

WITNESS PROTECTION: A FUNDAMENTAL NEED IN CRIMINAL JUSTICE SYSTEM

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Abstract

The witness is considered to be one of the most indispensable parts of the criminal justice system. They assist the court by submitting their testimony without any personal gain. While doing so they sustain lots of pain and grief but never stagger from their path. The service rendered by the Witness in the justice administration system cannot be ignored. Whittaker Chambers said, "In search of truth, he plays that sacred role of the sun, which eliminates the darkness of ignorance and illuminates the face of justice, encircled by devils of humanity and compassion."¹ Therefore, the witness should be kept in the highest place of honour. However, it has been found that the witness faces lots of troubles during the course of the trial process. The allowances which are paid to the witness are not feasible, the facilities which are offered to the witnesses during court stay are inadequate and apart from these issues they face unjustified adjournments. Often, witnesses are ill-treated by the court officials, harassed and threatened by the accused and sometimes even lose their life during the trial. These all incidences happen due to lack of effective witness protection mechanism in our country. This, in turn, battered the faith of witnesses in the Criminal Justice System and due to which they hesitate to come forward to lend their testimony or often turn hostile. Therefore, witnesses should be provided with adequate protection. Hon'ble Supreme Court of India and Law commission in various instance highlighted the need for a comprehensive policy on witness protection. In this research paper, the researcher shall underline the trouble faced by the witnesses in the criminal justice system and elaborate on the issue of witness protection in India.

Keywords: Criminal Justice System, Witness, threatened, Hostile, Witness protection program.

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¹ Available at: <https://www.scconline.com/blog/post/tag/witness-protection-scheme-2018/>

INTRODUCTION

Fair trial is an essence of the Criminal Justice Administration. The magistrate decides the guilt or innocence of the accused beyond a reasonable doubt basing upon the versions of witnesses. They assist the court in the truth-finding process. English writer Edward G Bulwer-Lytton said, “Whenever man commits a crime heaven finds witnesses”². Therefore, witnesses play a crucial role in the criminal justice system. They act as a friend of the court and laid the foundation of the criminal trials. Hence, Bentham called witnesses as the “eyes and ears of justice”.³ Moreover, the testimony submitted by the witness has magical strength which can change the course of the trial process. Justice Wadhwa in *Swaran Singh v. State of Punjab* observed that “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.”⁴ Committee on Reforms of Criminal Justice System headed by Justice V.S Malimath observed that “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”⁵. Therefore, the witness should be kept at the highest place of honour.

However, the witness in criminal justice administration experiences lots of pain and agony. It has been found that eyes and ears of justice (i.e. witnesses) are threatened and harassed during the course of the trial. They are tortured and ill-treated by the accused or his family member to give testimony in his favour. This has, in turn, paralysed the trial process which sometimes resulted in the incidences of witness turning hostile. All these mishaps occur due to the lack of effective witness protection regime available in our country. Many a time, the concern was raised by the Hon’ble Supreme Court and Law commission to incorporate a

² Available at: <https://indianexpress.com/article/explained/from-jessica-lals-case-to-sohrabuddin-sheikhs-why-witness-protection-in-india-remains-vexed-5069143/>

³ Bajpai G. S., ‘Witness in the Criminal Justice Process: A study of Hostility and Problems associated with Witness’ Bureau of Police Research and Development Ministry of Home Affairs, New Delhi

⁴ *Swaran Singh v. State of Punjab* AIR (2000) 5 SCC 68

⁵ Malimath V.S. (2003), Report of the Committee on Reforms of the Criminal Justice System. Delhi: Ministry of Home Affairs, Government of India.

comprehensive policy on witness protection but same was ignored.

DEFINITION OF WITNESS

The term witness is not defined under the Criminal procedure Code, 1973 but its meaning can be adduced from the definition of the expression ‘evidence’ under section 3 of the Indian Evidence Act, 1872. As per Section – 3 of describes "Evidence" as-"Evidence" means and includes:

- 1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;
- 2) all documents including electronic records produced for the inspection of the Court; such documents are called documentary evidence.

