An Undisclosed Truth: A Quandary to Be Dealt With

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ABSTRACT

The law of evidence plays an imperative role in the Indian judicial system by determining the credibility and correctness of various facts and ensuring orderliness in admission of evidences. A case entirely depends on the evidences provided by the prosecution. Therefore, witnesses play a decisive role in the justice delivery system. They can provide crucial evidence which can be instrumental in a conviction or an acquittal in a case. However, one of the problems that plague the justice system is that of the hostile witnesses. False testimonies of such witnesses can defeat the ends of justice. Threats, fear, intimidation, use of money as well as muscle power by the accused, absence of adequate witness protection schemes, granting of bail to the accused and protracted trials act as catalysts in turning a witness hostile. Although no Act defines a hostile witness, yet various laws such as The Evidence Act and the CrPC provide safeguards against this peril. The IPC also deals with the offence of perjury and acts a significant check on the problem of hostile witnesses. Despite the presence of such safeguards, a need is felt for amendments and stricter enforcement of existing laws along with enactment of a separate law for perjury to ensure full and honest cooperation of witnesses. This paper discusses the reasons for witnesses turning hostile and the consequences that follow, in addition to the legal provisions and case laws dealing with this quandary. This paper also throws light on the evidentiary value of the statements of such witnesses and some prominent cases including the Best Bakery case and the Jessica Lal case along with proposed amendments in existing laws, need for witness protection schemes, speedy trials and stringent implementation of laws.

INTRODUCTION

"A trial without witnesses, when it involves a criminal accusation, a criminal matter, is not a true trial." -Bill McCollum

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Witnesses play an imperative role in the justice delivery mechanism by determining the credibility and correctness of various facts in question. They can provide crucial evidence and clinching evidence which can lead to conviction or acquittal of a person. Apart from assisting the court in discovering the truth, they also play a decisive role in establishing the guilt of a person beyond reasonable doubt, the burden of which lies heavily on the prosecution. Therefore, an indispensable role is played by witnesses in such process. Bentham once correctly stated, "Witnesses are the eyes and ears of justice".[3]

However, one of the problems that beset the justice system in India is the problem of hostile witnesses. False testimonies of witnesses can defeat the ends of justice leading to a paralyzed trial and can weaken the case of the party which has relied upon the testimony of such witness instead of supporting it. The term "hostile witness" has neither been defined nor has been expressly used under Indian criminal laws. The terminology has its origin from the system of Common Law where the term was used as a measure against the "contrivance of an artful witness" who willfully by hostile evidence endeavoured to sabotage the cause of the party calling such a witness[4].

A hostile witness also termed as "adverse witness" or "unfavorable witness" can be considered as the one who possesses knowledge about the facts of the case, but makes inconsistent statements when called in the court to testify. A witness can be declared hostile when he has helped a party to build a case by revealing some information regarding the course of events, but makes contradictory statements when questioned in court and is thus, undesirous of telling the truth. Once a witness by his conduct or his statements shows hostility, an attorney not only has an opportunity to cross examine the witness, but also has a right to impeach the credit of the witness by various other modes given under the Indian Evidence Act.

In the case of *Sat Paul v. Delhi Administration*[5], the Hon'ble Supreme Court defined the term "Hostile witness" and "Unfavorable witness" and tried to resolve the confusion between the two terms. It was held that "a hostile witness is described as one who does not wish to tell the

[3] Chief Justice, M. Monir, *Textbook on the Law of Evidence*, Eighth Edition ,Universal Law Publishing Company, Dilkush Industrial Estate , G.T Karnal Road,Delhi-110033,2010, Page No. 466
[4]"HOSTILE WITNESS: Emerging Challenges & Issues"
http://shodhganga.inflibnet.ac.in/bitstream/10603/8788/14/14_chapter%205.pdf last visited on 26.03.2016
[5] 1976 Cri.L.J. 295; A.I.R. 1976 S.C. 294

truth for party, for whom such a witness appears and an unfavorable witness is one called by a party to prove a particular fact who fails to prove such fact or proves an opposite fact".

