the commission is directed, or to whom the duty of executing it is delegated, to examine the witness upon such interrogatories.

[81]Section 271 Cr .P.C, 1973
[82]Section 273 Cr .P.C, 1973
[83]Section 280 Cr. P.C, 1973
[84]Section 287 Cr. P.C , 1973

2. As per sub section 2 of this section any such party may appear before such Magistrate, Court or officer by pleader, or if not in custody, in person, and may examine, cross- examine and re- examine (as the case may be) the said witness.

4.5.5 Record of evidence in absence of accused[85]

1. If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try such person for the offence complained of may, in his absence, examine the witnesses produced on behalf of the prosecution, and record their depositions and any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without an amount of-delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

2. If it appears that an offence punishable with death or imprisonment for life has been committed by some person or persons unknown, the High Court or the Sessions Judge may direct that any Magistrate of the first class shall hold an inquiry and examine any witnesses who can give evidence concerning the offence and any depositions so taken may be given in evidence against any person who is subsequently accused of the offence, if the deponent is dead or incapable of giving evidence or beyond the limits of India.

4.5.6 Power to postpone or adjourn proceedings[86]

1. There is a mandate in sub section 1 for speedy disposal of cases that in every inquiry or trial, the proceedings shall be held as expeditiously as possible, and in particular,

[85]Section 299 Cr .P.C, 197
[86]Section 309 Cr. P.C, 1973

when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded.

2. Sub section 2 says that if the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody. There are three provisos attached to this section. First proviso provides that that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time. Under second proviso it is provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing. According to third proviso no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him. If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand[87] The terms on which an adjournment or postponement may be granted include, in appropriate cases, the payment of costs by the prosecution or the accused[88].

4.5.7 Power to summon material witness, or examine person present[89]

Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not

[87]Section 312 Cr .P.C, 1973
[88]Explanation 2 to section 309 Cr.P.C,1973
[89]Section 311 Cr .P.C., 1973

summoned as a witness, or recall and re- examine any person already examined; and the Court shall summon and examine or recall and re- examine any such person if his evidence appears to it to be essential to the just decision of the case.

4.5.8 Expenses of complaints and witnesses[90]

Subject to any rules made by the State Government, any Criminal Court may, if it thinks fit, order payment, on the part of Government, of the reasonable expenses of any complainant or witness attending for the purposes of any inquiry, trial or other proceeding before such Court under this Code.

4.5.9 Accused person to be competent witness[91]

Sub Section 1 says that any person accused of an offence before a Criminal Court shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial. As per proviso-

a. he shall not be called as a witness except on his own request in writing;

b. his failure to give evidence shall not be made the subject of any comment by any of the parties or the Court or give rise to any presumption against himself or any person charged together with him at the same trial.

Under Sub Section 2 any person against whom proceedings are instituted in any Criminal Court under section 98, or section 107, or section 108, or section 109, or section 110, or under Chapter IX or under Part B, Part C or Part D of Chapter X, may offer himself as a witness in such proceedings. Provided that in proceedings under section 108, section 109 or section 110, the failure of such person to give evidence shall not be made the subject

[90]Explanation 1 to section 309 Cr.P.C,1973
[91]Section 315 Cr .P.C, 1973

or any comment by any of the parties or the Court or give rise to any presumption against him or any other person proceeded against together with him at the same inquiry.

4.5.10 No influence to be used to induce disclosure[92]

Except as provided in sections 306 and 307, no influence, by means of any promise or threat or otherwise, shall be used to an accused person to induce him to disclose or withhold any matter within his knowledge.

4.5.11 Court to be open[93]

Under Sub Section 1 the place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed to be an open court to which the public generally may have access, so far as the same can conveniently contain them. Proviso says that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room building used by the court. Notwithstanding anything contained in sub-section (1), the inquiry into and trial of rape or an offence under section 376, section 376A, section 376B, section 376C or section 376D of the Indian Penal Code (45 of 1860) shall be conducted in camera:

Provided that the presiding Judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in, the room or building used by the court. Where any proceedings are held under sub-section (2), it shall not be lawful for any person to print or publish any matter in relation to any such proceedings, except with the previous permission of the court.

[92]Section 316 Cr .P.C, 1973
[93]Section 327 Cr .P.C, 1973

4.6 INDIAN PENAL CODE, 1860

Section 228A of the Indian Penal Code provides that the Court shall impose a sentence of two years imprisonment and fine upon any person who prints or publishes the name or any matter which may identify the person against whom rape has been found or alleged to have been committed.[94] This protection is given with a view to protect the rape victim's privacy from general public and so that the media may not cast stigma on the victim by disclosure of her identity.[95]

The Code of Criminal Procedure (Amendment) Act,2008 inserted a new section 195A.This section will empower the witness or any other person to file a complaint in response to the offence covered under IPC for threatening or inducing any person to give false evidence.

Some of the relevant sections are given below to ease the interpretation:

-"A witness or any other person may file a complaint in relation to an offence under section 195A of the Indian Penal Code. (45 of 1860)."

Complainant and witnesses not to be required to accompany police officer and not to be subjected to restraint.[96]

Magistrate, who may detain him in custody until he executes such bond, or until the hearing of the case is completed.

[94]Ratanlal&Dhirajlal's the Indian Penal Code (Act XLV of 1860) , Ratanlal Ranchhoddas Dhirajlal Keshavlal Thakore Y. V. Chandrachud, Edition 28 , Publisher Wadhwa and Co., 1997 1997,p45
[95]Section 228A: Disclosure of Identity of the victim of certain offences etc.
[96]Section 171 Cr.P,C.,1973

4.7 THE INDIAN EVIDENCE ACT, 1872

The expression 'evidence' is defined in Section 3 of the Indian Evidence Act 1872 as under:

Evidence means and includes…..

1. All statements which the court permits or requires to be made before it by witnesses, in relations to matter of fact under inquiry; such statements are called oral evidence;
2. All documents produced for the inspection of the court; such documents are called documentary evidence.

The words 'all statements' in Section 3 of the Act includes the examination-in chief as well as the cross-examination and subject to the permission re-examination also. The word 'evidence' is derived from the Latin word Evidens or Evidere, which means:

to show clearly; to make clear to the sight; to discover clearly; to make plainly certain to ascertain; to prove."

Evidence as defined by the Bentham means any matter of fact or design of which when presented to the mind, is to produce in the mind a persuasion concerning the existence of some other matter of the fact- a persuasion either affirmative or disaffirmative of its existence of the two facts so connected, the later may be distinguished as the principle fact and the former as evidentiary fact. Under the Act to simplify the matter the term Evidence has been reduced to two heads:

(i) oral evidence; and (ii) Documentary evidence

Evidence as defined in Section 3 of the Indian Evidence Act, 1872 covers:

(i) Evidence of witnesses; and (ii) Documentary evidences.

It does not cover every material that a court has before it.[97] The word 'evidence' in the Act signifies only the instruments by means of which relevant facts are brought before the court. The instruments adopted for this purpose are witnesses and documents[98]. The depositions of witnesses and documents included in the term 'evidence' are two principal means by which the materials, upon which the Judge has to adjudicate, are brought before him. In a criminal case, trial depends mainly upon the evidence of the witnesses and, the provisions of the Code of Criminal Procedure, 1973 and of the Evidence Act, 1872 exhaustively provide for the depositions of the witness and the rules regarding their admissibility in the proceedings before the Court. The provision relating to witnesses appears in Chapter IX 'of Witnesses' (from Section 118 to 134) and Chapter X 'of the Examination of Witnesses' (from Section 135 to 165) of the Act. The Evidence Act refers to direct evidence by witnesses. As to proof of facts, direct evidence of a witness who is entitled to full credit shall be sufficient for proof of any fact (Section 134), and the examination of witnesses is dealt with in Sections 135 to 166 of the Act (both inclusive). Section 134 Indian Evidence Act deals with the question of quantity of legitimate evidence required for judicial decision. The well-known maxim that 'Evidence has to be weighed and not counted 'has been given statutory recognition in Section 134 of the Evidence Act. It is well settled conviction can be recorded on the basis of the Statement of single eyewitness provided his credibility is not shaken by any adverse circumstances appearing on the record against him and the court at the same time, is convinced that he is a truthful witness. The court will not then insist on corroboration by any other eye-witness particularly as the incident might have occurred at a time or place when there was no possibility of any other eye witness being present. Indeed, the courts insist on the quality, and not in the quantity of evidence.

[97]Godrej Soap Ltd. V. State, 1991 Cri .L .J. 828 (Cal.)
[98]Gobarayyayaz V. Emperor , AIR Nagpur 242

Section 135 provides that the order in which witnesses are[99] produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedures respectively, and, in the absence of such law, by the discretion of the Court. In other words, the order in which evidence has to be produced by the parties is regulated by the Criminal Procedure Code [Chapter XX (Procedure for summons cases), Chapter XXI (Procedure for warrant cases) Chapter XXII (Procedure in summary trials) and Chapter XIII, in criminal cases and by Civil Procedure Code in Civil Cases (order XVIII C.P.C)].

As per Section 132 of the Act a witness shall not be excused from answering a question on the ground that such answer will criminate or may tend directly or indirectly to criminate such witness or that it will expose or tend directly or indirectly to expose such witness to a penalty or forfeiture of any kind. Proviso to the section engrafts a protection to the witness that any answer he is "compelled to give" shall not subject him to any arrest or prosecution or be proved against him in any criminal proceeding other than prosecution for giving false evidence. one of the earliest decisions under English Law dealing with the privilege a witness not to answer questions which have a tendency to criminate him is *Fisher V. Ronalds*[100].Section 132 of the Act is a reproduction of the English Law as to privilege of a witness from being compelled to answer questions which was taken away by Section 32 of Act 2 of 1855. *In Elavarthi Peddabba Reddi V.Iyyala Varada Reddi*[101]effect of the word 'compulsion' occurring in the proviso to Section 32 of the Act came up for consideration. Question considered was whether protection is available to witness only in respect of answers given on 'compulsion' and whether summoning of the person amounted to such 'compulsion'. Devadoss J., speaking for the bench said,

[99]Kartik Malhar v State of Bihar,1996 Cri. L. J. 899 (891) (S.C.); Shankar v State of Rajasthan, 2004 Cri .L .J. 1608 (Raj.)
[100]1852 (138) ER 1104
[101]AIR 1929 Mad. 236

"In order to avail oneself of the protection given, he must bring himself with in the proviso; in other words he should be compelled to answer the question. The compulsion contemplated in Section 132 is something more than being put in to the box and being sworn to give evidence; the compulsion may be expressed or implied. It is not necessary that the compulsion must be in any set form of words or that the asking for protection should be in a particular form. If the witness is made to understand that he must answer all questions without expression, it would amount to compulsion. In all cases it is the question of fact whether there was or was not compulsion"

Section 138 of the Evidence Act not only lays down the manner of examining a particular witness but also impliedly confers on the party, a right of examination-in-chief, cross-examination and re-examination. The examination of witnesses is generally indispensable and by means of it, all facts except the contents of document may be proved. Anybody who is acquainted with the facts of the case can come forward and give evidence in the Court. Under the Evidence Act, the right of cross-examination available to opposite party is a distinct and independent right, if such party desires to subject the witness to cross-examination.