Clause (1) of Section 3 of the Act though not clearly covered the term witness but states that all the all statements which are made by the witnesses with the Court’s permission in relation to the material fact under inquiry are called oral evidence.

- ✦ According to Black’s Law Dictionary;’s definition of witness: “In the primary sense of the word, a witness is a person who has knowledge of an event. As the most direct mode of acquiring knowledge of an event is by seeing it, “witness” has acquired the sense of a person who is present at and observes a transaction.”⁶
- ✦ The Witness Protection Scheme, 2018 defined the term ‘witness’ under Section – 2 (k) - which means witness is — “any person, who posses information or document about any offence”.⁷

Therefore, in general terms, the witness is a person who is called by the parties with the permission of the court to furnish certain information of which he has some knowledge.

PROBLEMS FACED BY WITNESS:

A witness is an incredible element of the criminal justice system. Though they are not a part of the incidence of crime but are always available to cooperate in the court process. However, instead of welcoming approach they sustain lots of hardships and faces troubles during the course of the trial. They travel a long way from their home to comply with the court’s order

⁶ Black’s Law Dictionary, Available at: <http://thelawdictionary.org/witness-n/#ixzz2cm686Dz8>

⁷ Section – 2 (k) - Witness Protection Scheme, 2018

when they are summoned for examination. Hon'ble Supreme Court in case of *State of U.P v. Shambhu Nath Singh & Ors* observed that, "Witnesses tremble on getting summons from courts, in India, not because they fear examination or cross-examination in courts but because of the fear that they might not be examined at all for several days and on all such days they would be nailed to the precincts of the courts awaiting their chance of being examined. The witnesses, perforce, keep aside their avocation and go to the courts and wait and wait for hours to be told at the end of the day to come again and wait and wait like that. This is the infelicitous scenario in many of the courts in India so far as witnesses are concerned. It is high time that trial courts should regard witnesses as guests invited (through summons) for helping such courts with their testimony for reaching judicial findings. But the malady is that the predicament of the witnesses is worse than the litigants themselves."⁸ Moreover, the witness also faces the situation of unwarranted adjournments due to the nonappearance of the parties or lawyers. The allowances which are remunerated to the witness for attending court is very low and obsolete. The infrastructural facilities which are provided to the witness in courts are very poor. They are not provided with the proper place to seat, drinking water and canteen facilities. Sometimes they need to remain in courtyards to wait for their turn to get testified. Witnesses not only undergo through these problems but even get threatened, harassed, bribed and induced or even killed by the accused to submit testimony in their favour. Supreme Court in *Swaran Singh v. State of Punjab* opines that "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 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 is a witness 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 is 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".⁹ Due to these hardships witness

⁸ (2001) 4 SCC 667

⁹ Supra note 5

hesitate to come forward to lend their testimony in the court of law and sometimes forced him to turn hostile. All these scenarios frustrate the very purpose of criminal justice administration.

NEED FOR LAW ON WITNESS PROTECTION

The witness undergoes lots of troubles and suffers pain during the course of the trial in the justice delivery system. This not only dilutes the purpose of trial but also violates the fundamental right of the witness for fair trial which is guaranteed under Article 21 of the Constitution of India. BMW hit and run case, Aasaram Bapu's case, Naroda Patia's case and VYPAM case are the few examples wherein the prime witnesses were threatened and harassed to give false testimony in the court. All the incidence of threat, intimidation and enticement happened due to the lack of effective witness protection mechanism available in our country. Hon'ble Supreme Court in *Zahaira Habibulla H. Sheikh & Another v. State of Gujarat and Others* observed that "The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who has political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. As a protector of its citizens it has to ensure that during a trial in Court the witness could safely depose truth without any fear of being haunted by those against whom he had deposed. Every State has a constitutional obligation and duty to protect the life and liberty of its citizens. That is the fundamental requirement for observance of the rule of law. There cannot be any deviation from this requirement because of any extraneous factors like, caste, creed, religion, political belief or ideology. Every State is supposed to know these fundamental requirements and this needs no retaliation."¹⁰ Therefore, the state shall take the entire endeavor to protect the rights of witnesses.