Further, in the case of *Panchanan Gogoi v. Emperor*[6], it was held that a hostile witness is one who from the manner in which he gives evidence shows that he does not wish to tell the truth to the court. The mere fact that the testimony of the witness is contrary to the interests of the party is not sufficient to deem the witness hostile. The Calcutta High Court in *Nirmal Kumar Saha & Anr. v. Dipankar Saha and Ors.*[7], observed that "A witness's primary allegiance is to the truth and not to the party calling him. Hence, unfavorable testimony does not declare a witness hostile." Hostility is when a statement is made in favor of the defence due to enmity with the prosecution[8].

In the case of *G.S. Bakshi v. State*[9], the Apex court issued certain guidelines which are to be kept in mind before declaring a witness hostile. Hostility of a witness can be inferred from the demeanor of the witness as well as his answers. Thus, if the witness cloaks his true sentiments, does not speak the truth and makes inconsistent statements, the witness may be termed hostile. When a witness turns hostile by stating something that is repugnant to the interests of the party calling such a witness, the prosecution with the permission of the Court may treat the witness as hostile.

SAFEGUARDS AGAINST HOSTILE WITNESSES AS ENVISAGED UNDER THE INDIAN LAW

THE INDIAN EVIDENCE ACT, 1872

The term 'hostile witness' is not defined in the Indian Evidence Act, 1872. Yet, provisions are present in the Act which deals with the quandary.

According to Section 132 of the Act, the witness has to answer questions even if the answers to such questions will or can criminate the witness or expose the witness to a penalty or forfeiture. The proviso states that such an answer cannot subject the witness to any arrest or

[6] AIR 1930 Cal 276
[7] Decided on 21st August 2013
[8] In R.K.Dey V. State of Orissa, AIR 1977 SC 170
[9] AIR 1979 SC 569

prosecution except a prosecution for providing false evidence. Thus, the protection accorded under the proviso does not extend to giving false evidence.

Section 154 of the Act provides for impeachment of credit of the witness by the party who calls such a witness. This may be done with the Court's discretion. The party can put any question to the witness which might be put by the opposite party in a cross examination. The party which is so permitted is not disallowed from relying on the any part of evidence provided by the hostile witness. This helps the party to extract the truth. This is one of the prime remedies that a party has against a hostile witness.

The wide discretion that is conferred upon the Court is to be used after due application of mind. In order to see if the witness has indeed turned hostile, statements made to the police officer can be relied on by virtue of Section 162 of the Code of Criminal Procedure.

It has been held that some material should be present to prove that the witness has gone back from his earlier statement or has shown hostility or is not speaking the truth. It was also observed that discretion is to be exercised in light of the circumstances that prevail.[10]

In *S. Murugesan & Others v. S. Pethaperumal And 2 Others*[11], the Court held that the fact that some of the statements of the D.W2 were against the defendants, it would not result in witness being termed hostile. Thus, the wide discretion conferred on the courts under Section 154 cannot be exercised merely because the truth that the witness has spoken is unfavorable to the party calling him. This view was reiterated by the Supreme Court in *R.K. Dey v. State of Orissa*[12].

The Madras High Court has held that once the discretion under Section 154 has been exercised, the appellate court should not interfere with the decision.[13]

In *B.N. Chobe v Sami Ahmed*[14], the Court while commenting upon when can the permission to cross examine be granted under Section 154, the Court observed that the permission can be granted only when the witness is under examination. It can be allowed during examination in chief or cross examination or even during re-examination. However, such permission cannot

[10] Shanmuganthan v. Vallaiswamy, 1997 AL HC 2176
[11] AIR 1999 Mad 76
12 A.I.R. 1977 S.C. 170
[13] Ammathayarammal v. Official Assignee, A.I.R. 1933 Mad. 137
[14] 1969 (I) An.L.T.R. 32

be granted after the evidence has concluded. Thus, a judge who did not record the evidence of a witness could not treat the witness as hostile after the conclusion of evidence.

The Supreme Court in *Dahyabhai v State of Gujarat*[15], while commenting on as to at during which all stages can recourse to Section 154 be taken to, held that the grant of permission under Section 154 cannot be restricted to any particular stage of examination of a witness as doing so would render the power granted to the courts ineffective. For example, if the grant of permission was restricted to any particular stage, a clever witness could stand by his earlier statements during examination in chief and then change his stance during cross examination. The Court observed, "To confine the operation of S.154 of the Evidence Act to a particular stage in the examination of a witness is to read words in the section which are not there."