Under the Evidence Act, in certain exceptional cases, where cross examination is not possible, then the previous deposition of a witness can be considered relevant in subsequent proceedings. This is provided in Section 33 of the Evidence Act. The essential requirements of Section 33 are as follows:

a) that the evidence was given in a judicial proceeding or before any person authorized by law to take it;

b) that the proceeding was between the same parties or their representatives-in- interest;

c) that the party against whom the deposition is tendered had a right and full opportunity of cross-examining the deponent when the deposition was taken;

d) that the issues involved are the same or substantially the same in both proceedings;

e) that the witness is incapable of being called at the subsequent proceeding on account of death, or incapable of giving evidence or being kept out of the way by the other side or his evidence cannot be given without an unreasonable amount of delay or expense The conditions mentioned above must be fulfilled before a previous deposition can be admitted in evidence, without cross-examination. It is significant to note as stated in (c) above, that where such deposition is to be admitted in criminal proceedings, a party against whom a deposition is tendered must have had a right and full opportunity of cross-examining the deponent when the deposition was taken.

Section 148 of the Act provides that if any question relates to matter which is not relevant to the suit or proceedings under hearing except it effects the credit of a witness by injuring his character, then it empowers the court to decide when such questions shall be asked and when such witness be compelled to answer it. The Section itself has given out the consideration in form of three clauses to decide whether a question proposed to be asked is proper question or improper question. What questions are proper, they are to be decided with reference to the consideration rule laid down in clause one. Whereas question, which are to be termed as improper, are to be decided with reference a consideration rule contained in clauses two and three. It may also be stated here that this section has classified questions to be put in cross-examination only in two categories: (1) proper questions, and (2) improper questions.

The object of this section is to prevent the unnecessary action racking up of the past history of a witness, when it throws no light whatsoever on the questions at issue in a case. It protects a witness from the evils of a reckless and unjustifiable cross-examination under the guise of impeaching his credit. In the course of cross-examination, the temptations is always too great to run down a witness's character, the Legislature has,

therefore, wisely provided ample safeguards for the unfortunate witness and placed wholesome checks on the wily cross-examiner[102].

Section 149 of the Evidence Act lays down that a question intended to impeach the credit of a witness ought not to be ask, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well founded. The extensive powers which have been granted to the court for protecting witnesses from questions not lawful in cross examination are set out in Sections 146 to 153.Section 149 of the Act is a warning signal to the person putting the question and indicates in suing liability. It also further points out how to work out the right of a cross examination in such matters. It expressly states that unless there are reasonable grounds for thinking that the imputation which is conveyed by these questions is well founded, questions should not be asked. Illustrations appended to the section lucidly illustrate the purpose of the provisions of Section 149. Section 150 is the penalty that may ensue against a reckless cross-examination if the court was of the opinion that the questions were asked without reasonable grounds[103]. Section 150 of the Evidence Act is enacted to keep a check on the lawyers if they ask any question without any reasonable ground. This Section lays down the procedure in case of question being asked without reasonable grounds. It empowers the court to report the circumstances of the case either to high court or other authorities (such as Bar Council) to which such barrister, pleader, Vakil or attorney is subject in exercise of his profession

Section 151 of the Evidence Act empowers the Court to forbid the putting of any questions which is indecent or scandalous, provided it does not relate to fact in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed. In other words, indecent and scandalous questions can be put if they directly

[102]Ratanlal &Dhirajlal's the Law of Evidence (Act I of 1872), RatanlalRanchhoddas, Dhirajlal Keshavlal Thakore, M.N.Venkatachalaiah , Edition 27, Lexis Nexis Butterworths Wadhwa , Nagpur , 2019, p. 66
[103]Prakash v State of Maharashtra , 1975 Cri .L.J. 1297

relate to facts in issue and also if it is necessary to be known in order to determine whether or not the facts in issue existed. It has to be pointed out therefore, that these exceptions are vital, and if any given case the court is satisfied that even an indecent and scandalous question may have a bearing upon a fact in issue, the same cannot be forbidden. However, all sorts of irrelevant questions which tend to harass or embarrass a witness are not to be allowed. Scandalous, vexatious and cantankerous questions which do not advance the cause of justice and which elicit irrelevant or inadmissible answers and which are put with a view to delay the progress of the case should not be allowed.[104] Evidence Act empowers the court to forbid any question which appears to be intended to insult or annoy or needlessly offensive in form. Evidence Act empowers the court to forbid any question which appears to be intended to insult or annoy or needlessly offensive in form.

Section 149 to 152 together with Section 148, ante were intended to protect a witness against there are instances where crucial witnesses, i.e., key witnesses or material witnesses, disappear either before or during a trial or a witness is threatened, abducted or done away with. These incidents do not happen by accident and the inevitable consequence is that in many of these matters, the case of the prosecution fails In the above scenario, it is imperative that the provisions of the Evidence Act are required to be looked into afresh to ensure fair trial by affording protection to a witness so that true and correct facts come up before the trial Court.

The aforesaid provisions of the Evidence Act have been designed to ensure a fair trial to the accused as he is presumed to be innocent till he is proved of guilty beyond reasonable doubt. However, there are instances where crucial witnesses, i.e., key witnesses or material witnesses, disappear either before or during a trial or a witness is threatened, abducted or done away with. These incidents do not happen by accident and the

[104]BabuRao Patel v BalThackeroy , 1977 Cr.L.J 1639

inevitable consequence is that in many of these matters, the case of the prosecution fails[105].

In the above scenario, it is imperative that the provisions of the Evidence Act are required to be looked into afresh to ensure fair trial by affording protection to a witness so that true and correct facts come up before the trial Court.

As to the limitation upon the right of cross-examination of the prosecutrix in rape cases, amendments restricting the scope of cross-examination have been made by the Indian Evidence (Amendment) Act, 2002. Recently, the Indian Evidence (Amendment) Act, 2002 has inserted a proviso below sub-Section (3) of Section 146 of the Evidence Act, 1872 thereby giving protection to a victim of rape from unnecessary questioning her about her past character. The said proviso reads as follows:

"Provided that in a prosecution for rape or attempt to commit rape, it shall not be permissible, to put questions in the cross-examination of the prosecutrix as to her general immoral character"

The Law Commission of India has recommended insertion of a broader provision by way of a new sub-Section (4) in Section 146 which reads as follows:

"previous sexual experience with any person for proving (4) In a prosecution for an offence under Sections 376, 376A, 376B, 376C and 376D of the Indian Penal Code or for attempt to commit any such offence, where the question of consent is in issue, it shall not be permissible to adduce evidence or to put questions in the cross-examination of the victim as to her general moral character, or as to her previous sexual experience with any person for proving such consent or the quality of consent.

Explanation;"Character' includes reputation and disposition."

[105]Turnor Morrison & Co. V. K.N. Tapuria, 1993 Cr. L.J. 3384 Bom.

Thus, a survey of the provisions of the Criminal Procedure Code, 1973 and the Indian Evidence Act, 1872 reveals that the accused has a right of open trial and also a right to cross-examine the prosecution witnesses in open court. There are a few exceptions to these principles and the Supreme Court has declared that the right to open trial is not absolute and video-screening techniques can be employed and such a procedure would not amount to violation of the right of the accused for open trial. The Code of Criminal Procedure contains a provision for examination of witnesses in camera and this provision can be invoked in cases of rape and child abuse. There is, however, need for extending the benefit of these special provisions to other cases where the witnesses are either won over or threatened, so : 'that justice is done not only to the accused but also to victims. The Evidence Act requires to be looked into afresh to provide for protection to a witness.

4.8 TERRORIST AND DISRUPTIVE ACTIVITIES (PREVENTION) ACT, 1987

Terrorist and Disruptive Activities (Prevention) Act, 1987 which followed the Act of 1985 provided likewise for the protection of identity of witnesses in Section 16 with a few charges. Section 16 differed from Section 13 of TADA Act, 1985 in two respects. Firstly, whereas it was mandatory to hold proceedings in camera under Section 13 of TADA Act, 1985 the proceedings could be held in camera under Section 16 of TADA Act, 1987 only where the Designated Court so desired. Secondly, Sec. 16(3) (d) of the TADA Act, 1987 empowered a Designated Court to take such measures in the public interest so as to direct that information in regard to all or any of the proceedings pending before such a Court shall not be published in any manner. The validity of sec 16 was challenged but was upheld in Kartar Singh V State of Punjab[106].

[106]1994(3) SCC 569

4.9 THE UNLAWFUL ACTIVITIES (Prevention) AMENDMENT ACT, Amended, 2004

The PoTA has been repealed by the Prevention of Terrorism (Repeal) Act, 2004, w .e. f. 21.9.2004. The Act applies to 'unlawful activities' and also to 'terrorist acts'. Section 44 (1) to (4) of the above Act bears the heading 'Protection of Witness' and is in identical language as section 30(1) to (4) of the PoTA, 2000

4.10 THE WHISTLE BLOWER ACT, 2011

The provisions relating to the protection of witnesses are provided as follows:-

"12. Protection of witnesses and other persons.—If the Competent Authority either on the application of the complainant, or witnesses, or on the basis of information gathered, is of the opinion that either the complainant or public servant or the witnesses or any person rendering assistance for inquiry under this Act need protection, the Competent Authority shall issue appropriate directions to the concerned Government authorities (including police) which shall take necessary steps, through its agencies, to protect such complainant or public servant or persons concerned.

4.11 THE SCHEDULED CASTES AND THE SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT , 1989

Section 15A of the above Act[107] It provides :-

15A.Rights of victims and witnesses.—(1) It shall be the duty and responsibility of the State to make arrangements for the protection of victims, their dependents, and witnesses against any kind of intimidation or coercion or inducement or violence or threats of violence.

[107]Section 15A of Chapter IV A of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act 1989 inserted by Act 1 of 2016 (w .e .f . 26-1-2016)

(6) Notwithstanding anything contained in the Code of Criminal Procedure,1973 (2 of 1974), the Special Court or the Exclusive Special Court trying a case under this Act shall provide to a victim, his dependent, informant or witnesses— (a) the complete protection to secure the ends of justice; (b) the travelling and maintenance expenses during investigation, inquiry and trial; (c) the social-economic rehabilitation during investigation, inquiry and trial; and (d) relocation.

(7) The State shall inform the concerned Special Court or the Exclusive Special Court about the protection provided to any victim or his dependent, informant or witnesses and such Court shall periodically review the protection being offered and pass appropriate orders.

(8) Without prejudice to the generality of the provisions of sub-section (6), the concerned Special Court or the Exclusive Special Court may, on an application made by a victim or his dependent, informant or witness in any proceedings before it or by the Special Public Prosecutor in relation to such victim, informant or witness or on its own motion, take such measures including— (a) concealing the names and addresses of the witnesses in its orders or judgments or in any records of the case accessible to the public; (b) issuing directions for non-disclosure of the identity and addresses of the witnesses; (c) take immediate action in respect of any complaint relating to harassment of a victim, informant or witness and on the same day, if necessary, pass appropriate orders for protection: Provided that inquiry or investigation into the complaint received under clause (c) shall be tried separately from the main case by such Court and concluded within a period of two months from the date of receipt of the complaint: Provided further that where the complaint under clause (c) is against any public servant, the Court shall restrain such public servant from interfering with the victim, informant or witness, as the case may be, in any matter related or unrelated to the pending case, except with the permission of the Court.

(9) It shall be the duty of the Investigating officer and the Station House officer to record the complaint of victim, informant or witnesses against any kind of intimidation, coercion or inducement or violence or threats of violence, whether given orally or in writing, and a photocopy of the First Information Report shall be immediately given to them at free of cost. (10) All proceedings relating to offences under this Act shall be video recorded.