WITNESS PROTECTION UNDER INDIAN LEGISLATIONS

★ The Unlawful Activities (Prevention) Act, 1967:

The Unlawful Activities (Prevention) Act, 1967 provide for two provisions in relation to the protection of the witnesses. Section 22 of the Act prescribes for punishment for intimidating a witness. It states that any person who threatens a witness by any act of violence or puts any restrains or confines the witness or does any unlawful act to threaten him shall be punished

¹⁰ (2004) 4 SCALE 375

with imprisonment.¹¹ Moreover, Section – 44 of the Act grants the protection of witnesses by holding the proceedings in camera. The two types of protection available to the witness are identity protection and maintaining the address of witness secret. Moreover, the person who contravenes the provisions of this section shall be punished with imprisonment.¹²

✦ The Terrorist and Disruptive Activities (Prevention) Act, 1987:

The Terrorist & Disruptive Activities (Prevention) Act 1987 was passed to criminalise terrorist acts in India. Section 16 of the Act provides for the protection of witnesses by holding the proceedings in camera. Further, the Designated Court under the Act is empowered to take measures to protect the identity of the witness and keep the address of any witness secret. In addition, if any person contravenes the provisions of this section then he shall be punishable with imprisonment.¹³

✦ The Maharashtra Control of Organised Crime Act, 1999 (MCOCA):

The Maharashtra Control of Organised Crime Act, 1999 was incorporated to combat organized crime in the State of Maharashtra. Section 19 the Act offers protection to the witnesses primarily by holding in-camera proceedings. The two types of protection available under the Act is identity protection of the witness and keeping the address of any witness undisclosed. Moreover, if any person contravenes the provisions of this section then he shall be punishable with imprisonment.¹⁴

✦ Prevention of Terrorism Act, 2002:

The Prevention of Terrorism Act, 2002 (POTA, 2002) was enacted to counter-terrorist activities. Section 3(7) of the Act provides for punishment to a person who threatens the witness by any act of violence or by wrongful restrain or confining the witness with imprisonment.¹⁵ Further, Section 30 of the Act provides for protection to the witness by holding proceedings in camera. Moreover, the Special Court may take appropriate measures like witness identity protection and keeping the address of any witness secret.¹⁶ However, if any person contravenes the provisions of this section then he shall be punishable with

¹¹ See Section – 22 of The Unlawful Activities (Prevention) Act, 1967

¹² See Section – 44 of The Unlawful Activities (Prevention) Act, 1967

¹³ See Section – 16 of The Terrorist & Disruptive Activities (Prevention) Act 1987

¹⁴ See Section – 19 of The Maharashtra Control of Organised Crime Act, 1999

¹⁵ See Section – 3 (7) of The Prevention of Terrorism Act, 2002

¹⁶ See Section – 30 of The Prevention of Terrorism Act, 2002

imprisonment.

✦ The National Investigation Agency Act, 2008:

The National Investigation Agency Act, 2008 is a special Act to combat terrorist act in India. National Investigation Agency Act also provides provision for the protection of witnesses. Section 17 of the Act, empowers the Special Court to hold proceedings in camera.¹⁷ The protection which is offered to witness under the Act is ‘protection of identity’ and ‘address of witness secrete’. Moreover, the person who contravenes the provision of this section shall be punished with imprisonment.

