

## WITNESS AND HOSTILE WITNESS: EMERGING ISSUES AND CHALLENGE

Mr. Aakash Chaturvedi<sup>1</sup> and Ms. Shivangi Sharma<sup>2</sup>

---

### ABSTRACT

*The word 'Evidence' has been derived from Latin word 'evidere' which implies to show distinctly, to discover clearly, to make plainly certain. The Indian Evidence Act was originally passed in India by Imperial Legislative Council in 1872 during British Raj which contains set of rules and allied issues governing admissibility of evidence in Indian courts of law. The law is mainly based on firm work by Sir James Stephen who could be called Founding Father of this legislation. The article is concerned with contemporary development of Evidence Law. The author will be particularly dealing with witness who plays a significant role in helping the court in dispensing justice. Witness is eyes and ears of justice. It is through witnesses and documents that evidences are placed before the court. A witness is a person who gives evidence or testimony before any tribunal. Section 118 of Indian Evidence Act lays down all persons are competent to testify unless court considers that they are prevented from understanding of question. In this paper, three points will be discussed namely Witness Protection Scheme, Hostile witness and Perjury.*

### INTRODUCTION

The term evidence is derived from Latin word 'evidere' which means "to show, to ascertain, to prove". The Indian Evidence Act was originally passed in India by Imperial Legislative Council in 1872 during the British Raj which contains set of rules and allied issues governing admissibility of evidence in Indian Courts of Law. The law is mainly based upon firm work by Sir James Stephen who could be called founding father of this comprehensive piece of legislation. Main principle which underlie law of evidence are

1. Evidence must be confined to matter in issue
2. Hearsay evidence must not be admitted
3. Best evidence must be given in all case

---

<sup>1</sup> Student of B.Com LL.B (Hons.), Dr. Shakuntala Misra National Rehabilitation University, Lucknow, UP.

<sup>2</sup> Student of B.Com LL.B (Hons.), Dr. Shakuntala Misra National Rehabilitation University, Lucknow, UP.

Witness through ages has been a key player in helping court to dispense justice. The fundamentals of justice necessitate that truth and unbiasedness must be the basis of justice. This brings the role of third party as witness to the scene and to confirm accuracy of evidence. Calling of witness to offer his testimony in a case is not a new or modern idea and advancement. It was present even in ancient India. Kautilya in his famous work 'Arthashastra' said "The parties shall themselves produce who are witnesses and who are not for removed either by time or place. Witnesses who are away or who will not stir out shall be made present themselves by order of judge"<sup>3</sup>

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 witness. According to Hindu Dharma Shastras the purpose of trial is the desire to find out the truth. Yajnavalkya says: "*Discarding what is fraudulent: the King should give decisions in accordance with the true facts.*" In order to discover the truth from the contradictory claims made by two parties in a case the Hindu law giver took every possible precaution. The Shastras enjoined 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 the transaction or incident giving rise to the case as well as the usages of the country, and pronounce the true judgement.*" Vasistha recognized three kinds of evidence: Likhitam Sakshino Bukhti Parmanam Trividham Smritham i.e.

1. Lekhya (Document)
2. Sakshi (Witness)
3. Bukhthi (Possession)

## HISTORICAL BACKGROUND

The law of evidence was also prominent during Muslim period. Often there is no true conception especially in the South of the highly developed Muslim rules of evidence and prejudice prevails.<sup>4</sup> The Al-Quran lays great stress on justice. It holds that the creation is founded on justice and that one of the excellent attributes of God is "just". Consequently the

---

<sup>3</sup> Kautilya, Arthashastra, Book I, Chapter 11, Verse 50; Kangle, Kautilya Arthasatsra(University of Bombay) (1970) Part IInd, page 230

<sup>4</sup> Woodroffe, Sir John and Syed Amir Ali, "*Law of Evidence*", Vol-1 17<sup>th</sup> Edition, New Delhi: Butterworths India, 2002, page 19

conception of Justice in Islam is that the administration of justice is a divine dispensation. Therefore, the rules of evidence are advance and modern.

