

Review Article

## Protection of Witness for Effective Administration of Criminal Justice in India

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### Abstract

The conditions of witnesses in Indian Legal System can be termed as 'poignant'. The witness are subject to number of threats, harassments and many pressures including attending the court on regular basis. Even during examinations in the court of law the witness are subject to number of illogical and unworthy questions which the witness is unable to bear. The question of hostile witnesses are another factor which ultimately led to the acquittal of accused and low conviction rate. As per number of reports which predict that in India, we have a low conviction rate the untrustworthy environment pertain to witness are one of the factor for such cause. Lack of witness protection programme led to the frustration and harassment of witness led to faulty conviction rate. Either the witness are not willing to become a witness in a case or if he comes as witness later on he turns to be the hostile witness. The current legal system has taken the witness for granted while as the reality is that as quoted by Bentham that witness are eyes and ears of justice delivery system. The frequent summons to the witness are also an issue. One of the main reasons which the paper highlights is witness harassment in terms of adjournment by court or they have to travel own due to this witness stop thereby to go to court, in this harassment lawyers play prominent role. The Frequent adjournments which are not necessary led to prolonged delay and delayed justice system. As it has been said that justice delayed is justice denied. The years long hearing add the fuel to fractured witness system. The bad behaviour including pulling them out of the court by poens, the bad day long stays inside courts add more fuel to the harassment of witness while as the criminal jurisprudence believes that witness are the guest of court.

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### Introduction

Witness are the pillars of fair justice delivery system. Witness are heart and soul of fair justice delivery system. As quoted by Bentham "witness are the eyes and ears of justice". Credible witness are the

soul of conviction. Witness are not only important only for conviction of accused by also important to enhance fair trail system. Witness saves the lives of those who are falsely included in the case but also are important pillar in providing the justice to the victim. The statement of witness in the court are

important as not only it saves the life of person but also provides the justice to the victim of crime. Keeping this in mind, the witness are subject to oath and many more formalities. The statement of witness helps the court to reach out the discovery of truth. The witness gives his time and labour for the effective administration of justice and the same should be respected and honoured. The witness travels a long distance, gives his labour so the same is required to be honoured as he serves as guest of the court. The witness should therefore be treated with great respect and consideration as a guest of honour. Unfortunately, all these are seen not to be happening in the courts.

Witness plays a major role in the process of delivering justice. The statement of witness affects the conviction and acquisition. Bentham states that "witnesses are the eyes and ears of justice". Therefore it is necessary that the interest of the witness should be protected. Witness protection has become the main concern. Nowadays it is very difficult to trace or detect the criminals in organized crimes. Criminal organizations have become stronger. In such circumstances the protection of witness has become very significant in prosecuting the accused particularly in complex and serious crimes. Their confidence in justice system can be built only if their interest is protected and the protection programs are properly implemented. They should be protected from the harm which can be inflicted upon them by the criminals. Witness should be able to give the testimony without any fear of danger to his life or his loved ones.

The issue of hostile witness came in the knowledge after the landmark judgment of *Jessica Lal, Best Bakery, BMW Hit and Run and Asaram Babu Cases* wherein the witnesses turned hostile.

The witness also suffers in the court in various other ways. The frequent adjournments and not paying his dues pushes the witness in trouble. The court highlighted the plight of witness particularly not paying them their dues. The court directed that their dues should be paid to them on the same day. If the case gets adorned the dues of the same day should be paid to the witness. Steps need to be required in the same direction. Supreme Court stressed upon the need of witness protection law to provide adequate protection to the witnesses thereafter the problem of justice can be sorted out.