✦ Delhi Witness Protection Scheme, 2015:

National Capital Territory of Delhi is the first state to bring policy on witness protection. Section – 3 of the Scheme the witness is categorized into three different categories i.e. according to the threat perception.¹⁸ The Competent Authority is empowered under the Scheme to pass the order of witness protection basing upon the Threat Analysis Report (TAR). The Scheme provides for different types of protection which may include: non meeting of witness and accused during trial, concealing of identity of the witness, close protection, regular patrolling around the witness’s house, temporary change of residence, holding of *in-camera* proceedings, awarding financial assistance to the witness from Witness Protection Fund for the purpose of re-location, sustenance or starting new vocation/profession etc.¹⁹

✦ Maharashtra Witness Protection and Security Act, 2017:

The State of Maharashtra incorporated Maharashtra Witness Protection and Security Act, 2017. Section – 6 of the Act deals with the aspect of protection to witnesses in serious offences.²⁰ Section – 7 of the Act provides for the procedure for providing protection to the witness.²¹ The District Committee may take action to protect witness whose life is in danger. Section – 8²² and Section - 9²³ of the Act offers protection during investigation and trial

¹⁷ See Section – 17 of The National Investigation Agency, 2008

¹⁸ See Section – 3 of The Delhi Witness Protection Scheme, 2015

¹⁹ See Section – 7 of The Delhi Witness Protection Scheme, 2015

²⁰ See Section – 6 of The Maharashtra Witness Protection and Security Act, 2017

²¹ See Section – 7 of The Maharashtra Witness Protection and Security Act, 2017

²² See Section – 8 of The Maharashtra Witness Protection and Security Act, 2017

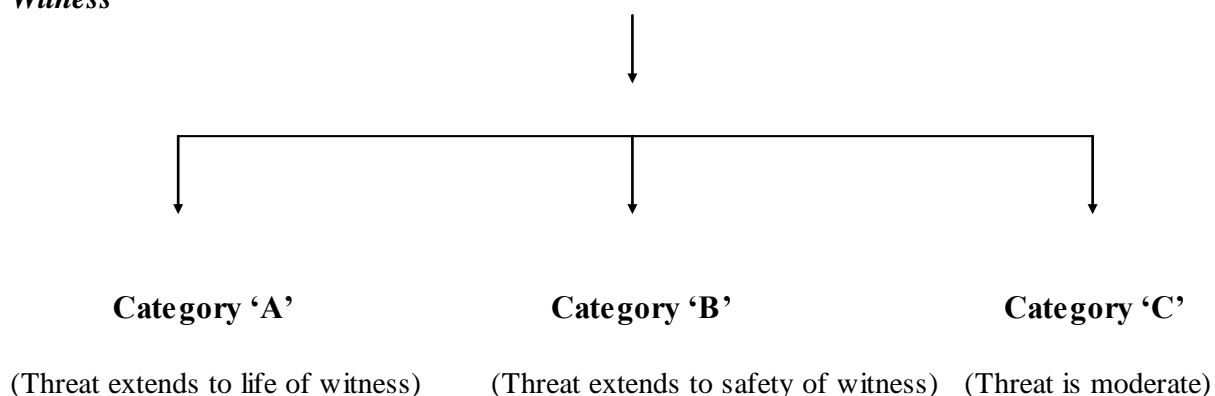
²³ See Section – 9 of The Maharashtra Witness Protection and Security Act, 2017

which shall be directed by the committee. Section 11²⁴ mandates that the investigating officer shall not disclose the names and addresses of the witnesses till the disposal of the case and if they contravene the provision they shall be punished under Section 13²⁵ with imprisonment.

✦ Witness Protection Scheme, 2018:

As there was no Central legislation on witness protection, therefore, Hon'ble Supreme Court in *Mahender Chawla & Ors. v. Union of India & Ors*²⁶ approved a Scheme called as The Witness Protection Scheme, 2018. The Scheme provides for various measures for witness protection. The Scheme defined the term 'witness' as "any person, who possess information or document about any offence".²⁷ Section – 3 of the Scheme classified witness into three different categories. Under Category 'A' witness are categorized according to the threat which is extending to cause harm not only to the witness. Further, Category 'B' specified the threats which affect the safety, reputation or property of the witness. Category 'C' includes the threats which are ordinary in nature and covers the offence of harassment and intimidation of the witness or his family member's, reputation or property, during the investigation process.²⁸