The Muhammadan law gives deal with evidence under the heads of oral and documentary, the former being sub divided into direct and hearsay. There was a further classification of evidence in the following order of merit, viz., full corroboration, testimony of a single individual and admission including confession. In regard to oral evidence, the Quran enjoins truthfulness. It says “O true believers observe justice when you appear as witnesses before God, and let not hatred towards any induce you to do wrong: but act justly: this will approach nearer unto plenty, and fear God, for God is fully acquainted with what you do.”<sup>5</sup>

Before the introduction of Indian Evidence Act, there was no systematic enactment on this subject. The English rules of evidence were always followed in the courts established by the royal charter in the presidency towns of Calcutta, Madras and Bombay. “Such of these rules, as were contained in the Common Law and the Statutory Law, which prevailed in England before 1726, were introduced in presidency towns by the Charter”<sup>6</sup> The British rulers, though they do not have any codified or consolidated law of evidence in their country, thought fit to frame some rules to be followed by the courts in India. During the period of 1835 A.D. to 1853 A.D., a series of Act were passed by the Indian legislature introducing some reforms of these Acts which superficially dealt with the law relating to the witness are summarized as follows:

1. Lord Denman’s Act<sup>7</sup> provides that no witness should be schedule from giving evidence either in person or by deposition by reason of “incapacity for crime interest”
2. The same Act<sup>8</sup> declares that the parties to the proceedings their wives or husband and all other person capable of understanding the nature of oath and the duty to speak the truth, as competent to witnesses in the country courts
3. Lord Broughams Act<sup>9</sup> declared that the parties and the person on whose behalf any suit, action or proceeding many be brought or defended , are competent as well as compellable to give evidence in any court of justice.

---

<sup>5</sup> Holy Quran, Chapter 5, verse 8

<sup>6</sup> Bunwaree v. Het Narain 7, MIA 148

<sup>7</sup> 6 and 7 Vic. C.85 of 1843

<sup>8</sup> 9 and 10 Vic. C.95 of 1843

4. Lord Broughams Act of 1853<sup>10</sup> made husband and wives of parties to the records competent and compellable witnesses.

5. Act XIX of 1834 abolished the incompetence of the witness by reason of a correction for criminal offences.

In the year 1870, Sir James Stephen prepared a new bill which was passed by the parliament in 1872 which codified consolidated the rules relating to admissibility of fact competency of witness, examination and cross examination.

## **WITNESS**

The Halsbury's Law of India has classified witness into different categories

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

## **WITNESS UNDER INDIAN EVIDENCE ACT**

A witness is a person who gives evidence or testimony before any tribunal. Section 118 of Indian Evidence Act lays down who may testify. Section 118 states that all persons shall be competent to testify<sup>11</sup> unless court considers that they are prevented from understanding questions, by tender years, extreme old age, disease, whether of body or of mind, or any other cause of same kind. Chapter IX titled 'OF WITNESSES' of the Indian Evidence Act, 1872 consists of seventeen sections spreading from Section 118 to 134 which deals with

- Competency
- Compellability
- Privileges
- Quantity of Witnesses required for judicial decisions

---

<sup>9</sup> 14 and 15 Vic. C.95 of 1843

<sup>10</sup> 6 and 17 Vic. C.83 of 1852

<sup>11</sup> Man Kaur v. Hartar Singh Sanghe, (2010) 10 SCC 512.

Section 118 to 121 and Section 133 of the Act deals with competency of the witnesses whereas Section 121 and Section 132 provides for compellability of witnesses. Section 134 of Indian Evidence Act, 1872 lays down that no particular number of witnesses is required for proof of any fact. Section 134 lays down the well-recognized maxim that Evidence should be weighed and not counted.<sup>12</sup> There is a general rule that a witness who is competent is all compellable. But competency of a witness is distinguished from his compellability and from privilege. There are cases where a witness is competent but not compellable to give evidence. For example, sovereign and ambassadors of foreign states (Section 125 and 133).<sup>13</sup> A witness maybe compellable to give evidence but at the same time he may be privileged or protected from answering certain questions.<sup>14</sup> Generally speaking oral testimony of a witness maybe classified into three categories: wholly reliable; wholly unreliable; neither wholly reliable nor wholly unreliable.<sup>15</sup> As the name itself suggests, in first and second category of proof the court has no difficulty in coming to its conclusion. The problem comes in the third category of cases that the court has to be circumspect and to look for corroboration in material particulars by reliable testimony, direct or circumstantial.<sup>16</sup> There are four ways by which a trial can hold a witness unworthy of belief:

1. The statement of the witness is inherently improbable or contrary to the course of nature.
2. The witness deposition contains mutually contradictory or inconsistent passage
3. The witness possesses ample motive for wishing the opposite party harm and is his bitter foe.
4. The outward behavior or bearing of the witness whilst under examination is found abnormal or unsatisfactory.<sup>17</sup>

The evidence of a witness has to be judged mainly and broadly on the strength of the nature of the evidence he has given in a case and not so much as to how he has been able to impress the court while in the witness box.<sup>18</sup> It is very rare to come across the testimony of a witness which does not even have fractional amount of untruth. It is the work of court to separate

---

<sup>12</sup> YS Rao Judge, "Basic Principles and Rules of Law of Evidence", published in [www.legalserviceindia.com](http://www.legalserviceindia.com) on 16 January, 2016.

<sup>13</sup> Phipsons' Evidence, 13<sup>th</sup> edition, page 690; Bank Officers Section 5 of the Bankers' Evidence Act

<sup>14</sup> Section 122, 124, 125 and 129 of the Evidence Act, 1872

<sup>15</sup> Vadivelu Thevar v. State of Madras, AIR 1957 SC 614

<sup>16</sup> State of Punjab v. Tarlok Singh, AIR 1971 SC 1221

<sup>17</sup> 1957 Cri LJ 32

<sup>18</sup> Koli Nana Bhana v. State of Gujarat, 1986 Cri L.J.

chaff from the grain and accept what seems to be true and correct and accordingly reject the rest. A witness need not to be hundred percent accurate.

The Hon'ble Supreme Court has held that the maxim *falsus in uno, falsus in omnibus* i.e. false in one thing, false in everything, is neither a sound rule nor a rule of practice.<sup>19</sup> It is quite obvious that a witness is not a tape record. He cannot remember each and every word. In country like India where cases carry on for longer period of time such an act is quite obvious. Hugo Munsterberg in his book *On the Witness Stand* talked about the memory of witness. He said that even though a person may have a good memory, there are a series of things (confusions, illusions, forgetting, wrong conclusions, and suggestion) that came into play when he was a witness. He went further to say that this not only happened him, but also happens all the time to other witnesses around the world. Witnesses mix up truth and untruth and come up with wrong conclusions. He was an example of this.

Munsterberg goes on to talk about the different types of memory. To him, memory could be grouped as visual, acoustical, and motor types. Individuals may have excellent memory for one type, but may fail when they have to rely on another form. Still another attribute of memory is that there are variations in memory, which can be discriminated. And with this Munsterberg said that the courts will have to learn to take individual differences into account when interviewing on the witness stand because no two witnesses will be able to come up with the exact same conclusion.<sup>20</sup> The Hon'ble Supreme Court in observed in a case about certain presumptions regarding an ordinary witness<sup>21</sup>

1. By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident.
2. A witness maybe overtaken by events. The mental faculties therefore cannot be expected to be attuned to absorb the details.
3. The power of observation varies from person to person.
4. People cannot recite the exact words and it is unrealistic to expect a human to be human tape recorder.
5. In respect to time duration or happening of an incident people give a probable time. The time sense varies from person to person.

---

<sup>19</sup> Ugar Ahir V. The State of Bihar, AIR 1965 SC 277: (1965)1 Cr LJ 256

<sup>20</sup> Hugo Munsterberg's "On the Witness Stand" 123 [www.HelpMe.com](http://www.HelpMe.com) 31 January, 2016.

<sup>21</sup> Bhogin Bhat Kirji v. State of Gujarat 1983 Cri L.J. 1096 (S.C.)

6. A person may get confused when there are series of event which took place and may get confused when interrogated later on or in future.
7. The other problem is very common one. Most of the people fear the atmosphere of the court and cross examinations by the counsel and in this process they may get confused.

## PROBLEMS FACED BY THE WITNESSES

The present judicial system has completely taken the witness for granted. Witness are summoned to the court regardless of fact that they may not have enough money, they cannot leave their family, they can be from remote areas and reaching the court every now and then may not be easy for them to appear before the court. But that's not all. On reaching the Court, some are told that case has been adjourned and they are given a further date to appear in the court and the certainty that on the next allotted date the case will not be adjourned is probably zero.