The term 'any question' in the above provision includes:

1. Leading questions (Section 143)
2. Questions as to previous statements in writing (Section 145)
3. Questions which are lawful in cross examination (Section 146)

Section 141 of the Act defines leading questions as questions which suggest an answer which the party that is posing the question desires and expects to receive. Section 142 prohibits asking of leading questions during examination in chief or re-examination except in certain circumstances because a witness is biased towards the party for whom such a witness appears. However, such a bar is not present during a cross examination or when the credit of the hostile witness is sought to be impeached.

According to Section 145, in a cross examination, a witness may be asked if his previous statement in writing relevant to matters in issue are different than the present statements. This is to be done without showing or proving such writing. However, if the object is to contradict such a witness then attention of the witness should be drawn to such writing.

Section 146 lays down that questions may be asked which test the veracity of the witness, discover who he is and what is his position in life or to shake his credit by injuring his character.

[15] 1964 AIR SC 1563

In *R.R Chari & Anr. v. State*[16] the Court observed that the credit of a witness can be impeached only if his veracity can be shaken. His bad moral character is of no consequence. It is not necessary that a black marketer would be unreliable and a non black marketer would be reliable. The Court also noted that since the witnesses in this case were accomplices as they had given bribes, corroboration could be done.

Section 153 disallows evidence which contradicts his answer to a question as to his credit. However, if the answer is false, the witness can be prosecuted for giving false evidence under Section 193 of IPC. According to the second exception to Section 153, the answer may be contradicted if the question seeks to impeach the impartiality of the witness. The third exception is incorporated in Illustration (c) of the Section which allows contradiction by use of independent evidence when a fact which is directly related to the issue is denied by the witness.

Section 155 provides for impeachment of credit of witnesses by adverse parties or parties who call the witnesses with the consent of the court in the following manner:

(1) By using evidence of persons who believe that the witnesses are unworthy of credit or,
(2) By using evidence to prove that the witness has been bribed or he has accepted the offer of a bribe or has received other corrupt inducement to give evidence
(3) By showing that his former statements are inconsistent with his present evidence
(4) When a man is prosecuted for rape or attempt to ravish, evidence can be given to show that the woman is of generally an immoral character

There lies a difference between Section 145 and Section 155 of the Act. Section 145 deals with impeachment of credit by way of cross examination while Section 155 deals with impeachment of credit by ways other than cross examination. This is because impeachment of credit may not be successfully done by way of cross examination.

Section 156 lays down that when the evidence of a witness is to be corroborated he may be questioned about the surrounding circumstances. This provision helps in ascertaining the credit of the witness.

[16]AIR 1959 ALL149

Another safeguard against hostile witnesses is present in the form of Section 157 of the Act. According to the Section, former statements of a witness may be proved provided that the statement made deals with the time or place of the occurrence. This helps in corroborating the testimony of the witness.

In *Ram Prasad v. State of Maharashtra*[17] the scope of the Section was discussed. The Court laid down that the ambit of the section is restricted to corroboration of the evidence of the witness.

THE CODE OF CRIMINAL PROCEDURE, 1973

Section 161 of the Code of Criminal Procedure allows oral examination of a person who is likely to be familiar with facts and circumstances of the case. Such a statement may be reduced to writing by the police officer.

If the evidence is inconsistent with the statements given under Section 161 of the Code, then the witness may be termed hostile. However, the part of evidence which furthers the case of the prosecution or defence may be used as long as it is subject to close scrutiny.[18]

Section 162 lays down that when a statement is made to a police officer during an investigation, then that statement cannot be used for any purpose during an inquiry or trial. The statements cannot be used for corroboration of evidence of a witness.[19]However, if such a statement is made by a witness and if the statement is proved, then such a statement can be used by the prosecution or the accused to contradict the witness in the manner provided in Section 145 of Evidence Act. The statement may be used in re-examination of witness with regard to matters referred in cross examination. An omission in the statement can be termed as a contradiction depending on the circumstances.

In *Chinamma v. State of Kerala*[20], where the lower Court sought to rely on the case diary for corroboration, it was held that the statements of the witness could not be used for corroboration. The word statement includes written as well as oral statements. The statement made can only be used if the person who made the statement is examined as a prosecution witness and not a defence witness.

[17] AIR 1999 SC 1669
[18] Gurpreet Singh v. State of Bihar, AIR 2000 SC 1833
[19] Sat Paul v. Delhi Administration, AIR 1976 SC 294
[20] 1995 Cr LJ 1711

The limitation imposed under Section 162 does not apply in civil suits or those related to Article 32 or Article 226.