Witness



Section - 7 of the Scheme provides for a variety of protective measures available to the witness including concealment of identity of the witness, close protection, regular patrolling around the witness's house, temporary change of residence, holding proceedings *in-camera*, awarding time to time periodical financial aids to the witness from Witness Protection Fund etc. The order for witness protection under this section shall be in proportion to the threat

²⁴ See Section – 11 of The Maharashtra Witness Protection and Security Act, 2017

²⁵ See Section – 13 of The Maharashtra Witness Protection and Security Act, 2017

²⁶ *Mahender Chawla & Ors. v. Union of India & Ors* Writ Petition (Criminal) No. 156 Of 2016

²⁷ Section – 2 (k) of The Witness Protection Scheme, 2018

²⁸ See Section – 3 of The Witness Protection Scheme, 2018

acuity which shall be limited to not exceeding three months at a time.²⁹ Section – 9 of the Scheme offers protection of the identity of witnesses during the course of investigation or trial based on Threat Analysis Report.³⁰ Moreover, Part IV of the Scheme, section - 10 provides for change of identity of a witness by granting new identities³¹ and Part V of the Scheme section - 11 for the relocation of witness to a safe place in any State and Union Territory of India.³²

Hon'ble Supreme Court approve the Scheme to fill the gap to fight against the troubles faced by the witness during the course of a trial. However, there are few drawbacks of the Scheme, but the same can be overcome by making amendments. The fruits of the Scheme shall fetch only if it is implemented in its true letter and spirit.

JUDICIAL PRONOUNCEMENTS ON WITNESS PROTECTION:

- ★ *Zahaira Habibulla H. Sheikh & Another v. State of Gujarat and ors. (The Best Bakery Case)* – In this milestone decision, the Hon'ble Supreme Court highlighted that the fair trial is an essential ingredient Article 21 of the Constitution of India which the witness also possess. If the witnesses are forced to give testimony then their right to fair trial shall be violated. Therefore, it is the duty of the state to protect the rights of the witness to ensure a fair trial.³³
- ★ *Neelam Katara v. Union of India* – This landmark decision of Delhi High Court opens the new avenues of witness protection. In this case, the High Court highlighted the need for a law on witness protection. The Court analyses various laws on witness protection of foreign countries, previous judgements of the Supreme Court and the reports of law commission and frame guidelines till any suitable legislation incorporated by the state of Delhi.³⁴
- ★ *Swaran Singh v. The State of Punjab* – Supreme Court of India in this significant decision highlighted the importance of witness and elaborated the troubles faced by them during the course of the trial. The witness being the necessary ingredient criminal trial suffers lots of injustice. However, they are ill-treated, harassed and intimidated by the accused

²⁹ See Section - 7 of The Witness Protection Scheme, 2018

³⁰ See Section – 9 of The Witness Protection Scheme, 2018

³¹ See Section – 10 of The Witness Protection Scheme, 2018

³² See Section – 11 of The Witness Protection Scheme, 2018

³³ *Zahaira Habibulla H. Sheikh & Another v. State of Gujarat and Others* (2004) 4 SCALE 375

³⁴ *Neelam Katara v. Union of India* ILR (2003) II Del 377 260

during the process of trial. Instead of all these adversity, they assist in the cause of justice administration system. Therefore, it is imperative that the rights of the witness should be protected.³⁵