(11) It shall be the duty of the concerned State to specify an appropriate scheme to ensure implementation of the following rights and entitlements of victims and witnesses in accessing justice so as— (a) to provide a copy of the recorded First Information Report at free of cost; (b) to provide immediate relief in cash or in kind to atrocity victims or their dependents; (c) to provide necessary protection to the atrocity victims or their dependents, and witnesses; (d) to provide relief in respect of death or injury or damage to property; (e) to arrange food or water or clothing or shelter or medical aid or transport facilities or daily allowances to victims; (f) to provide the maintenance expenses to the atrocity victims and their dependents; (g) to provide the information about the rights of atrocity victims at the time of making complaints and registering the First Information Report; (h) to provide the protection to atrocity victims or their dependents and witnesses from intimidation and harassment; (i) to provide the information to atrocity victims or their dependents or associated organisations or individuals, on the status of investigation and charge sheet and to provide copy of the charge sheet at free of cost; (j) to take necessary precautions at the time of medical examination; (k) to provide information to atrocity victims or their dependents or associated organisations or individuals, regarding the relief amount; (l) to provide information to atrocity victims or their dependents or associated organisations or individuals, in advance about the dates and place of investigation and trial; (m) to give adequate briefing on the case and preparation for trial to atrocity victims or their dependents or associated organisations or individuals and to provide the legal aid for the said purpose; (n) to execute the rights of atrocity victims or

their dependents or associated organisations or individuals at every stage of the proceedings under this Act and to provide the necessary assistance for the execution of the rights.

4.12 THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015

Section 74 in The Juvenile Justice (Care and Protection of Children) Act provides that:-

"74 - Prohibition on disclosure of identity of children :- (1) No report in any newspaper, magazine, news-sheet or audio-visual media or other forms of communication regarding any inquiry or investigation or judicial procedure, shall disclose the name, address or school or any other particular, which may lead to the identification of a child in conflict with law or a child in need of care and protection or a child victim or witness of a crime, involved in such matter, under any other law for the time being in force, nor shall the picture of any such child be published: Provided that for reasons to be recorded in writing, the Board or Committee, as the case may be, holding the inquiry may permit such disclosure, if in its opinion such disclosure is in the best interest of the child.

(2) The Police shall not disclose any record of the child for the purpose of character certificate or otherwise in cases where the case has been closed or disposed of.

(3) Any person contravening the provisions of sub-section (1) shall be punishable with imprisonment for a term which may extend to six months or fine which may extend to two lakh rupees or both."

4.13 C0NCLUSI0N

The time has come that the malaise of 'hostile witnesses' is to be taken seriously and redressed immediately. The only solution to the problem of hostile witness is to bring the

proposed changes in the existing laws and to enact a special legislation to protect the rights of witnesses so that they may depose freely and without intimidation. Punitive and deterrent actions are required to weed out the menace of hostility of the witnesses which has become common these days as there is no fear of punishment. Appropriate measures must be taken for the protection of witnesses who appear before the courts to testify so as to render a helping hand in dispensation of justice. Dearth of funds should never be an excuse, if our society fails to be alive to the reality, the plight of an honest witness will be catastrophic and calamitous.

The survey of the provisions of the Criminal Procedure Code, 1973 and the Indian Evidence Act, 1872 reveals that the accused has a right of open trial and also a right to cross-examine the prosecution witnesses in open court. There are a few exceptions to these principles and the Supreme Court has declared that the right to open trial is not absolute and video-screening techniques can be employed and such a procedure would not amount to violation of the right of the accused for open trial. The Code of Criminal Procedure contains a provision for examination of witnesses in camera and this provision can be invoked in cases of rape and child abuse. There is, however, need for extending the benefit of these special provisions to other cases where the witnesses are either won over or threatened, so: 'that justice is done not only to the accused but also to victims. The Evidence Act requires to be looked into afresh to provide for protection to a witness.

The above specific Acts provide protection to the witnesses but the protection is provided to the witnesses who give testimony under those Acts only. So, a general legislation should be provided for witnesses protection which will cover each and every witness.

Chapter V

PROTECTION OF IDENTITY OF WITNESSES Vs. RIGHTS OF ACCUSED – PRINCIPLES OF LAW DEVELOPED BY THE SUPREME COURT AND THE HIGH COURTS

5.1 INTRODUCTION

The following Chapter deals with the cases in which the importance of witnesses for criminal trial has been emphasized. The Chapter also lays down the cases in which the causes of witness intimidation, witness turning hostile as well as the guidelines to protect witnesses has been provided.

In the absence of a general statute covering witness identity protection and partial restriction of the rights of the accused, the Supreme Court has taken the lead. Some of the High Courts have also gone into this issue recently. We shall start our discussion with the law declared by Supreme Court in 1978.

The decision of the Supreme Court in *Maneka Gandhi's* case[108] continues to have a profound impact on the administration of criminal justice in India. In terms of that case, the phrase "procedure established by law" in Article 21 of the Constitution no longer means "any procedure" whatsoever as interpreted in earlier judgments of the Court but now means a "just, fair and reasonable" procedure. In a criminal trial, a fair trial alone can be beneficial both to the accused as well as society in as much as the right to a fair trial in a criminal prosecution is enshrined in Article 21 of the Constitution of India.

[108] AIR 1978 SC 597: 1978(1) 240

The primary object of criminal procedure is to bring offenders to book and to ensure a fair trial to accused persons. Every criminal trial begins with the presumption of innocence in favour of the accused; and, in India, the provisions of the Code of Criminal Procedure, 1973 are so framed that a criminal trial should begin with and be throughout governed by this essential presumption. A fair trial has two objectives in view, i.e. first, it must be fair to the accused and secondly, it must also be fair to the prosecution or the victims. Thus, it is of utmost importance that in a criminal trial, witnesses should be able to give evidence without any inducement, allurement or threat either from the prosecution or the defence.

5.2 CASE LAWS RELATING TO WITNESS PROTECTION

5.2.1 Talab Haji Hussain vs Madhukar Purshottam Mondkarand[109]

The facts in Talab Haji Hussain vs. Madhukar Purushottam Mondkarand were that the person was accused of having committed an offence which was bailable but the High Court, in exercise of its inherent power, allowed an application by the complainant for cancelling the bail on the ground that "it would not be safe to permit the appellant to be at large".

The Supreme Court confirmed the order of cancellation and observed that the primary purpose of the Criminal Procedure Code was to ensure a fair trial to an accused person as well as to the prosecution. The Court observed:

"It is therefore of the utmost importance that, in a criminal trial, witnesses should be able to give evidence without inducement or threat either from the prosecution or the defence….the progress of a criminal trial must not be obstructed by the accused so as to lead to the acquittal of a really guilty offender…. there can be no possible doubt that, if

[109]Talab Haji Hussain vs Madhukar Purshottam Mondkarand AIR 1958 SC 376

any conduct on the part of an accused person is likely to obstruct a fair trial, there is occasion for the exercise of the inherent power of the High Court to secure the ends of justice…. and it is for the continuance of such a fair trial that the inherent powers of the High Courts, are sought to be invoked by the prosecution in cases where it is alleged that accused person, either by suborning or intimidating witnesses, or obstructing the smooth progress of a fair trial."

The cancellation of bail was justified on the basis of the conduct of the accused subsequent to release on bail.

5.2.2 Delhi Domestic Women's Working vs. Union of India and others[110]

As compared to statutory provisions, the judicial pronouncements have gone far ahead in protecting the witnesses and more particularly the protection of victim's witness as in the case of a rape. In the Delhi Domestic Working Women's Forum vs. Union of India, the Supreme Court, while indicating the broad parameters that can assist the victims of rape, emphasized that in all rape trials "anonymity" of the victims must be maintained as far as necessary so that the name is shielded from the media and public. The Court also observed that the victims invariably found the trial of an offence of rape trial a traumatic experience. The experience of giving evidence in court has been negative and destructive and the victims have often expressed that they considered the ordeal of facing cross-examination in the criminal trial to be even worse than the rape itself.

5.2.3 State of UP vs. Shambhu Nath Singh[111]

The Supreme Court stated that section 309 of the Code of Criminal Procedure, 1973 requires that the criminal trial must proceed from day to day and should not be adjourned

[110]Delhi Domestic Working Women's vs. Union Of India And Others (1995) 1 SCC 14
[111]State of UP vs. Shambhu Nath Singh 2001 (4) SCC 667

unless 'special' reasons are recorded by the Court. In that case, after several adjournments, PW1 was not examined even when present. The Supreme Court observed:

"If any Court finds that day to day examination of witnesses mandated by the legislature cannot be complied with due to the non-cooperation of the accused or his counsel, the Court can adopt any of the measures indicated in the sub section, i.e. remanding the accused to custody or imposing costs on the party who wants such adjournments (the costs must be commensurate with loss suffered by the witnesses, including the expenses to attend the Court). Another option is, when the accused is absent and the witness is present to be examined, the Court can cancel his bail, if he is on bail."

5.2.4 NHRC vs. State of Gujarat: (Best Bakery Case) (2003): need for law of witness protection[112]

The National Human Rights Commission (NHRC) filed a public interest case seeking retrial on the ground that the witnesses were pressurised by the accused to go back on their earlier statements and the trial was totally vitiated. In its order dated 8.8.2003 NHRC vs, State of Gujarat the Supreme Court observed:

"……. A right to a reasonable and fair trial is protected under Articles 14 and 21 of the Constitution of India, Art. 14 of the International Covenant on Civil and Political Rights, to which India is a signatory, as well as Art. 6 of the European Convention for Protection of Human Rights and Fundamental Freedoms.

on perusal of the allegations in the special leave petition and number of criminal cases coming to this Court, we are prima facie of the opinion that criminal justice delivery system is not in sound health. The concept of a reasonable and fair trial would suppose justice to the accused as also to the victims. From the allegations made in the special

[112]NHRC V State of Gujarat 2003 (9) SCALE 329

leave petition together with other materials annexed thereto as also from our experience, it appears that there are many faults in the criminal justice delivery system because of apathy on the part of the police officers to record proper report, their general conduct towards the victims, faulty investigation, failure to take recourse to scientific investigation etc."

Then, on the question of protection of witnesses, the Supreme Court referred to the absence of a statute on the subject, as follows:

"No law has yet been enacted, not even a scheme has been framed by the Union of India or by the State Government for giving protection to the witnesses. For successful prosecution of the criminal cases, protection to witnesses is necessary as the criminals have often access to the police and the influential people. We may also place on record that the conviction rate in the country has gone down to 39.6% and the trials in most of the sensational cases do not start till the witnesses are won over. In this view of the matter, we are of opinion that this petition (by NHRC) be treated to be one under Art. 32 of the Constitution of India as public interest litigation."

The Court directed that in the counter-affidavit of the Gujarat Government, it should indicate the steps, if any, taken by it for extending protection to the lives of victims, their families and their relations; if not, the same should be done. The Court also wanted to know whether any action had been taken by the Gujarat Government against those who had allegedly extended threats of coercion to the witnesses, as a result whereof the witnesses had changed their statements before the Court. The Court also directed the Union of India to inform the Court about the proposals, if any, "to enact a law for grant of protection to the witnesses as is prevalent in several countries".

By a subsequent order passed on 12th July, 2004, the Supreme Court issued directions to all States and Union Territories to give suggestions for formulation of appropriate guidelines in the matter.

5.2.5 State of Uttar Pradesh vs Vikas Yadav &Anr. (Delhi High Court): (2003) Guidelines for witness protection issued:[113]

We shall next refer to the guidelines suggested by the Delhi High Court in *Ms. Neelam Katara vs. Union of India,* as applicable to cases where an accused is punishable with death or life imprisonment. The significance of the guidelines is that they are not confined to cases of rape, or sexual offences or terrorism or organized crime. The Court suggested the following scheme:

(1) Definitions:

(a) Witness' means a person whose statement has been recorded by the Investigating officer under section 161 of the Code of Criminal Procedure pertaining to a crime punishable with death or life imprisonment.

