CRIMINAL JUSTICE SYSTEM AND WITNESSES: ANALYSIS IN THE LIGHT OF WITNESS PROTECTION SCHEME IN INDIA

DISSERTATION

Submitted in the Partial Fulfilment of the Requirement

FOR THE AWARD OF THE DEGREE OF

MASTERS OF LAW

Submitted by

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Session (2020-2021)

CERTIFICATE

I hereby certify that,

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I, Apurva Singh, student of legal studies, BBD UNIVERSITY, Lucknow declare that the dissertation entitles, “CRIMINAL JUSTICE SYSTEM AND WITNESSES: ANALYSIS IN THE LIGHT OF WITNESS PROTECTION SCHEME IN INDIA” submitted by me for the award of Degree of Masters of Law in school of legal studies BBD UNIVERSITY, LUCKNOW is a work carried out by me and it has not been submitted to any other University/Institution for the award.

ACKNOWLEDGEMENT

In consummation of this dissertation I have taken help and guidance from many whom I
would like to thank.

I do hereby pay my due regard to the Almighty and omnipotent God with whose power and creator's cooperation, I have been able to complete this dissertation.

I deem it my pious duty to put on record my deep sense of gratitude and thankfulness to my guide, supervisor **DR. GITU SINGH f**or the help and inspiring guidance, she is very kindly extended to me. Without his able guidance and inspiration, this work could never have seen the light of the day.

I am grateful to my colleagues especially for encouragement and able care to do the work on my topic.

I am also thankful to the librarians and staff of BBDU. I express my immense gratitude to my learned authors and my teachers whose works I have consulted and referred on my occasions.

Thanks

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TABLE OF CONTENTS

TABLE OF CASES

2. *Delhi Domestic Working Women's Forum v. Union of India, (1995) 1 SCC 14*

3. *Gagan Kanojia & Ano. v. Sate of Punjab, Appeal (crl.) 561-62 of 2005*

4. *Gujrat v Hemang Prameshrai Desai, 1966 Cri LJ 474.*

5. *Gura Singh v. State of Rajasthan, (2001 Cri LJ 487: AIR 2001 SC 330.)*

6. *Gurbachan Singh v. The State of Bombay and another, [1952] S.C.R. 737*

7. *K. Karunakaran v TV Eachara Warrier, AIR 1978 SC 290*

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

9. *Kartar Singh v. State of Punjab, 1994 Cri LJ 3139 (SC)*

10. *KTMS Mohd. v UOI, AIR 1969 SC 7.*

11. *MS Jaggi v Registrar, Orissa HC, 1983 Cri LJ 1527*

12. *Ms Neelam Katara v. Union of India, (Crl.WP 247 of 2002) (dated 14.10.2003)*

13. *Naresh Shridhar Mirajkar v. State of Maharashtra,(1966) 3 SCR 744. AIR 1967 SC*

14. *Narmada Shankar v Dan Pal Singh, AIR 2001 SC 2004.*

15. *NHRC v. State of Gujarat : (Best Bakery Case) 2003 (9) SCALE 329*

16. *PUCL v. Union of India: 2003 under sec. 30 of POTA (2003)*

17. *Rangaswami v State of Tamil Nadu, AIR 1989 SC 1137*

18. *Re : Suo Moto Proceedings against Mr. R. Karuppan, Advocate, AIR 2001 SC 2004*

19. *Sat Pal v. Delhi Administration, AIR 1976 SC 294 : 1976 Cri LJ 295.*

20. *State of Maharashtra vs. Dr. Praful B. Desai,2003(4) SCC 60) [AIR 1952 SC 221)*

19. *Surendra Narain & Munna Pandey v.State of U. P., 1998 Cri LJ 359 : AIR 1998 SC 192*

20. *Swaransingh vs. State of Punjab, (2000) 5 SCC 68. 10*

21. *Talab Haji Hussain v. Madhukar Purushottam Mondka, AIR 1958 C 374*

22. *Vineet Narain v. Union of India (1998 (1) SCC 226)*

23. *Zahira Habibulla H. Sheikh and others vs. State of Gujarat and others*

24. *Santosh Kumar vs State Of M.P., Appeal (crl.) 1368 of 2005*

LIST OF ABBREVIATIONS

- **AIR** — **All India Reporter**
- **All E. R.** — **All England Reporter**
- **All.** — **Allahabad**
- **Art.** — **Article**
- **Bom L.R** — **Bombay Law Reporter**
- **Cal** — **Calcutta**

Cr.L.J	**Criminal Law Journal**
Cr.P.C	**Code of Criminal Procedure**
DB	**Division Bench**
Ed	**Edition**
Hon 'ble	**Honorable**
ILR	**Indian Law Reporter**
IPC	**Indian Penal Code**
NOC	**Notes on Cases**
Ors.	**Others**
P.	**Page**
Sec.	**Section**
SC	**Supreme court**
SCC	**Supreme Court Cases**
SCC Online.	**Supreme Court Cases Online**
SCR	**Supreme Court Reporter**
UNGA	**United Nations General Assembly**
Vol.	**Volume**
WLR	**Wales Law Report**
WPS	**Witness Protection Scheme, 2018**

CHAPTER-I

INTRODUCTION

"Whenever man commits a crime heaven finds a witness," says Edward G. Bulwer. Witness is therefore inevitable. Witness can have a pivotal role in bringing the offender to justice. Witness assumes additional significance in adversarial system of criminal justice where the onus of proving the case lies on the prosecution and the witness of prosecution becomes important in the pursuit of exploring the truth. The status of witness in the court is that of a friend and supporter to the cause of justice. According to Bentham, witnesses are the 'eyes

and years of justice'. It is absolutely appropriate as the decision in the system of justice that is followed in India profoundly depends on the witness and his conduct. The witness has the capacity to change the course of the whole case. Underlining the significance of witness, in *Swaran Singh v. State of Punjab*[1], Wadhwa J. said, "A criminal case is built on the edifice of evidence, evidence that is admissible in law. For that, witnesses are required whether it is direct evidence or circumstantial evidence." It was further observed by him - "By giving evidence relating to the commission of an offence, he performs a sacred duty of assisting the court to discover the truth. It is because of this reason that the witness either takes an oath in the name of God or solemnly affirms to speak the truth, the whole of the truth and nothing but truth. He/she performs an important public duty of assisting the court in deciding on the guilt or otherwise of the accused in the case. He submits himself to cross- examination and cannot refuse to answer questions on the ground the answer will incriminate him"

The testimony given by the witnesses enables the court to decide the merit of facts and circumstances of the case. Therefore, the truthfulness of the witness's testimony becomes the cornerstone of the justice and hence the witness is made to offer statement under oath. The statement of witness may lead to the conviction or acquittal of accused. The speedy justice or delay in justice delivery also depends, to a great extent, on the quality of statement given by the witness during trail.

On the whole, the successful functioning of the criminal justice system largely depends on the readiness of individuals to furnish information and tender evidence without being threatened or lured. While the crucial role played by a witness is generally recognized, the conditions relating to witness in India are highly pathetic. The witnesses in this country are no longer willing to come forward to offer testimony. This situation has developed over a period of time and mainly on account of several factors consistently working in this process.

[1]AIR *(2000) 5 SCC 68. 10*

Witness dithers as he faces wrath, pressure and intimidation to his life and existence from accused party. The situation gets further aggravated when he finds the state does not have any legal obligation to him for extending any security. Besides, undergoing the judicial process in terms of visiting court again and again and facing adjournments cause him to reappear many times before the court. All this leads to a frustration and immense loss of time and work for him. Moreover, he does not find the behaviour and attitude of police, prosecution and court officials very encouraging. At times, he is dealt at equal footing of offender. These problems force him to turn hostile. And turning hostile opens up new issues and problems for justice delivery and fair trial.

The willingness of an ordinary person to cooperate with legal process in terms of offering testimony or any such thing is not surely governed by the constitutional expectations from him. Similarly, his unwillingness has also nothing do with the great ideals of fundaments of justice or any such thing. He dithers because he has either seen the consequences of being witness or he has exhausted by visiting the court and getting grilled for no reason. As also the Supreme Court has observed, "A witness is not treated with respect in the Court... He waits for the whole day and then finds the matter adjourned... And when he does appear, he is subjected to unchecked examination and cross-examination and finds himself in a hapless situation. For these reasons and others, a person abhors becoming a witness" (*Swaran Singh v State of Punjab, AIR 2000*[2]).

1.1 SCOPE AND OBJECTIVES

- Give an overview of the concept of witness protection
- To know the concept and position of witness protection scheme 2018
- Why there is a need for insertion of a well-defined law relating to Witness Protection in our Criminal Justice system

[2] Ibid

- To make an analytical study of the concept of "hostile witness" and emerging challenges and issue concerning the same
- To critically analyses the exposition of law from the legislative and judicial trends
- To study the deciding facts in providing the protection to the witness.

1.2 RESEARCH METHODOLOGY

The research is doctrinal. Empirical method of research is not followed in this work, as in a short span of time, large of published material has come up for scholar' understanding of the topic and it's possible to carry out a doctrinal research with the help of primary and secondary data. As a secondary source of study will be books of eminent authors, articles in research journal, news paper and legal web-sites.

The study has followed explorative, descriptive and analytical methods .The purpose of the design is to explore, describe, analyse and review the existing law related to providing information in India and challenges to implement it properly. The attempt of the government to find the solution and its implication to solve the controversy will be discuss.

In accordance with the objectives of the present study, doctrinal and non-doctrinal research designs have been adopted.

The doctrinal design has been used to study the jurisprudential development in the areas of hostility, protection and problems of witnesses. This has been done primarily with the help of case laws and leading judgments of various courts. The reports of committees and commissions have been scanned to sifting the issues relating to the research problem.

The non-doctrinal method or empirical approach is the prime highlight of this study. In this pursuit, a sample survey has been carried out to collect the required data by using some structured methods of data collection.

1.3 Hypothesis/Research Problems

1. The rights of the accused person to fair and open trial are mentioned in various International documents relating to human rights like Human Rights and International Covenant on Civil and Political Rights, but it has failed to recognize and mention the need and importance of various protection that might result in the failure of criminal justice system. Are accused better protected than witness in International Instruments?

2. The law commission of India has prepared a report on the witness protection programme and the Witness Identity Protection Bill. But there are still some major drawbacks in the draft which needs to be taken care of.

3. In India there were very few Statutes like POTA and TADA that provided for witness protection. Most of these statutes are repealed and currently there is only one Statute i.e., Unlawful Activities (Prevention) Act 2004 that provides for witness protection. Therefore it is desired to have a special law in respect of the protection of witnesses in violent cases.

4. The Indian Judicial System, in various decisions, has recognized and emphasized the need of a special law relating to witness protection. The court has also been instrumental in laying down the guidelines for the same. These guidelines which could be helpful in formulating a better witness protection progrramme. Whether the guidelines laid down by Indian Supreme Court could be relied while formulating the witness protection programe.

5. The developed countries like United States of America, Great Britain and developing countries like Philippines have witness protection programmes and those are implemented in cases of violent crimes as well. It is

important to make a comparative analysis of the provisions incorporated in these laws and their relevance in Indian situation. Could witness protection programs instituted in other developed and developing nations helpful in framing the witness protection program for India?

6. It is possible to evolve a model scheme for witness identity protection and physical protection in violent crimes and involvement of societies in witness protection.Whether India needs a special scheme for witness protection in violent crimes?Does society have a role play in witness protection.

1.4 Literature Review

In 2003 the Malimath Committee while submitting 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 like the delay in proceedings and backlog of cases etc.

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 sure of getting scot free from the clutches of law. The committee also mentioned about witness but it did not emphasise upon the aspect of witness protection in India.

The Constitution of India provides important safeguards for the protection of rights of the accused. The code of criminal procedure provides for procedural safeguards to the accused person like fair trial, right to consult, right to cross examine and right to compensation in case of false allegations etc.

The basic object of the criminal justice system is to protect the society against the crime and punish the offenders. But unfortunately, the criminal justice system does not show equal concern to the victims of the crime. Traditionally, the claims of the victims were sufficiently satisfied by conviction and sentence of

the offenders. Very few provisions could be found in respect of the victim of sexual offences etc. But in today's time it is felt that in order to achieve the true success of the criminal justice system is not only the reformation of the offender but the restoration of justice to the victims of the crime. One of the most important aspects of this is the protection of the victim and even the witnesses who play a vital role in the administration of justice. This protection can be provided in various manners by awarding the compensation or physically protecting them from the possible threats of their life, property and the safety of their family members.

The law Commission in its 198th report has suggested comprehensive 'Witness Identity protection' and 'Witness Protection' programmes to prevent witness from turning hostile under threat from the accused and to ensure that criminal trials do no end in acquittals. However, the report has not exhaustively dealt with the problems of the witnesses.

B.Guru rajah Rao, 'Ancient Hindu Judiciature', talks about the ancient judicial system. The book has given 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 middle period I.e. Mohammedan law relating to witness 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 persons. The treatment was been given to witness in the courts might be one of the reasons that could have attracted the witnesses to participate in the administration of criminal justice. The book is of great help in finding out the success of ancient criminal justice system.

The aspect of compensation to accused persona and even to the victims is being dealt by The Indian Legislature through various statutory provisions, though, the witness protection has remained overlooked.

A. K. Sarkar and S.K. Awasthi in the book, 'Law on Compensation' has dealt with the various aspects of protection of rights of victims and accused persons

through compensation covering international perspective of law of compensation. But he has failed to mention about the idea of compensation to witness.

Dr. Avatar Singh in his book 'Principles of law of evidence' and Vepa P. Sarthi in 'Law of Evidence' has discussed in detail the various aspects of law relating to testimony of witness.

CHAPTER-2

HISTORICAL DEVELOPMENT

2.1: Introduction

Witness, through ages, has been a key player in the pursuit of justice delivery. The fundamentals of justice necessitate that the truth and impartiality must be quintessence of justice. This brings the role of an onlooker or third party as witness to confirm or report to criminal justice agencies the ingredients of the incident. The sanctity of statements made by the witness is considered to be correct and factual as they are made under oath. Hence, the role of witness has been of paramount importance in assisting the course of justice.

Calling of witness to offer his testimony in a case is not a new idea. It was present even in ancient India. Kautilya in his famous work 'Arthasastra[3]' says "the parties shall themselves produce who witnesses who are not far removed

[3] Kautilya, Arthasastra, Book J, Chapter 11, Verse 50; Kangle, Kautilya Arthasastra (University of Bombay) (1970), Part IInd, Page 230

either by time or place. Witnesses who are far away or who will not stir out shall be made to present themselves by the order of the judge"

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 Yajnvalkya [4]enumerates three means of proof.

It also directs even for the comparison of handwriting. However, in order to understand what role does the witness play in Indian Criminal Justice System we have to trace the history of the Law of Evidence in the country? For this we have to study the subject referring to three different periods, namely the Ancient Hindu period the Ancient Muslim period and the British period.

2.2 Law of Evidence in Ancient Hindu Period

The law evidence in Ancient Hindu period can be traced from the Hindu Dharma Shasta's. The historical background of the Law of Evidence and its later development has been elaborately discussed in Radha Kumod Mukherjee's Endowment Lectures on Hindu judicial System, delivered by Sir S. Vardhachariar[5].