The Hon'ble Supreme Court criticized such act in the case of *State of Uttar Pradesh v. Shambhu Nath Singh*<sup>22</sup> "Witness tremble on getting summons from Courts, in India, not because they fear examination or cross examination 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 Court awaiting their chance of being examined. The witnesses, perforce, keep aside their avocation and go to the Courts and wait for hours to be told at the end of the day to come again and wait and wait like that. It is high time that trial Courts should regard witnesses as guests which are 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 litigants themselves...The only casualty in the aforesaid process is criminal justice."

Not only this, in order to get rid of the cross examinations as early as possible witness often retract from their previous statement i.e. that turn hostile which results in acquittal of the accused. Mr. Soli Sorabjee, the former Attorney General said, "Nothing shakes public

---

<sup>22</sup> (2001) 4 SCC 667

confidence in the criminal justice delivery system more than the collapse of the prosecution owing to witnesses turning hostile and retracting their previous statements.”<sup>23</sup>

## HOSTILE WITNESS

A criminal case is built upon the edifice of evidence that is admissible in law. For that witnesses is required. It is submitted that justice must not only done but must be seen to be done. Free and fair trial is the very foundation of criminal jurisprudence. There is apprehension in mind of majority of public that the trial is neither free nor fair with the prosecutor appointed by the State Government conducting the trial in a manner where frequently the prosecution witness turns hostile. Today the Indian criminal justice system is facing problems of low conviction rate. In today's scenario the problem of witnesses turning hostile is quite evident.

Witnesses play a crucial part in bringing offenders to justice, successful conclusion of each stage from initial reporting of crime to the trial usually depends on the cooperation of witnesses. Their role becomes even of more importance in adversarial legal system where prosecution must prove its case by leading evidence, often in form of oral examination of witnesses, which can be then challenged by the defense at a public hearing.<sup>24</sup> The witnesses assist the court in discovering the truth. But the witness turning hostile is a common scene in criminal justice system today. The whole case of prosecution shatters when the witness turns hostile and retract from his previous statement. The result is that more and more citizens are losing their faith in the effectiveness of the system in providing justice to the victims. As long as the witnesses continue to go hostile and do not make truthful depositions in court, justice will always suffer and people's faith in efficacy and credibility of judicial process will continue to be eroded and shattered.<sup>25</sup>

It can demolish the most painstakingly constructed cases, it can waste the precious time of courts, and it can lead to acquittal of the criminals making a mockery of the investigative purposes. It's the problem of witness turning hostile.<sup>26</sup> The term 'hostile' has its genesis in Common Law. Witness play a significant role in helping court to dispense justice but

---

<sup>23</sup> The Indian Express, October 26, 2003, The Columnists, Witness Protection by Soli Sorabjee

<sup>24</sup> Mackarel Mark, Raitt Fiona and Moody Susan, "Briefing paper on Legal Issues and Witness Protection in Criminal Case" Scottish Executive, Central Research Unit, 2001

<sup>25</sup> Mukherjee Subhrarag and Arya Vatsal, "Independent Witnesses: A Legal Crisis in India". 2004, Cri. L.J.186 (S.C.)

<sup>26</sup> Mamta Chatterjee, "Problem of Witness Turning Hostile", published in [www.legalserviceindia.com](http://www.legalserviceindia.com)



problem occurs when they become hostile. Generally, a witness is said to be hostile when he furnishes a certain statement about commission of crime before the police but contradict it when called as witness before the court during the trial.

The term 'hostile witness' does not find any mention in any of the Indian laws whether it be Indian Evidence Act or Code of Criminal Procedure or any other law. Hostile means adverse, unfavorable or alien. These words have been borrowed from the British Law. The term hostile witness was first coined in the Common Law to provide the adequate safeguard against the 'contrivance of an artful witness' who willfully by hostile evidence ruin the cause of the party calling such a witness. Such actions not only fetter the interest of litigating parties but also the quest of the courts to meet the ends of justice. To initiate the safeguard it was imperative to declare such a witness 'hostile'.