(c) 'Competent Authority' means the Secretary, Delhi Legal Services Authority.

(d) Admission to protection: The Competent Authority, on receipt of a request from a witness shall determine whether the witness requires police protection, to what extent and for what duration.

(2) Factors to be considered:

In determining whether or not a witness should be provided police protection, the Competent Authority shall take into account the following factors:

[113]State vs VikasYadav &Anr (Crl. W No. 247 of 2002) on 14.10.2003

(a) The nature of the risk to the security of the witness which may emanate from the accused and their associates.

(b) The nature of the investigation in the criminal case.

(c) The importance of the witness in the matter and the value of the information or evidence given or agreed to be given by the witness.

(d) The cost of providing police protection to the witness.

(3) Obligation of the police:

(a) While recording statement of the witness under sec. 161 of the Code of Criminal Procedure, it will be the duty of the Investigating officer to make the witness aware of the 'Witness Protection Guidelines' and also the fact that in case of any threat, he can approach the Competent Authority. This, the Investigating officer will inform in writing duly acknowledged by the witness.

(b) It shall be the duty of the Commissioner of Police to provide security to a witness in respect of whom an order has been passed by the Competent Authority directing police protection."

The above guidelines laid down by the Delhi High Court are the first of its kind in the country and have to be commended. But, they deal only with one aspect of the matter, namely, protection of the witnesses. They do however not deal with the manner in which a witness's identity can be kept confidential either before or during trial nor to the safeguards which have to be provided to ensure that the accused's right to a fair trial is not jeopardized.

5.2.6 PUCL vs. Union of India: Witness protection under sec.30 of the POTA (2003)[114]

In PUCL vs. Union of India, where the validity of several provisions of the Prevention of Terrorism Act, 2002 (PoTA), came up for consideration, the Supreme Court considered the validity of section 30 of the Act which deals with 'protection of witnesses'.

The provisions of section 30 are similar to those in section 16 of the TADA, 1987, which were upheld in *Kartar Singh's case*[115]. In PUCL, the Court referred to *Gurubachan Singh* vs. State of Bombay 1952 SCR 737, and other cases, and observed that one cannot shy away from the reality that several witnesses do not come to depose before the Court in serious cases due to fear of their life. Under sec. 30 a fair balance between the rights and interests of witnesses, the rights of the accused and larger public interest has, it was held, been maintained. It was held that section 30 was also aimed to assist the State in the administration of justice and to encourage others to do the same under given circumstances. Anonymity of witnesses is to be provided only in exceptional circumstances when the Special Court is satisfied that the life of witnesses is in jeopardy. The Court in PUCL has pointed out that the need for existence and exercise of power to grant protection to a witness and preserve his or her identity in a criminal trial has been universally recognized. A provision of this nature should not be looked at merely from the angle of protection of the witness whose life may be in danger if his or her identity is disclosed but also in the interests of the community to ensure that heinous offences like terrorist acts are effectively prosecuted and persons found guilty are punished and to prevent reprisals. Under compelling circumstances, the disclosure of identity of the witnesses can be dispensed with by evolving a mechanism which complies with natural justice and this ensures a fair trial. The reasons for keeping the identity and address of a

[114]PUCL vs. Union of India 2003 (10) SCALE 967
[115]Kartar Singh vs State of Punjab 1994 SCC (3) 569

witness secret are required to be recorded in writing and such reasons should be weighty. A mechanism can be evolved whereby the Special Court is obliged to satisfy itself about the truthfulness and reliability of the statement or deposition of the witness whose identity is sought to be protected.

In PUCL, the Supreme Court speaking through Justice Rajendra Babu observed (in para 57) as follows:

" In order to decide the constitutional validity of section 30, we do not think, it is necessary to go into the larger debate, which learned counsel for both sides have argued, that whether right to cross-examine is central to fair trial or not. Because right to cross-examination per se is not taken away by section 30. The section only confers discretion to the concerned court to keep the identity of witness secret if the life of such witness is in danger. … In our view, a fair balance between the rights and interests of witness, rights of accused and larger public interest has been maintained under section 30. It is also aimed to assist the State in justice administration and encourage others to do the same under the given circumstance. Anonymity of witness is not the general rule under section 30. Identity will be withheld only in exceptional circumstances when the special court is satisfied that the life of witness is in jeopardy."

The Court further observed (in para 59) as follows:

"The present position is that section 30 (2) requires the Court to be satisfied that the life of a witness is in danger to invoke a provision of this nature. Furthermore, reasons for keeping the identity and address of a witness secret are required to be recorded in writing and such reasons should be weighty. In order to safeguard the right of an accused to a fair trial and basic requirements of the due process, a mechanism can be evolved whereby the Special Court is obligated to satisfy itself about the truthfulness and reliability of the statement or deposition of the witness whose identity is sought to be protected."

It was stated further in PUCL that the effort of the Court is to strike a balance between the right of the witness as to his life and liberty and the right of the community in the effective prosecution of persons guilty of heinous criminal offences on the one hand and the right of the accused to a fair trial, on the other. The Court observed: (p 993)

"This is done by devising a mechanism or arrangement to preserve anonymity of the witness when there is an identifiable threat to the life or physical safety of the witness or others whereby the Court satisfies itself about the weight to be attached to the evidence of the witness. In some jurisdictions, an independent counsel has been appointed for the purpose to act as amicus curiae and after going through the deposition evidence assist the Court in forming an opinion about the weight of the evidence in a given case or in appropriate cases to be cross-examined on the basis of the question formulated and given to him by either of the parties. Useful reference may be made in this context to the recommendation of the Law Commission of New Zealand."

While elaborating further the need for keeping the identity of the witness secret, the Court observed: (p 994)

"…It is not feasible for us to suggest the procedure that has to be adopted by the Special Courts for keeping the identity of witness secret."

5.2.7 Sakshi vs. Union of India[116]

The Supreme Court in *Sakshi vs. Union of India* referred to the argument of the petitioner that in case of child sexual abuse, there should be special provisions in the law to the following effect:-

(i) permitting use of videotaped interview of the child's statement by the judge (in the presence of a child support person).

[116] 2004 (6) SCALE 15

(ii) allowing a child to testify via closed circuit television or from behind a screen to obtain a full and candid account of the acts complained of.

(iii) that the cross examination of a minor should only be carried out by the judge based on written questions submitted by the defence upon perusal of the testimony of the minor.

(iv) that whenever a child is required to give testimony, sufficient breaks should be given as and when required by the child.

During the pendency of the case in *Sakshi,* the Supreme Court requested the Law Commission to examine the question as to the expansion of the definition of rape. The Commission gave its 172nd Report dealing with various aspects of the problem. Details of the Report have been set out in Chapter IV para 4.5.

The Supreme Court in *Sakshi*, after receipt of the Report of the Law Commission (172nd Report, Chapter VI), did not accept the above said arguments of the petitioner in view of sec. 273 of the Code of Criminal Procedure as, in its opinion, the principle of the said section of examining witnesses in the presence of the accused, is founded on natural justice and cannot be done away with in trials and inquiries concerning sexual offences.

The Supreme Court however pointed out that the Law Commission had observed that in an appropriate case, it may be open to the prosecution to request the Court to provide a screen in such a manner that the victim does not see the accused and at the same time provide an opportunity to the accused to listen to the testimony of the victim and the Court could give appropriate instructions to his counsel for an effective cross examination.

The Law Commission had also suggested that with a view to allay any apprehensions on this score, a proviso could be placed above the Explanation to sec. 273 Cr.P.C to the

following effect: "Provided that where the evidence of a person below 16 years who is alleged to have been subjected to sexual assault or any other sexual offence, is to be recorded, the

Court may, take appropriate measures to ensure that such person is not confronted by the accused while at the same time ensuring the right of cross examination of the accused". In para 31 and 32 the Supreme Court observed as follows:

"The whole inquiry before a Court being to elicit the truth, it is absolutely necessary that the victim or the witnesses are able to depose about the entire incident in a free atmosphere without any embarrassment. Section 273 Cr.P.C. merely requires the evidence to be taken in the presence of the accused. The Section, however, does not say that the evidence should be recorded in such a manner that the accused have full view of the victim or the witnesses. Recording of evidence by way of video conferencing vis-à-vis Section 272 Cr .P.C. has been held to be permissible in a recent decision of this Court in *State of Maharashtra vs. Dr. Praful B. Desai*[117] There is a major difference between substantive provisions defining crimes and providing punishment for the same and procedural enactment laying down the procedure of trial of such offences. Rules of procedure are hand-maiden of justice and are meant to advance and not to obstruct the cause of justice. It is, therefore, permissible for the Court to expand or enlarge the meaning of such provisions in order to elicit the truth and do justice with the parties.

32. The mere sight of the accused may induce an element of extreme fear in the mind of the victim or the witnesses or can put them in a state of shock. In such a situation he or she may not be able to give full details of the incident which may result in miscarriage of justice. Therefore, 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. often the questions put in cross-examination are purposely designed to

[117] 2003(4) SCC 601

embarrass or confuse the victims of rape and child abuse. The object is that out of the feeling of shame or embarrassment, the victim may not speak out or give details of certain acts committed by the accused. It will, therefore, be better if the questions to be put by the accused in cross-examination are given in writing to the Presiding officer of the Court, who may put the same to the victim or witnesses in a language which is not embarrassing. There can hardly be any objection to the other suggestion given by the petitioner that whenever a child or victim of rape is required to give testimony, sufficient breaks should be given as and when required. The provisions of sub-section (2) of section 327 Cr. P.C. should also apply in inquiry or trial of offences under Section 354 and 377 IPC."

The Court *in Sakshi* referred to *State of Punjab vs. Gurmit Singh* [118]where the Supreme Court had highlighted the importance of section 327(2) and (3) of the Cr. P.C. which require evidence to be recorded in camera in relation to holding rape and other sexual offences.

The Court gave the following directions, in addition to those given in *Gurmit Singh's case, namely,*

(1)The provisions of sub-section (2) of section 327 Cr.P.C. shall, in addition to the offences mentioned in that sub-section, would also apply in inquiry or trial of offences under sections 354 and 377 IPC.

(2) In holding trial of child sex abuse or rape:(i) a screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;

(3) The questions put in cross-examination on behalf of the accused, in so far as they

[118]1996 (2) SCC 384

relate 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;

(4) the victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.