According to Hindu Dharma Sastras the purpose of any trial is the desire to find out the truth. Yajnvalkya says that "Discarding what is fraudulent; the King should give decisions in accordance with the true [6]facts." In order to discover the truth from the contradictory claims made by two parties in a case the Hindu law givers took every possible precaution. The Shastras enjoined that the parties coming into the Court must be prevailed on to admit the truth. Manu says, the King presiding over the tribunal shall ascertain the truth and determine the correctness of the testimonies of the witness, the description, time and place of

[4] Yajnvalkya, II, 22 (100 A.D. to 300 A.D.); Kane, History of Dharmasastra, Vol. 3, Page 304

[5] Vishnu, VIII, 12; M.K.Sharan, Court Procedure in Ancient India (1978) Page 96 [4] Krisnamachari V., The Law of Evidence, Hyderabad, 2003, Page 2

[6] Yajnvalkya, II, 22 (100 A.D. to 300 A.D.); Kane, History of Dharmasastra, Vol. 3, Page 304

the transaction or incident giving rise to the case as well as the usages of the country, and pronounce the true judgment .

Vasista recognizes three kinds of evidence:

1-Likhitam Sakshino

2-Bukhti Parmanan

3- Trividham Smritham. i.e.

A. Lekhya (Document), B. Sakshi (Witnesses) , C. Bukhthi (Possession)

A. Lekhya (Documentary Evidence):

This lekhya or documentary evidence was further classified into three categories, namely, RAJASAKSIKA, SASAKSIKA and ASAKSIKA.

[I] Rajasaksika:

Rajasaksika is a document which is executed in the King's Court by the King's clerk and attested by the presiding officer affixing the seal which resembles to a modern registered document.

[II] Sasksika:

Sasksika is purely a private document written by anyone and in their own hands by witness.

[III] Asaksika:

Asaksika is a document which has been written by the parties itself and hence admissible.

Just like in present days in which documentary evidence is being preferred over oral evidence, the Ancient Hindu Law of Evidence also preferred the documentary evidence over oral evidence. The Hindu law givers, however, were

probably aware of the weakness of the documentary evidence as against possible forgery. They have provided elaborate rules to ensure the genuineness of the document. In Ancient Hindu Law a document written by children, dependents, lunatics, women or person under fear was considered as vitiated. There were also rules for testing the genuineness of document by comparison of handwriting in question, particularly in cases where executants are dead.

B. Sakshi (Witnesses):

The Hindu law givers provided the rules for the purpose of determining the competency of witnesses. Persons whose character was highly dubious were considered as tainted witnesses and were held to be not competent. Shastrakartas (similar to the contemporary Advocates) were enjoined in order to ensure the witnesses to speak the truth. Before giving evidence the witnesses were required to perform a brief Sankalpa (ablution) and were to face towards the auspicious direction and were exhorted to speak the truth, in the most solemn apples to their strongest religious sentiments. For the purpose of determining the credibility of the witnesses the Judges were required to pay attention to demeanor of the witnesses. According to Vishnu Puran "a false witness" may be known by his altered looks, by his countenance changing colour and by his talk, wandering from the subject. Yagnavalkya says, "He who shifts from place to place, licks his lips, whose forehead perspires, whose countenance changes colour, who with a dry tongue and stumbling speech talks much and incoherently and who does not heed the speech or sight of another, who bites his lips, who by mental, vocal bodily acts falls into a sickly state, is considered a tainted person[7]."

C. Bhukhti (Possession):

In an agricultural economy existing in Ancient Hindu India, disputes regarding possession of landed property constituted the bulk of litigation. Possession was recognized as evidence of right and title and one of the modes of proving along

[7] Ancient Hindu Judicature: Tagore Law Lectures: S. Varadachari

with the documents and witnesses. In the present Evidence Act also there is a presumption that the possessor of anything is the lawful owner of that thing.

2.3 Law of Evidence in Ancient Muslim Period

More details of the historical background of Law of Evidence in Ancient Muslim India are contained in the book "Muslim Jurisprudence" by Sir Abdul Rahim.

[8]The Holy Quran lays great emphasis on justice. It holds that the whole creation is founded on justice and that one of the excellent attributes of God is that He is just. Therefore, in Islam the Conception of justice is, the administration of justice is a divine disposition[9].

The Mohammedan Law givers classify the whole Evidence in two heads i.e. oral evidence and documentary evidence. Oral evidence is further sub- classified into direct and here-say evidence as in the present day. Although documents properly executed and books kept in the course of business were accepted as evidence, oral evidence appears to have been preferred to documentary evidence.[7] When documents are produced the court insisted upon examining the party which produced them. In regard to oral evidence the Holy Quran says "O True believers: Observe justice, when you appear as witnesses before God and let not hatred towards any induce to you to do wrong, but act justly. This will approach nearer to piety. Fear God for God is fully acquainted with what you do."[8]

In another verse the Holy Quran says that "O: You who believe, be maintainers of justice when you bear witnesses 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 bringing testimony so that you may swerve from justice and if you swerve or turn aside then surely God is aware of what you

[8] section 110, The Indian Evidence Act

[9] Krishnamachari V., The Law of Evidence, Hyderabad, 2003, Page 5

do[10]"

In Ancient Muslim Period the Courts had to pay great attention while examining the witnesses. In the process the Court pays great emphasis on the credibility of the witnesses as well as the parties. This can be substantiated by an example from that period in which a case came before the Mughal emperor Shahjehan. In that case Hindu scribe complained that a Mughal soldier has eloped with his (scribe's) wife. The King ordered for the arrest of the person and to be produced before him. When the person was produced the woman who was said to be the wife of the Hindu scribe denied of being his wife. Emperor Shahjehan watching her demeanor suddenly asked her to fill the Court's Inkpot[11]. The lady did the job so dexterously and cleanly that the King was convinced that she must be the wife of the Hindu scribe.

2.4 Documentary Evidence:

The Ancient Muslim Law also recognizes the Documentary Evidence[12]. However, there were some documents which were not recognized as evidence in the Ancient Muslim Courts. Under Ancient Muslim Law documents executed by certain classes of persons were considered as vitiated and were not recognized to be admitted as evidence. Persons like women, children, drunkards, gamblers, criminals were not considered as competent to execute any documents and thus the documents executed by such types of persons were inadmissible (as evidence) in the Ancient Muslim Courts.

2.5 Law of Evidence in British India

In British India the Courts established under the provisions of the Royal Charter in Bombay, Madras and Calcutta were following the English rules of the Law

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[10] Ibid at para 3

[11] Holy Quran, Chapter 5, Verse 8

[12] Holy Quran, Chapter 4, Verse 135

of Evidence. [13]In Mofussil Courts which were situated outside the Presidency Towns there were no definite rules relating to the Law of Evidence. The Courts enjoyed unfettered liberty in the matter of admission of evidence.

2.6 Witness in Modern Times:

The term ‘witness’ has not been defined in any Indian statutes. However, the legal understanding with the term is quite apparent. A witness may be defined as one who gives evidence in a case; an indifferent person to each party, sworn to speak the truth, the whole truth, and nothing but the truth. The Black's Law Dictionary defines a witness as one who sees, knows, or vouches for something, or one who gives testimony, under oath or affirmation in person or by oral or written deposition, or by affidavit. In Sat Pal v. Delhi Administration,[14] the Supreme Court of India defined a hostile witness as "one who is not desirous of telling the truth at the instance of the party calling him and an unfavorable witness is one called by a party to prove a particular fact, who fails to prove such fact or proves an opposite fact."

The Halsbury’s Laws of India classified witnesses into different categories as-

- Eye witness
- natural witnesses,
- chance witnesses,
- official witnesses,
- sole witnesses,
- injured witnesses,
- independent witnesses,

[13] Krishnamachari V., The Law of Evidence, Hyderabad, 2003, Page 6

[14] AIR 1976 SC 294 : see at 1976 Cri. L. J. 295.

- interested, related and partisan witnesses,
- inimical witnesses,
- trap witnesses,
- rustic witnesses,
- child witnesses,
- approver, accomplice etc.

The group called "WITNESSES" is the species called out for considering the subject on hand. The usage "hostile witness" does not find a place in the Indian Evidence Act, 1872. Authorities are not unanimous with regard to the meaning of the words "adverse", "unwilling" or "hostile" and the draftsman of the Evidence Act has, 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 Judge, he bears a hostile animus to the party calling him and not merely when his testimony contradicts his proof. Who is a 'hostile witness'? 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 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. Historically, the term Hostile Witness seems to have its origin in Common Law. The Common Law categorizes witnesses as "hostile" or "adverse" witnesses. But till now no any such distinction has been made in any of the laws enforced in India. 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. The Law.Com Dictionary defines hostile witness means an adverse witness in a trial who is found by the judge to be

hostile or adverse to the position of the party whose attorney is questioning the witness, even though attorney called the witness to testify on behalf of his or her client or the witness becomes openly antagonistic, the attorney may request the judge to declare the witness to be hostile or adverse. If the judge declares to be hostile or adverse the attorney may ask “leading questions”, which suggests answers, or are challenging to the testimony just as in cross-examination of a witness who has testified for the opposition.

Alri Ajit [15]defines hostile witness as ‘an adverse witness in a trial who is found by the Judge to be hostile (adverse) to the position of the party whose attorney is questioning" the witness, even though the attorney called the witness to Testify on behalf of his/her client. When the attorney calling the witness finds that the answers are contrary to the legal position of his/her client or the witness becomes openly antagonistic, the attorney may request the Judge to declare the witness to be 'hostile' or 'adverse'. If the Judge declares the witness to be hostile the attorney may ask leading questions which suggest answers or are challenging to the testimony just as on cross- examination of a witness who has testified for the opposition.

Thus, a 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 can not 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

[15] 2008 Criminal Law Journal , Jul

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 favorable witness.

The Supreme Court in Gura Singh v. State of Rajasthan[16], tried to define hostile witness and laid down that under the common law the hostile witness is described as one who is not desirous of telling the truth at the instance of one party calling him and an unfavorable witness is one called by a party to prove a particular fact in issue or relevant to the issue who fails to prove such facts or proves the opposite test the witness by the party calling him Section 142 requires that leading questions can not be put to the witness in examination in chief in re-examination except with the permission of the Court. 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. Section 154 empowers the Court as discretion to permit the persons who call a witness to put any question 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 is his position in life or to shake his credit (Section 146 of Evidence Act).

Thus the spirit of Section 154 implies following. The provision (S.154 of The Indian Evidence Act, 1872) only talks about permitting "such questions as may be asked in cross-examination". The law nowhere mentions, the need to declare a witness as 'hostile' before the provision can be invoked. The judicial consideration (under S. 154) is only to be invoked when the court feels that

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[16] 2001 Cri. L.J. 487

"the attitude disclosed by the witness is destructive of his duty to speak the truth. From the above, we can conclude that whereas the Common Law seeks to categorize witnesses as “hostile" or "adverse", for the purpose of cross-examining, the Indian law endeavors not to make such a distinction. All that the law seeks to do is elicit hidden facts 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 question as referred in Section 154 of the Indian Evidence Act.

2.7 Causes for hostility of witness

The experiences have shown that the witnesses of the police or prosecution tend to turn hostile during the prosecution of the case. The instances of disowning the statements made before the police has grown to be a real dilemma before the system of criminal justice in this country. This weakens the whole case in the interest of the offender. Mr. Soli Sorabjee, observed that- ‘nothing shakes public confidence in the criminal justice delivery system more then the collapse of the prosecution owing to witnesses turning hostile and retracting their previous statements.’

While there is enough popular understanding as what causes a witness to turn hostile, there is hardly any empirical knowledge confirming the same.

It is generally felt that the main cause for the high acquittal rate in our criminal justice system is the witness turning hostile. In order to get rid of this cross examination as early as possible, either the witness will give false statements or to make the matter worse, he will turn hostile i.e. he will retract from his previous statement.[17] The reason of witness’s hostility, to a great extent, is attributed to the unholy combination of money and muscle power, intimidation and monetary inducement.

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[17] ‘Hostile Witnesses in our Criminal Justice System’ by Brisketu Sharon Pandey, Cri. L. J. Journal, 2005

In cases where the accused belong to habitual or organized group of offenders, witness tends to avoid primarily due to threat. It is more so as because the protection to witness is rare in our country.

Several studies conducted abroad on witnesses seem to suggest that taxing cross-examination, repeated adjournments and indifferent attitudes are some of the key factors that compel a witness to turn hostile. The successful working of the criminal justice system depends critically on the willingness of individuals to furnish information and offer evidence without being forced or intimidated. As symbolized by Zahira Sheikh's flip-flops in the Best Bakery case[18], the threat of retaliation, which could include physical violence, is a major reason why witnesses (some of them victims) do not cooperate. That case sparked off a nationwide debate on the need for witnesses to be protected by the state. But it is not threat or pressure alone that makes witnesses turns hostile. The issue seems to have linked with a range of problems that the witness invariably faces during the investigation and trial. The witness, in the face of such problems, find himself alienated. The protracted trial and the treatment meted out to witness in the court have a definite bearing on shifting testimonies.

On an occasion, the PUCL [19]said that there were two ways to explain why witnesses turn hostile. The first is that the police had recorded the statements incorrectly. The second and more plausible was that the police had recorded the statements correctly but were retracted by the witnesses because of 'intimidation and other methods of manipulation'. Another major reason of this growing menace is protracted trials. The working of judicial process is very slow.

Several dates are fixed for cross examination of witnesses, who becomes frustrated over because of being summoned again and again only to find that the date is adjourned. This frustration takes its toll, and the witness decides to

[18] NHRC v. State of Gujarat : (Best Bakery Case) (2003)[1]SEP

[19] PUCL v. Union of India: 2003 under sec. 30 of POTA (2003)

turn hostile to get rid of the harassment.

The 4th Report of the National Police Commission (1980) acknowledged the troubles undergone by witnesses attending proceedings in court. The witnesses are not at all treated properly in our judicial system. The Malimath Committee [20]has expressed its opinion about such witnesses by saying, 'the witness should be treated with great respects and should be considered as a guest of honor'. Lack of a witness protection program, unsympathetic attitude of the police, bribery and corruption are other reasons which add to the malaise. For all these reasons and others a person abhors becoming a witness.

Some commonly observed factors responsible for the hostility of witness could be as under:

Threat/intimidation Inducement by various meansAllurement/seduction Disillusionment caused by the delay in the judicial process.

Hassles faced by the witnesses during investigation and trial is also a reason making witness hostile. Accused/adverse party may be responsible for the volte-face shown by the witness in categories (i) to (iii). In other cases, the entire criminal justicesystem, including the trial courts, could be held responsible. Here comes the relevance of the observations made by the Apex Court in Swaran Singh's [21]case. Later, the Supreme Court in "Best Bakery Case[22]", came down heavily on the State administration in general and the investigating agency in particular for rashly and negligently handling their duties and abdicating their responsibilities.

Infact a systematic research is needed to know as to why do the prosecution witness fall felt. There are experiences that in the olden days it was pretty rare

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[20] Report on Criminal Justice Reforms, Lawyers Collective, August 2001

[21] (2000)5 SCC 68

[22] Zahira Habibulla H. Sheikh and others vs. State of Gujarat and others, 2003

to see prosecution witness going hostile. Its not that money and muscle power factors were absent in those days. It seems it has something to do with the quality of investigation. The SHO himself used to carefully conduct the entire process of investigation and it was seldom left to the junior functionary. Secondly, the SHO used to remain present during all the hearings and his presence was a definite deterrent to the witness to twist his statements. Thakur.J (2001) [23]is of the opinion that earlier an eye witness used to be summoned only once and he would be examined on the same day. Hostile witness are also 'stock witness' or 'pocket witness' with police and they are planted to go hostile only.

Das.J (2002) [24]quoted many reasons for the hostility of witness and resultant effects on declining rates of conviction in India. This paper report following data:

According to a recent survey by the Directorate of Civil Rights Enforcement (DCRE) the following are the main reasons for the low conviction rate:—

. (1) WITNESSES — 26 per cent,

. (2) Hostile victims — 27 per cent,

. (3) Lack of abysmally low at 6.8 percent.

