

NEED FOR WITNESS PROTECTION MEASURE IN INDIA: A CRITICAL ANALYSIS

by

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ABSTRACT

“The role of a witness is fundamental in the criminal justice system of any country. They are an indispensable aid in the justice dispensation system in any civilized society. By giving evidence relating to the commission of an offence they bring the criminal justice machinery into action. The inception of administration of justice is largely cantered upon witnesses coming forward and deposing without pressure or enticement before a Court of law. The very institution of the criminal justice system gets annihilated if witnesses are threatened and incapacitated from tendering substantive evidence to the Court. The criminal justice system must endeavour to accomplish the intricate balance of conflicting interests of the accused, the victim and the society. The necessity of fairness permeates in every practice and process of law. Due to this, the parties often threaten the witnesses, turning them hostile and interfering with the fair administration of justice. The main reason behind hostility is that the witness is threatened and being pressurized by the accused or his family members to offer testimony in his/her favour. This has turned to a miscarriage of justice. Therefore, there is a need to adopt a proper and effective witness protection policy in the country. Hence, it becomes very important to protect the witnesses so that they do not get intimidated or fear revealing the truth in court.”

This paper discusses the concept of witness protection, and talks about programmes in other common law countries. Further it analyses witness protection in India, the reasons for failure and finally suggestions to improve it. Hence, an earnest attempt is made in this research to highlight the necessity and importance of effective witness protection measures, with a special thrust on criminal justice dispensation.

KEYWORDS: Administration of Justice, Witness, Hostile Witness, Witness Security and Anonymity.

INTRODUCTION

Witness is regarded as the most indispensable part of the criminal justice system. He is the foundation on which the building of justice and equity rests and therefore inevitable. A witness in a criminal trial plays an important role on which the fate of the case depends as it is the backbone of the trial whether civil or criminal or any other trial. It is the witness who builds the case of the contesting parties by deposing before the court. 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 justice and hence the witness is made to offer statement under oath. The statement of witness may lead to 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 trial. It is not necessary that the witnesses must always depose in favour of prosecution and against the accused in a criminal trial. What is important and subject matter of concern is that a witness must depose without force, fear and pressure and out of his or her own free will and consent. The successful functioning of criminal justice system largely depends upon the readiness of individuals to furnish information and tender evidence without being threatened or lured.

However, the conditions relating to witnesses in India are highly deplorable. The witnesses in this country are no longer willing to come forward to offer testimony. 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. Witnesses are the cornerstones for successful investigation and prosecution of crime. In today's situation the matter of witnesses is turning hostile in sort of evident. The crucial half compete by the witnesses in transferral offenders to justice is central to any trendy criminal justice system, since the in conclusion of every stage in criminal proceedings from the initial reportage of the crime to the trial itself typically depends upon the cooperation of witnesses. Their role at the trial is especially necessary in adversarial system wherever the prosecution should prove its case by leading proof, typically within the sort of test of witnesses, which may then be challenged by the defence at a public hearing.

Furthermore, the research paper also discusses the concept of 'Fair Trial' under Article 21 of the Indian Constitution to be sine qua non to the Rule of Law under Article 14. The researcher discusses the Witness Protection Means provided in various statutes and the legal precedents. The Paper also discusses International Standards concerning Witness Protection and the Law Commissions' Report; securing law and order and dispensation of a trial in an effective and optimal manner.

STATEMENT OF PROBLEM

- ✓ What are the statutory norms, principles of law and settled position under the Code of Criminal Procedure, 1973 and other Laws in force concerning the Witness Protection Schemes in India?