Finally, the Court in *Sakshi* added that cases of child abuse and rape are increasing with alarming speed and appropriate legislation in this regard is, therefore urgently required. They observed:

5.2.8 Zahira Habibullah Sheikh and Anr. vs. State of Gujarat And ors[119]: Protection of witnesses

This is also one of the most recent cases. In this case, the Supreme Court dealt with 'witness protection' and the need for a fair trial, whereby fairness is meted out not only to the accused but to the victims/witnesses. on the question of 'witness protection', the Court observed (p.392):

"If the witnesses get threatened or are forced to give false evidence, that also would not result in a fair trial." (Page 394):

"Witnesses, as Bentham said, are the eyes and ears of justice. Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed and it no longer can constitute a fair trial. The incapacitation may be due to several factors like the witness being not in a position for reasons beyond control, to speak the truth in the court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by the court on account of frequent turning of

[119] 2004 (4) SCALE 373

witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle truth and realities coming out to surface. Broader public and social interest require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State representing by their presenting agencies do not suffer (p.395) … there comes the need for protecting the witnesses. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth presented before the Court and justice triumphs and that the trial is not reduced to mockery. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who have political patronage and could wield muscle and money power. …As a protector of its citizens, it has to ensure that during trial in court, the witness could safely depose truth without any fear of being haunted by those against whom he has deposed." (Page 395):

"Legislative measures to emphasize prohibition against tampering with witness, victim or informant, have become the imminent and inevitable need of the day."[120]

5.2.9 JESSICA LAL CASE

As in the murder of Jessica Lal case [121](when the victim was shot in a crowded bar), the BMW killings (when six persons were mowed down by Santee Nanda's speeding car) and many others, it is a common experience that those witnesses who initially file the police complaint turn hostile before the court. The prosecution, in most cases, simply fizzles out due to witness intimidation .This is not the first time however that the need for a witness protection programme has been felt The 14th report (1958) of the Law Commission of India had recommended provision of proper facilities to witnesses

[120]LAW COMMISSION OF INDIA 198TH REPORT ON WITNESS IDENTITY PROTECTION
[121]State vs Sidhartha Vashisht And Ors 2001 Cri .L. J. 2404

attending court, while the 154th report (1996) spoke of creating confidence in the witnesses that they would be protected from the" wrath" of the accused. The 172nd report (2000) of the Law Commission suggested drastic changes in the way the testimony of a minor is to be recorded in child sexual abuse cases. Apart from this, in 2003, in the case of *the National Human Rights Commission vs State of Gujarat*, the Supreme Court noted that there is neither a law nor even a scheme by the union or any state government to protect witnesses And in the following year, while hearing the Best Bakery case, it said that a witness protection programme was imperative At least five high courts have expressed the need for such a programme but other than the

Delhi High Court which has given broad and general guidelines in, one of the courts have listed any concrete steps for such a mechanism.

However, it was the plight of the main witness in the Best Bakery case, Zahira Sheikh that brought the matter into serious consideration in 2004, so much so that the Law Commission suo moto prepared a consultation paper on the issue. It said that witnesses must be given the option of deposing anonymously or of being

Rehabilitated elsewhere Deposing anonymously violates the right of the accused to cross-examine prosecution witness and the Law Commission suggested that the witness should give evidence in the presence of the defence counsel of the accused. Significantly, the paper noted the many practical difficulties that a witness protection programme involves, which range from arranging a complete change of identity for the witness and the immediate family maintenance and employment in the new place of residence as well as the enormous costs involved in such an exercise.

The Special Investigation team(sit) appointed by the Supreme Court (following a petition filed by Zakia Jaffery wife of the ex-Member of Parliament Ehsan Jaffery who had been killed in the post-Godhra riots, and social activist Teesta Setalvad) was recently

asked to set up a witness protection programme. The sit announced that such a programme had become operational room 10 June and offered protection by central and state agencies (at the court premises in transit court and at residences) and the setting up of a phone helpline According to the sit, relocation of the witnesses is not called for since the atmosphere in the state did not warrant it.

The security of witnesses has turned out to be a vulnerable aspect of India's criminal justice system class, that shows marked class, caste and gender biases, suffers under the weight of archaic laws and whose more significant shortcomings is the citizen's lack of trust in the police force Leave aside protection the general treatment meted out to witnesses in all criminal cases, big and small, is such that it is considered the better part of discretion to walk away from giving evidence to the police. In fact, the Supreme Court, in the *Swaran Singh Vs. State of Punjab* case, described eloquently the condition of such witnesses who are forced to come to court often due to adjournments are treated rudely by the courts staff and are intimidated by the accused.

5.2.10 Mahender Chawla vs. Union of India[122]

"The Hon'ble High Court of Bombay laid down the State's role to evolve a machinery to protect witnesses in sensitive matters .In a proceeding before the Hon'ble Apex Court, Court issued direction to the States to indicate the steps taken/ to be taken for witness protection in their respective States. At the same time, the (then) learned Attorney General for India was also requested to provide his suggestions in the form of a draft scheme. Pursuant thereto and based on the recommendations of several States/ Union Territories, "Witness Protection Scheme, 2018" ("**Scheme**") was finalized by the Central Government, in consultation with National Legal Services Authority."[123]

[122]Mahender Chawla v. Union of India***, 2017 SCC OnLine SC 1764***
[123]Article by Sanjeev Kumar &Abhishek Goyal L&L Partners

5.2.11 Mahender Chawla V Union of India[124]

"Subsequently, the Hon'ble Court vide its judgment dated 05.12.2018 noted a paramount need to have witness protection mechanism/ scheme India. However, considering the absence of statutory regime, the Scheme was duly adopted and declared to be law by the Hon'ble Court, in terms of Article 141 of the Constitution, until a suitable law in this regard was framed. only Goa has adopted Witness Protection Scheme, 2018.[125]

Moreover, the Government of National Territory Delhi, Maharashtra and odisha have also incorporated their respective Scheme in their states to provide protection to the witness."[126]

5.3 CONCLUSION

The Supreme Court and the High Court have taken a great step to provide protection to the witnesses in the absence of any particular central legislation. Witness Protection Bill, 2015 and Witness Protection Scheme, 2018 have been formulated but they can't be implemented effectively.

[124]Mahender Chawla v Union of India (2019) 14 SCC 615
[125]http://times of india.indiatimes.com/goa/state govt. adopts Centre's Witness Protection Scheme,2018
[126]Supra note 123

CHAPTER VI

COMMISSIONS & COMMITTEE ON WITNESS PROTECTION IN CRIMINAL JUSTICE SYSTEM

6.1 INTRODUCTION

The following Chapter deals with the Committees and Commissions in which the problems of the witnesses while giving testimony, the recommendations to solve their problems as well as how to give them protection has been discussed.

Generally speaking, witness protection would imply protection to a witness from physical harm, but in the Indian context it has been given a restricted meaning. It has been understood to mean protection of witnesses from discomfort and inconvenience and, therefore, has had reference only to the provision of facilities. It is in this limited sense that 'witness protection' was considered in the earlier reports of Law Commission[127].

6.2 14th Report of Law Commission (1958) (Inadequate Arrangements For Witnesses)

In the 14th Report of the Law Commission[128], 'witness protection' was considered from a different angle. The Report referred to:

[127] *shodhganga.inflibnet.ac.in/bitstream/10603/8788/7/07_contents.pdf*

[128] Law Commission of India, *Reform of Judicial Administration*, 14th Report, First Law Commission under the Chairmanship of Mr. M.C. Setalavad , 1995-1958 in 1958

"Inadequate arrangements for witnesses in the Courthouse, the scales of traveling allowance and daily batta (allowance) paid for witnesses for attending the Court in response to summons from the Court."

This aspect too is important if one has to keep in mind the enormous increase in the expense involved and the long hours of waiting in Court with tension and attending numerous adjournments. Here the question of giving due respect to the witness's convenience, comfort and compensation for his sparing valuable time is involved. If the witness is not taken care of, he or she is likely to develop an attitude of indifference to the question of bringing the offender to justice.

6.3 4TH NATIONAL POLICE COMMISSION REPORT, 1980

The above Commission has noted that "prosecution witnesses are turning hostile because of pressure of accused and there is need of regulation to check manipulation of witnesses."

6.4 154th LAW COMMISSION REPORT ON PROTECTION AND FACILITIES FOR WITNESSES[129]

The absence of the witnesses or even their presence in the courts of non-examination are some of the causes of delays .It was highlighted that an important reason for reluctance of witness to cooperate with the law enforcement agencies and actively associate themselves with the proceedings in the courts is the fact that their attendance in the courts entails lots of inconvenience and harassment. Added to this, the listing of large number of cases and adjourning them at the fag end of the day is also important factor which makes the witnesses refrain from coming forward to cooperate with the law enforcement

[129] 154TH Law Commission Report "on the Code Of Criminal Procedure, 1996"

agencies either at the investigation or during the trial. This is despite section 174 IPC and section 370 Cr .P.C which provide for punishment for non-attendance by the witnesses in obedience of summons issued by the courts.

It is said that the plight of the witnesses appearing on behalf of the state against a criminal is pitiable .While adjourning the case the fag end of the day after keeping the witness waiting for the whole day and while fixing the next date, harsh step are taken against him. Even if he appears on the adjourned date, the chances are that the case would be adjourned again. After suffering all these inconveniences even if he appears and evidence recorded, he is brown beaten by overzealous defence counsel or declared hostile by the prosecutor. Even after undergoing this agonising experience the poor witness is not compensated for the loss of earning of the day .Even his pocket expenses incurred are not reimbursed by anyone .Besides no facility provided whatsoever for the witness to make their long awaiting in the courts bearable .Even basic amenities that are needed are not provided for to this poor lot in court premises. Added to this they have to incur the wrath of the accused particularly hardened criminals which results in their life being at great peril. Because of this traumatic time consuming and humiliating experience, many respectable keep themselves away.

1. The allowances paid to the witnesses are very meagre because the rates of allowances are totally inadequate .Thus there is immediate need to enhance the rates and that witnesses summoned to the courts should be paid better regardless of whether he is examined or not . Further the procedure for disbursement for the allowances should not be cumbersome.
2. It is also pertinent to note that all the causes of the aversion and reluctance on the part of the witnesses should be removed .Such an effort should be there even from the stage of their examination by the police by treating them in friendly manner and giving self-confidence by giving adequate protection for them.

3. We recommend that the allowance payable to the witnesses for their attendance in court should be fixed on realistic basis and that payment should be effected through a simple procedure which would avoid delay and inconvenience .Section 312 Cr. P.C and rule thereunder made will have to be suitably amended .They should be paid allowances for all the days they attend .Adequate facilities should be provided in the court premises for their stay .The treatment afforded to them right from the stage of investigation up to the stage of conclusion of the trial should be in a fitting manner giving them due respect and removing all causes which contribute to any anguish on their part .Necessary confidence has to be created in the minds of the witnesses that they would be protected from the wrath of the accused in any eventuality.
4. Listing of the cases should be done in such a way that the witnesses who are summoned are examined on the day they are summoned and the adjournments should be avoided meticulously .The list should be prepared in such a way that a day or two are devoted continuously to all cases of particular police station and cases should not be proceeded mechanically just according to the chronological order regardless of the fact of the likelihood of their being tried or not The court also should proceed with trial on a day -to -day basis and the listing of the cases should be on those lines .The high courts should issue necessary circulars to all the criminal courts giving guidelines for listing of the cases[130]

6.5 178th Report of the Law Commission (2001) (Preventing Witnesses Turning Hostile)

In December, 2001, the Commission gave its 178th Report for amending various statutes, civil and criminal. That Report dealt with hostile witnesses and the precautions the Police should take at the stage of investigation to prevent prevarication by witnesses when they are examined later at the trial. The Law Commission recommended the insertion of Sec.

[130]ibid

164A in the Code of Criminal Procedure, 1973 to provide for recording of the statement of material witnesses in the presence of Magistrates where the offences were punishable with imprisonment of 10 years and more[131]. on the basis of this recommendation, the Criminal Law (Amendment) Bill, 2003 was introduced in the RajyaSabha. The Commission recommended three alternatives, (in modification of the two alternatives suggested in the 154th Report). They are as follows:

1. "The insertion of sub-section (1A) in Section 164 of the Code of Criminal Procedure so that the statements of material witnesses are recorded in the presence of Magistrates"
2. Introducing certain checks so that witnesses do not turn hostile, such as taking the signature of a witness on his police statement and sending it to an appropriate Magistrate and a senior police officer.
3. In all serious offences, punishable with ten or more years of imprisonment, the statement of important witnesses should be recorded, at the earliest, by a Magistrate under Section 164 of the Code of Criminal Procedure, 1973. For less serious offences, the second alternative was found viable."