### Role of witness in the justice system

According to law dictionary a witness is a person

who was present there and has the knowledge of the event. Witness testifies under an oath in the trial or a prior deposition can be made. Witness play an important role in the criminal cases as the facts are determined on the basis of their testimony. Witness is the one who has relevant information about the case. The whole case depends upon the testimony of the witness. The role of witness becomes very crucial if in case the victim is dead or the victim's testimony is insufficient in determining the case. Then the conviction and acquisition depends on the statement of the witness. The statement of witness becomes part of the evidence and is considered while giving the judgment. The whole case can fall because of the false statement of the witness. Witness is one of the essential parts of the justice system, as his statement determines the decision of the case. Therefore, the truth of the witness's testimony becomes the basis of justice and so the witness is required to make his statement under an oath. A witness must be able to depose out of his own consent rather under any fear or pressure.<sup>1</sup>

### Law relating to Witness Protection

There are certain statutory provisions which talks of witness protection but these provisions are not properly implemented in India. But in India there is no separate legislation regarding witness protection. These provisions are stated in different legislations. Furthermore, these laws are not effective to ensure the safety of the witnesses or his relatives.

In Criminal Procedure Code, 1973 there is provision for proceedings in the open court<sup>2</sup> and also for in-camera proceedings<sup>3</sup> for offences involving rape.<sup>4</sup> Section 273 of the Code states that evidence to be taken in presence of the accused except in cases mentioned in Section 299 in which the evidence can be recorded in the absence of the accused. Section 173 (6) states that if the police officer is of opinion that any part of statement made under Section 161 is not relevant to the subject-matter of the proceedings or that its revelation to the accused is not necessary in the interests of justice and is inexpedient in the public interest then he can request the Magistrate to exclude that part from the copies.<sup>5</sup> It is punitive to publish the identity of the rape victim.<sup>6</sup>

### Some Special Enactments Regarding Witness Protection in India:

There were certain specific statutes providing for the protection of the identity of witnesses –

*Terrorists and Disruptive Activities Act, 1985* –

(TADA): This Act via Sec. 13 offered a meticulous modus operandi for the identity protection of witnesses who were endangering their lives while testifying in the proceeding. In a criminal trial involving the acts punishable under the Act. It was subsequently reinstated in 1987 (via TADA 1987) and under section 16 of the new Act the same procedure was mentioned. The validity of section 16 of the Act was upheld by the Supreme Court in *Kartar Singh v. State of Punjab*.

*Prevention of Terrorism Act, 2002 (POTA)*: This Act repealed TADA, 1987. Sec. 30 of the Act provided for in camera proceedings and protection of the identity of witnesses. The validity of section 30 was challenged in *PUCL v. UOI* wherein the Supreme Court upheld its validity.

*The Unlawful Activities (Prevention) Amendment Act, 2004*: POTA was repealed and the Unlawful Activities (Prevention) Act, 1967, was amended accordingly. Sec.44 of the Act provides for the protection of the witnesses which is identically worded with Sec. 30 of POTA.

*Juvenile Justice (Care and Protection of Children) Act, 2000*: Sec. 21, hereby, under the act offers the identity protection of juveniles. It provides that no report in any newspaper, magazine, news sheet or visual made of any inquiry regarding a juvenile in conflict with law shall disclose any sort of details which can identify a juvenile in any circumstance or by any reason whatsoever. The provisions mentioned above are applied only in specific types of cases and cannot be applied elsewhere. The person who witnesses violent crimes or other serious crimes is not covered under the purview of any other law. The vulnerability of witness is so palpable that it has shocked and alarmed the legal authorities of highest order and have prompted them to take a serious note of the issue in question i.e. protection of witness.

### Various Law Commission Reports: At a glance

In the 14<sup>th</sup> Report of the Law Commission<sup>7</sup> the issue was providing adequate facilities to witnesses. In 154 and 172 reports of the law commission stress were laid on witness protection and adequate measures need to be taken in their direction without compromising fair trial. Videotaped interview or allowing the child to give his testimony by closed circuit television should be permitted by the court and the cross examination of the minor should be conducted by the Judge on the basis of written questions submitted by the defence. Another

recommendation was to insert a proviso to Section 273 of the Code of Criminal Procedure that the prosecution can request the court to provide a screen so that the child does not see the accused during the trial. The 178<sup>th</sup> Report of the Law Commission recommended inserting Section 164A in the Code of Criminal Procedure to record the statement of witnesses in the presence of Magistrates in such cases where the punishment prescribed for the offence was 10 years imprisonment or more.<sup>8</sup>