AIM & OBJECTIVE OF THE STUDY

- ✓ To critically analyze the concept of 'Fair Trial' under Article 21 of the Indian Constitution, it being *sine qua non* to just criminal proceedings so as to forge procedural and substantive justice
- ✓ To pound over the issue of 'Witness Turning Hostile' and such Recommendations of the Law Commission of India concerning Witness Protection in India along with certain Case Studies.
- ✓ To highlight the various Statutory mandates concerning Witness Protection along with such legal precedents provided through various landmark judgements of the Indian Courts.
- ✓ To describe such International Standards concerning Witness Protection and certain unique modalities of the Witness Protection Scheme, 2018

RATIONALE OF THE STUDY

- ✓ To stress upon the issue of Witness Protection in India through a lens of Statutory dictum and legal precedents keeping into light the Law Commissions' Report, Concept of 'Fair Trial', International Standards and the 2018 Scheme.

RESEARCH HYPOTHESIS

- ✓ Witness Protection Scheme in India is an imperative essentiality for a Fair Trial in criminal adjudication; aims to facilitate a just, rule-based society, securing law and order and dispensation of a trial in an effective and sustainable manner.

RESEARCH QUESTIONS

- ✓ What are the statutory modalities under the Code of Criminal Procedure and other Statutes in regards to Witness Protection, such legal precedents and Law Commission's Report and International Standards aiming to secure Rule of Law under Article 14 of Indian Constitution.

RESEARCH METHODOLOGY

- ✓ **RESEARCH DESIGN:** The researcher follows the premise of the Exploratory Research Design and primarily focusses on the socio-legal means of strengthening efficient Justice Dispensation. The study '*in-toto*' is qualitative, descriptive and analytical in its nature.

- ✓ **METHOD OF DATA COLLECTION:** The researcher follows Doctrinal method of research requiring the compilation of relevant data from the specified databases in order to analyze the material and arrive at a more complete understanding of the Concept of Witness Protection in India and other considerations revolving around the said matter of socio-legal pertinence.
- ✓ An analysis of reports, documents, journals and other available resources within online databases were referred to.

WITNESS PROTECTION LAW: A CONCOMITANT IN RIGHT TO FAIR TRIAL

The primary object of criminal procedure is to bring offenders to book and to ensure a fair trial to accused persons. As held in the landmark case of **Rattiram v. State of M.P.**,¹ every criminal trial begins with the presumption of innocence in favour of the accused. In India, the provisions of the Code of Criminal Procedure, 1973 are so framed that a criminal trial should begin with and be throughout governed by this essential presumption.

The Supreme Court in yet another case of **Mohd. Hussain Julfikar v. The State (Govt. Of NCT)**² held that conducting a fair trial for those who are accused of criminal offences stands as the cornerstone of democracy. Conducting a fair trial is beneficial both to the accused as well as to the society. A conviction resulting from unfair trial is contrary to the concept of justice. Furthermore, in the case of **Nahar Singh Yadav v. Union of India**³, the Court observed that In India, Adversarial System of Law is followed wherein crime is required to be proved beyond reasonable doubt. In short, the system which we follow is accused centric. Right to fair trial in criminal prosecution is the fundamental Right of the accused read into the Article 21 of the Constitution by the judiciary. However, providing fair trial to the accused and examining witnesses in open court may provide him an opportunity to cause threat, inducement, promise in most sensational cases, which results in witness turning hostile.

Fair justice under Article 21 of the Indian Constitution is not difficult to comprehend in Criminal justice system, but due to various complexities it is difficult to obtain. Fair justice has various aspects like fair investigation, fair inquiry, expeditious and fair trial. Since India follows adversarial system of court proceeding where impartiality hold the key, it is important to note that procedural justice is the main cornerstone to achieve fairness. Procedural justice is the objective which ensures transparency during investigation and trial stage by implementing due procedure established by law. But there are

¹ (2012) 4 SCC 516

² Criminal Appeal No. 1091 of 2006.

³ (2011) 1 SCC 307

many important considerations that needs to be followed like responsible & vigilant role of government, police and public prosecutor to bring transformation in the administration of justice.