However, it is to be noted that the Law Commission, in the above Report, did not suggest any measures for the physical protection of witnesses from the 'wrath of the accused' nor deal with the question whether the identity of witnesses can be kept secret and if so, in what manner the Court could keep the identity secret and yet comply with the requirements of enabling the accused or his counsel to effectively cross examine the witness so that the fairness of the judicial procedure is not sacrificed.

[131]Law Commission of India, Recommendations for Amending Various Enactments, Both Civil and Criminal, 178[t] Report , Sixteenth Law Commission under the Chairmanship of Mr. Justice B.P. Jeevan Reddy 2000-2001 & Mr. Justice B.P. Jeevan Reddy 2000-2001 & Mr. Justice M. Jagannadha Rao 2002-2003, in 2001

6.6 Malimath committee report on the witness protection[132]

The prosecution mainly relies on the oral evidence of witnesses for proving the case against the accused. Unfortunately there is no dearth of witnesses who come to the courts and give false evidence with impunity. This is a major cause of failure of the system. The procedure prescribed for taking action against perjury is as cumbersome as it is unsatisfactory.

Many witnesses give false evidence either because of inducement or because of the threats to him or his family members. There is no law to give protection to the witnesses subject to such threats, similar to witness protection laws available in other countries.

Unfortunately the witnesses are treated very shabbily by the system. There are no facilities for the witnesses when they come to the court and have to wait for long periods, often their cross-examination is unreasonable and occasionally rude. They are not given their TA /DA promptly. The witnesses are not treated with due courtesy and consideration; nor are they protected. Witnesses are required to come to the court unnecessarily and repeatedly as a large number of cases are posted and adjourned on frivolous grounds. To overcome these problems, the Committee has made the following recommendations:-

1. a) Witness who comes to assist the court should be treated with dignity and shown due courtesy. An official should be assigned to provide assistance to him. b) Separate place should be provided with proper facilities such as seating, resting, toilet, drinking water etc. for the convenience of the witnesses in the court premises.
2. Rates of traveling and other allowance to the witness should be reviewed so as to compensate him for the expenses that he incurs. Proper arrangements should be made for payment of the allowances due to the witness on the same day when the case is

[132]www.pucl.org/Topics/Law/2003/malimath-recommendations.htm;Committee on Reforms of Criminal Justice System Government of India, Ministry of Home Affairs, Report VOLUME I,INDIA March 2003

adjourned without examining the witness he should be paid T.A. and D. A. the same day.

3. A law should be enacted for giving protection to the witnesses and their family members on the lines of the laws in USA and other countries.
4. Courts should list the cases in such a manner as to avoid the witnesses being required to come again and again for giving evidence. The trial should proceed on day to day basis and granting of adjournments should be avoided. The judge should be held accountable for any lapse in this behalf. The High Court should ensure due compliance through training and supervision.
5. Evidence of experts falling under Sections 291, 292 and 293 of the Court may as far as possible received under affidavit.
6. DNA experts should be included in subsection 4 of Section 293 of the Code.
7. The witness should be provided a seat for him to sit down and give evidence in the court
8. The judge should be vigilant and regulate cross-examination to prevent the witness being subjected to harassment, annoyance or indignity. This should be ensured through training and proper supervision by the High Courts.
9. a) Section 344 of the Code may be suitably amended to require the court to try the case summarily once it forms the opinion that the witness has knowingly or wilfully given false evidence or fabricated false evidence with the intention that such evidence should be used in such proceeding. The expression occurring in Section 344(1) to the effect "if satisfied that it is necessary and expedient in the interest of justice that the witness should be tried summarily for giving or fabricating as the case may be, false evidence" shall be deleted.

   b) The Committee recommends that the punishment of three months or fine up to Rs. 500/- or both should be enhanced to imprisonment for two years or fine up to Rs.10000 /- or both.

c) Sub-section 3 may be suitably amended to the effect that if the Court of Session or Magistrate of first class disposing the judicial proceeding is however satisfied that it is necessary and expedient in the interest of justice that the witness should be tried and punished following the procedure prescribed under Section 340 of the Code, it shall record a finding that effect and proceed to take further action under the said provision. Section 341 providing for appeal is Part II – Witness Identity Protection v. Rights of accused (Chapters V, VI) and

Part III – Witness Protection Programmes (Chapter VII).

The Statutes of New Zealand and Portugal were annexed as examples of existing laws.

6.7.1 In the Introductory chapter-1 titled 'Protection 0f Witnesses in Criminal Cases – Need for new law– observations of the Supreme Court' at page 15 dealing with the issue of Witness Protection it states as follows:

"There are two broad aspects to the need for witness protection. The first is to ensure that evidence of witnesses that has already been collected at the stage of investigation is not allowed to be destroyed by witnesses resiling from their statements while deposing on oath before a court. This phenomenon of witnesses turning `hostile' on account of the failure to `protect' their evidence is one aspect of the problem. This in turn would entail special procedures to be introduced into the criminal law after knowing all details about witnesses, to balance the need for anonymity of witnesses on the one hand and rights of the accused for an open public trial with a right to cross-examination of the witnesses, on the other hand.

The other aspect is the physical and mental vulnerability of the witness and to the taking care of his or her welfare in various respects which calls for physical protection of the witness at all stages of the criminal justice process till the conclusion of the case.

While the first aspect of protecting the evidence of witnesses from the danger of their turning `hostile' has received limited attention at the hands of Parliament, there is an urgent need to have a comprehensive legislative scheme dealing with the second aspect of physical protection of the witness as well. Further, witness protection will have to be ensured in all criminal cases involving grave crimes not limited to terrorist crimes. The implementation of such a law would involve drawing up of Witness Protection Programmes."

The Consultation Paper deals with a number of practical aspects related to this problem – changed identity of a witness, police protection being made available to the witness and his family members, witness being relocated elsewhere in the country or abroad and whether a memorandum of understanding, suggesting the rights and obligations of the witnesses and the Law enforcement authorities, is an appropriate method of going about this programme. The enormous expenditure involved in implementing such a Witness Protection Programme has also to be kept in mind.

The Commission prepared this Consultation Paper in order to invite responses from all sections of society which if found fit, would be incorporated in the recommendations to be sent to the Government along with the Draft Bill on Witness Protection.

6.7.2 Final Report:

In the Final Report, the Commission has discussed the responses and given its recommendations, both in regard to Witness Identity Protection and Witness Protection Programmes. So far as the Witness Identity Protection is concerned, it has also annexed a Draft Bill as Annexure I. The Commission has not given any Draft Bill in regard to Witness Protection Programmes. The observation of the Law Commission on Witness Identity Protection and Witness Protection Programme is worth mentioning here:

I. Witness Identity Protection:

The accused in our country have a right to an open public trial in a criminal court and also a right to examination of witnesses in open court in their presence. But, these rights of the accused are not absolute and may be restricted to a reasonable extent in the interests of fair administration of justice and for ensuring that victims and witnesses depose without any fear. The right of the accused for an open trial in his or her presence, being not absolute, and the law has to balance that right of the accused as against the need for fair administration of justice in which the victims and witness depose without fear or danger to their lives or property or those of their close relatives.

There are three categories of witnesses:

(i) victim-witnesses who are known to the accused;
(ii) victims-witnesses not known to the accused and
(iii) witnesses whose identity is not known to the accused.

Category (i) requires protection from trauma and categories (ii) and (iii) require protection against disclosure of identity.

In category (i) above, as the victim is known to the accused, there is no need to protect the identity of the victim but still the victim may desire that his or her examination in the Court may be allowed to be given separately and not in the immediate presence of the accused because if he or she were to depose in the physical presence of the accused, there can be tremendous trauma and it may be difficult for the witness to depose without fear or trepidation. But, in categories (ii) and (iii), victims and witnesses who are not known to the accused have a more serious problem if there is likelihood of danger to their lives or property or to the lives and properties of their close relatives, in case their identity kept secret at all stages of a criminal case, namely, investigation, inquiry and trial.

At the stage of investigation*:*

We are of the opinion that witness protection is necessary even at the stage of investigation. This can be provided by the prosecutor moving the Magistrate to a conduct a preliminary inquiry or voir dire, in his chambers, i.e. in camera. The Magistrate will have to consider the material relied upon by the prosecutor for substantiating the danger to the witness or his property or those of his relatives, and, if necessary, the Magistrate can examine the witness. The suspect is not entitled to be heard at this stage during investigation. If the Magistrate comes to the conclusion that there is likelihood of danger, he can grant identity will, however, be disclosed to the Magistrate and none else. Further, the real identity will not be reflected in the court records but the witness will be described by a pseudonym or a letter from the alphabet.

During inquiry and before recording evidence at the trial*:*

In the inquiry before the Magistrate or Court of Session (before the trial starts), the prosecutor or the witness has to make a fresh application and this is necessary even if some of the witnesses have been allowed anonymity and given a new identity during investigation. The Magistrate or judge has to pass a fresh preliminary order granting anonymity. The reason is that, unlike at the stage of investigation, in the case of identity protection during inquiry/or before trial, such protection can be granted only after giving a reasonable opportunity to the accused. We have evolved a procedure in which inquiry before the Magistrate or before the Sessions Judge before recording of evidence at the trial, the Magistrate or Judge will consider the material produced by the prosecutor or the witness as to the danger to his life or property or that of his relatives, and will, if necessary, hear the witness. All this has to be in camera and the accused/his lawyer will not be present. However, the Magistrate or Judge will have to hear the accused or his lawyer separately and disclose to them the material relating to the alleged danger to the witness, but not any facts which may enable the accused or his lawyer to discover the real

identity of the witness. This, we have pointed, satisfies the requirement of law where rights of the accused and the rights of the witness get balanced. If, during inquiry, the Magistrate or Judge grants identity protection by a preliminary order, it will ensure not only for the period during inquiry, trial, but at the later stages of appeal or revision and even after the case has been finally concluded. The record of the proceedings shall not, however, contain the real identity of the witness or any facts from which identity can be discovered.

Recording evidence during the trial in the Sessions Court: two-way closed circuit television*:*

The next stage is the final stage of trial in the Sessions Court. The witness, if he had already been granted anonymity by the Magistrate or Judge, as stated above, he need not apply again for anonymity. In respect of the evidence during the trial a two-way closed-circuit television or video link and two-way audio link is proposed and these will be installed connecting two rooms. Fortunately, after the decision of the Supreme Court in *State* o*f Maharashtra vs Dr. Praful B Desai*[133]*, and Sakshi*[134], such evidence by video-link is admissible.