The situation has reached such a stage that, in cases relating to lesser grave offences, there are certain "stock witnesses" who give evidence in trials. The problems in this instance are compounded by the fact that people are not willing to come forward or are discouraged to give evidence in cases while the police claim that they have to make do with whoever is available.

This also suggests some key reasons for witness turning hostile:

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[23] From the Lawyers Collective, August 2001

[24] 'Witness Protection -Legal Crisis In India', Cri, L. J,2002

1. **Easy Availability of Bail to the Accused-** In many eases Involving high-profile personalities or heinous Crime, the courts easily grant bail to the accused thereby making the witnesses vulnerable to threats and intimidation by the accused. No doubt Section 439(2) of the Code of Criminal Procedure provides for the arrest of a person who has been released on ball, it Is seldom used by the State in cases where there exists a reasonable apprehension that the accused might try to influence the witness.

2. **Prolonged Trials-** Section 309 of the Cr. P. C. was enacted with the objective of ensuring speedy and expeditious disposal of cases and thus to prevent harassment of witnesses. However, the spirit of this beneficial provision has been totally missed by the judiciary and adjournments are granted by Courts at the drop of a hat, Courts have also become non- responsive to the delaying tactics adopted by the defence during trials. As already stated earlier, prolonged trial and harassment is one of the main reasons for witnesses falling in side of the defence and retracting their statements.

'Criminal Consequences of witnesses turning hostile'

The most serious consequence of witness turning hostile is seen the cases resulting into acquittals. It is estimated that more than 60 percent of acquittals in the trials relating to heinous offences are as a result of the witness becoming hostile. [25]

The legal framework governing the matter of witness turning hostile is provided in the procedural law of the country. In order to place the matter in context, it would be imperative to have a look at these provisions.

2.8 Perjury Laws: A view

[25] Justice K. Sreedhar Rao, Criminal Justice System-Required Reforms, 2002

The brazenness that was seen in BMW case where the lawyers were caught in a sting operation by a TV channel for bribing a key witness to turn hostile is a real slur on the judicial history of this nation. Such instances call for strict penal action. The experiences in many sensational cases wherein the witness turned hostile lead us to look at the legal remedy of this criminality which too often involves "buying" of witness by influential accused can be handled only by strictly enforcing the penal law on perjury.

The Bombay special trail court in the Best Bakery case has served notices to Zaheera Sheikh for "perjury" or "false.She had backtracked her statements several times. Later, as a very exceptional case, the court punished Zahira for hostility for one year of imprisonment. The Delhi High Court has suo motu taken cognizance of the police/ prosecution theory on "hostile witness" in the Jessica Lall murder case. Though Zaheera is not the lone example of perjury-in a majority of cases in Indian courts, false evidence or retraction of statements is a common phenomenon. Because of being almost unrevoked, the perjury provisions have almost reduced to an exceptional thing in judicial circles.

Concept of perjury

These six things the Lord hates, yes, seven are an abomination to Him: A proud look, a lying tongue, hands that shed innocent blood, a heart that devises wicked plans, feet that are swift in running to evil, a false witness who speaks [26]lies.

The abhorrence to lying by witness seems to have been disliked by our spiritual wisdom. In modern language its all about sanctions against lying and it is called perjury.

Perjury in general sense is considered as lying. The legal understanding about

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[26] from Bible

perjury means lying or making verifiable false statements on a matter under oath or affirmation in a court of law or in any of various sworn statements in writing. Perjury is a crime because the witness/ accused has sworn to tell the truth and, for the credibility of the court, witness testimony must be relied on as being truthful. Perjury is considered a very serious crime as it could be used to usurp the authority of the courts, resulting in miscarriage of justice.

The perjury principles and norms are applied to witnesses who have admitted or affirmed that they are telling the truth. A witness who is unable to swear to tell the truth uses affirmative. For example, in the United Kingdom and till a little while ago in India, a witness may swear on the Bible or holy book. If a witness has no religion, or does not wish to swear on a holy book, the witness may make an affirmation he or she is telling the truth instead. In some countries such as France, suspects cannot be heard under oath and thus do not commit perjury, whatever they say during their trail.[27]

The matter of perjury laws recently gathered considerable attention. The offence of perjury is not only applicable to criminal cases, but also extends to other judicial proceeding including civil case being tried by civil courts exercising original jurisdiction. While the problem of perjury in criminal cases is generally confined to giving of false evidence on oath, it has a wider spectrum as far as civil cases are concerned and includes giving false evidence, fabricating false/ forged documents to be used as evidence etc. Statements of interpretation of fact are not perjury because people often make inaccurate statements unwittingly and not deliberately. Individuals may have honest but mistaken beliefs about certain facts or their recollection may be inaccurate like most other crimes in the common law system, to commit the act, and to have actually committed the act (the actus rues).

Legal Interpretation of Perjury

[27] Article by Sairam Bhat in Kerela Law Journal, 2006

In legal parlance “lying under oath” constitutes perjury. It is primarily a voluntary act of taking false oath during a trail in court. A lie that could detrimental to the outcome of trail would be an act of perjury. But the ordinary lies like giving incorrect details of one’s age may not be perjury unless it is otherwise crucial to the case.

The idea of “safeguard" as rooted in the Common Law, consisted of contradicting witnesses with their previous statements or impeaching their credit (which normally as a rule was not allowed) by the party calling such witnesses. To initiate the "safeguard", it was imperative to declare such a witness as "hostile". For this purpose, Common Law laid down certain peculiarities of a 'hostile' witness, such as," not desirous of telling the truth at the instance of the party calling him" or " the existence of a 'hostile animus' to the party calling such a witness." [28]

Thus there are three specific prerequisites to judge the degree of hostility of witnesses as per Sec.191 IPC which are as under:

[1]Whether there is a legal obligation to state the truth or not

[2]Whether there is any making of false statement

[3] Whether there is any belief in its falsity.

There are some specific provisions dealing with the offence of perjury. The section 191 of IPC defines perjury as “giving false evidence” and by interpretation it includes the statements retracted later as the person is presumed to have given a “false statement” earlier or later, when the statement is retracted. But hardly anyone, including the legal experts, could recall a single case in which a person was prosecuted for making a false statement before the court.

[28] “Problem of Hostile Witness” by Mamta Cahterjee at www.legalserviceindia.com

Any statement tendered under oath on an affidavit also constitutes perjury. Under section 191 of IPC[29], an affidavit is evidence and a person swearing to a false affidavit is guilty of perjury punishable under section 193 IPC that prescribes the period of punishment as seven years imprisonment. The procedure as per sec. 344(1) [30]of Cr. P. C. for taking action against a person sec. 344(1), a Court of Session or a Magistrate of the first class, express opinion to the effect that any witness appearing in such proceeding had knowingly or willfully given or fabricated false evidence, it may take cognizance of the offence and after giving the offender a reasonable opportunity of showing cause why he should not be punished for such offence, try such offender summarily and sentence him to imprisonment which may extend to three months or a fine which may extend to five hundred rupees or with both. An article makes an in-depth analysis of certain sections of IPC dealing with the subjects. They are discussed as under:

Section 193- Punishment for false evidence

Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

195. Prosecution for Contempt of Lawful Authority of Public Servants, For Offences against Public Justice and for Offences relating to documents given in Evidence:

[29] Supra at para 2

[30] Criminal Procedure Code 1973

(1) No Court shall take cognizance-...

1. of any offence punishable under any of the following sections of the Indian Penal Code,(45 of 1860) namely, sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, or

2. (ii) of any offence described in section 463, or punishable under section 471, section 475 or section 476, of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court, or

3. (iii) of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in sub-clause (I) or sub-clause (ii), except on the complaint in writing of that Court, or of some other Court to which that Court is subordinate.

4. In this context, reference may be made to Section 340 of the Code under Chapter X XVI under the heading "Provisions as to certain offences affecting the administration of justice". This section confers an inherent power on a Court to make a complaint in respect of an offence committed in or in relation to a proceeding in that Court, or as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, if that Court is of opinion that it is expedient in the interest of justice that an enquiry should be made into an offence referred to in 1 Hereinafter referred to as the Code clause (b) of sub-section (1) of Section 195 and authorizes such Court to hold preliminary enquiry as it thinks necessary and then make a complaint thereof in writing after recording a finding to that effect as contemplated under sub-section (1) of Section 340. The words "in or in relation to a proceeding in that Court" show that the Court which can take action under this section is only the Court operating within the definition of Section 195

(3) before which or in relation to whose proceeding the offence has been committed. There is a word of caution in built in that provision itself that the action to be taken should be expedient in the interest of justice. Therefore, it is incumbent that the power given by this Section 340 of the Code should be used with utmost care and after due consideration.2 Section 340 of the Code is as follows:

5. Explanation 1: A trial before a Court-martial is a judicial proceeding. Explanation 2: An investigation directed by law preliminary to a proceeding before a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.

196. Using Evidence known to be False:

Whoever corruptly uses or attempts to use as true or genuine evidence any evidence, which he knows to be false or fabricated, shall be punished in the same manner as if he gave or fabricated false evidence.

199. False Statement made in declaration, which is by Law receivable as Evidence.

Whoever, in an declaration made or subscribed by him, which declaration any Court of Justice, or any public servant or other person, is bound or authorized by law to receive as evidence of any fact, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, touching any point material to the object for which the declaration is made or used, shall be punished in the same manner as if he gave false evidence. In context of cases under above sections section 195 of the Criminal Procedure Code1 is applicable. According to this section the Court shall take cognizance of such offence only on the complaint of such Court or any other Court to which such Court is subordinate.

340. Procedure in Cases Mentioned in Section 195: (1)

1. When, upon an application made to it in this behalf or otherwise, any Court is of opinion that it is expedient in the interest of Justice that an inquiry should be made into any offence referred to in clause (b) of sub-section (1) of Section 195, which appears to have been committed in or in relation to a proceeding in that Court, or as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary,--

2. (a) record a finding to that effect;

3. (b) make a complaint thereof in writing;

4. (c) send it to a Magistrate of the first class jurisdiction;

5. (d) take sufficient security for the appearance of the accused before such

6. Magistrate or if the alleged offence is non-bailable and the Court thinks it necessary so to do, send the accused in custody to such Magistrate, and bind over any person to appear and give evidence before such Magistrate[31].

7. The power conferred on a Court by sub-section (1) in respect of an offence may, in any case where that Court has neither made a complaint under sub- section (1) in respect of that offence nor rejected an application for the making of such complaint, be exercised by the Court to which such former Court is subordinate within the meaning of sub-section (4) of Section 195.

8. A complaint made under this section shall be signed- (a) where the

9. Court making the complaint is a High Court, by such officer of the Court

[31] KTMS Mohd. V UOI, http://supremecourtonline.com/cases/4287.html.

as the

10. Court may appoint; (b) in any other case, by the presiding officer of the Court.

11. In this section, "Court" has the same meaning as in Section 195. The case of K. Karunakaran v TV Eachara Warrier [32]established the two pre-

conditions for an enquiry held under Section 340(1) of the Code. These are that there has to be prima facie case to establish the specified offence and that it has to be expedient in the interest of justice to initiate such enquiry. This was relied upon in Thes was rrlied upon in the case of KTMS Mohd. V UOI[33], where the Court held that Section 340 of the Code should be alluded to only for the purpose of showing that necessary care and caution is to be taken before initiating a criminal proceeding for perjury against the deponent of contradictory statement in a judicial proceeding. In India, law relating to the offence of perjury is given a statutory definition under Section 191 and Chapter XI of the Indian Penal Code, incorporated to deal with the offences relating to giving false evidence against public justice. The offences incorporated under this Chapter are based upon recognition of the decline of moral values and erosion of sanctity of oath. Unscrupulous litigants are found daily resorting to utter blatant falsehood in the courts which has, to some extent, resulted in polluting the judicial system. [34]In the case of State of Gujrat v Hemang Prameshrai Desai, [35]the Court stressed upon the need to corroborate the falsity of a statement with ample evidence. Mere police evidence was held insufficient to convict the accused. Also where the conviction of the accused was based on his voluntary admission of guilt, his statements were to construed literally and strictly.

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[32] AIR 1978 SC 290

[33] Ibid.

[34] Supra at para

[35] Re: Suo Moto Proceedings against Mr. R. Karuppan, Advocate, AIR 2001 SC 2004 (Para 12) 1966 Cri. L. J. 474

In the same year in the Allahabad High Court in Narmada Shankar v Dan Pal Singh[36], a case of malicious prosecution, where defendant-respondent was charged under Section 193 of the IPC for having arrested the Petitioner and subsequently lying under oath as to the presence of such orders, admitted during cross-examination that he had previously lied about the orders. It was held in this case that when a witness comes to Court prepared to make a false statement and makes it, but is cornered in cross-examination and compelled to admit his false statements he cannot claim that the admission neutralises the perjury committed by him. The real test in all such cases was held to be whether the witness voluntarily corrected himself due to realisation of his error or genuine feeling of remorse before his perjury was exposed. In the given circumstances, though, the defendant was let off with a warning.

The Supreme Court in the case of Re : Suo Moto Proceedings against Mr. R. Karuppan, Advocate has stressed upon stern and effective to prevent the evil of perjury. It remains a fact that most of the parties despite being under oath make false statements to suit the interests of the parties calling them. In the present case the respondent filed an affidavit stating that the age of the then CJI was undetermined by the President of India according to Article 217 of the Constitution of India in another matter in 1991. As regards this the affidavit prima facie was held to have made a false statement. It was not disputed that an affidavit is evidence within the meaning of Section 191 of the Indian Penal Code and a person swearing to a false affidavit is guilty of perjury punishable under Section 193 IPC. The respondent herein, being legally bound by an oath to state the truth in his affidavit accompanying the petition was prima facie held to have made a false statement which constitutes an offence of giving false evidence as defined under Section 191 IPC, punishable under Section 193 IPC.

Also in the case KTMS Mohd. v UOI [37]the Bench observed that the mere fact

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[36] AIR 2001 SC 2004

[37] AIR 1969 SC 7

that a deponent has made contradictory statements at two different stages in a judicial proceeding is not by itself

always sufficient to justify a prosecution for perjury under Section 193 IPC but it must be established that the deponent has intentionally given a false statement in any stage of the `judicial proceeding' or fabricated false evidence for the purpose of being used in any stage of the judicial proceeding. Further, such a prosecution for perjury should be taken only if it is expedient in the interest of justice. According to Section 199 of the IPC to constitute an offence the declaration made by the accused must be of such nature as may be admissible as evidence in a Court of Law and any public authority or public servant must be bound by law to accept such declaration as evidence. The statement, which is alleged to be false in such a declaration, must be of material importance to the object of the declaration and the accused must have reasonable knowledge of its falsity. If the falsity of the statement is proved then the accused will be punished as he would be for giving false evidence.

In the case Jotish Chandra v State of Bihar[38], the falsity of the statement as touching upon any point material to the object of the declaration was held to be essential to constitute an offence under Section 199 of the IPC. The section was subjected to further interpretation in the case M S Jaggi v Registrar, Orissa HC

[39]Herein the accused was held to have made a reckless and false allegation against a Judge in order to have a revision petition to which he is a party, transferred to another Judge. Dwelling upon the essentials of constituting a rime under Section 199 of the IPC there must be a deliberate false statement. Statement made in a reckless and haphazard manner, though untrue in fact, need not constitute an offence when the person making such statements immediately admits the mistake and corrects the statements. If, however, a person makes a reckless and false allegation against a Judge (or for that matter ant other person)

[38] AIR 1969 SC 7[illegible]

[39] 1983 Cri LJ 1527

in an affidavit, he lays himself open to prosecution under this section.

503. Criminal Intimidation:

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 alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threats, commits criminal intimidation.

