

WITNESS PROTECTION AND JUSTICE DELIVERY SYSTEM IN INDIA - A CRITIQUE

Mrs. Priyanka Dhar¹

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. Their each and every statement is very important as it has a magic force to change the course of the whole case. By giving evidence relating to the commission of an offence they bring the criminal justice machinery into action. Witnesses, who are considered as the eyes and ears of justice, are turning hostile with unpredictable irregularity. Witnesses turn hostile often, when high profile personalities are involved in the commission of crimes, thereby leading to the failure of the criminal justice system. Presently, the vulnerability of the witnesses is very prominent. Provisions in the existing laws are inadequate to meet the need of time. Now-a-days reporting of unceremonious acquittals in sensational criminal cases is on the rise. Most of them are on account of defection of loyalty of witnesses. Causes for defection may be various. Definitely, the lack of witness protection programme is one of them. 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.

INTRODUCTION

Witnesses play an important role in justice administration system in any country. Their role in a criminal trial is indispensable as their evidence before the Court of law can change the entire direction of a case. According to Jeremy Bentham “witnesses are the eyes and ears of justice”. However the word ‘witness’ has no proper definition. To define in simple words, a witness is a person who comes to court and swears under oath to give truthful evidence. The Code of Criminal Procedure, 1973 has tried to define it in its various provisions. For instance Section 161 of the Code provides that “Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may

¹ Assistant Professor (Law) Hidayatullah National Law University (HNLU), Raipur, Chhattisgarh.

examine orally any person supposed to be acquainted with the facts and circumstances of the case”.

Right of the victim for a fair trial necessarily implies the obligation of the witness to give evidence on the case. But unfortunately in India, many witnesses hesitate to depose before the Court of law, because of threats, intimidation and other forms of manipulation by the accused. In large number of cases like Best Bakery case, Jessica Lal murder case etc witness has been forced either not to depose or to detract from their statements. The witness turning hostile with predictable regularity further points to glaring defects in the Indian criminal justice system. We have protection and privilege programme for the accused but there is no law relating to the protection of witnesses in India. Though the witnesses disclose a wealth of information regarding the case however often it is done under danger to his life or that of his relatives or of his property. It was observed by the Hon’ble Supreme Court in *Zahira Habibullah Sheikh & Others v. State of Gujarat*² that “Legislative measures to emphasize prohibition against tampering with witness, victim or informant, have become imminent and inevitable need of the day”. Further it was observed by the Supreme Court in *People’s Union for Civil Liberties v. Union of India*³ that ‘the need for the existence and exercise of power to grant protection to a witness and preserve his or her anonymity in a criminal trial has been universally recognized.’ This paper examines the conditions of witness protection in India, how the law relating to protection of the witness is inadequate and also emphasize upon the need for a witness protection programme in India.

“WITNESS”- THE TERM EXPLAINED

The Indian Criminal Laws have not provided any definition for the word "Witness". Therefore, it is imperative that one ought to fall back on the ordinary dictionary meaning of the word. The Oxford Dictionary defines the term as "[o]ne who gives evidence in a cause; an indifferent person to each party, sworn to speak the truth, the whole truth and nothing but the truth".⁴

² 2004 (4) SCC 158

³ AIR 2004 SC 456

⁴ Catherine Soanes(Ed), Compact Oxford Dictionary, 1049, 14th impression, New York: Oxford University Press, 2005.