In the case of **Moti Lal Saraf v. Union of India**,⁴ the Court ruled that Fair trial has a wide connotation wherein inherent features like equal opportunity of representation from both sides, absence of delay or pendency of the cases are imperative. It is also expected in the adversarial court of proceeding that all possible kind of oral and documentary evidence should be heard, verified and cross-examined wherever possible. There is one crucial point, which has to be considered seriously that is vulnerable position of victim/witness during pre-trial, trial & post-trial stage.

The fate of the whole case or conviction depends on represented information given by witnesses. The whole principle of equity and natural justice rests on reliability and credibility of evidence provided by witness even in those cases where there is some sort of conflict of interest in existence of direct evidence and circumstantial evidence. So, it is quite evident of the fact that witness plays a very important and responsible role for any case in the dispensation of justice.

WHO IS A 'WITNESS'?

The word witness is not specifically defined in The Indian Evidence Act, 1872. But legislators tried to explain the concept of witness through Section 118 of Indian Evidence Act, 1872,⁵ where competent person can give testimony under declaration of oath. It means any person who is directly connected with the case who is aware about facts of case and know the accused or victim meaning thereby someone who has seen the incidents the case; or someone who is experienced in specific field with having specialized knowledge on general issues related to case.

Though, there are certain references in Criminal Procedure Code, 1973 related to preliminary stage of investigation where witness's role is important. It is described that police have power to call upon witness in police station for getting information related to facts & circumstances of case.⁶ A witness can be examined by police officer and he has to respond the questions in appropriate way that may be reduced in writing.⁷ However, statements made before police officer in the police station cannot be considered as prima-facie evidence for the simple reason, witness is only permitted to give evidence before judge in the Court of law as mentioned in Section 3 of Indian Evidence Act, 1872. But the

⁴ 2007 1 SCC [CRI] 180

⁵ Section 118 Indian Evidence Act 1872

⁶ Section 161 The Code of Criminal Procedure 1973

⁷ Section 162 The Code of Criminal Procedure 1973

relevancy of evidence procured through witness can serve the purpose of justice especially when it is made in the absence any kind of biasness, false, misleading & deceptive statements. That is why it is important to expedite the process of investigation & trial so that there won't be presence of sufficient time gap by which accused or close associate can use their undue influence to instill fear or pressurize witness.

CONCERNS OF 'WITNESSES' IN INDIA

There are certain issues which further aggravate complications for fair justice delivery system in India like lack of well-trained police officers, non-sensitivity of media over these issues, involvement of influential persons (politicians, mafia gangster) in high-profile cases, non-cooperation of the state with full sincerity due to lack of legal obligation, influence over witness through convincing methods like providing bribe, threat of any sort. Either of the above situations will directly or indirectly inculcate fear & intimidation in the mind of witness. As a consequence of it, witness will either lose his confidence in providing truthful information in the court or will abstain from presenting himself before court even after receiving summon.

With the same thought, the High court highlighted in the case of **Mrs. Neelam Katara v. Union of India & others**⁸ that it is the fundamental principle of justice that witness should testify before court of law by providing true facts without any fear or temptation. His truthful statement can decide the nature of the case through which guilt or innocence will be proved. But testimony under fear, undue pressure & temptation will vitiate the proceeding of the case, compromise with justice and detrimentally impact the societal harmony and public confidence in the criminal justice system.

In the case of **Swaran Singh v. State of Punjab**,⁹ Supreme Court highlighted the importance of witness in justice delivery system in general. The Court remarked that in many cases, witness has to face multiple ordeals in overall court proceeding starting from pendency of case, adjourning from one date to another, thus delaying the trial. Sometimes witness gets killed, beaten up as no specific protection is available to them. Sometimes they are unnecessarily harassed during cross-examination for a long period of time. So common people often try to maintain distance from court and investigating authorities. They don't turn up as witness.

The Committee on Reforms of Criminal Justice System under the chairmanship of Dr. Justice V.S. Malimath categorically emphasized on importance of legal relevancy of evidence procured through

⁸ ILR (2003) II Del 377

⁹ AIR 2000 SC 2017

witness. A sensible responsibility of witness is to provide assistance to the court in deciding conviction or innocence in case. He cannot refuse to respond questions during cross-examination. It is important for judge to have a bold and rational approach while deciding the matter so as to maintain impartiality throughout the trial. It is also necessary for judge to uphold justice by preserving the rights of victim so as to avoid the miscarriage of justice.