506. Punishment for Criminal Intimidation:

Whoever commits the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both; [if threat be to cause death or grievous hurt, etc.] and if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or [imprisonment for life], or with imprisonment for a term which may extend to seven years, or to impute unchastely to a woman, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

507. Criminal Intimidation by an Anonymous Communication:

Whoever commits the offence of criminal intimidation by an anonymous communication, or having taken precaution to conceal the name or abode of the person from whom the threat comes, shall be punished with imprisonment of either description for a term which may extend to two years, in addition to the punishment provided for the offence by the last preceding section.

The Indian Penal Code punishes anyone who threatens another with injury to his person, property or reputation or to the person or reputation of anyone that such person is interested in. There must be an intention to cause alarm to such

person or cause that person to do any act or omit to do anything in order to avoid the execution of such threat. The offence is so defined in Section 503 and the punishment is prescribed under Section 506.

The fact that threat has to real was emphasised in the case Rangaswami v State of Tamil Nadu[40], that in case the threat is merely construed by the 'victim' then the person accused on criminal intimidation is to be given the benefit of doubt. Arijit Pasayat, J presiding in the Orissa High Court in the case Amulya Kumar Behera v Nagabhushana Behera[41], laid down the essentials of the offence defined under Section 503 of the IPC:

1. Threatening a person with any injury, (a) to his person, reputation or property; (b) to the person or reputation of anyone in whom that person is interested 2. The threat must be with intent; (a) to cause alarm to that person; or (b) to cause that person to do any act which he is not legally bound to do as means of avoiding execution of such threat; or (c) to cause that person to omit to do any act which that person is legally entitled to doe as means of avoiding execution of threat.

In this case the defense pleaded that the victim had admitted the fact that he was not alarmed upon being threatened by the accused. The Court observed that, whether J. Wadhwa[42], expressing the concern over plight of witness stated that "perjury has also become a way of life in the law Courts. A trail judge knows that the witness is telling a lie and is going back on his previous statement, yet he does not wish to punish him or even file a complaint against him. He is required to sign the complaint himself which deters him from filing the complaint. Perhaps law needs amendment to clause (b) of sec. 340(3) of Cr. P C in this respect as the High Court can direct any officer to file a complaint.

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40 AIR 1989 SC 1137

41 1995 Cri LJ 3559

42 Swaran Singh v. State of Punjab, (2000)5 SCC 68

To get rid of the evil of perjury, the Court should resort to the use of the provisions of law as contained in chapter XXVI of Cr. P C".

The case of Jeffrey Archer:

Jeffery Archer, a well known novelist of Britain, was sentenced for four years imprisonment for perjury. In 1987 he sued the Daily Star for libel when they alleged that he had sex with an Irish prostitute, Monica Coughlan. He won the case and was £ 500,000 damages, but not everyone was convicted by the verdict. The journalist, Adam Raphael wrote an article at the time which carefully avoided libel but implied a number of things that Archer probably had gone with a prostitute; that at the trail Archer and his lawyers had shifted attention from this issue to the tactics used by the Daily Star to trap Archer; and that the Daily Star had only themselves to blame for this. Before sentencing him the judge Mr. Justice potts told Lord Archer. "These charges represent as serious an offence of perjury as I have had experience of and have been able to find the books".

The jury found him guilty of lying and cheating in his 1987 libel case against the Daily Star. The verdicts were unanimous on each count. Lord Archer, who was ordered to pay £ 175,000 costs within 12 months, was told by the judge he would have to serve at least half of his sentence.

This case has set a new trend in the contemporary society about the sanctity of legal system in Britain.

The Indian scenario, on the contrary presents a rather dismal picture. Even the apex court of the country expressed its concern over this matter time and again. In one of the cases, the Supreme Court held that "unscrupulous litigants are found daily resorting to utter blatant falsehood in the Courts". While "most of the witness....make false statements to suit the interests of the parties calling them". The perjurer in the case happens to be Advocate R. Karuppan, who is also president of the Madras High Court Advocates Association. The perjury

committed by Karuppan is that he filed a petition questioning the authenticity of Justice A. S. Anand's date of birth in spite of knowing full well that the issue had already been settled by the President of India.

Ordering a complaint of perjury to be filed against Karuppan before a magistrate, the Apex court warned; "If the system is to survive, effective action is the need of the time.

Indeed, Karuppan's perjury may not be exceptional but the action initiated in his case, that too suo motu, seems to be an exception to the general practice among the courts to condone perjury. And it would not be out of place to suggest that Karuppan also would have probably got away with his perjury had the aggrieved party not been former Chief Justice of India A S Anand himself.

CHAPTER-3

CONCEPT AND ROLE OF WITNESSES

3.1 WHO IS A WITNESS?

The Indian Criminal Laws have not given any definition of the word "Witness". Therefore, it is imperative that we fall back on the ordinary dictionary meaning of the word. The Oxford Dictionary defines the term as "One who gives evidence in a case; an indifferent person to each party, sworn to speak the truth, the whole truth and nothing but the truth".

The Black's Law Dictionary defines the word Witness as one who sees, knows or vouches for something or one who gives testimony, under oath or affirmation in person or by oral or written deposition, or by affidavit.

A witness is an important party in a case apart from the complainant and the accused. By giving evidence relating to the commission of an offence, he performs a sacred duty of assisting the court to discover the truth. It is because of this reason that the witness either takes an oath in the name of God or solemnly affirms to speak the truth, the whole of the truth and nothing but truth. He/she performs an important public duty of assisting the court in deciding on the guilt or otherwise of the accused in the case. He submits himself to cross-examination and cannot refuse to answer questions on the ground the answer will incriminate him.

3.2 WHO IS A HOSTILE WITNESS?

A witness is termed hostile, when he gives 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 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. Historically, the term Hostile Witness seems to have its origin in Common Law

Although, the word "hostile witness" is not defined in the Indian Evidence Act, 1872, the matter is left entirely to the discretion of the Court. A witness is considered adverse or hostile when in the opinion of the judge he bears a hostile animus to the party calling him and not merely when his testimony contradicts his proof.

In the case of Sat Pal vs. Delhi Administration , the Supreme Court defined a Hostile Witness as "one who is not desirous of telling the truth at the instance of the party calling him and an unfavorable witness is one called by a party to prove a particular fact, who fails to prove such a fact or proves an opposite fact".

Further, in Gura Singh vs. State of Rajasthan The Supreme Court defined hostile witness as one “who is not desirous of telling the truth at the instance of one party calling him”.

In R.K.Dey V. State of Orissa ,the Apex Court held that, 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 defense due to enmity with the prosecution.

The Apex Court in G.S.Bakshi vs. State held that 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.

3.3 WHEN DOES A WITNESS TURN HOSTILE?

Under Section 164 Cr.P.C any Metropolitan or Judicial Magistrate, irrespective of whether he has the jurisdiction or not, may record any confession or statement of a person made in the course of investigation by the police, or at any time afterwards but before the commencement of inquiry or trial. Statements made under S.161 are inadmissible in a Court of Law, for the reason that the investigating police officer may compel or intimidate the witnesses, into making statements that do not constitute as evidence. Generally, the reason is the unholy combination of money and muscle power, intimidation and monetary inducement. There are a number of reasons for a witness turning hostile, the major one being the absence of police protection during and after the trial. The witness is afraid of facing the wrath of convicts who may be well connected.

Therefore, before the Court during the trial, the witness is expected to restate whatever stated to the police at the time of investigation. But, due to excessive pressure from the defense side or the witness may retract and go back on his statements at the time of the trial, or may deny having made those statements. The prosecution may then request the Court to declare such witness as "hostile" and subsequently obtain the right to Cross-examine the Witness. Eventually, the witness loses his/her credibility and this has a negative impact on the prosecution case, which loses the testimony of its witness, which may be instrumental in building up its arguments.

Further, psychological studies carried on witnesses seem to suggest that grueling cross-examination, frequent adjournments; courtroom-intimidations are some of the major reasons that force a witness to turn hostile. The successful working of the

criminal justice system depends critically on the willingness of individuals to furnish information and tender evidence without being intimidated or bought.

A witness in a criminal trial may come from a far-off place to find the case adjourned. He has to come to the Court many times and at what cost to his own-self and his family is not difficult to fathom. It has become more or less a fashion to have a criminal case adjourned again and again till the witness tires and he gives up. It is the game of unscrupulous lawyers to get adjournments for one excuse or the other till a witness is won over or is tired. Not only that a witness is threatened; he is abducted; he is maimed; he is done away with; or even bribed. There is no protection for him. In adjourning the matter without any valid cause a Court unwittingly becomes party to miscarriage of justice. A witness is then not treated with respect in the Court. He is pushed out from the crowded courtroom by the peon. He waits for the whole day and then he finds that the matter adjourned. He has no place to sit and no place even to have a glass of water. And when he does appear in Court, he is subjected to unchecked and prolonged examination and cross-examination and finds himself in a hapless situation. For all these reasons and others, a person abhors becoming a witness. It is the administration of justice that suffers. Then appropriate diet money for a witness is a far cry. Here again the process of harassment starts and he decides not to get the diet money at all. High Courts have to be vigilant in these matters. Proper diet money must be paid immediately to the witness (not only when he is examined but for every adjourned hearing) and even sent to him and he should not be left to be harassed by the subordinate staff. If the criminal justice system is to be put on a proper pedestal, the system cannot be left in the hands of unscrupulous lawyers and the sluggish State machinery.

Each trial should be properly monitored. Time has come that all the Courts, district Courts, subordinate Courts are linked to the High Court with a computer and a proper check is made on the adjournments and recording of evidence. The Bar Council of India and the State Bar Councils must play their part and lend

their support to put the criminal system back on its trail. Perjury has also become a way of life in the law Courts. A trial judge knows that the witness is telling a lie and is going back on his previous statement, yet he does not wish to punish him or even file a complaint against him. He is required to sign the complaint himself which deters him from filing the complaint. Perhaps law needs amendment to clause (b) of Section 340(3) of the Code of Criminal Procedure in this respect as the High Court can direct any officer to file a complaint. To get rid of the evil of perjury, the Court should resort to the use of the provisions of law as contained in Chapter XXVI of the Code of Criminal Procedure."

Justice Malimath Committee has attended this matter with great concern and it says: '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:

- 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.

- 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.

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

Experiences of witness are generally of avoidable grievances, lack of courtesy, human treatment, expression of concern, paying attention and recognition and extending guidance. Many cases studied in this project reflect that the witness, on several occasions, was treated like accused. The whole issue of witness hostility, over which much hue and cry is being expressed, also appears to be linked with the kind of treatment the witness is meted out in the criminal justice process.

If the co-operation of the witnesses to be gained, the need is to understand the problems of witnesses. A judgment of the Supreme Court has vindicated the fact that the witnesses experience harassment and non-sympathetic attitudes from police, prosecution and judiciary. The division Bench comprising, Justice K.T. Thomas and R.P. Sethi, said that "Witnesses tremble on getting summons from courts in India not because they fear examination or cross examination but because they fear that they might not be examined at all for several days and on such days they would be nailed to the precincts of the courts''.

This judgment was especially significant from the angle of witnesses. The court took serious view of the adjournment granted on the flimsy grounds, which put the witnesses in a range of problems. The Supreme Court said that ".....it is high time that witnesses are regarded as guests invited (through summons) for helping with their testimony in reaching judicial findings The Supreme Court was particularly scathing about the way the provisions under section 309 of the Cr.P.C. are flaunted by the courts. The section lays down that once examination in the court started it has to continue the trial until all witnesses in attendance have been examined. The SC categorically laid down that "if a witness is present in the court he must be examined on that day. It is now quite likely that the situation will improve as presently even when witnesses are present

adjournments are granted to suit the convenience of the advocate concerned.

A major category of problems of witness consists of his wastage of time and non- payment of whatever allowances he is supposed to get for his appearance in the court.

The National Police Commission [43]paid attention to allowances due to witnesses for appearance in Courts. The Commission noted that the monetary compensation was woefully inadequate and referred to a sample survey carried out in 18 Magistrate's Courts in one State, which revealed that out of 96,815 witnesses who attended the Courts during the test period, only 6697 witnesses were paid some allowance, and that too after following a rather cumbersome procedure (which incidentally has hardly changed for the better anywhere). These figures signify the irrelevance of the amount paid to witnesses for their troubles. Apart from this point made by the Commission, these figures suggest the backbreaking burden on the Magistracy, in as much as each Magistrate was expected to examine, on an average, about 5400 witnesses! Unfortunately, the length of the test period has not been given and so it may be difficult to comment further on these figures; but, whatever the period, the situation could not at all have improved since then.

Many victims and witnesses do not receive the level of information and support they need when participating in the criminal justice process. This neglect can often lead to a withdrawal of support for the prosecution, non- attendance at court and dissatisfaction with the process, which can result in failed cases and reluctance by witnesses to re-engage in the criminal justice process on future occasions.

The criminal justice system has a responsibility to ensure victims and witnesses feel safe and able to give evidence. Giving evidence at court is a daunting

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[43] Fourth Report

experience for anyone. Victims and witnesses have a right to expect a smooth and coordinated service from the criminal justice agencies.

In a study conducted abroad, it was shown that only 19 percent of witnesses felt they had been kept properly informed about progress in their case. 28 percent of victims want some form of help, whilst 13 percent say they received support. 21 percent of witnesses felt intimidated by the process of giving evidence or by the court environment[44].

The former Solicitor-General, K.T.S. Tulsi said: 'honest witnesses have deserted the criminal courts because the police and courts often treat them as accused. The police routinely tutor the testimony of witnesses and stream rolls them.'

In nutshell the categories of problems that a witness faces vis-à-vis criminal justice functionaries could be stated as under

A. Witness vis-à-vis police

(i) Maltreatment/misbehaviour

(ii) Forced/pressurized/lured to concoct /twist statement

(iii) Apathy of indifference/neglect

(iv) No assurance of protection

(v) Police and women, child and victims as witnesses

B. Witness vis-à-vis prosecution/court

(i) Prolonged waiting

(ii) No place for waiting

[44] 'No Witness, no Justice' Programme Office Report (2004), UK

(iii) Loss of work/wages

(iv) Frequent adjournment

(v) Apathy/indifference

CHAPTER-4

LEGISLATIVE TRENDS

There are legal and procedural provisions in the laws in India dealing with witnesses in various stages. A gist of relevant provisions of law is presented in this Chapter.

4.1 CRIMINAL TRIAL

Criminal Procedure Code, 1973

The Cr. P. C empowers a police officer to record the statement of a person, who is acquainted with the facts and circumstances of the case being investigated by him (Section 161). This however is not admissible in a court of law. The rationale behind this is that the police coerce witnesses into making statements, and such statements should not be adduced as evidence. Hence, the witness is required to appear before the court at the time of the trial and restate what he stated to the police at the time of investigation. At the time of the trial, the witness may change his statement or deny having made the statement. In such situations, the prosecution prays to the court that such witness be declared hostile and consequently, gets the right to cross- examine the witness. Ultimately, the creditworthiness of the witness is impeached and the prosecution loses the testimony of a witness, which may be crucial to construct its version of the story. Therefore, in most instances of WITNESSES, the prosecution is unable to prove its case beyond reasonable doubt, as required in law. Another option available to a police officer is to produce the witness before a Magistrate

and make the Magistrate record the statement (Section 164). Such statement may be recorded under oath and is admissible as evidence. However, this is not substantive evidence, i.e., the court cannot use such a statement as the basis of convicting a person. Such statements may be used to corroborate or contradict the witness who made it. Since the statement is recorded on oath, if the person makes a statement, which is false or which he either knows or believes to be false, he can be prosecuted for perjury under the Indian Penal Code.

{B} Code of Criminal Procedure, 1973 Section 160: Police Officer's Power to Require Attendance of Witnesses.