II. Witness Protection Programmes:

Witness Protection Programmes refer witness protection outside the Court. At the instance of the public prosecutor, the witness can be given a new identity by a Magistrate after conducting an ex parte inquiry in his chambers. In case of likelihood of danger of his life, he is given a different identity and May, if need be, even relocated in a different place along with his dependents till be trial of the case against the accused is completed. The expenses for maintenance of all the persons must be met by the State Legal Aid

[133]2003 (4) SCC 601
[134]2004 (6) SCALE 15

Authority through the District Legal Aid Authority. The witness has to sign an MoU which will list out the obligations of the State as well as the witness. Being admitted to the programme, the witness has an obligation to depose and the State has an obligation to protect him physically outside Court. Breach of MoU by the witness will result in his being taken out of the programme." A detailed framework for Witness Identity Protection and Witness Protection Programmes is recommended by the Law Commission of India in its 198th Report

6.8 WITNESS PROTECTI0N BILL, 2015[135]

"This bill was prepared and introduced in parliament in 2015. Its objective was to put in place a strong law for witness protection in a manner which ensures a fair trial to both the parties. The bill sought to ensure protection of witness by the following:

1. Formulation of witness protection programme to be provided to a witness at all stages i.e. during the course of an investigation; during the process of trial; and after the judgment is pronounced[136]
2. Constitution of a "witness protection cell" to prepare a report for the judge of the trial court to examine and grant protection to the witness referred a "protectee" after being admitted in the programme[137]
3. Constitution of National Witness Protection Council and State Witness Protection Councils to ensure implementation of witness protection programme in its letter and spirit[138]
4. Providing safeguards to ensure protection of Identity of witness[139]

[135]http://www.gktoday.in>currentaffairrs
[136]Clause 4(2) of Witness Protection Scheme , 2018
[137]Clause 3(5) & 3(6) of Witness Protection Scheme , 2018
[138]Clause 8 and 12 of Witness Protection Scheme ,2018
[139]Clause 5 of Witness Protection Scheme, 2018

5. Providing transfer of cases out of original Jurisdiction to ensure that the witness can depose freely[140]
6. Providing stringent punishment to the persons contravening the provisions;[141]
7. Prescribing stringent actions against false testimonies and misleading statements.

The above bill has not been passed so far."[142]

6.8.1 Key challenges and Issues[143]

"The above bill was circulated to the state governments and UT administrators but no consensus could be formed. Since police and public order are State Subjects under the seventh Schedule to the Constitution, the state governments are responsible for witness protection also. At the same time, the criminal law and criminal procedure are under concurrent list, so best the Central government can do is amend those laws to the extent of its jurisdiction. Further, the witness protection programme would incur huge expenditures also which shall be paid by the states. Most states are reluctant in India to incur expenditures on such things.

Due to non-consensus among the states, the witness protection programme was shelved. **In 2016, the Union Government entrusted the Bureau of Police Research and Development (BPR&D)** with the task of examining the concerns raised by them regarding the feasibility of the programme and also look into the financial implications of the scheme. As of now, this matter thus lies with BPR&D"[144]

[140]Clause 7 of Witness Protection Scheme , 2018
[141] Clause 17 of Witness Protection Scheme , 2018
[142]Supra note 135
[143]Supra Note 135
[144]ibid

6.9 WITNESS PROTECTION SCHEME, 2018[145]

6.9.1 NEED OF SCHEME

"Witnesses are eyes and ears of the Court."

"In a society governed by a Rule of Law, it is imperative to ensure that investigation, prosecution and trial of criminal offences is not prejudiced because of threats or intimidation to witnesses. The need to protect witnesses has been emphasised by the Hon'ble Supreme Court of India in "*Zahira Habibulla H. sheikh and Another v. State of Gujarat" 2004 (4) SCC 158 SC*. While defining Fair Trial, the Hon'ble Supreme Court observed that "If the witnesses get threatened or are forced to give false evidence that also would not result in fair trial"."

"In 1958, the 14th Report of Law Commission indicated about the need to protect witnesses. The 4th Report of the National Police Commission, 1980 also dealt with the said subject. In 154th Report (1996) The Law Commission dealt with the plight of the witnesses. The report spelt out the inconvenience and the lack of facilities and the threat from the accused to the witnesses. The 172 and 178th report also dealt with the said subject and recommended that witnesses should be protected from the wrath of the accused in any eventuality. The Hon'ble Supreme Court also repeatedly observed about the importance to give protection to witnesses in complex cases, where cooperation by a witness is critical to successful prosecution of a powerful criminal group, extraordinary measures are required to ensure the witness's safety viz. anonymity, relocation of the witness under a new identity in a new, undisclosed place of residence. At present there is no law/scheme holistically at the National level for protection of witnesses. Keeping in

[145]Article by NALSA $ BPR&D, SAMPAT MEENA, IG/DIRECTOR (R&CA) BPRD , GROUP LEADER-I

view the said scenario, "Witness Protection Scheme, 2018" has been drafted/devised by NALSA & BPR&D."[146]

6.9.2 Framework of the proposed Scheme

""The scheme consists of six Parts, and all the parts are interrelated. Part I consists of the definitions of the various terms used in the Scheme such as "Witness Protection Application, Witness Protection Fund, Witness Protection order, Witness Protection Cell, Competent Authority."

The entire proceedings regarding filing of application etc. take place before the Competent Authority who is empowered under the Scheme to pass orders for protection of the witness. The Competent Authority under the scheme has been defined to mean Secretary, District Legal Services Authority (DLSA) and he/she alone can pass witness protection order for the witness protection under this Scheme and who may issue orders for protection of identity/change of identity/relocation of a witness, categorisation of threat, duration and types of protection as detailed in clause 7. For the purpose of orders passed under Part IV & V, the Competent Authority will be Chairperson, DLSAs;

The second part at the scheme spells out the categories of witnesses as per the threat perceptions. It also spells about the creation of State Witness Protection Fund.[147] This part contains the procedural aspects such as filing and processing of application for protection. Types of protection measures are also mentioned in the said part. Parts III to V consist of the special witness protection measures which may be required in much graver scenarios. The last part spells out miscellaneous aspects related to the operational aspects of the scheme. It also mentions about the right to review and appeal."[148]

[146]ibid
[147]Clause 4 of Witness Protection Scheme,2018
[148]Supra note 145

6.9.3 The Approach

"The edifice of the scheme stands on the categorisation of the witnesses as per the threat perception. Three categories keeping in view of the degree of threat has been conceptualised i.e. Category no. A pertains to the scenario where the threat is graver and extends to life of a witness or his family members; category B comprises that degree where threat is to the safety, reputation, property of witness or family members, and lastly, the category C comprises of the degree where threats are more moderate as compared to the threats conceptualised in the categories A and B. Category C extends to harassment or intimidation of the witness or his family members reputation.[149]

State Witness Protection Fund has been proposed under the Scheme. The sources of the State Witness Protection Fund are: Budgetary allocation made in the Annual Budget by the State Government; Receipt of amount of fines imposed (under Section 357 of the Cr .P.C) ordered to be deposited by the courts/tribunals in the Witness Protection Fund; Donations/contributionsfromInternational/National/Philanthropist/CharitableInstitutions/ organizations and individuals permitted by Central/State Governments and Funds contributed under Corporate Social Responsibility"[150].[151]

1) Filing of application: The application for seeking protection order under¬ this scheme can be filed in the prescribed form before the Competent Authority as per area jurisdiction along with supporting documents. [152]

2) As and when an application is received by the Competent Authority,¬ in the prescribed form, it shall forthwith pass an order for calling the Threat Analysis

[149]Clause 3 of Witness Protection Scheme, 2018
[150]Supra note 145
[151]Clause 4(b) of Witness Protection Scheme, 2018
[152]Clause 5 of Witness Protection Scheme, 2018

Report from the Commissioner of Police in Commissionerates/ SSP in District Police investigating the case.[153]

3) Depending upon the urgency in the matter owing to imminent threat, the Competent Authority can pass orders for interim protection of the witness or his family members during the pendency of the application.[154]

4) The Threat Analysis Report shall be prepared expeditiously by the Commissioner of Police in Commissionerates/ SSP in District Police investigating the case while maintaining full confidentiality and it shall reach the Competent Authority within five working days of receipt of the order.[155]

5) In the report, the Commissioner of Police in Commissionerates/ SSP¬ in District Police investigating the case shall categorize the threat perception and shall also submit the suggestive measures for providing adequate protection to the witness or his family as contained in clause 7 of the scheme or any other measure found appropriate.[156]

6) While processing the application for witness protection, the¬ Competent Authority shall also interact preferably in person and if not possible through electronic means with the witness and/or his family members/employers or any other person deemed fit so as to ascertain the witness protection needs of the witness. [157]

7) All the hearings on Witness Protection Application shall be held in camera by the Competent Authority while maintaining full confidentiality. [158]

8) An application shall be disposed of within five working days of receipt of Threat Analysis Report from the Police authorities. [159]

[153]Clause 6(a) of Witness Protection Scheme,2018
[154]Clause 6(b) of Witness Protection Scheme,2018
[155]Clause 6(d) of Witness Protection Scheme,2018
[156]Clause 6(d) of Witness Protection Scheme,2018
[157]Clause 6(e) of Witness Protection Scheme,2018
[158]Clause 6(f) of Witness Protection Scheme,2018

9) The Witness Protection order passed by the Competent Authority shall be implemented by the Witness Protection Cell of the State/UT/CPo. overall responsibility of implementation of all witness protection orders passed by the Competent Authority shall lie on the Head of the Police in the State/UT. However the Witness Protection order passed by the Competent Authority for change of identity or/and relocation shall be implemented by the Department of Home of the concerned State/UT.[160]

10) Upon passing of a Witness Protection order, the Witness Protection Cell shall file a monthly follow-up report before the Competent Authority.[161]

11) In case the Competent Authority finds that there is a need to revise the Witness Protection order or an application is moved in this regard, a fresh Threat Analysis Report may be called from the Commissioner of Police in Commissionerates / SSP in District Police. [162]

6.9.4 Types of Protection Measures[163]

"The types of Protection measures envisaged under the Scheme are to be applied in proportion to the threat. The same are not expected to go for infinite time, but are expected to be for a specific duration on need basis which is to be reviewed regularly. The measures provided for the protection of the witnesses include the following:-

(a) Ensuring that witness and accused do not come face to face during investigation or trial;

(b) Monitoring of mail and telephone calls;

[159]Clause 6(g) of Witness Protection Scheme,2018
[160]Clause 6(h) of Witness Protection Scheme,2018
[161]Clause 6(i) of Witness Protection Scheme,2018
[162]Clause 6(j) of Witness Protection Scheme,2018
[163]Clause 7 of Witness Protection Scheme,2018

(c) Arrangement with the telephone company to change the witness's telephone number or assign him or her an unlisted telephone number;

(d) Installation of security devices in the witness's home such as security doors, CCTV, alarms, fencing etc.;

(e) Concealment of identity of the witness by referring to him/her with the changed name or alphabet;

(f) Emergency contact persons for the witness;

(g) Close protection, regular patrolling around the witness's house;

(h) Temporary change of residence to a relative's house or a nearby town;

(i) Escort to and from the court and provision of Government vehicle or a State funded conveyance for the date of hearing

(j) Holding of in-camera trials;

(k) Allowing a support person to remain present during recording of statement and deposition;

(l) Usage of specially designed vulnerable witness court rooms which have special arrangements like live links, one way mirrors and screens apart from separate passages for witnesses and accused, with option to modify the image of face of the witness and to modify the audio feed of the witness' voice, so that he/she is not identifiable;

(m) Ensuring expeditious recording of deposition during trial on day to day basis without adjournments;

(n) Awarding time to time periodical financial aids/grants to the witness from Witness Protection Fund for the purpose of re-location, sustenance or starting new vocation/profession, if desired

Apart from the above measures, any other form of protection measures considered necessary, and specifically, those requested by the witness can be ordered by Competent Authority.