For this purpose Common Law laid down certain strangeness of a hostile witness such as 'not desirous of telling the truth at the instance of the party calling him' or "the existence of 'hostile animus' to the party calling such a witness."<sup>27</sup> The Wikipedia Encyclopedia defines the 'hostile witness' as a witness in trial who testifies for the opposing party or a witness who offers adverse testimony to the calling party during direct examination. A witness called by opposing party is presumed hostile.<sup>28</sup> Atri Ajit<sup>29</sup> defines hostile witness as 'an adverse witness in a trial who is found by the judge to be hostile (adverse) to the position of that party whose attorney is questioning the witness, even though the attorney called the witness to testify on behalf of his/her client.

Hostile witness is a witness who testifies for the opposing party or a witness who offers adverse testimony to the calling party during direct examination. So a hostile witness is one who from manner in which he gives evidence shows that he is not desirous of telling the truth to the court.<sup>30</sup> The hostile witness is also called 'adverse witness' as he weakens the case of the side he was supporting. It is the attorney who urges the Judge to declare the witness as a hostile witness. It is the court and no other than the court who has the authority to declare a witness hostile. It has to be kept in mind that the court itself cannot declare a witness hostile but it can only be done on the request made the prosecution attorney.

---

<sup>27</sup> Bose Suprio, "Hostile Witness: A Critical Analysis of Key Aspects Hitherto Ignored in Indian Law", published on [www.legalserviceindia.com](http://www.legalserviceindia.com)

<sup>28</sup> [en.wikipedia.org/wiki/Hostile\\_witness](http://en.wikipedia.org/wiki/Hostile_witness)

<sup>29</sup> Atri Ajit, "Hostile Witness: Not Sufficient to earn acquittal", 2008 Cri. L.J.(Jour.) 191

<sup>30</sup> Panchanan Gogai v. Emperor, (1930) 57 Cal 1566

In *Sat Pal v. Delhi Administrator*<sup>31</sup> the Hon'ble Supreme Court tried to define hostile witnesses and laid that to steer clear controversy over the meaning of hostile witness, adverse witness, unfavorable witness which had given rise to considerable difficulty and conflict of opinions, the authors of Indian Evidence Act, 1872 seem to have advisedly avoid the use of any of those terms so that in India the grant of permission to cross examine his own witness by party is not conditional on the witness being declared adverse or hostile.

The Supreme Court in *Gura Singh v. State of Rajasthan*<sup>32</sup> defined hostile witness as one who is not desirous of telling the truth at instance of the party calling him. The principles dealing with hostile witness are encompassed in Section 154 of the Indian Evidence Act, 1872. A witness is not necessarily hostile if he is speaking the truth and his testimony goes against the party calling him. A witness's primary duty is to tell truth and not desirous of telling the truth at instance of the party calling him. The principles dealing with hostile witness are encompassed in Section 154 of the Indian Evidence Act, 1872. A witness is not necessarily hostile if he is speaking the truth and his testimony goes against the party calling him. A witness's primary duty is to tell truth and not to back the party calling him. It has to be understood that a hostile witness is not necessarily a false witness. Merely because one part of statement of witness was not favorable to the party calling him, the Court should not readily conclude that he was suppressing truth or that his testimony was adverse to that party.<sup>33</sup>

Hostility is one form of perjury. There are 3 specific prerequisites to judge degree of hostility of witness under Section 191 of IPC which are as under 1. Whether there is legal obligation to state truth or not; 2. Whether there is any making of false statement; and 3. Whether there is any belief in falsity.

## THE SCOPE OF STATUTORY AUTHORITY

In a criminal trial a witness is declared hostile with the permission of the court when he does not confirms previous statements given by him but such declaration is not the requirement of law or Section 154 of the Indian Evidence Act 1872. If a testimony of a hostile witness inspires confidence or evolves presumptions to guilt of accused a conviction maybe awarded

---

<sup>31</sup> AIR 1976 SC 294

<sup>32</sup> AIR 2001 SC 330

<sup>33</sup> B M Prasad, Manish Mohan, The Law of Evidence, 25th Edition, Lexis Nexis, Delhi, 2013, 779

by court as is averted by the Supreme Court. It is a misunderstood notion that just because of a witness turned hostile his entire evidence should be excluded of the consideration. It is for the court of the fact to consider in each case whether as result of such cross examinations and contradiction the witness stands discredited or can still be believed in regard to any testimony of such witnesses if that part is found to be credit worthy.