(1) Any police officer making an investigation under this Chapter may, by order in writing, require the attendance before himself of any person being within the limits of his own or any adjoining station who from, the information given or otherwise, appears to be acquainted with the facts and circumstances of the case; and such person shall attend as so required: Provided that no male person under the age of fifteen years or woman shall required to attend at any place other than the place in which such male person or woman resides.

(2) The State Government may, by rules made in this behalf, provide for the payment by the police officer of the reasonable expenses of every person, attending under sub-section (1) at any place other than his residence.

Section 160 of chapter XII of Cr.P.C. Says that police officer making an investigation may by a written order require the attendance of any witness. The section further says that in case of male person under 15 years or woman the police officer investigation the case has to examine them at the place of their residence.

Section 171: Complainant and witnesses not to be required to

accompany police officer and not to be subject to restraint.

No complainant or witness on his way to any court shall be required to accompany a police officer, or shall be subject to unnecessary restraint or inconvenience, or required to give any security for his appearance other than his own bond:

Provided that, if, any complainant or witness refuses to attend or to execute a bond as directed in section 170, the officer in charge of the police station may forward him in custody to the Magistrate, who may detain him in custody until he executes such bond, or until the hearing, of the case is completed.

S/171 of The Act; in order to secure impartial evidence from the witness the section says that witness on his way to any 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 271: Power to issue commission for examination of witness in prison. 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 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.

S/271 of the Act empowers the court to issue commission or the examination of person detained or confined in prison, if the court thinks that the evidence of such parsons is necessary to meet the end of justice.

Section 273: Evidence to be taken in presence of accused.

Except as otherwise expressly provided all evidence taken in the course of the 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.

S/273 provides that except as otherwise expressly provided all evidence taken in the course of the trial or shall be taken in the presence of accused. However the supreme court in *SAKSHI VS UNION OF INDIA2004 (6) SCALE 15* observed that in spite of provision of S/273 which requires evidence to be taken in the presence of the accused, it is open to the court to examine the witness using a video screen in as much as video recorded evidence has been held to be admissible by the supreme court in state of Maharashtra vs. Dr. Prafful B. Desai. [45]

Section 280: Remarks respecting demeanor of witness.

When a Presiding Judge or magistrate has recorded the evidence of witnesses, he shall also record such remarks (if any) as he thinks material respecting the demeanor of such witness whilst under examination.

S/280 provides that as a general rule in criminal proceeding, the important witness on whose testimony the case against the accused has to be established must be examined in court and usually the issuing of commission should be restricted to formal witnesses or to such witnesses can not be produced without unreasonable delay or inconvenience. The section provides the exemption from personal appearance with regard to President Vice- President of India or Governor of a state or the Administrator of a Union Territory whose evidence is necessary to meet the end of justice. The court for them shall issue commission for examination such witnesses.

Section 284: When attendance of witness may be dispensed with and commission issued.

(1) Whenever, in the course of any inquiry, trial or other proceeding under

[45] 2003(4) SCC 601

this Code, it appears to a Court of Magistrate that the examination of a witness is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, the Court or Magistrate may dispense with such attendance and may issue a commission for the examination of the witness in accordance with the provisions of this Chapter:

Provided that where the examination of the President or the Vice-President of India or the Governor of a State or the Administrator of a Union Territory as a witness is necessary for the ends of justice, a commission shall be issued for the examination of such a witness.

The court may, when issuing a commission for the examination of a witness for the prosecution direct that such amount as the court considers reasonable to meet the expenses of the accused including the pleader's fees, be paid by the prosecution.

Section 287: Parties may examine witnesses.

(1) The parties to any proceeding under this Code in which a commission is issued may respectively forward any interrogatories 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 (he witness upon such interrogatories.

(2) 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 reexamine (as the case may be) the said witness.

S/287.Provides the parties may with the permission of the court may examine or cross examine of the witness.

Section 299: Record of evidence in absence of accused.

(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 [or commit for trial] such person for the offence complained of, may, in his absence, examine the witnesses (if any) 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 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.

Section 309: Power to postpone or adjourn proceedings.

(1) In every inquiry or trial the proceedings shall be held as expeditiously as possible, and in particular, 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) 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:

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time:

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:

[Provided also that 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).

Explanation-1.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.

Explanation 2. 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.

Section 311: Power to summon material witness, or examine person present.

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

Section 312: Expenses of complainants and witnesses.

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.

Section 315: Accused person to be competent witness.

(1) 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:

Provided that-

(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.

(2) Any person against whom proceeding 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 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.

Section 316: No influence to be used to induce disclosure.

Excepts as provided in section 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.

4.2 Legislative Provisions

The issues pertaining to hostility of witnesses and related matters have received official attention in the recent past. The Law Commission in its 155th report had suggested that it should be made mandatory for investigating officers (IOs) to get statements of all material witnesses, questioned by him during the investigation, recorded on oath by magistrate. This, according to the Law Commission, would have prevented witnesses from turning hostile at their free will. A witness at a trial who is so adverse to the party that called him or her that he or she can be cross- examined as though called to testify by the opposing party.

Witness forms an integral part of a case. Therefore all Acts and legal provisions right from pre-independent to post-independent India incorporated special provisions for them so that impartial and dependable evidence can be extracted from them while deciding the case. For better understanding of the different provisions that have been provided in different Acts we have divided the provisions relating to witness into following two categories.

. A) Provisions Relating to Witnesses in Procedural Acts

. B) Provisions Relating to Witness in Different Acts

(A) The Indian evidence act, 1872 Section 118: Who may testify? –

All persons shall be competent to testify unless the Court considers that they are prevented from understanding the question put to them, or from giving rational answer to those questions, by tender years, extreme old age, disease, whether of body and mind, or any other cause of the same kind.

Explanation - A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the question put to him and giving rational answers to him.

Section 11: Dumb Witnesses –

A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence.

Section 120: Parties to Civil Suit, and Their Wives or Husbands - Husband or Wife of Person under Criminal Trial –

In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness.

Section 120 of the Act says that in a civil suit the parties to the suit are competent witnesses. In further says that husband or wife of any party to the suit is a competent witness. Similarly in a criminal proceeding against any person, the husband or wife of such person shall be a competent witness.

Section 147: When Witness o Be Compelled To Answer –

If any such question relates to a matter relevant to the suit or proceeding, the provisions of Section 132 shall apply thereto.

Chapter X of the Act talks about the examination of witnesses.

Further in this chapter Section-147 provides the provisions when a witness can be compelled to answer.

Section 154: Question by Party of his own witness – The Court may, 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.

S/154 of the Act impliedly talks about WITNESSES. The sec. provides that court may in its discretion permit the party who has called a witness to put him such questions as could have been asked in cross-examination. Section 155: Impeaching Credit of Witness –

The credit of a witness may be impeached in the following ways by the adverse party, or with the consent of the Court, by the party who calls him:

(1) By the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;

(2) By proof that the witness has been bribed, or has accepted the offer of a bride or has received any other corrupt inducement to give his evidence; (3) By proof of former statement inconsistent with any part of his evidence which is liable to be contradicted;

(4) When a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

Explanation - A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives cannot be contradicted, though if they are false, he may afterwards be charged with giving false evidence.

S/155 of the Act talks about the provisions relating to the impeaching credit of witness who turn hostile.

The sections 138, .140, .145, 146 and section 154 of the Indian Evidence Act make some provisions dealing with the hostility of witness.

Section 138 deals with the Order of examinations

Witnesses are first examined-in- chief. No leading questions are put in examination in chief i.e. one which itself contains the answer or suggests an answer.(Section 141)except with the permission of court.

Then if the adverse party desires cross-examination takes place. Leading questions can be asked.

Then if the party calling the witness so desires re-examination can take place. The examination and cross-examination must relate to relevant facts.

The cross-examination need not be confined to the facts to which the witness testified in examination in chief.

Re-examination is directed for firstly, the explanation of the matters referred to in cross-examination and secondly, if any new matter is referred in reexamination, with court's permission then adverse party may further cross-examine upon that matter.

Section 140 says that a witness who has been called to testify about the character may be cross-examined and re-examined. This is unlike the English law.

Section 145 says about cross-examination as to previous statements in writing. It says that a witness may be cross-examined as to previous statements made by him in writing or reduced to form of writing and relevant to the matter in question- without such writing being shown to him or being proved. But if oral statements by the witnesses are intended to be contradicted with the writing made by him, then it is necessary that the attention of the witness must be brought to that part of writing before the writing is permitted to be proved. The previous statement of a witness is cross-examined to contradict him, for which he should be shown the parts of writing and to refresh his memory no such need is there.

Section 146

It generally lays down that when a witness is cross-examined he may be asked questions which tend to test his veracity, i.e. how credible and reliable he is. Secondly it is to test his identity and position and most importantly to shake his credit by injuring his character

Section 154

This becomes the main section which hints towards WITNESSES. It says that "The Court may, 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." This means that when a party calls a witness who turns hostile, some material has to be shown that witness has reviled from what he stated during investigation and then if court grants permission then only questions can be put. The court has discretionary powers in this regard. The court can rely on that part of evidence of hostile witness which is credible and reject the rest which is not worth.

Witness identity protection under special statutes in India

Terrorists and Disruptive Activities Act, 1985: (TADA) makes explicit provisions of protecting the identity of witness.

"Section 13(1): Notwithstanding anything contained in the Code, all proceedings before a Designated Court shall be conducted in camera:

Provided that where public prosecutor so applies, any proceedings or part thereof may be held in open court.

(2) A Designated Court may, on an application made by a witness in any proceeding before it or by the public prosecutor in relation to a witness or on its own motion, take such measures as it deems fit for keeping the identity and address of the witness secret.

(3) In particular and without prejudice to the generality of provisions of sub section 2, the measures which a Designated Court may take under that subsection may include –

. (a) The holding of the proceedings at a protected place;

. (b) The avoiding of the mention of the names and address of witnesses

in its order or judgments or in any records of case accessible to public;

(c) The issuing of any directions for security that the identity and address of the witnesses are not disclosed.

(4) Any person who contravenes any direction issued under subsection (3) shall be punishable with imprisonment for a term which may extend to one year and with fine which may extend to one thousand rupees."

The TADA was repealed and Prevention of Terrorism Act, 2002: (POTA), 2002 was introduced and this Act also made provision for protecting the identity of witness in section 30. It states:

Notwithstanding anything contained in the Code, the proceedings under this Act may, for reasons to be recorded in writing, be held in camera if the special Court so desires. (2) A Special Court, if on an application made by a witness in any proceeding before it or by the Public Prosecutor in relation to such witness or on its own motion, is satisfied that the life of such witness is in danger, it may, for reasons to be recorded in writing, take such measures as it deems fit for keeping the identity and address of such witness secret.

In particular, and without prejudice to the generality of the provisions of subsection (2), the measures which a Special Court may take under that subsection may include – (a) the holding of the proceedings at a place to be decided by the Special Court; (b) t he avoiding of the mention of the names and addresses of the witnesses in its orders or judgments or in any records of

the case accessible to public; (c) t he issuing of any directions for securing that the identity and address of the witnesses is not disclosed; (d) a decision that it is in public interest to order that all or any of the proceedings pending before such a Court shall not be published in any manner. (4) Any person who contravenes any decision or direction issued under sub section (3) shall be punishable with imprisonment for a term which may extend to one year and with fine which may extend to one thousand rupees."

The Unlawful Activities (Prevention) Amendment Act, 2004 amended (w.e.f. 21.9.2004)

Section 44 (1) to (4) of the this Act has the provision of 'Protection of Witness'. As this identical to the section 30(1) to (4) of the POTA, 2002, no separate mention is required here. Juvenile Justice (Care and Protection of Children) Act, 2000 also requires the protection of identity of witness. Section 21 of this states: (1) No report in any newspaper, magazine, news- sheet or visual made of any inquiry regarding a juvenile in conflict with law under this Act shall disclose the name, address or school or any other particulars calculated to lead to the identification of the Juvenile nor shall any picture of any juvenile be published: Provided that for reasons to be recorded in writing, the authority holding the inquiry may permit such disclosure, if in its opinion such disclosure is in the interest of the juvenile."

Criminal Practice Directions 2013

The Criminal Practice Directions 2013 (CPD) supplement the Rules in Part 3 of the Criminal Procedure Rules 2013 (CPR).

Case management in the Crown Court

Paragraph IV.41 of the CPD provides the case detail forms which are set out at Annex E to be completed in all cases tried on indictment. These include forms for cases sent, committed or transferred for trial and the Plea and Case

Management Hearing form (PCMH).

Cases sent for trial

The case progression form is at Annex E. A preliminary hearing (PH) is not required in every sent case. A PH should be ordered by the magistrates' court or the Crown Court only where:

there are case management issues which call for such a hearing; the case is likely to last for more than 4 weeks; it would be desirable to set an early trial date; the defendant is a child or young person;

it seems to the court that it is a case suitable for a preparatory hearing in the Crown Court (see sections 7 and 9 of the Criminal Justice Act 1987 and sections 29 - 32 of the Criminal Procedure and Investigations Act 1996).

A PH, if there is one, should be held about 14 days after sending.

Where the magistrates' court does not order a PH it should order a PCMH to be held within about 14 weeks after sending for trial where a defendant is in custody and within about 17 weeks after sending for trial where a defendant is on bail. Those periods accommodate the periods fixed by the relevant rules for the service of the prosecution case file and for making all potential preparatory applications.

Where the parties realistically expect to have completed their preparation for the PCMH in less time than that then the magistrates' court should order it to be held earlier. But it will not normally be appropriate to order that the PCMH be held on a date before the expiry of at least 4 weeks from the date on which the prosecutor expects to serve the prosecution case papers, to allow the defence a proper opportunity to consider them.

To order that a PCMH be held before the parties have had a reasonable opportunity to complete their preparation in accordance with the CrimPR risks

compromising the effectiveness of this most important pre-trial hearing and risks wasting their time and that of the court.

The Attorney General's Crime and Disorder Act 1999 (Service of Prosecution Evidence) Regulations 2000 set out the default period for the service of copies of the documents containing the evidence and a draft indictment which is:

within 50 days of the date of sending where a defendant is in custody; and

within 70 days of sending in other cases.

The magistrates' court has no power to enlarge this period - only a Crown Court judge can do so under the provisions of Paragraph 1 of Schedule 3 to the Crime and Disorder Act 1998. The default period for the preferment of the indictment is within 28 days of the service of papers.

If it is likely to take longer than 50 days to prepare the case file, the case would be an appropriate one for a Preliminary Hearing (see above) - that there are case management issues which call for such a hearing. But it should be borne in mind that the clock for 50 days would continue to tick in the event that any application for an extension of time is refused.

The case progression directions made by the magistrates, together with the increased cooperation and communication between the parties should ensure that a case is properly ready for an effective PCMH. The directions set out in Section 2 of the form, to be made by the magistrates include the following:

the prosecution to comply with its initial duty of disclosure within 14 days from the date of sending in sent cases;

the prosecution to serve any application for special measures within 28 days of the date of committal/transfer or service of papers;

the prosecution to serve notice of any intention to introduce hearsay evidence within 14days of compliance with its initial duty of disclosure;

the prosecution to serve any notice to introduce the defendant's bad character within 14 days of committal/transfer or service of papers.

The directions set out in Section 2 are default directions, which will apply unless a contrary order is made. The magistrates have power to vary the time limits in the default directions Rule 3.5. Once the orders have been made however, only the Crown Court can vary them.

If the Defendant intends to plead guilty, the magistrates' court should make appropriate orders so that he can be sentenced at the Preliminary Hearing if possible.

Cases committed for trial or transferred.

The case progression form for committals and transfers together with guidance notes are at Annex E. There should be a PCMH in every case to be held within about 7 weeks after committal/transfer.