Some other measures, which can be resorted to in graver scenarios are 'Protection of Identity[164]', 'Change of Identity[165]' and 'Relocation of Witness.[166] For protection of identity, an application for seeking identity protection can be filed in the prescribed form before the Competent Authority. The Competent Authority, keeping in view the 'Threat Analysis Report and after examining the witness, his family members or any other person can pass an order for concealment of identity of witness. Similarly, in some cases keeping in view the threat perception report a new identity may be conferred. In appropriate cases relocation of witnesses can also be ordered to a safer place within the State/UT or territory of the India Union".[167]

6.9.6 Review

This scheme provides review and appeal in case witness or the police authority is agreed by the decision of the Competent Authority. Review can be filed before the Competent Authority within 15 days[168]

6.9.7 Recovery of expenses

In case the witness has lodged a false complaint, the State Legal Service Authority can initiate proceedings for recovery of the expenditure incurred to recoup the Witness Protection Fund.[169]

"Thus, The Witness Protection Scheme, 2018 (Draft) is a first attempt at the National level to holistically provide for the protection of the witnesses which will go a long way

[164]Clause 9 of Witness Protection Scheme,2018
[165] Clause 10 of Witness Protection Scheme ,2018
[166]Clause 11 of Witness Protection Scheme,2018
[167]Supra note 145
[168] Clause 15 of Witness Protection Scheme,2018
[169]Clause 14 of Witness Protection Scheme,2018

in eliminating secondary victimization. The witnesses being eyes and ears of justice, and play an important role in bringing perpetrators of crime to justice. This scheme attempts at ensuring that witnesses receive appropriate and adequate protection. This will go a long way in strengthening the Criminal Justice System in the Country and will consequently enhance National Security Scenario.

The Witness Protection Scheme, 2018 has been approved by the Supreme Court in its historic ruling by *Mahender Chawla v. Union of India*.[170] which makes it the first attempt to bring witness protection under the scope of the law and hold the State responsible for implementing it effectively. This ruling occurs in the context of several cases of fatal attacks suffered by witnesses in the past. In cases involving influential people, witnesses become hostile due to the threat to life and property, as they discover that there is no legal obligation on the part of the state to extend any security.

Though Witness Protection Scheme, 2018 has been laid down but only few states have adopted it. only Goa has adopted the Witness Protection Scheme, 2018. The other States should also adopt the Witness Protection Scheme, 2018."[171]

\6.10 C0NCLUSI0N

Law Commission of India has paid attention to this issue seriously and attempted to give suggestions on this issue in its different reports. It was in the 14th Law Commission Report where the witness protection was considered for the first time in limited sense. The Report dealt with the inadequate arrangements for witnesses in the court house, the scales of travelling allowances and daily batta (allowance) paid for witnesses for attending the court.

In its 154th Report, while concerning the plight of witnesses appearing on behalf of the State, Law Commission observed that the witnesses is not only bothered but also suffers

[170]Mahender Chawla v. Union of India, (2019) 14 SCC 615
[171]Supra note 145

hazard to their lives on account of offenders and Criminals. In this way, it made proposals for relieving different problems and dilemmas. The Law Commission in its 178th Report again took up the issue of preventing witnesses from turning hostile. The Report has tried to manage the issue of precautionary measure police should take at the stage of investigation to prevent fabrication by witnesses when they are examined later at the trial. After these reports, The commission on reforms of Criminal Justice System under the chairmanship of Dr. Justice V.S. Malimath submitted its voluminous report containing 158 recommendations. Some of these recommendations were made even in the 14th Report of the Law Commission about 50 years ago, but there is little improvement in the quality of facilities available to a witness.

Committee on Reforms of Criminal Justice System [172] has made recommendations relating to the facilities provided to the witnesses in the court, travelling allowances paid to the witnesses, protection to the witnesses & their family, protection of the witnesses from harassment while being cross-examined, summarily trial for witnesses who give false evidence, duty of the judge to inform the witnesses about the punishment for the offence of perjury while he gives evidence.

198th Report of the Law Commission of India titled as Witness Identity Protection & Witness Protection Programmes, 2006 provides about the non-disclosure of the identity of the accused from the stage of investigation till the case has been finally concluded till the threat continues. If the witness has already been granted anonymity by the Magistrate or Judge, the evidence during the trial should be taken by a two way closed circuit television or video link. It also provides about the witness protection outside court by relocating the witness alongwith his dependents and the cost will be borne by the State Legal Aid Authority through the District Legal Aid Authority. If the witness signs the Memorandum of Understanding with the State for his protection, it will be the duty of the

[172]Headed by Justice Malimath , Vol I, p. 151

State to provide protection. But this Law Commission Report was only the recommendations and no Draft Bill was framed regarding the Witness Identity Protection and Witness Protection Programmes.

So, the Witness Protection Bill, 2015 was framed which contained provisions relating to the protection of witnesses from the stage of investigation till the threat continues even after the pronouncement of judgement., Constitution of Witness Protection Cell to prepare report given to judges on the basis of which witnesses will be admitted in the programme., Constitution of National Witness Council and State Witness Council to implement Witness Protection Programmes in its true spirit, to protect the identity of witnesses, stringent punishment to the persons contravening the provisions, stringent actions against false testimonies & misleading statements. The above bill was circulated to the State Governments & Union Territories administrators but no consensus could be formed. So the Bill has not been passed so far.

Then Witness Protection Scheme, 2018 came into existence. The Scheme provides about the protection/change of identity of witnesses, their relocation, installation of security cameras at the residence of witness, usage of specially designated court rooms etc. The Scheme also provides about the categories of Witnesses as per Threat Perception. The State Witness Protection Fund from which the expenses will be incurred during the implementation of Witness Protection order, filing of application before the Competent Authority, types of protection measures, confidentiality and preservation of records, recovery of expenses, review of the decision. This Scheme was formulated and it was declared as Law by the Supreme Court in the case of *Mahender Chawla V Union of India*[173] till the enactment of suitable Central or State legislation on the subject. But only Goa has adopted it.[174]

[173](2019) 14SCC 615

[174]http://times of India .india times.com/ city/goa/ State government adopts Centre's Witness Protection

CHAPTER VII

CONCLUSIONS & SUGGESTIONS

Crime is the most crucial issues facing the country today, and the development of effective mechanisms to fight crime is another. 'Crime affects the quality of life' which ultimately has a detrimental effect on the growth of our country. There are a number of initiatives that can be developed by both the government and judiciary to address crime. However, these initiatives can only be effective if they run parallel to the development of a more effective criminal justice system. Within the criminal justice system, witness protection is one area that requires immediate attention. The present study highlights the need and significance of witness protection in India. It also validates the same in the light of the fact that due to the witness's reluctance to come forward and depose before the court there is a big decline in conviction rate in India . In the absence of any law to protect witness more and more witnesses are turning hostile this in turn is affecting the credibility of the justice delivery system to provide justice. The present chapter discusses the major findings, conclusions and recommendation. The researcher has succeeded to draw certain logical findings of the present study on the strength of the analysis and interpretation of the various research studies, reports of the commissions and committees and by making comparison of law relating to witness protection in other countries. The major findings which have emerged from the study are presented in the light of the various objectives and subsequently appropriate recommendations are made, the same is elaborated in the successive paragraphs.

7.1 CHALLENGES TOWARDS WITNESS PROTECTION

Even though the Witness Protection Bill, 2015 and Witness Protection Scheme, 2018 has been formulated but unfortunately both the Bills couldn't be transformed into a statute.

Witness protection Bill, 2015 was not at all implemented. So Witness Protection Scheme, 2018 was framed. Though the Scheme was declared as law by Supreme Court under Article 141 of the Constitution in *Mahender Chawla v Union of India.*[175], yet only Goa has adopted it.[176] There are some drawbacks in the Witness Protection Scheme, 2018 which are as follows :-

a) The Witness Protection order provided here is limited for a specific duration of three months at a time. But the threat can continue for the period exceeding three months. So the witness protection should be provided until the threat has ceased to exist.

b) The task of deciding the contents and preparation of the Threat Analysis Report has been accorded to the head of the police in the district, so in high profile cases involving politicians or influential people the police officer can be put under pressure to provide those people the information regarding the witness.

c) Though, the Scheme envisages for confidentiality and preservation of records but no punishment has been provided for its violation though Witness protection Bill provided the punishment for the violation of it.

d) The Scheme also does not make any provision for occupation/ work/ education, in the interim, of the witnesses. In contrast, the Witness Protection Bill, 2015made, *inter alia*, specific provisions in relation to the penalties which may be imposed for the violation of the terms of the said Bill; orders for safety and security of the

[175] (2019) 14SCC 615
[176]supra note 174

protectee[177] from the inception of investigation till the stage after trial on terms, as warranted by the Court as per the threat perception of the individual; etc. In fact, under the said Bill there were specific provisions in relation to the protectee's right to practice an alternate occupation, without compromising the integrity of the case and continuity of education of juvenile protectee lacking under the Scheme.

e) The functioning of the criminal justice system is the responsibility of the State and some states may not have adequate resources to implement this scheme effectively. The remedy to this is assistance by the centre but nowhere in the scheme the centre has been entitled to give a single penny for the Witness Protection Fund;

f) There are many practical problems like costs of implementation and infrastructure. When talking about providing bodyguards, security, relocation to another area etc., the costs involved are bound to be enormous.

g) A witness in Indian situation, who is living comfortably with a job and family may not intend to undergo such drastic changes in his life for the sake of being a witness in a Court of law.

7.2 SUGGESTIONS

Following are some of the suggestions that have been made to plug gaps and to overcome the above mentioned difficulties. The States should formulate their Witness Protection Act on the basis of the following suggestion:-

a) The first step in developing a witness protection law is to acknowledge that witness protection is not a favour to witnesses, but rather a duty for States. So all the states

[177] *Clause 2 (g)* "protectee" means any individual who has been or might be threatened, coerced, attacked, injured or influenced in any manner whatsoever as may be determined by the court in which the proceedings involving him as a witness are going on;"

should implement the provisions of the Witness Protection Scheme, 2018 in their respective schemes as only Goa has adopted it.[178]

b) The witness is given protection for three months at a time in the Witness Protection Scheme, 2018. The protection should be given from the stage of investigation till the pronouncement of judgement and even after that if the threat continues to the life and security of the witness.

c) Even though strict penal provisions were provided for violation of the provisions of the Witness Protection Bill, 2015. But Witness Protection Scheme, 2018 does not contain any such provision for its violation. So strict penal provisions should be added in the Witness Protection Scheme and the States should also include it in their respective Act.

d) The provisions relating to the occupation/work/education of the witness during the proceeding of the case in which they have become witness while being relocated on the basis of Threat Analysis Report is not provided in the Witness Protection Scheme, 2018. So the provision for their occupation/work/education of the witness while being relocated should be incorporated in the Witness Protection Scheme.

e) Centre should also contribute funds in the State Witness Protection Fund.

f) Providing protection to a witness is a very lengthy process so practically in the case of immediate threat to witness, it doesn't work well.

g) Every step of the process, from investigation to conviction and punishment, should be analysed to identify ways in which witnesses are placed at risk, and potential reforms designed to limit those risks.

[178]Supra note 174

h) Provision should be made to fast track cases where witnesses are under protection. Even if this is not always possible, Judges should be made aware of certain defence lawyers' efforts to needlessly drag cases involving witnesses under protection in the hope that these witnesses will succumb to stress and leave the protection. The spirit behind Section 309 of Cr.P.C must be realised in true sense by the court and adjournment should be exercised in exceptional situations only. i) Witnesses who come to the court should be treated with dignity and shown due courtesy. Separate place should be provided with proper facilities such as seating, resting, toilet, drinking water etc. for the convenience in the court premises.

j) The witnesses should be fully compensated for the day when he is in the court because he sacrifices his work to assist the court.

k) The judge should keep an eye on the defence in order to prevent the witnesses from harassment, annoyance or indignity during the time of cross-examination.

l) Protection of witnesses should be given on the priority basis. Firstly, crime that have an impact on the safety and the security of the Country, secondly the crime that have impact on the economy of the Nation and thirdly those related to organized crime but the less serious offences should also be given consideration.

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Article

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