INTRODUCTION TO HOSTILE WITNESS: CASE LAWS

In recent times, the instances of witnesses turning hostile at trial due to threats is an unfortunate far-cry; lack of protective mechanism conceives fear and apprehension in the mind of a witness due to which they are unenthusiastic to cooperate in the court process. Retracting of previous statements by a witness results in breakdown of the trial. A witness is considered to be hostile when he gives a statement before police with respect to commission of an offence out of his knowledge but retracts it or changes his stance when deposing before the court during trial. While there is nothing to declare a witness as hostile under the Indian Evidence Act, Section 145 of the Act permits cross-examination of any witness as to previous statement made by him in writing. A witness is said to be hostile if he tries to suppress the truth thereby injuring the cause of the party that calls him. Such evidence should be discarded as unworthy of credit. However, as held in **Atmaram & Ors. v. State of Madhya Pradesh**,¹⁰ every inconsistency in the statement of a witness cannot be used to contradict the case of prosecution per se.

Hence, the Supreme Court in the case of **Zahira Habibullah**,¹¹ conclusively held that the State has a definite role to play in protecting the witnesses. 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. The witness must be able to depose the truth without any fear of being haunted by those against whom he had deposed.

STATUTORY PROTECTION TO WITNESS: POSITION UNDER INDIAN LAW

✓ Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA)

In **Kartar Singh v. State of Punjab**,¹² the Apex Court upheld the validity of Section 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;

¹⁰ (2012) 3 MLJ (CrI) 117 (SC).

¹¹ (2006) 3 SCC 374

¹² 1994 Cr.L.J. 3139 (SC)

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. The court further held that the right of the accused to cross-examine the prosecution witnesses was not absolute but was subject to exceptions.

✓ **The Prevention of Terrorism Act, 2002 (POTA)**

In **People's Union of Civil Liberties v. Union of India**,¹³ the Supreme Court considered the validity of Section 30 of The Prevention of Terrorism Act, 2002 which deals with 'protection of witnesses'. The court upheld the validity of the provision requiring 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. 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 disposition of the witness whose identity is sought to be protected.

✓ **Juvenile (Care and Protection of Children) Act, 2000**

Section 21 of the Act establishes rule against publication of name, address or other particulars relating to juvenile in conflict with law, which can lead to determination of identity of the juvenile. Disclosure of identity may be allowed in the interests of the juvenile provided permission is granted for the same by recording reasons in writing. Making any picture of the juvenile public is also prohibited.¹⁴ The idea is to strike a balance between the right of a witness as to his/her life and liberty and the right of the community in the effective prosecution of persons guilty of heinous criminal offences on the one hand and the right of the accused to a fair trial, on the other.

✓ **The Code of Criminal Procedure, 1973**

SEC 327(2): IN CAMERA TRIAL¹⁵

The Supreme Court in **State of Punjab v. Gurmit Singh**,¹⁶ held that if the witness or victim is protected it would enable the victims of crimes to be a little comfortable and answer the questions with greater ease in not too familiar surroundings.¹⁷ Trial in camera would not only be in keeping the self-respect of the victim of (the) crime and in tune with legislative intent but is also likely to improve the

¹³ 2003 (10) SCALE 967

¹⁴ Section 21(1) The Juvenile (Care and Protection of Children) Act 2000

¹⁵ Section 327 The Code of Criminal Procedure 1973

¹⁶ 1996(2) SCC 384

¹⁷ Sec 376 and 376A to 376D of Indian Penal Code 1861

quality of evidence of a prosecutrix because she would not be so hesitant or bashful to depose frankly as she may be in the open court, under the gaze of (the) public. The improved quality of her evidence would assist the court in arriving at the truth and sifting truth from falsehood.