The Black's Law Dictionary defines the word Witness as "one who sees, knows or vouches for something or one who gives testimony, under oath or affirmation in person or by oral or written deposition, or by affidavit".⁵

The *Indian Evidence Act, 1872* states about competency of witnesses⁶ and also provides for mode of examination of witnesses⁷. As general rule, every person is competent to testify unless the court feels that he is not able to understand the questions put to him or to give rational answers to them. This may be due to tender age, extreme old age, disease, whether of body or mind, or any other cause of same kind. Thus, no person is particularly declared to be incompetent. Even a lunatic is not declared to be incompetent unless his lunacy prevents him understanding or answering questions.⁸

WITNESS- IN NEED OF PROTECTION

One of the fundamental principles of criminal justice system is that the crime must be proved beyond reasonable doubt. And the burden lies on the prosecution to prove the crime beyond reasonable doubt and it is the testimonies of the witnesses, which establishes the guilt of the accused beyond reasonable doubt. In *Swaran Singh v. State of Punjab*⁹ Wadhwa J., 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". Unfortunately in India, a witness though being an important party to a case has to go through a lot of troubles mentally as well as physically.

It was further held by the Court in Swaran Singh's case that "the witnesses ...are a harassed lot. A witness in a criminal trial may come from a far-off place to find the case adjourned. He has to come to the Court many times and at what cost to his own-self and his family is not difficult to fathom. It has become more or less a fashion to have a criminal case adjourned again and again till the witness tires and he gives up. It is the game of unscrupulous lawyers to get adjournments for one excuse or the other till a witness is won over or is tired. Not only that a witness is threatened; he is abducted; he is maimed; he is done away with; or even bribed. There is no protection for him." There must be a balance between the rights of the

⁵ Garner Bryan A. (Ed), Black's Law Dictionary', 1596, 17th edn. West Group, St. Paul, Minnesota, 199.

⁶ Chapter IX, Sections 118 to 134

⁷ Chapter X, Sections 135 to 166

⁸ Dr. Singh, Avatar, Principles of The Law Of Evidence 486, 8th edn., Central Law Publications, 2006

⁹ 2000 (5) SCC 68 at 678.

accused for an open trial as against the right of the victim for a fair trial. However on the one hand, it is the rights of the accused that are better protected in an adversarial system of criminal justice. There is right to open trial for the benefit of the accused and the public have a right to know about the conduct of the trial and the accused has a right to have the trial conducted in his presence¹⁰.

The Hon'ble Supreme Court in *NHRC v. State of Gujarat*¹¹ held that the trial must be fair not only to the accused but also to the victim. Protection of victim and witness becomes necessary in several cases. On the other hand, barring a few provisions like Sections 151 and 152 of the Indian Evidence Act 1872, the law is silent on the rights of the witness who form a key ingredient in a criminal trial. This calls for rectification of the flaws in the existing statutes so as to provide adequate safeguards to the witness.

Witness turning hostile is a major impediment in the administration of criminal justice. Many high profile cases like that of Jessica Lal murder case, Best Bakery case etc. ends up in acquittal. Despite being an eye witness to the crime, witnesses are hesitant to testify the truth in the Court of law due to incessant threats and external pressures and they turn hostile witnesses. It calls for evolving a proper and adequate remedy to tackle the issue of hostile witnesses and to protect the witnesses from being harassed by anti-social elements when they testify the truth in the court of law.

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. 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. Conducting a fair trial for those who are accused of criminal offences is 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. In India, we follow Adversarial System of Law, 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

¹⁰ 198th Law Commission Report on "Witness Identity Protection and Witness Protection Programme"

¹¹ 2003 (9) SC 329

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.

RESPONSE SURROUNDING WITNESS PROTECTION LAW IN INDIA

It is aptly averred that "*[t]here will be no Zaheera Sheikhs and Shayan Munshis if we have more protection for witnesses.*" This averment made by Ms. Ramani after the Delhi High Court had found Manu Sharma guilty in the *Jessica Lal's Case*. Ms. Ramani was an eye witness and had recognized the guilty Manu Sharma in the open court. The Court termed this act of Ms. Ramani as "*courageous*". But the question is whether we can expect all the witnesses to be as 'courageous' as Ms. Ramani was in the above-mentioned matter in the absence of any Witness Protection Programmes as we have in India. The greatest weakness of our criminal justice system is that it has become dogged and does not function in a fluent fashion resulting in prompt determination of the guilt or innocence of those charged with crime. The most overwhelming and important reason for this weakness is the fact that prosecution witnesses retract from statements made earlier before the police and turn hostile in the Court. Witnesses are turning hostile with predictable regularity in cases involving heinous crimes or high profile personalities due to external pressures, thereby leading to the failures of the criminal justice.