These recommendations were considered in Criminal Law (Amendment) Bill, 2003. In the 178<sup>th</sup> Report<sup>9</sup> of the Law Commission the issue was preventing witness from turning hostile. It provide suggestive Measures which are listed below:

- (1) Insertion of 164 (1A) in criminal Procedure Code to record the statement of the witness in the presence of Magistrate.
- (2) To introduce some checks to prevent the witness from turning hostile.
- (3) In the offences where the punishment prescribed is imprisonment of 10 years or more, the `statement of the witness vital for the fair decision should be recorded by Magistrate as soon as possible. The Law Commission considered the last two options and recommended to insert Section 164A in the Code of Criminal Procedure.

### *Justice Malimath Committee's Report 2003: An overview*

Keeping in view the major challenges in criminal justice system, the government constituted a committee headed by former chief justice of Karnataka and Kerala chief justice, Justice V.S. Malimath. The task of the committee was to suggest major changes in criminal jurisprudence. The committee was formed in year 2000 and submitted its report in year 2003. The committee has recommended around 160 recommendations suggested major shift in criminal jurisprudence including shift from adversarial to inquestoral model. The committee has recommended witnesses protection as a matter of importance for the effective implementation of criminal justice system. The committee highlighted the safety, anonymity of witness as a major concern for witness protection. Many countries in the world have enacted laws for witnesses' protection. There is no such law in India. Time has come for a comprehensive law being enacted for protection of the witness and members of his family. Therefore this witness protection scheme has been adopted till the time central govt. makes a law on it.

### Supreme Court Guidelines pertaining to witness protection

The Apex Court on 06.12.2018 directed all State and Union Territories to implement witness protection scheme recommended by the Central Govt., and follow the certain parameters pertaining to the witness protection.

A bench of A.K. Sikri and S. Abdul Nazeer said that the criminal justice system had been witnessing traumatic experience and sordid phenomena as witnesses turn hostile resulting in acquittal of accused in heinous offences and they (witnesses) must be protected to ensure justice. The order came as it approved the witness protection scheme framed by the centre in consultation with National Legal Services Authority and bureau of police research and development.

The Supreme Court in its order directed all the states and union Territories to implement the witness protection scheme unless parliament comes out with legislation. As per the scheme, police escort will be provided to witnesses who are threatened and, if needed, they would be relocated to a safe house. The scheme also says mails and phone calls of witnesses would be monitored to trace the person threatening them. It said a separate witness protection fund will be creating in each State to meet the expenses incurred under the scheme. It directed that the witness deposition complexes be set up in all district courts by the State and Union Territories within a year where the witnesses could fearlessly depose against the high and mighty without coming face-to-face with the accused.

It is a harsh reality, particularly, in house cases where the accused persons/criminals are tried for heinous offences, or where the accused persons are influential persons or they make attempts to terrorise or intimidate the witnesses to restrain and from deposing truthfully. This unfortunate situation prevails because of the reason that the State has not under taken any protective measure to ensure the safety of these witnesses. All this has created problems of low convictions in India. This has serious repercussions for the criminal justice system itself. Criminal justice is closely associated with human rights. Whereas, on the one hand it is to be ensured that no innocent person is convicted and thereby deprived of his liberty. It is of equal importance to ensure, on the other hand, that the victim of crime gets justice by punishing the offender. In this whole process, protection of witnesses assume significance to enable them to depose fearlessly and truthfully, it said

### Background of the Scheme

- The topic of witness protection scheme was discussed earlier when the SC was hearing a PIL wherein witness protection issue was raised in the case of Asaram Babu.
- Attorney General of KK Venu gopal had disclosed before the SC that draft for witness Protection Scheme has been finalized and same would be part of law "in due course", and had also contended that direction may be given to States to implement the same.

### Highlights of the draft scheme

- The witness protection draft has been finalised in consultation with the National Legal Services Authority (NALSA) and Bureau of Police Research and Development (BPRD).
- The scheme shall extend to the whole of the India except the State of Jammu & Kashmir.

Witness has been divided in three categories bases on threat perception.

*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 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.