SECTION 299¹⁸

Section 299 lays down the right of accused to cross-examine the prosecution witnesses. In certain exceptional circumstances where the accused is absconding and cannot be produced before the court, the section provides for examination of witnesses by the prosecution in the absence of the accused. Hence, the accused is lawfully denied his right to cross-examine a prosecution witness in an open court

SECTION 312¹⁹

Any Criminal Court may, if it thinks fit, order for the payment of the reasonable expenses of any complainant or witness attending for the purposes of any inquiry, trial or other proceeding.

SECTION 195A²⁰

Where a witness or any person is threatened or induced to give false evidence in relation to any offence, Section 195A empowers such a person to file a complaint.

✓ INDIAN PENAL CODE

Section 228A of the IPC²¹ lays down the provisions barring the publishing of identity of the victim of certain offences relating to rape while providing for certain circumstances under which the identity can be disclosed. Hence, social object of preventing social victimization or ostracism of the victim of a sexual offence stands as the utmost consideration.

Section 191²² also discusses about the offence of Perjury or giving false evidence wherein, a person who is legally bound by an oath or by an express provision of law and mandated to state the truth if make any statement which is false, and which he either knows or believes to be false or does not believe to be true, is said to give false evidence.

¹⁸ Section 299 The Code of Criminal Procedure 1973

¹⁹ Section 312 The Code of Criminal Procedure 1973

²⁰ Section 195A The Code of Criminal Procedure 1973

²¹ Section 228A Indian Penal Code 1860

²² Section 191 Indian Penal Code 1860

Section 195A²³ provides that any person who threatens another with any injury to his person, reputation or property or to any interested person of his/her with intent to cause that person to give false evidence shall be punished with imprisonment for a term extendable to seven years, or with fine, or with both.

JUDICIAL DIRECTIONS & GUIDELINES FOR THE PROTECTION OF WITNESSES

National Human Rights Commission v. State of Gujarat and Ors.²⁴ – The Apex Court in this landmark judgement discusses the aspect of a fair trial. It was mentioned that if the witness is not able to depose freely in the court of law then the very purpose of trial gets frustrated. Therefore, the court should adopt a mechanism to ensure that the witness should be provided with an environment wherein he could be able to submit his testimony without fear. Following are the guidelines:

JUDICIAL TREND: A SYNOPSIS

It is the foremost function of the State and of the Court of law to conduct a free and fair trial and come to a final verdict after pursuing all the records presented. The Judge has a quintessential role to play in ensuring the same. The role of a Judge is to strike a fair balance between the rights of the accused as well as the victims. In order to achieve the same, the Judge should see to it that the witnesses are not intimidated or influenced to manipulate their deposition before the court. Where the witnesses are pressurized, the trial is reduced to a mere travesty of the criminal justice system. The judiciary has time and again commented on the dire need and significance of witness protection in India.

In **Swaran Singh v. State of Punjab**,²⁵ the Supreme Court emphasized on the pitiful condition of witnesses. The Apex Court stated that witnesses come from far off places to depose before the court only to see the matter adjourned multiple times. They are subjected to prolonged examinations, not given place to sit in the courtroom and harassed a lot throughout the trial. Alarmed by the rising cases of witnesses turning hostile, the Supreme Court in the **Best Bakery case**²⁶ expressed concern that merely showing concern without taking any positive action amounts to betraying public trust in the system. With respect to measures for doing away with confrontation with the accused, in **Sakshi v. Union of India**,²⁷ use of trial cameras was suggested as a measure to offer protection to victims of

²³ Section 195A Indian Penal Code 1860

²⁴ (2009) 6 SCC 767

²⁵ (2000) 5 SCC 68 at 678

²⁶ (2006) 3 SCC 374

²⁷ (2004) 5 SCC 518.

sexual offences. In the historical case of **State of Maharashtra v. Praful Desai**,²⁸ the Supreme Court held that witness examination through video conferencing is valid in certain cases and the same falls under 'procedure established by law' under Article 21 of the Constitution. Further, as held in **A. K. Roy v. Union of India**,²⁹ where disclosure of the identity of the witness may be detrimental to public interest and aborts the very process of administration of justice, an effective hearing can be undertaken sans cross examination of the witness by the accused person. These rulings will go a long way in protecting the rights of victims and witnesses.