## **BRIEF ANALYSIS OF SECTION 154 OF THE INDIAN EVIDENCE ACT, 1872**

The courts are under legal obligations to exercise the discretion vested in them by proper application of mind and keeping in view the attending circumstances. The permission of cross examination under Section 154 of the Indian Evidence Act should not be granted at merely party calling the witness. A close and critical observation of Section 154:

1. The provision merely talks about allowing such questions which can be asked in the cross examination.
2. The law has nowhere mention the need to declare the witnesses as hostile before the provision can be recalled.
3. The judicial consideration is only to be invoked when the court feels that “the attitude disclosed by the witness is destructive of his duty to speak the truth.”

The Common Law seeks to categorize witness as “hostile” or “adverse” for the purpose of cross examination but the Indian law strives not to make such a distinction. All the law seeks to reduce undiscovered facts for the sole purpose of determining the truth.

## **FACTORS RESPONSIBLE FOR WITNESS TURNING HOSTILE**

Today the main reason for the high acquittal rate in our criminal justice system is the witness turning hostile. In order to get rid of the cross examination as early as possible either the witness will give false statement or to make the matter even worse will turn hostile. 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. Hostile Witnesses- 26 per cent
2. Hostile Victims- 27 per cent

### 3. Lack of abysmally low at 6.8 per cent

“It was an avowed task of the police and the prosecution to protect the witness earlier. Now it does not appear to be so. That is why witness after witness turning hostile while deposing for the state.”(The Supreme Court)<sup>34</sup> A witness may turn hostile for various reasons. It is combination of muscle power and money, threat, inducement by various means and one of the major is the absence of witness protection schemes i.e. protecting the witness during and after the trials. Some of the elements responsible for witness turning hostile can be following<sup>35</sup>

1. Disinclination to get involved with court proceedings.
2. Fear of criminals or anti-social elements like goons. A witness turning hostile is either due to allurement or threats to witnesses. Commonly threat plays a prominent part in forcing a witness in retracting from his statements.
3. Sympathetic attitude towards accused.
4. Lack of civilized sense in public.
5. High rate of bribe and corruption.
6. Non implementation of penal laws.
7. Delhi High Court has observed that lot of witness are turning hostile due to intimidation and threats.
8. Political pressure, fear of police and legal system, absence of fear of perjury, an unsympathetic law enforcement machinery being some other factors.

Thakur. J (2001)<sup>36</sup> 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 is also ‘stock’ witness or ‘pocket’ witness with police and they are planned to go hostile only.

Common causes for hostility can be summed up as following:

#### 1. ABSENCE OF WITNESS PROTECTION PROGRAMS:

In India it is a common problem that many witnesses do not come forward to give their testimony either due to unreasonable delay in police or court proceedings. Sometimes they

---

<sup>34</sup> Paliwal, Anand , “Witness Protection Program- Necessary to Ensure Justice”, 2008 Cri. L.J. (Jour) page 113

<sup>35</sup> “Hostile Witness and Efficacy of Law”, article was published on [www.legalserviceindia.com](http://www.legalserviceindia.com).

<sup>36</sup> From the Lawyers Collective, August 2001

also do not come forward because they face threat calls or warnings. The need for comprehensive witness protection legislation has been long felt in India. In most of the cases witnesses are threatened or injured sometimes even murdered before giving testimony in Court. In *Swaran Singh's* case, the Apex court also observed, "not only that a witness is threatened; he is maimed; he is done away with; or even bribed. There is no protection for him."<sup>37</sup> The threat to the lives of witnesses is the primary reason for them to retract from their previous statements recorded during the trials. Section 151 and 152 of the Indian Evidence Act, 1872 protects the witness from being asked indecent, scandalous, offensive questions and questions likely to insult or annoy them. Apart from that there are no provisions in law to safeguard and protect the witness from external threats, inducement or intimidation.

## 2. DELAYED AND EXTENSIVE TRIALS:

Apart from absence of program relating to witness protection another major reason for retracting of witnesses is delayed and extensive trials. The judicial process works very slowly. Every time the witness reaches the court for cross examination he is told that case has been adjourned and he is given a further date to appear. This results in frustrating of the witness and he then decides to turn hostile and get rid of the all the troubles for once and all.