In India, there are certain provisions relating to 'protection of witnesses' but they are plagued with some inherent difficulties in implementation. These provisions have scattered existence as there is no consolidated separate legislation. Moreover, the existing laws are weak. But, in the United States, Canada, Australia, South Africa legislations to deal with the 'protection of witnesses' do exist. Though, in India, Some of the special enactments like POTA, TADA [all repealed now] contained some provisions offering protection to the witnesses, however, there is a need for a general law dealing with witness anonymity in all criminal cases where there is danger to the life of the witness or of his relatives or to his property.

The presiding Judge or Magistrate may, if he thinks fit, order, at any stage of any inquiry into or trial of, any particular case, that the public generally, or any particular person, shall not

have access to, or be or remain¹² in, the room or building used by the Court. It is provided that in the case of inquiry into or trial of rape¹³ and other sexual offences¹⁴ the same shall be conducted in camera and in such inquiry or trials, the Court may permit any 'particular person' to have access to, or be or remain in, the room or building used by the Court.¹⁵ In regard to the in camera proceedings, it is declared that it shall not be lawful for any person to print or publish any matter in relation to any such proceedings, except with the previous permission of the Court.¹⁶

The Indian Penal Code, 1860 prescribes punishment if the identity of the victim of rape is published.¹⁷ The Supreme Court held that where a video screen is employed during recording of the evidence of a victim, the provisions of Section 273, Code of Criminal Procedure, 1973 requiring evidence to be recorded in the presence of the accused is deemed to have been satisfied.¹⁸ Section 299 of the Code also indicates certain exceptions. It bears the heading 'Record of evidence in absence of accused'. This covers cases where accused has absconded or where there is no immediate prospect of arresting him. Further, the law states that when the Police Report is filed under *Section 173* into the Court, the police officer shall forward to the Magistrate along with the Report¹⁹ all documents or relevant extracts thereof on which the prosecution proposes to rely, other than those already sent to the Magistrate during investigation; the statements recorded under *Section 161* of all the persons whom the prosecution proposes to examine as its witnesses. But there is an exception under *Section 173(6)*. Under *Section 173(6)* of the Criminal Procedure Code, 1973 which refers to the 'report of Police officer on completion of investigation', there are certain statutorily recognized exceptions to this rule²⁰.

Further Inquiries and trials can be held in the absence of the accused in certain cases where the Judge or the Magistrate is satisfied, for reasons to be recorded, that the personal

¹² Proviso to S. 327(1), Code of Criminal Procedure, 1973 126 S. 376, Indian Penal Code, 1860

¹³ Ss. 376A, 376B, 376C, 376D Indian Penal Code, 1860

¹⁴ Ibid

¹⁵ 327(2), Code of Criminal Procedure, 1973

¹⁶ Ibid.

¹⁷ S.228-A Indian Penal Code, 1860

¹⁸ *Shakshi v. Union of India*, 2004(6) SCALE 15

¹⁹ S.173(5) of the Code of Criminal Procedure, 1973

²⁰ The Sub-Section (6) reads as follows:

"Section 173(6): If the police officer is of opinion that any part of any such statement (i.e., statement under section 161) is not relevant to the subject matter of the proceedings or that its disclosure to the accused is not essential in the interest of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request."

attendance of the accused before the Court is not necessary in the interests of justice, or that the accused persistently disturbs the proceedings in the Court.²¹ Procedure for examination and cross-examination of witnesses is specified in the Code. At the trial in the Court of Session, the prosecution may produce its evidence on the date fixed and the defence may cross examine or the date of cross examination may be deferred.²² The Code permits cross-examination by accused in cases instituted on police report ²³ and trial under warrant procedure is by magistrates and also provides for cross-examination of prosecution witness in trials of warrant cases by Magistrates in cases instituted otherwise than on police report. But witnesses can now be examined by video conference procedure as per the judgment of the Supreme Court in *Praful Desai's Case*²⁴.