Plea and case management hearing

The effectiveness of a PCMH hearing in a contested case depends in large measure upon preparation by all concerned and upon the presence of the trial advocate or an advocate who is able to make decisions and give the court the assistance which the trial advocate could be expected to give. Resident Judges in setting the listing policy should ensure that list officers fix cases as far as possible to enable the trial advocate to conduct the PCMH and the trial.

The PCMH form as set out in Annex E must be used in accordance with the guidance notes.

Additional pre-trial hearings should be held only if needed for some compelling reason. Such hearings - often described informally as 'mentions' - are expensive and should actively be discouraged. Where necessary the power to give, vary or revoke a direction without a hearing should be used.

Case management in magistrates' court

Paragraph V.56 of the CCPD provides for case progression forms to be used in the magistrates' court. The Magistrates' Court Trial Preparation Form as a general rule should be used in any case to be tried in a magistrates court in which a not guilty plea is entered. However, as indicated above, its use in each case is in the discretion of the court. Where the court is in possession of all the relevant information, and is satisfied that the issues in the case, and the arrangements required for trial in consequence, are so straightforward as to require few directions: then the court may decide to dispense with the form. In any other case, the form provides at the least an aide memoire of the matters that the experience of many courts demonstrates may need to be considered, and it should be used.should be used for all not guilty cases This form together with guidance notes can be found at Annex E of the CCPD.

Statements made at pre-trial hearings, including those recorded in the case progression forms such as the trial preparation form, are admissible in evidence see R (on the application of Firth) v Epping Magistrates' Court [2011] EWHC 388 (Admin) [46]

However, prosecutors should note that an application to admit assertions recorded on the form should only be made when necessary and appropriate e.g. where the defence are not acting in the spirit of the Criminal Procedure Rules in seeking to ambush the prosecution or raising late and technical defences that were not previously raised as issues. Prosecutors should encourage the court to actively manage cases, including directing full engagement of the parties in the process. Comprehensive file endorsements should record whether the assertions were made orally or in writing, and whether the defendant was present or raised any objection. A copy of any completed case management forms should be retained on the prosecution file. The current form distinguishes between matters

[46] 'Access to Justice: Witness Protection and Judicial Administration', CHRI/INTERIGHTS Judicial Exchange_Mumbai

in issue and admissions of fact, unlike the previous form used in Firth[47]. This should address concerns that engagement in case management could be adverse to the defendant's interests.

4.3 Initiatives by the law commission of India

In the 154th Report of the Commission (1996), [48]while dealing with 'Protection and Facilities to Witnesses', referred to the 14th Report of the Law Commission and the Report of the National Police Commission and conceded that there was 'plenty of justification for the reluctance of witnesses to come forward to attend Court promptly in obedience to the summons".

The Law Commission recommended, inter alia, as follows:

'We recommend that the allowances payable to the witnesses for their attendance in courts should be fixed on a realistic basis and that payment should be effected through a simple procedure which would avoid delay and inconvenience. ... Adequate facilities should be provided in the court premises for their stay. The treatment afforded to them right from the stage of investigation upto 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.'

Law Commission on witness protection

The Law Commission has carried out significant exercises on the issue of witness protection. Initially, the Commission has partially and sporadically dealt

[47] Vineet Narain v. Union of India (1998 (1) SCC 226)

[48] 154th Report on the Code of Criminal Procedure, 1973 (Act No 2 of 1974) Vol I

with this subject while attending to associated issues and witness figured as part of that process. The Reports of the Law Commission, namely the 14th [49] ,154th[50], 172nd, [51]178th[52] Reports are mentionable in this context. The Consultation Paper of the Law Commission on 'Witness Identity Protection and Witness Protection Progammes' [53](August 2004) is specially noteworthy in this context.

In its Consultation paper the Commission dealt with two aspects of witness protection programme:

(1) To ensure that the evidence of witnesses is protected from the danger of them turning hostile; and (2) To relieve the physical and mental vulnerability of the witnesses.

The first aspect has received attention in the form of proposed amendment to the Code of Criminal Procedure, 1973, s. 164. In its 178th Report (2001), the Law Commission recommended the insertion of s. 164A to provide for recording of the statement of material witnesses in the presence of magistrates on oath where the offences were punishable with imprisonment of 10 years and more. On the basis of this recommendation, the Criminal Law (Amendment) Act, 2005 was passed. However, the second aspect has hardly received any attention in India. The Law Commission looked for the second aspect in the consultation paper on witness protection and has suggested measures like witness anonymity and physical protection to the witnesses. It also drew attention to special statues on terrorism like TADA and POTA which have provisions for protecting the identity and address of witnesses; and suggested a general law dealing with witness anonymity be implemented.

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[49] 14th Report on Reforms of the judicial administration-Vol(1), Vol(2)

[50] 154th Report on the Code of Criminal Procedure, 1973 (Act No 2 of 1974) Vol I

[51] 172nd Report on Review of Rape Laws

[52] 178th Report on Recommendations for Amending various Enactments, Both Civil & Criminal : Part-I,

[53] 198th Report of the Law commission (2006)

The need to accord anonymity to witness is directly linked with the likely use of force or inducement endangering the security of witness. The issue of extending complete

anonymity in investigation or trial involves fundamental legal questions.

The Law Commission has considered witness anonymity in the context of requirement of an open public trial, which necessitates right to examination of witness in open court. The views that the rights of accused in this regard are not absolute and the governing requirement is that of fair trail ensuring the victim and witness depose without any fear or threat. The ideal position would be to strike a balance between these two contending matters. This paradox has been in active debate in many countries as to how both the matters could be accommodated in criminal justice process without causing any infringements of rights either of accused or those of witness-victim. This objective has been achieved in many countries including the U.S. where the open confrontation of witness is constitutional requirement.

The Law Commission classified witness, according to their protection needs, into three types: (i) victim-witnesses who are known to the accused; (ii) victims-witnesses not known to the accused (e.g. as in a case of indiscriminate firing by 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.

The issue as to which stage of criminal justice processes the witness may be provided protection. The Law Commission suggests that the protection ought to be available to the witness at three stages: one, at the stage of investigation and with the involvement of a Magistrate who, apart from assessing the case, would examine the witness and ascertain the associated threat perception and accordingly anonymity orders could be passed. Second, protection during inquiry

and before recording evidence at the trial and third, recording evidence with two-way CCTV during the trail.

We may now summarize the approach of the Law Commission to witness protection. It is mentionable that the Law Commission has circulated a questionnaire to a cross section of respondents from judiciary, bar, and police etc. to elicit their views on various aspects of witness protection. The views were analyzed by the Commission and some consensus has been drawn.

It was suggested by the Commission that, to begin with, the witness protection programme might be applied in case of serious offences only. The need of protecting witness has been suggested at four stages i.e. investigation, inquiry, trial, post -trial: The best course to protect the witness could be hiding his identity by providing a new identity. This could be done by devising a proper programme, which would extend all support and maintenance assistance to witness. As per Commission's opinion, the control of witness protection programme must be with judiciary. Only the prosecution witness would be extended the protection cover. The close and primary members of the family of witness would be incorporated in this programme. The provision of a MOU between witness and implementation agency will also be there. The funding of this programme is to be shared by the center and state jointly.

The Law Commission suggested the Witness Protection Programmes providing 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 expert 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 dependants 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 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".

To give effect to the entire mechanism, the Law Commission proposed a legislation namely 'Witness Identity protection Act' which details the administrative and procedural aspects of the functioning of this system.

CHAPTER-5

JUDICIAL TRENDS

5.1 Role of law and witness protection

With a view to ensure free and fair trail, the need to accord adequate safety to witness has been emphasized time and again by the apex court of the country. Though the dust does not seem to be settling on this issue, as there are several interconnected legal and procedural matters, which require a consensus. The Supreme Court in its several judgments held that the witness needs to be attended with care and consideration and his security is the responsibility of the state. But how these ends would be achieved is something yet to be worked out. The problem assumes crucial significance, as there is no formal mechanism of witness protection in India.

The present exercise approaches this matter in a three-fold manner. In the first part, it is attempted to underline the existing legal arrangements and the guidelines and directives issued by the judiciary on this subject. Secondly, this study would make a critical review (of only selected and relevant portions) of the Consultation paper of the Law Commission on 'Witness Identity Protection and Witness Protection Progammes' (August 2004[54]) as well as 198th Report of the Law commission (2006) [55]which dealt with this subject. The rationale behind undertaking these two documents for analysis is that these documents provide an extensive framework of witness protection and also offer some schematic details to implement the suggested measures. Thirdly, an attempt has been made to

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[54] Consultation paper of the Law Commission on 'Witness Identity Protection and Witness Protection Progammes' (August 2004)

[55] 198th Report of the Law Commission on 'Witness Identity protection & Witness protection Programme'(August2006)

offer some suggestions leading to concretize the witness protection efforts in our country.

(I) Legal Provisions in witness protection

There is no specific legislation, as exist in many other countries, in India exclusively providing protection to witness. However, there are a few provisions in the Indian Evidence Act, 1872. Ss. 151 and 152 that protect the witnesses from being asked indecent, scandalous, offensive questions, and questions which intend to annoy or insult them. Apart from these provisions, there is no provision for the protection of witnesses in India. This fact was acknowledged by Supreme Court in the case of NHRC vs. State of Gujarat[56] where it said that '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'. The Supreme Court said 'that there comes the need for protecting the witness as time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the Court and justice triumphs and that the trial is not reduced to a mockery. Legislative measures to ensure prohibition against tampering with witness, victim or informant, have become the imminent and inevitable need of the day.'

Sec. 16 of the Terrorists and Disruptive Activities (Prevention) Act,1987 (TADA) and Sec. 30 of the Prevention of Terrorism Act, 2002 (POTA) are not only in pari materia, but also verbatim. Provisions contained in POTA and TADA were the initial steps taken in the direction of witness protection. The special courts constituted under the respective enactments were authorized to avoid mentioning the names and addresses of the witnesses in the orders/ judgments. Further, they were authorized to issue directions for keeping the identity and address of the witnesses undisclosed. Any contravention of those provisions is made punishable

[56] NHRC v. State of Gujarat: (Best Bakery Case) (2003)

under the respective enactments. However, in reality, it was found that those provisions were not adequate for rendering actual protection to the witnesses in sensitive cases. Recently the Criminal Law (Amendment) Act, 2005 (No.2 of 2006) has been enforced w.e.f. 16.4.2006. The said Act has amended the Penal Code, Code of Criminal Procedure and Evidence Act. Above Act has introduced Section 195A to the Indian Penal Code, whereby threatening or inducing any person to give false evidence is made punishable. By virtue of the said amending Act, Section 195 of Cr.P.C. has also undergone changes. Section 154 of Evidence Act empowers the court to permit the person who calls a witness to put any question to him which might be put in cross examination by the adverse party. Judicial pronouncements are available to fortify the proposition that the testimony of a hostile witness need not be discarded for the reason of hostility alone. The amending Act has created a sub section to Section 154 of Evidence Act, whereby the above mentioned principle has been incorporated in the statute. The impact of these provisions is yet to be seen. The matter of hostility in several key cases has put a big question mark on all legal arrangements in this country.

(II) Judicial response:

As a matter of fact, it was the activism of higher judiciary to the cause of witness issues that seems to be taking shape. The Supreme Court through its various judgments in all kinds of cases has given a certain direction to the need of protecting witness. The Apex Court in cases like NHRC vs. State of Gujarat[57], PUCL vs. Union of India[58], Zahira Habibullah H Sheikh and Others vs. State of Gujarat, [59]and Sakshi vs. Union of India[60] has categorically emphasized the need to have a legislation on this matter. More pertinently, the Court in Zahira case said (p.395) '"Legislative measures to emphasize prohibition

[57] 2003(9) SCALE 329

[58] 2003(10) SCALE 967

[59] 2004(4) SCC 158

[60] 2004(6) SCALE 15

against tampering with witnesses, victims or informants, have become imminent and inevitable need of the day". It further observed (p.399) "Witness protection programmes are imperative as well as imminent in the context of alarming rate of somersaults by witnesses".

In Kartar Singh v. State of Punjab4, the Supreme Court upheld the validity of S. 16(2) and (3) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) which gave the discretion to the Designated Court to keep the identity and address of a witness secret upon certain contingencies; to hold the proceedings at a place to be decided by the Court and to withhold the names and addresses of witnesses in its orders.

In Delhi Domestic Working Women's Forum v. Union of India [61]the Supreme Court emphasised the maintenance of the anonymity of the victims of rape who would be the key witnesses in trials involving the offence of rape.

The Supreme Court in Swaran Singh Vs. State of Punjab [62]also conveyed its concern about the quandary of a witness. "A criminal case is built on the edifice of evidence, evidence that is admissible in law. For that witnesses are required, whether it is direct evidence or circumstantial evidence. Here are the witnesses who are a harassed lot. A witness in a criminal trial may come from a far-off place to find the case adjourned. He has to come to the Court many times and at what cost to his own-self and his family is not difficult to fathom. It has become more or less a fashion to have a criminal case adjourned again and again till the witness tires and he gives up. It is the game of unscrupulous lawyers to get adjournments for one excuse or the other till a witness is won over or is tired. Not only that a witness is threatened; he is abducted; he is maimed; he is done away with; or even bribed. There is no protection for him. In adjourning the matter without any valid cause a Court unwittingly becomes

[61] (1995) 1 SCC 14

[62] Swaransingh vs. State of Punjab, (2000) 5 SCC 68.

party to miscarriage of justice. A witness is then not treated with respect in the Court. He is pushed out from the crowded courtroom by the peon. He waits for the whole day and then he finds that the matter adjourned. He has no place to sit and no place even to have a glass of water. And when he does appear in Court, he is subjected to unchecked and prolonged examination and cross-examination and finds himself in a hapless situation. For all these reasons and others a person abhors becoming a witness. It is the administration of justice that suffers. Then appropriate diet money for a witness is a far cry. Here again the process of harassment starts and he decides not to get the diet money at all."

The apex court has very categorically demanded the state to-

In Zahira Habibulla H. Sheikh and Another Vs. State of Gujarat and Others (2004) [63]

respond to the issue of protection of witness. While taking up the contempt proceedings against Zahira Habibulla H. Sheikh, the Apex Court highlighted the importance and primacy of the quality of trial process. It has been observed that if the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralyzed. Following excerpt from the said decision will be appropriate in this context:

"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 courts on account of frequent turning of 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

63 Ibid

surface rendering truth and justice to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the court and justice triumphs and that the trial is not reduced to a mockery."

In Zahira Habibulla H. Sheikh and Another Vs. State of Gujarat and Others[64], the apex court was emphatic on the role of the State in protecting the witnesses. It has been observed that as a protector of its citizens, the State has to ensure that during the trial in the Court the witness could safely depose the truth without any fear of being haunted by those against whom he had deposed. Supreme Court reminded the State that it has a constitutional obligation and duty to protect the life and liberty of the citizen.

Apart from physical protection because of the threat from accused party, the witness does need to protect his/her identity specially in case where the accused does not know the witness. In such case, witness could only come forward if there is some way through which witness without facing the accused could offer the testimony. On this matter, the Supreme Court made some useful observations in two cases. In Sakshi vs. Union of India [65]accepted 'video conferencing' and 'written questions' in sexual and other trials in the absence of a statute. In the State of Maharashtra vs. Dr. Praful B. Desai [66] (which concerned allegations as

[64] ….

[65] 2004(6) SCALE 15 the Court (26.5.2004)

[66] 2003(4) SCC 60) [AIR 1952 SC 221)

to medical negligence), permitted the evidence of a foreign medical expert to be received by video- conferencing.