In order for a trial to be fair, it must be conducted in harmony and unanimity. In **G.X. Francis v. Banke Bihari Singh**,³⁰ the Supreme Court opined that if reasonable grounds are made out, transfer of the case should be allowed so as not to undermine the public confidence in the fairness of the trial. As held in yet another case of **Maneka Sanjay Gandhi v. Rani Jethmalani**,³¹ A friendly ambience for fair and unprejudiced trial is quintessential.

Balancing the right of an accused to an open trial and the right of a witness to maintain anonymity, the Supreme Court thus, in **Naresh Shridhar Mirajkar. v. State of Maharashtra**³² held that an order to prevent the publication of evidence given by a witness is valid provided it was passed with an aim to obtain true evidence in the matter and assist the administration of justice. In cases where the threat to a witness persists even after the trial, owing to certain conditions, the authorities may extend the protection accordingly.³³

REFERENCES

Indian Statutes:

- ✓ Indian Penal Code, 1860
- ✓ The Indian Evidence Act, 1872
- ✓ The Code of Criminal Procedure, 1973
- ✓ Juvenile (Care and Protection of Children) Act, 2000.
- ✓ Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA)
- ✓ The Prevention of Terrorism Act, 2002 (POTA)

²⁸ (2003) 4 SCC 601

²⁹ AIR 1982 SC 710

³⁰ AIR 1958 SC 209

³¹ (1979) 4 SCC 167.

³² 1966 SCR (3) 744.

³³ Paramjit Kaur v. State of Punjab, (2008) 152 PLR 185.

Articles:

- ✓ Thakur, Rustam Singh, Evidentiary Value of Hostile Witness: Chronological Case Law, Study to Address Current Position in India Available at SSRN: <https://ssrn.com/abstract=1985129>
- ✓ Manoj Mitta, Urgent Need for a Witness Protection Programme: Law Panel Tells Govt., available at <<http://www.indianexpress.com/oldstory.php?storyid=53483>>
- ✓ N . VARGHESE, Witness Protection: Problems Faced and Need for a Protection Programme in India, Available from <<http://www.lawctopus.com/academike/witness-protection-problems-faced-and-need-for-a-protection-programme-in-india/>>
- ✓ Fali S. Nariman, Complexities of Witness Protection, available on <<http://www.hindu.com/2007/03/27/stories/2007032702731100.htm>>
- ✓ H. Suresh, New Law Needed for Witness Protection, Combat Law, Vol. 4, Issue 1, April-May 2005, available at <www.indiatogether.org/combatalaw/vol4/issue1/witness.htm>
- ✓ Suprio Bose, “Hostile Witness: Critical Analysis of Key Aspects Hitherto Ignored in Indian Law” available on www.Legalserviceindia.com/article
- ✓ Justice Malimath committee- Government of India, Report on Reform of Criminal Justice System, 2003, Vol. I, p. 151.
- ✓ United Nations Office on Drugs and Crime report on Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime
- ✓ M.P. Nathanael, A law for those who testify, The Hindu <https://www.thehindu.com/opinion/op-ed/a-law-for-those-who-testify/article29127685.ece>.
- ✓ Abhinav Garg, HC issued first guidelines on Neelam Katara plea, Times Internet, <https://timesofindia.indiatimes.com/city/delhi/HC-issued-first-guidelines-on-Neelam-Katara-plea/articleshow/48288461.cms>.
- ✓ Ananya Sengupta, Call for cover to witnesses, The Telegraph <https://www.telegraphindia.com/india/call-for-cover-to-witnesses/cid/1511425>.