The Law Commission of India has time and again suggested the need for witness protection. In the *14th Report of the Law Commission* 1958, 'witness protection' was considered from a different angle. The Report referred to inadequate arrangements for witnesses in the Courthouse, the scales of travelling allowance and daily batta (allowance) paid for witnesses for attending the Court in response to summons from the Court. This aspect too is important if one has to keep in mind the enormous increase in the expense involved and the long hours of waiting in Court with tension and attending numerous adjournments. Here the question of giving due respect to the witness's convenience, comfort and compensation for his sparing valuable time is involved. If the witness is not taken care of, he or she is likely to develop an attitude of indifference to the question of bringing the offender to justice.

The 154th Law Commission of India Report (1996) while dealing with 'Protection and Facilities to Witnesses' referred to the *14th Report of the Law Commission* and the *Report of the National Police Commission* and conceded that there was 'plenty of justification for the reluctance of witnesses to come forward to attend Court promptly in obedience to the summons'. It was stated that the plight of witnesses appearing on behalf of the State was pitiable not only because of lack of proper facilities and conveniences but also because witnesses have to incur the wrath of the accused, particularly that of hardened criminals, which can result in their life falling into great peril.

²¹ S. 317, Code of Criminal Procedure, 1973

²² S. 231(2), Code of Criminal Procedure, 1973

²³ S. 242(2), Code of Criminal Procedure, 1973

²⁴ 2003 (4) SCC 601

In December, 2001, the Commission gave its 178th Report for amending various Statutes, civil and criminal. That Report dealt with hostile witnesses and the precautions the Police should take at the stage of investigation to prevent prevarication by witnesses when they are examined later at the trial. The Commission recommended three alternatives, (in modification of the two alternatives suggested in the 154th Report).

CONCLUSION

The manner in which cases are being prosecuted, something concrete has to be done to improve the investigative and prosecuting machinery. There should be separation of the investigating authorities from the law and order duties. Support by an effective and efficient investigation is need of the hour. Adequate provisions should be made for constitution of special investigation teams for speedy investigation. Special legislation is required to protect the rights of witnesses so that they depose freely and without intimidation. In criminal cases, witnesses be permitted to record their evidence in-camera, or by video-links or other audio-visual techniques. They should be protected from all types of harassment and treated with dignity. To save the witnesses from the trouble of appearing before the courts time and again, speeding up of the trial is also required to prevent the witnesses from turning around their statements. However, when witnesses change their versions, make false statements with impunity in the courts, they should be dealt with seriously for committing the offence of perjury, since it leads to conviction of an innocent and acquittal of a criminal.

Failure of system to address perjury has engendered a callous disregard for the sanctity of court proceedings. Such law needs to be made more stringent and put into practice more frequently. Witnesses play a key role in the proper direction of a criminal case. However the absence of adequate safeguards for the protection of the witnesses results in miscarriage of justice. Further in India, rights and interests of the witnesses are least taken note of and there are hardly any statutory provisions to address the issue of physical and mental vulnerabilities to which the witnesses subjected to while making deposition before the court of law. Thus for a sound and efficient administration of criminal justice, there is a need for stringent laws in this area in the form of amendments in the existing criminal statutes.

Witness protection is a dire need of the hour and India needs to come up with a suitable and comprehensive legislation to protect the witnesses so as to strengthen the administration of criminal justice. It is universally accepted that, the society is in flux i.e., it keeps on changing;

accordingly the law should change to reciprocate with the changing needs of the society. Therefore further silence of Legislature on this issue may, in all probabilities, lead people losing their trust in Justice dispensing system. In this context, the statement of French Philosopher Andre Gide should not come true in which he says that, "Everything has been said already, but as no one listens, we must always have to begin again."