### Safety Shields

- Ensuring that witnesses and accused do not come face- to-face during investigation or trial.
- Monitoring of Mails and telephones calls of the witness.
- Change witness telephone number or assign him an unlisted number.
- Concealment of identity of witness by referring to him with the changed name/ alphabet.
- Close protection, regular patrolling around witness's house.
- Escort to and from court.
- Holding in-camera trials.

## Application of Witness Protection Program in India: Issues and Challenges

There are many issues and challenges to the practical efficacy of the witness protection program in India. Some of them are listed below:

1. The foremost important challenge is with respect to anonymity of witnesses and the balancing of interests of the prosecution to indemnify the witness and the rights of the true accused.
2. The most obvious is the cost of implementation and infrastructure. While talking about providing safety and concerned security to another area etc., the cost involved in providing such security is very high. The fact may remain that no cost is appreciative when it comes to providing justice, but everyday realities should be kept in mind. Countries like Thailand and Puerto Rico have also successfully implemented witness protection, though they are not developed countries. The same cannot be said in the case of India, because in comparison with these countries India is much more vast and unwieldy. However, the problem could be solved by carefully selecting the cases, which value protection, and not every other case. Thus by reviewing cases which may be communally charged, high profile, involving drugs or organized crime syndicates or cases in which grave offences are involved and there is a possible threat, protection could be provided.
3. The other major problem is that of deep rooted corruption in the administration and judiciary. Witness protection program cannot function properly with such a degraded supervision. If in the greed of money someone sold the information about the identity of the witness then whole programme will be of no use. Thus, corruption and political pressure is the major problem while addressing the problem of hostile witness. Therefore, it is recommended that a different body should be set up that is outside political control to ensure the protection of witnesses during the trial. Almost all countries that have enacted witness protection have established a Witness Protection Cell. Witness Protection Cell must have provision for fake and illegal identities

## Conclusion

It is high time that India should have proper witness protection laws. It has a long way to go as far as these laws are concerned. Ensuring the safety of the witnesses is the vital element in providing justice. India needs to tackle the problem of witnesses turning hostile due to intimidation. Appropriate measures should be taken to provide protection to witnesses who courageously come forward and help in rendering justice. If cases like Best Bakery, Jessica Lal, Asaram case and Vyapam scam are repeated then it will shatter the credibility of the justice system and no witness will come forward to testify against the criminal. Witnesses may be given protection before, during and/or after the trial. India should develop an effective legislation for witness protection involving police, government and judiciary. Government should implement the necessary Acts, legal aspects would be looked by the judiciary and police should execute them. To protect the identity of the witnesses, a witness protection cell could be constituted. Witnesses must be treated fairly and with dignity. They should not be subject to intimidation, abuse or harassment. They should be provided information about the status of investigation and the trial. They should be provided with medical facilities, compensation, social services or other support which they may require. If violations are found to exist on the part of witnesses enrolled in this programme then they should be penalized. Police should be able to take basic steps to protect the witnesses like escorting, surveillance etc. Anonymity of the witnesses should be maintained by using voice and face distortion techniques or concealing the information about their identity. Law is a means to achieve justice. In this dynamic world laws cannot remain stagnant. They should also be amended as per the need of the society. It will be unfair to expose the persons to harassment simply because they testified against the wrong. In India, situation of witness protection is miserable. Only a few witnesses have the courage to stand in favor of the victim. For the proper functioning of judiciary, it is necessary that India should enact laws for witness protection.

## References

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2. See S. 327, the Code of Criminal Procedure, 1973.
3. See S. 327 (2), The Code of Criminal Procedure, 1973.
4. See S. 376 and S. 376 A to 376 D, The Indian Penal Code, 1861.
5. See S. 173 (6), The Code of Criminal Procedure, 1973.
6. See S. 228A, The Indian Penal Code, 1861
7. See, Law Commission of India, the Code of Criminal Procedure, 1973 (Act No. 2 of 1974), 154<sup>th</sup> Report, Fourteenth Law Commission under the Chairmanship of Mr. Justice K.J. Reddy 1995-1997, in 1996.
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