- ✦ *National Human Rights Commission v. State of Gujarat and Ors.* – Apex Court in this decision highlighted the facet of a fair trial. The Court observed that if the witnesses are not provided with a favourable environment then they would not be able to depose freely. Therefore, it is the duty of the court to make sure that the witness should submit his testimony without fear and favour.³⁶
- ✦ *The State of Maharashtra v. Bandu @ Daulat* – In this landmark judgement Supreme Court ordered that all the state government in India shall incorporate special centres for the examination of vulnerable witnesses. These vulnerable witness centres shall give an opportunity to the victim/witness to depose in a free and fearless environment.³⁷
- ✦ *State of Maharashtra v. Praful Desai* – In this case, the Supreme Court of India affirm the argument of the Appellant for recording the evidence of witness by the modern method of video-conferencing as the witness was in a foreign country. The Supreme Court elaborated the scope of section 3 of the Indian Evidence Act, 1872 and observed that the definition of ‘evidence’ also includes evidence in electronic form. Therefore, the courts may adopt the modern method of recording of evidence video-conferencing.³⁸
- ✦ *Mahender Chawla v. Union of India* – In this landmark decision Hon’ble Supreme Court of India made an attempt to bring the aspect of protection of the witness within the purview of legislation and made a duty of the state to provide safeguard to the witness during the course of the trial. Before this landmark judgement, there was no comprehensive policy on witness protection in India, however, few states like Maharashtra³⁹ and National Capital Territory of Delhi⁴⁰ incorporates witness protection laws in their states. Moreover, few legislations like TADA, POTA, UAPA also provided for protection of the witnesses by they were special Acts. The Law Commission of India in various of its reports and Hon’ble Supreme Court of India in its previous decisions

³⁵ Supra note 4

³⁶ National Human Rights Commission v/s State of Gujarat and Ors.(2009) 6 SCC 767

³⁷ The State of Maharashtra vs. Bandu @ Daulat (2018) 11 SCC 163

³⁸ State of Maharashtra vs Praful Desai (2003 4 SCC 601)

³⁹ Maharashtra Witness Protection and Security Act, 2017

⁴⁰ Delhi Witness Protection Scheme, 2015

highlighted the necessity of witness protection programme in our country but the same was ignored. Therefore, Hon'ble Supreme Court in Mahender Chawla v. Union of India approved a Scheme called Witness Protection Scheme, 2018. As per the verdict, the Scheme shall be deemed as 'Law' within the ambit of Article 141 and 142 of the Constitution of India till any suitable law is incorporated by the Parliament.

The Scheme was framed with an objective to endow with adequate protection to the witness who is in need during the process of trial. The Scheme provides for the provision of witness protection by categorising the threat into three different categories. The witness shall be provided witness protections like witness identity protection, relocation, change of identity, financial assistance under the Scheme. The expenditure for providing protection under the Scheme shall be borne from the Witness Protection Fund' incorporated by the state governments.⁴¹

Hon'ble Supreme Court in its decision mandate that the Center, States and Union Territories shall enforce the Witness Protection Scheme, 2018 in letter and spirit. Moreover, the witness deposition centres shall be incorporated by the State governments and the Union Territories in each and every district and the plan of the Scheme shall be followed rigorously.⁴²

CONCLUSION

The purpose of the Criminal Justice System is to administer peace and harmony in society by maintaining the rule of law. This could be possible only when the justice is imparted to the victim and the wrongdoer is punished by following the due process of law. During the process of administering justice, the witness plays an imperative role. The witness cooperates with the courts by furnishing their testimony during the trial process. However, if the witness is threatened and forced to depose in favour of one of the party then it would not be termed as a fair trial followed by the due process. Therefore, it is the duty of the State to protect the rights of witnesses during the course of the trial so that they could depose their version in a free and fearless environment. Prior to the *Mahender Chawla's case*, there was no comprehensive policy on the protection of witness in India. Looking upon the gravity of the situation Hon'ble Supreme Court approved a Scheme called as Witness Protection Scheme, 2018 to provide protection to the witness during the trial. The Scheme is the first attempt in this regard and it shall be treated as Law till any appropriate law is framed by the Parliament.

⁴¹ *Mahender Chawla v. Union of India*, 2018 SCC OnLine SC 2679

⁴² *ibid*

The purpose of law shall be fulfilled only when it is implemented in its true sense. Therefore, Hon'ble Apex Court mandates the State government and Union territories to implement the Scheme in its true letter and spirit.