In *Swaran Singh's* case, the Hon'ble Supreme Court said:<sup>38</sup> "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 the adjournments for one excuse or the other till a witness is won over or is tired....in adjourning the matter without any valid cause a Court unwittingly becomes party to miscarriage of justice. A person abhors becoming a witness. It is the administration of justice that suffers." The evil of incessant adjournments has plagued the Indian judiciary for long. They are the one of the main reason for causing hardships and inconvenience to the witnesses and the parties. They are required to visit the courts repeatedly from long distances at their own expense. Sometimes they cannot travel long distances leaving their family or they may not have enough money. This causes frustration for the witness and therefore gives an opportunity to the opposite party to threaten or induce them not to speak the truth.<sup>39</sup> Now if he does not turns up at the fixed date, harsh measures are initiated against him. Now if he does not turns up at the fixed date, harsh

---

<sup>37</sup> *Swaran Singh v. State of Punjab* 2000 Cri L.J. 2780 (S.C.)

<sup>38</sup> *Id.*

<sup>39</sup> 178<sup>th</sup> Law Commission Report, 2003, page 142

measures are initiated against him. The Report of the Justice Malimath Committee on Criminal Justice Reforms suggested that the Section 309 of the Cr. P.C. which regulates adjournments should be made amended to make it obligatory to award costs against the party who obtains adjournments.<sup>40</sup>

### 3. DEFAULTS IN PAYMENT OF ALLOWANCES

The Law Commission of India 154th Report<sup>41</sup> observed that the allowances paid to witness for appearing before the courts is inadequate and called for a prompt payment, whether they are examined or not. Section 312 of the Cr. P.C. says that “subject to any rules made by the State Government, any Criminal Court may “if it thinks fit, order payment, on the part of Government, of the reasonable expenses of any complainant or witness attending for the purpose of any inquiry, trial or other proceeding before such Court under this Code.” However, in the most cases proper diet money is not been paid to the witnesses.

### 4. LACK OF ADEQUATE FACILITIES IN THE COURTS

Despite the crucial and important role played by the witnesses in criminal trials, the facilities which are being provided to them are minimal and insufficient. The 14th Law Commission Report<sup>42</sup> highlighted that in several States, the witnesses are made to wait under trees in Court campuses, or in the verandas of court houses. They are not protected from vagaries of the weather. Even the sheds of the courts are dilapidated.

## CONSEQUENCES OF WITNESS TURNING HOSTILE

The social and legal consequences of witness turning hostile are<sup>43</sup>

**(a) Perjury:** Under Section 191 of Indian Penal Code, as person is legally bound to answer a question truly, not only on oath, but also on being bound by some law and if he knows or believes to be false, he may be giving false evidence under S.191 and may be punished under S.193. Similarly, if a person makes a statement under S.164, Cr.P.C. and contradicts himself during the trial, he may be convicted of giving false evidence intentionally. S.164 explains

---

<sup>40</sup> 178<sup>th</sup> Law Commission Report, 2003, page 142

<sup>41</sup> 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

<sup>42</sup> Law Commission of India, “*Reform of Judicial Administration*” , 14<sup>th</sup> Report, First Law Commission under the Chairmanship of Mr. M.C. Setalvad 1955-1958, in 1958

<sup>43</sup> Kiruthika Dhanapal, “A Critical Analysis on Hostile Witnesses” , published on [www.lawyersclubindia.com](http://www.lawyersclubindia.com)

about the phenomena of making Extra-judicial Confessions and Statements before any Magistrate. There are high chances that statements made before a magistrate under S.164 may be totally changed by a witness during trial proceedings. In all the above cases of contradictory statements and confessions, S.191 acts as a safeguard against retracted statements and confessions given by witnesses who may have turned hostile at some point in the trial. They may be convicted of the offence of perjury.

**(b) Decline in Conviction Rates:** The caliber of a Criminal Justice System is ascertained by the rate of conviction in criminal offences, which implies percentage of cases that resulted in conviction of the accused to the number of cases in which trials were completed during a particular year. The National Crime Records Bureau reveals that the Conviction rate which was 36.2% in 2004 went down to 26% by 2007, because of the problem of hostile witnesses. This means that along with other reasons, the problem of hostile witnesses is also one of the major reasons for which there has been a decline in conviction rates. Very often, the truth remains uncovered and the accused are acquitted due to lack of evidence available against them.