In fact, this process had begun way back 1952 in Gurbachan Singh v. State of Bombay [67]case where the court ordered the shifting of accused to some different place or for want of security. Also in case of Talab Haji Hussain v. Madhukar Purushottam Mondka[69], the Supreme Court felt that witnesses should be able to give evidence without inducement or threat either from the prosecutor or the defence'. In this case the apex court also mentioned about the exercise of 'inherent power of the high court' where 'any conduct on the part of an accused person is likely to obstruct a fair trial'. Furthermore, in case of Kartar Singh v. State of Punjab[68] related to trial of terrorists (TADA), the Supreme Court recognized the need to shun any element of harassment or intimidation to witness. Observing the need to have a fair trial not only to the accused but also to the victim in NHRC v. State of Gujarat, the apex court highlighted the concern for victim-witness. The Delhi High Court in Ms Neelam Katara v. Union of India[70] issued guidelines for witness protection. A peculiar aspect of witness protection came up before the Supreme Court in somewhat strange circumstances in a defamation case.

In Naresh Shridhar Mirajkar v. State of Maharashtra,[69] a witness for the defence repudiated in the witness box all statements earlier made by him. With the permission of the High Court, he was cross-examined by the defence, but he maintained his stance. Later, the defence came to know of some other proceedings where the witness had substantially stated what was alleged by the defence. Accordingly, the defence recalled him to the witness box. At that stage, the witness sought protection of the High Court against the publication of his evidence because, he said, the publication of his earlier evidence had caused him

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[67] Appeal (cry.) 561-62 of 2005

[68] AIR 1958 C 374

[69] (Crl.WP 247 of 2002) (dated 14.10.2003)

business losses. Protection against publication of his evidence was given by the High Court and affirmed by the Supreme Court because it was "thought to be necessary in order to obtain true evidence in the case with a view to do justice between the parties[70]." This may well be the only case in which the business interests of a witness were sought to be protected rather than [71]the witness himself. It is a novel and unexplored dimension to witness protection.) The Supreme Court in a case clearly suggested that an impartial agency akin to those of the Director of Prosecution in England should be established to administer the witness protection in India.

Judicial Pronouncement

Instances of witnesses turning hostile are so widespread in our criminal justice system that in the year 2000 the Supreme Court observed, "It has become a way of life in the law courts". Judicial history of India is fraught with the instances of witnesses turning hostile in several prominent cases. This problem, to some extent, is found in other nations too. The oft-cited case of a British millionaire novelist and politician Jeffrey Archer is quite noteworthy where this man was found guilty of perjury and sentenced for four years.

The recurrence and frequency of instances of witness's hostility in the recent past have grown dramatically. The cases like Zahira Sheikh, Jessica Lal, BMW and Prof. Sawarbal shook the fundamental principles of our criminal justice system. This reminds of Karl Marx's words: 'History repeats itself first as tragedy and then as farce'[72].

In the sensational cases like the BMW and Jessica Lal murder case and in the Best Bakery case, the National Human Rights Commission intervened when the

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[70] (1966) 3 SCR 744. AIR 1967 SC 1

[71] (quoted by Justice Madan Lokur

[72] As quoted in an article by Sairam Bhatt in Kerela Law Journal, 2006

witnesses changed their statements in the court due to lack of protection to them and their families whereas in the earlier cases, i.e. the BMW and Jessica Lal case, most of the eye witnesses did not open up to pin point the possible reason which compelled them to change their stand. In the absence of any formal programme of witness protection, the accused could frighten the witnesses in these cases. A report by the parliamentary standing committee on home affairs tabled in Parliament had pointed out that the conviction rate in criminal cases may be as low as 10 per cent due to perjury by witnesses who do so either of their own volition or under threats, allurements, or inducements from others.

Experts say the absence of a witness protection programme in India makes it possible for the accused in a case to threaten or intimidate witnesses. It was rightly observed by Arijit Pasayat J. - “All this sadly reflects on the quality of determination exhibited by the State and the nature of seriousness shown to pursue the appeal. Criminal trials should not be reduced to be the mock trials or shadow boxing of fixed trials. Judicial Criminal Administration System must be kept clean and beyond the reach of whimsical political wills or agendas and properly insulated from discriminatory standards or yardsticks of the type prohibited by the mandate of the Constitution. Those who are responsible for protecting life and properties and ensuring that investigation is fair and proper seem to have shown no real anxiety.”

It is indeed one of the most important factors responsible for so many acquittals in criminal cases. In the rape-cum-murder of a Delhi University law student Priyadarshini Mattoo in 1996, the judge recorded his displeasure over shoddy work by the investigating agency and said: "Though I know that he is the man who committed the crime I acquit him, giving him the benefit of doubt.

The system of criminal justice in India is biased in favour of the accused and the imbalances in the rights available to offender and victim is glaring. The offenders in criminal justice system have a range of rights, (both constitutional

and legal), the victims and more particularly, witnesses, have a limited range of rights, (expressed and implied) certain privileges and protection accorded to them through the judicial discretions of the judges. The lop-sided division of rights has been echoed in various cases, where the accused frightened witnesses (e.g. using subtle means like cross- examination), thereby rendering the witnesses vulnerable (who lack sufficient rights to protect themselves under such circumstances) and forcing them to turn hostile. It seriously compromises the prosecution's case, already under a heavy burden to prove the guilt, "beyond reasonable doubt".

This problem has its prevalence in other countries too. Recognizing this as a crucial problem in criminal justice administration, the U.N. Declaration of Basic Principle for Victims of Crime and Abuse of Power, 1985 was brought in which it was laid down the victims of crime and witnesses deserve certain rights. This declaration has been moving spirit to a number of victim- witness assistance programmes launched in various parts of the globe.

The following section presents some relevant cases where the court held various positions concerning witnesses. The account shown in these cases also reflects the changing stand of judiciary over a period of time in India.

Gura Singh v. State of Rajasthan - It was held in this case - “It is misconceived notion that merely because a witness is declared hostile his entire evidence should be excluded or rendered unworthy of consideration. In a criminal trial where a prosecution witness is cross-examined and contradicted with the leave of the Court by the party calling him for evidence cannot, as a matter of general rule, be treated as washed off the record altogether. It is for the Court of the fact to consider in each case whether as a result of such cross-examination and contradiction the witness stands discredited or can still be believed in regard to any part of his testimony. In appropriate cases the Court can rely upon the part of testimony of such witness if that part of the deposition is found to be creditworthy.”

In Gagan Kanojia and Anr. v. State of Punjab [73]it was held that for certain specific purposes the statement of a hostile witness can be relied upon.

In the Best Bakery case the witness turned hostile because of intimidation to her life. To threaten a witness is an offence and if a witness complains of being threatened by the accused or someone outside the trial acting in favor of the accused, the bail bond for the accused may be cancelled. It is also a duty of the state to protect the witness. However, in this case the state neither protected the interests of the victims nor sincerely sought to render justice. In the Best Bakery case, Zahira Sheikh twisted her previous statement and alleged that her life was under threat from the human rights activist, [74]Ms. Teesta

Setalvad, who supposedly "forced" her to lie in court. This indicates a need to categories witnesses to identify the "vulnerable" or "intimidated" witnesses to ensure effective segregation of those witnesses who need protection and those who do not.

Santosh Kumar V. State of M.P. - This case is also about the witness hostility. The accused Munim Mishra the conductor of the bus and the driver named Santosh Kumar ravished the prosecutrix Halki Bai. Hearing her alarm, three constables who were on patrol duty and some others came near the bus, but both the accused managed to run away. The policemen brought Halki Bai to P.S. Silvani, where she lodged the FIR of the incident at 1.00 a.m. on 21.5.1985. Halki Bai was sent for medical examination where PW.3 Dr. Z. Fezi examined her at 2.00 a.m. and prepared a medical examination report which is Ex. P-8. After completion of the investigation, charge sheet was submitted. In order to establish its case, the prosecution examined 10 witnesses and filed some documentary evidence. The appellant and co-accused Munim Mishra in their

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[73] Appeal (crl.) 561-62 of 2005

[74] Appeal (crl.) 1368 of 2005

statements under Section 313 Cr.P.C[75]. denied the prosecution case and examined two witnesses in their defence. Sessions Judge convicted and sentenced both the accused. The appeal preferred by the accused was dismissed by the High Court.

During trial the prosecution examined four witnesses of fact. PW-10 Halki Bai in her deposition gave details of the incident and stated that first she was ravished by the appellant Santosh Kumar and then by Munim Mishra. PW-1 Mukhtar Hasan, who was working as a helper in the Forest Department, deposed that he was going to the Range Office and at about

12.00 p.m. when he reached the bus stand, he saw some persons standing near a bus which had come from Sagar. Shortly thereafter, some police constables also came there. He saw Halki Bai and both the accused inside the bus. Halki Bai informed them that both the accused had ravished her. The witness was declared hostile and was cross-examined by the State counsel. PW-1 Mukhtar Hasan has also supported a part of the prosecution case in his examination-in- chief, namely, that after hearing the shrieks of a girl, he went inside the bus where he found the two accused holding the hands of Halki Bai. He further deposed that Halki Bai had informed them that the accused had ravished her. Though PW-1 was declared as hostile, his evidence is not to be treated as effaced from record and can be relied upon in part. Therefore, the testimony of PW-1 Mukhtar Hasan to the extent that he went inside the bus after hearing the shrieks of Halki Bai and that he saw the accused holding her hands and also the further fact that Halki Bai immediately stated that the accused had committed rape upon her can be believed. The learned Sessions Judge and also the High Court have placed reliance on his testimony as he is an independent witness. Thus the oral evidence on record fully establishes the case of the prosecution. The learned Sessions Judge and the High Court have rightly convicted the appellant under Section 376(2)(g) IPC and there is absolutely no ground which may warrant

[75] Criminal procedure Code, 1973

interference by this Court. The appeal is accordingly dismissed.

Jessica Lal: A Chronological Study

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

At about 0200 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. During an intense hunt for Sharma over a week, three of his friends were arrested, but Sharma himself went underground. Eventually Manu Sharma surrendered on May 6 in Chandigarh. Subsequently the fourth person, Vikas Yadav, son of DP Yadav, another heavyweight minister from Uttar Pradesh with mafia connections, also surrendered. Four of the witnesses who had initially said they had seen the murder happen, eventually turned hostile. It is widely speculated that he may be under threat and that the judicial system is unable to provide witnesses with adequate security. Karan Rajput and Shivdas Yadav also had not seen anything, while Parikshit Sagar said he had left the place before the incident. In a conversation with the sister of Jessica, Karan Rajput is alleged to have played a tape-recording discussing with some friends how Venod Sharma's people have "won over" several witnesses already.

Shyan Munshi's testimony

Shyan Munshi was serving behind the bar with Jessica when the shooting occurred. In his initial statement he said unequivocally that Manu Sharma had

fired the gun twice, once into the air, and once at Jessica. This testimony was recorded by the police in their First Information Report (FIR), which Shyan signed. However, during the trial he claimed that he did not know Hindi and that he was not aware of what he had signed. It later turned out that he had passed the secondary school exam with Hindi as a subject, and had also acted in the Hindi movie, Jhankar Beats. At the trial, Shyan said that Manu Sharma had fired only once, and that also into the air. He described Manu's clothes carefully. Subsequently, he said that another bullet, fired by someone else, was the one to hit Jessica. About this man's dress, he was evasive, and saying only that he was wearing a "light-coloured" shirt. This led to the "two-gun theory" - with the forensic report said that the bullets were fired from different weapons. It is widely believed that the forensic reports were also doctored. he high court has ordered Shyan and other witnesses who turned hostile in court, to appear before it to explain why they should not be prosecuted for Acquittal by Lower Court: After extensive hearings with nearly a hundred witnesses, the court passed its order on February 21, 2006. Throughout his 179-page case verdict, Additional Sessions Judge (ASJ) S L Bhayana said that police sought to 'create' and 'introduce false evidence' against Sharma. The judgment repeatedly hints that the prosecution may have attempted, from the very beginning, to fabricate the evidence and present false witnesses, so as to render the case indefensible. In conclusion, he agrees with "the counsel for the accused that on April 30, 1999 the police had decided to frame the accused," read the judgment. 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.

Appeal and Conviction in High Court

On March 25 2006, the Delhi High Court admitted an appeal by the police against the Jessica Lall murder acquittals, issuing bailable warrants against prime accused Manu Sharma and eight others and restraining them from leaving the

country. This was not a re-trial, but merely an appeal based on evidence already marshaled in the lower court.

On September 9 2006, a sting operation by the news magazine Tehelka was shown on the TV program Star News, which revealed how the witnesses had been bribed and coerced into retracting their initial testimony. Venod Sharma was named in the expose as paying millions of rupees to some of the witnesses.

Judgment

The High Court bench of Justice R S Sodhi and Justice P K Bhasin, in a 61-page judgment held Manu Sharma guilty based on existing evidence. The judgment said that the lower court had been lax in not considering the testimony of witnesses such as Deepak Bhojwani: "With very great respect to the learned judge, we point out that this manner of testing the credibility of the witness is hardly a rule of appreciation of evidence... Obviously, this reflects total lack of application of mind and suggests a hasty approach towards securing a particular end, namely the acquittal."

In particular, the key witness Shyan Munshi came in for serious criticism, and may be facing criminal proceedings. The judgment says, of his repudiating his own FIR: "[Munshi] is now claiming that the said statement was recorded in Hindi while he had narrated the whole story in English as he did not know Hindi at all... We do not find this explanation of Munshi to be convincing." Regarding Munshi's testimony about the two-gun theory, the judgment says: "In court he has taken a somersault and came out with a version that there were two gentlemen at the bar counter. ... [W]e have no manner of doubt that on this aspect he is telling a complete lie." On December 20, Manu Sharma was awarded life imprisonment. The other accused, Vikas Yadav and Amar Deep Singh Gill, were awarded four years of imprisonment for destroying evidence.

Phoolan Devi Case

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 retiled 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.

In PUCL vs. Union of India [76]the validity of certain 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

[76] 2003 (10) SCALE 967

witnesses'. The Court observed that "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"

Obviously, the Supreme Court in this wanted to strike a balance between the right of accused and the witness. It has been further stated in this case that: "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."

The Supreme Court in yet another sensational murder case of Prof Sabharwal came heavily upon the State Government of M.P. by issuing a contempt notice and asked its explanation about the action taken against the police officials who turned hostile before the session court. The Bench in this case observed: "What action have you taken against those police officers turn hostile? Our anxiety is that if every police officer turns turtle all the accused will be given clean chit"[77]

[77]This case assumes significance as some 70 persons including police officials

[77] The Hindustan Times, July 11, 2007

were present on the scene of occurrence and none came forward for testimony. The Police officials who earlier submitted their statements naming the accused later turned hostile.

CHAPTER-6

WITNESS PROTECTION SCHEME 2018

INTRODUCTION

The witness protection scheme 2018 has been approved by the SC in its landmark judgement of Mahendra Chawla vs. Union of India, or in Asaram Bapu case which had turned the nation's attention towards witnesses who face continuous threats and attacks on their family and their own lives.

Witness protection scheme prepared by Centre in consultation with States has been given a go ahead by SC to be followed in all States till law is passed in Parliament It was one of the major recommendations for Criminal justice reforms since long Law commission of India - 14th report and other few reports along with National Police Commission and various SC judgements have talked about it time and again.

It will provide protection to the witness from threats, also at times anonymity and complete secrecy for his/her safety.

Earlier also witness protection existed on the case by case basis depending upon the threat assessment by the court. But for the first time it has been given a formal structure. Another important point to note is the significant departure from accused being the center of stage to the victim/witness long due attention.

Major example of the case which prompted SC in this direction was the dire killings of witnesses in the Asaram Bapu Case. When compared to other countries, only

When compared to other countries, only few countries have any such formal structure, most relying on informal ways.