**(c) Cross-examination by the Party who called the witness:** When the prosecution Counsel feels that the witness is making statements against the interest of his party, a Court may permit a party to cross-examine his own witness, when his temper, attitude, demeanor etc., in the witness-box shows a deliberately hostile feeling towards the party calling him, or he does not exhibit any hostile feeling but makes a statement contrary to what he was called or expected to prove or what he had purposely said previously.

**(e) Loss of faith in the judiciary:** The large number of acquittals in criminal trials, will seriously erode the faith imposed on the judiciary by the common man. Judgments have been influenced in the past as a result of witnesses turning hostile at crucial points in Criminal Trials, especially in cases where there has been involvement of high profile parties.

## MAJOR INDIAN CASES

1. *Best Bakery Case*<sup>44</sup> Best Bakery trial is the shining example of miscarriage of justice where the witnesses turned hostile due to external pressure by the rich and powerful accused. The first track trial began on May 9 and was completed on 29 June, 2003.

---

<sup>44</sup> (2004) 4 SCC 158

Twenty one persons were named accused in the case and the prosecution mainly depended on the testimony of the survivor Zahira Shaikh. Before the court she denied to identify any of the accused which was contrary to her previous statements which were recorded before the police and the National Human Rights Commission. The court recorded a verdict that the prosecution had failed to prove the charges. Later Ms. Sheikh asserted that she lied to the court under the threat and fear for her life.

2. *Case of Jessica Lal*<sup>45</sup> - 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 Lal and her friends Malini Ramani and Shyan Munshi. This case seemed to be open and shut case in beginning. The celebrity barmaid was shot dead at point blank range after refusing to serve the drink to two youngmen. The man accused of killing her Manu Sharma was the son of former Union Minister who fled and was absconded for a week before he surrendered to the Delhi police. All the nine accused were acquitted on grounds of insufficient evidence. The gun used to shoot Jessica Lal was not recovered which shows how diligent the investigating authorities were. However the reason that sunk the case was the witnesses turning hostile in high profile cases.
3. *BMW Hit and Run Case*<sup>46</sup> - On 10 January, 1999, a BMW driven by Sanjeev Nanda, grandson of former Chief of Naval Staff and arms dealer S.I. Nanda had allegedly run over sleeping pavement dwellers in Delhi. Three people died on the spot and other received serious injuries. On progressing of the trial a lot of witnesses turned hostile. Monoj Mallick, the lone survivor told the court that he was hit by the truck and Hari Shankar refused to identify the BMW and other witnesses absconded. None of the witnesses supported the prosecution. In the end both the accused were granted bail. The Hon'ble Supreme Court held that "The evil of perjury has assumed alarming proportions in cases depending on oral evidence and in order to deal with the menace effectively it is desirable for the courts use the provision more effectively and frequently than it is presently done."

---

<sup>45</sup> 2001 Cri. L.J. 2404

<sup>46</sup> (2003) 10 SCC 670



## CONCLUSION

The witnesses need to be given much more protection than what they are provided at present time. We need to enact strict laws on witness protection keeping in mind the needs of witnesses in our system. The strict laws are the need of the hour to stop the witness from turning hostile. The media too has tremendous responsibility. Instead of sensationalizing the issues, they must endeavor to present constructive and analytical account of such situations. The courts and the law should make provisions for assuring the safety of the witnesses. The protracted trials should be avoided. This delayed and time taking cases and frequent adjournment of the cases should be done away with. Proper measures should be made so that such acts are reduced. Protracted trials are the breeding grounds for the hostile witnesses. The court should see witness as the guest who has been invited to the court for helping him. The treatment he gets should be good. The prosecution should treat him good and in better way. The more the protection will be given to the witnesses the more number of witnesses would turn up before the court to give their testimony. The witnesses are poor and they may have to bear a lot of loss while they are coming to the court. Now if the case is adjourned they are given another date to come.

Therefore the provisions pertaining to payments of allowances should be strengthened so that the poor witness does not turns hostile after being frustrated to lose a lot of money. The easy granting of bails to the accused and in return he threatening the witness should be checked upon. There is an imminent need for reforms in the police in the manner the investigations are conducted. Until and unless the witness is made to realize that the system is made for him and he is made comfortable with the system till then hostile witnesses will be a common scene in each and every case.