The guidelines have categorized the threat perception to the victim/witness in

three categories Severe Mediocre Low And accordingly steps have been mandated to take the proper care of the situation. Also just like Visakha guidelines which although came in 1996, law for it finally came recently. And it may/may not take the same course here. Either way there won't be any issue.

Judiciary has filled the gap here by working out what should have been done by the legislature in the first place.

Few other examples of high profile cases - National Rural Health Scheme scam in UP Fodder Scam and even 2G Scam saw many witnesses going into the dark.

But this scheme is not a one stop solution for every problem. It will be effective only if the criminal trails gets completed quickly Because it is not possible for the State to provide witness protection for long time. Also there are an infringement of the privacy rights of the victim as well.

Implementation of the scheme is not going to be easy. Two important requirements are human resources and funds. Scheme talks about arranging funds from various avenues like international bodies etc.

There is also an urgent need for sensitization among the system towards the witness. Though it's a long haul given the deplorable situations of victim itself. For e. g SC had to create guidelines in case of road accidents with no one asking too many questions to the one helping during the first Golden hour. Questions left unanswered –

How the identity will be kept secret? How relocation will be done? What will happen if authorities don't follow this scheme as there is no provisions of penalty acting as a deterrent to them.

Use of technology in criminal investigations like DNA analysis, fingerprinting has still not become mainstream in our policing. And expertise needs to be created regarding this. Forensic labs/ institutions need to be increased as well.

In a landmark verdict, a bench of Justices AK Sikri and Abdul Nazeer have approved the Witness Protection Scheme 2018.

The top court ruled that the scheme would be law under Article 141/142 of the Constitution, until the enactment of suitable Parliamentary and/or State Legislations on the subject. Significance of Witness Protection Scheme

In every case, the witnesses are the eyes and ears of justice; thus, they play an important role in bringing the criminal or accused to justice. The Witness Protection Scheme is the initial attempt at the National-Level to provide the required protection for the witness bearers, which will go a long way in nullifying secondary victimization. This scheme attempts to ensure that the witnesses receive the necessary protection. It also strengthens the Criminal Justice system in the country and will inevitably increase the National Security.

6.1 Salient Features of Witness Protection Scheme

- The court has stated that the scheme will be implemented under Article 141/142 of Constitution till the enactment of parliamentary and state legislation.

- This scheme has also directed the states and Union Territories to set up the Vulnerable Witness Deposition Complexes (VWDCs) within a period of one year so that the witnesses could fearlessly depose against the high and mighty without coming in face-to-face interaction with the accused.

- The primary reason for establishing these VWDCs is due to the large percent of acquittal in criminal cases due to the witnesses turning hostile and giving false testimonials. This is caused mostly because of the lack of protection for them and their families.

- The Witness Protection Scheme will extend to all the states of India except Jammu & Kashmir.

- A separate witness protection fund will be created in each state to meet the

expenses incurred under the Witness Protection Scheme.

6.2 Objectives of the Witness Protection Scheme :

- ●Firstly the scheme was formulated by the Home Ministry based on the inputs received Union Territories, legal services authorities, civil society, three high courts as well as from police personnel.

- ●The passing of this scheme was finalised in consultation with National Legal Services Authority (NALSA) and Bureau of Police Research and Development (BPRD).

- ●Witness Protection Scheme ensures that the investigation, prosecution and trial of criminal offences are not biased as this may result in the witnesses being intimidated or frightened to give evidence without appropriate protection from criminal recrimination.

- ●As per the scheme, Police Escort will be provided to the witnesses who are threatened and, if required, the family of the witness would be relocated to a safe house.

- ●The scheme also states that the Police would monitor the Social Media accounts, emails and phone calls of the witnesses. Also, the installation of CCTV cameras would be done in the houses of the victims in order to trace the person threatening them.

6.3 Demand for Witness Protection Scheme

There were certain demands behind the implementation of this scheme which includes the reasons listed below,

- ●Victims and Witnesses of serious crimes are at high risk when the criminal or accused is influential or, and the victim or witness belongs to an economically marginalised community.

- ●Adolescent girls or Women who report a complaint towards being victims of sexual violence are often even more vulnerable and face extreme pressure r direct threat from the criminal.

- ●In addition to these, the witnesses also need to possess the confidence to come forward to assist law enforcement and prosecutorial authorities.

- ●The witnesses need to be assured that they will receive protection and support from the harm that criminal groups may inflict upon them in order to discourage or control them from Co-operating towards the case hearing.

- ●Due to these reasons, legislative measures to emphasise prohibition against tampering of witnesses have become the imminent need of today's scenario.

- ●Besides India, countries such as the United States of America, United Kingdom, China, Italy, Canada, Hong Kong and Ireland have implemented Witness Protection Scheme to sustain law and order within the country respectively.

6.4 State Witness Protection Fund :

There will be a Fund called 'the Witness Protection Fund' from which the expenses caused during the execution of the Witness Protection Order passed by the Competent Authority and other expenditures spent.

The Witness Protection Fund will consist of the following measures:-

I. The budgetary allocation made in the Annual Budget by the State Government;

II. Receipt of the number of fines imposed (under section 357 of the CrPC) has to be reversed by the courts in the Witness Protection Fund.

III. Funds contributed towards Corporate Social Responsibilities.

Background :

- ●The SC in State of Gujarat v. Anirudh Singh (1997) held that it is the salutary duty of every witness who has the knowledge of the commission of the crime, to assist the State in giving evidence.
- ●First ever reference to Witness Protection in India came in 14th Law Commission Report in 1958. After that 154th, 178th and 198th Law Commission Report also recommended putting in place a witness protection scheme.
- ●Malimath Committee Report also batted for a strong witness protection mechanism and said that the courts should be ready to step in if the witness is harassed during cross-examination.
- The report puts witnesses in three categories:
- ●Category A: Where the threat extends to life of witness or his family members and their normal way of living is affected for a substantial period during the investigation/trial or even thereafter.
- ●Category B: Where the threat extends to safety, reputation or property of the witness or his family members, only during the investigation process or trial.
- ●Category C: Where the threat is moderate and extends to harassment or intimidation of the witness or his family member's reputation or property, during the investigation process.

6.5 Rights of the witnesses :

There needs to be a certain sense of safety that need to be given by the state to the witness who comes forward to testify and it is the responsibility of the

State to impart adequate protection to the witness. The various Law Commission Reports and the Witness Protection Scheme had identified certain rights that a witness possess:

i. Right to secure waiting place while at Court proceedings;

ii. Right to information of the status of the investigation and prosecution of the crime;

iii Right to be treated with compassion and dignity.

iii. Right to protection from harm and intimidation;

iv. Right to give evidence without revealing identity; and,

v. Right to a stay at a safe place and transportation.

It shall be mandatory for Investigating Officer/Court to inform each and every witness about the existence of "Witness Protection Scheme" and its salient features.

6.6 Types of Protection Measures:

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;
- (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 the 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
- (l)Usage of specially designed vulnerable witness court rooms which have special arrangements like live links, one way mirrors and
- (m)screens apart from separate passages for witnesses and accused, with option to modify the image of the face of the witness and to modify the audio feed of the witness' voice, so that he/she is not identifiable;
- (n)Ensuring expeditious recording of deposition during trial on day to day basis without adjournments;
- (o)Awarding time to time periodical financial aids/grants to the witness from Witness Protection Fund for the purpose of re-location,
- (p)sustenance or starting new vocation/profession, if desired;

- Apart from the above measures, any other form of protection
- (q)Holding of in-camera trials;
- (r)Allowing a support person to remain present during recording of statement and deposition;
- (s)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 the face of the witness and to modify the audio feed of the witness' voice, so that he/she is not identifiable;
- (t)Ensuring expeditious recording of deposition during trial on day to day basis without adjournments;
- (u)Awarding time to time periodical financial aids/grants to the witness from Witness
- (v)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', 'Change of Identity' and 'Relocation of Witness 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 be ordered to be a safer place within the State/UT or territory of the India Union

6.7 Drawback of scheme :

The witness protection scheme is the first attempt in India to protect witnesses. But it suffers from serious limitations. The foremost problem is the time frame of protection. The scheme has limited the scope of protection for three months at a time. This renders it redundant as the possibility of threat from the accused cannot be eliminated once protection is terminated. Putting a cap on the duration of protection is akin to providing temporary protection at a premium. Witness protection should be provided until the threat has ceased to exist.

The second drawback pertains to the categorization of witnesses according to threat perception. No scheme can succeed if a corrupt administration or police department is invested with the authority to assuage the threat perception and then categorize witnesses on the basis of its assessment.

Lastly, even though the scheme is committed to protecting the identity of witnesses by maintaining the confidentiality of personal information, it does not penalize any violation of the said provision, reducing the potency of the provision. An effective deterrent must be put in place to prevent the disclosure of such sensitive information.

Owing to its major loopholes, the witness protection scheme is unlikely to instill confidence in witnesses. Neither can it resolve the problem of witnesses turning hostile.

In the Best Bakery case, the Supreme Court had recognized that political patronage and corrupt practices have a role to play in witnesses turning hostile. Witness protection requires foolproof mechanisms. It is possible that the existing scheme would have addressed the problems embedded in it if the provisions

were deliberated upon by the stakeholders. Such a procedure, however, was surpassed. In its current form, the scheme is a disservice to the cause of witness protection.

CHAPTER-7

CONCLUSIONS AND SUGGESTIONS

7.1 CONCLUSION

Thus we conclude all that could be inferred is that we need to enact strict laws on witness protection keeping in mind the needs of the witnesses in our system. The plain fact is that the level of professionalism demanded by the witness protection program is considered to be beyond the capability of our police in the existing system, making it as susceptible as it to extraneous influences. Today, stringent laws against persons giving false evidence and against witnesses that turn hostile are very much the need of the hour. The Jessica Lal murder case provoked a public outcry against miscarriage of justice that impelled authorities to reopen the case. The distortion in the case was so brazen that even worms turned. Middle class empathy with the murdered victim finally aroused public opinion.

But it would be facile to conclude that India is on the way to reform of its criminal justice system. This is just the first half step. The media too has a tremendous responsibility. Instead of sensationalizing issues, they must endeavor to present a constructive and analytical account of such situations. Besides, there may be similar situations in the future. And in order to ensure that justice is delivered, the courts and the law should make provisions for guarantying the safety of witnesses

The present judicial system has taken the witnesses completely for granted. The country is facing problems regarding conviction of criminals due to the unavailability of witnesses. Witnesses are still threatened in India by the accused. It is submitted that, 'hostility', under Common Law, was a legal measure, resorted to, when witnesses willfully prevaricated, to help the other party. However, it has been observed, that witnesses mostly turn 'hostile', on account

of "hostile animus" exhibited by the criminal justice system towards them. It is felt that, 'hostility', under such circumstances, conceptually differs from what the Common Law had envisaged. That, much needs to be done in this regard is evident from the observations made in the case of " Van Mechelen" wherein it was observed that, " there had not been sufficient effort to assess the threat of reprisals" against witnesses".

An important step has been taken in this direction with the recommendations made in the Malimath Committee Report in the chapter, "A Hybrid System of Criminal Justice" which 'inter alia' has sought to incorporate certain features of the 'inquisitorial" system of trial into the 'adversarial' system, namely "empowering judges further with the duty of leading evidence with the object of seeking the truth and focusing on justice to victims." It is felt that, focusing on "justice to victims" is possible, only if careful consideration is paid to "the rights of witnesses", "considering them as a special category of victims" and acknowledging their insecurity and vulnerability in general, while recognizing that certain witnesses may need protection.

Witness Protection Programs and Witness Protection Laws are the need of the hour. In fact it is the absence of these laws that has been strengthening criminals in the Indian Judicial system.

As long as witnesses continue to turn hostile and do not make truthful deposition in court, justice will always suffer and people’s faith in efficacy and credibility of judicial process and justice system will continue to be eroded and shattered. Soli j. Sorabjee, former Attorney general states: “nothing shakes public confidence in the criminal justice delivery system more than the collapse of the prosecution owing to the witnesses turning hostile and retracting their previous statements.”

It is evident from the discussion in the research paper, that the concept of an independent witness has almost become a utopian demand. If one were to go by statistics, majority of acquittals are as a result of material witnesses becoming

hostile. The statements recorded by the investigating officer under S. 161(3) of the CrPC have practically no significant value and are merely used to impeach the credibility of the witness. The social climate anyways heavily discourages any right- minded person to be bold and truthful and the legal immunity given to the witness to turn hostile whether for bona fide or oblique reasons, by and large encourages the witnesses to turn hostile, without any qualms for the same.

Having pointed out the various loopholes in the legislations and analysed the proposed solutions and amendments in the course of this paper, the researcher seeks to submit, the conclusions I have reached:

- Although, making statements made to a police officer during investigation, admissible, appears to be an effective solution, it does pose a strong possibility that it might lead to defeat of faith posed in the Criminal justice system. With such high costs attached to it, the solution is clearly not desirable. Nevertheless, it cannot be denied, that such a solution would undoubtedly have been ideal, if the perceptions of people were to change leading to more trust in the police. As long as the same is not forthcoming, it is suggested that such a solution would do more harm by allowing mechanisms for abuse, than remedy the situation.

- Taking the proposition that all statements made during investigation by material witnesses should be compulsorily recorded by the magistrates, it prima facie seems to be an ‘impractical’ solution. However it has its own merits too - (a) it pays due regards to the intention of the legislators behind protecting witnesses from any coercion by the police; (b) it would sink well with the general public and does not require any change in perceptions; (c) it is an effective method of adding utility to statements made by witnesses, since statements made to magistrates can also be used for

corroboration, in opposition to the current legal position whereby statements made to police officers can only be used for impeaching the credibility of the witness.

Moreover, to bring a change in the perceptions of people is far more difficult than amending a piece of legislation and recruiting more magistrates, as the need may so arise. However the solution proposed here would be meaningless unless it is supplemented by adequate laws on perjury, which should be severely censured from now on.

Again, all the above solutions and the proposition of bringing in more stringency with respect to perjury, would be completely meaningless, if they trap the witness between the devil and deep sea, whereby on one side his life is threatened by the accused and on the other, it is an offence to depose falsely. When faced with such situations, which are quite frequent, any rational witness would rightly decide not to depose before the court of law and therefore the above solutions would not just discourage witnesses from giving false evidence but also discourage them from deposing the court.

The outlet to the above dilemma lies in the 'witness protection programme' which is necessitated to complement the solutions that have been proposed. Hence a hybrid solution of witness protection programme, independent from police interference, adequate amendments to CrPC and severe censuring of perjury, is proposed as a solution by the researcher to check witnesses from turning hostile without being unnecessarily harsh upon them.

7.2 Suggestions

The following suggestions can be drawn in order to curb the hostile tendencies among the witnesses:

(1) The fairly long time consumed in a criminal case is a breeding ground for witnesses to turn hostile. Therefore, delay in disposal of cases and

frequent adjournments should be avoided.

(2) The prosecution should take adequate care of the witnesses.

(3) Witnesses should be provided proper protection. Merely keeping the identity a secret is not enough. The enactment of a comprehensive legislation dealing with witness identity and witness protection is the only way forward.

(4) The provisions pertaining to payments of allowances to the witnesses must be strengthened in order to facilitate smooth payment of allowance for each day a witness comes to the court to testify.

(5) Proper facilities should be provided in the court premises which are conducive to the witnesses and facilitate them into testifying against the accused rather than being harassed and dropping out of the case forever.

(6) Serious action against the WITNESSES needs to be taken and for the same to happen, the perjury proceedings need to be actively invoked against the WITNESSES.

(7) There is an imminent need for reforms in the police in the manner the investigation are conducted.

To sum up, it is only through a positive outlook of all the pillars of the administration of justice in the country, that a witness can be made to feel comfortable in the system and is ready to fearlessly depose in the court.