Section 164 provides for recording of confessions and statements. Clause (1) provides that confession by an accused is inadmissible in evidence if made to a police officer. The confession should be made to either a Judicial Magistrate or a Metropolitan Magistrate. Clause (2) provides that the confession should only be recorded if after questioning the person, the Magistrate is of the opinion that the confession is made voluntarily. Clause (3) provides that if the person refuses to confess, then his detention in police custody cannot be ordered. Clause (4) and (5) provide for the manner in which the confession is to be recorded. Clause (6) provides for forwarding of the confession or statement to the Magistrate inquiring or trying the case.

It has been held in many cases that the statements made under this section are not to be used as a piece of substantive evidence. However, it has been held that the statements recorded under this Section can be used for contradiction of the witnesses.[21]

In *Ram Kishan v. Harmit Kaur*[22], the Supreme Court reiterated the view that the statements recorded under this Section can only be used for corroboration and contradiction. It is important to note that such statements should be used with caution.[23]

Section 311 provides that any Court may summon or examine any person as a witness or recall or re-examine any witness and shall summon or examine or recall or re- examine any person if his evidence seems to be important for just decision in a case.

In *Himanshu Singh Sabharwal v. State Of M.P. And Ors*[24], the Supreme Court held that Section 311 of the Code along with Section 165 of the Evidence Act confer wide powers on the Court to extract necessary materials. The Court held that the power is exercised not to further the case of the prosecution or the defence but to serve the interests of justice.

[21] Ganeshdas Mimani, (1950) 1 Cal 462
[22] AIR 1972 SC 468
[23] Balak Ram etc. v. State of UP, 1974 AIR 2165
[24] AIR 2008 SC 1943

In *Hussain Umar v. Dalipsinghji*[25], it was held that the Court can exercise the power conferred under this Section if it feels that the witness would give evidence which is different from the evidence he gave during the trial.

THE OFFENCE OF PERJURY

Perjury can be understood as the act of lying by person to whom oath is administered when he is under a duty to speak the truth. In other words, a person can be charged with the offence of perjury if he makes any statement in court which he knows or believes to be false. Blackstone described it as "a crime committed when a lawful oath is administered, in some judicial proceeding, to a person who swears willfully, absolutely and falsely, in a matter material to the issue or point in question.[26]

Section 8 of the Oaths Act, 1969 states that a person who is administered oaths and affirmations by a lawful authority is bound to state the truth while giving evidence.

Further safeguards are incorporated in the Indian Penal Code, 1860 and the Code of Criminal Procedure, 1973.

Section 191 of the Indian Penal Code discusses the offence of giving false evidence which in essence is the offence of perjury. However, perjury in English law is different than perjury under Indian law as under the English law, to constitute the offence of perjury, there should be two witnesses to prove it. However, under the Indian law, no such requirement is stipulated. On a bare reading of the section the following ingredients can be culled out[27] :

(1) A person must be legally bound by an oath, or any express provision of law, to state the truth or to make a declaration upon any subject.
(2) He must make a false statement
(3) He must know or believe it to be false, or not believe it to be true

[25] AIR 1970 SC 45
[26]Charles Doyle, "Perjury Under Federal Law : A Brief Overview", Congressional Research Service,2014 https://www.fas.org/sgp/crs/misc/98-808.pdf last visited on 25.03.2016
[27] Ratanlal & Dhirajlal, *The Indian Penal Code*, 33rd Edition, Lexis Nexis, Okhla Industrial Area, Phase-II, New Delhi-110020, 2010, Page No.324

In order to constitute an offence under this section, what is also important is that the Court should have the authority to administer the oath or affirmation.[28] Thus, if a Court does not possess the relevant authority, a person cannot be made liable under the Section. However, an oath or affirmation is not a mandatory requirement.[29]

Giving of false evidence is made punishable under Section 193-195 of the Indian Penal Code. *In Re: Suo Moto Proceedings against Mr. R. Karuppan, Advocate*[30], it was observed that an affidavit is an evidence under Section 193.

Although Section 193 seeks to deal with the offence strictly by laying down a punishment of imprisonment which can extend up to seven years, yet the section has been brought into play only a few times due to the fear of overburdening of courts.[31] In a case, wherein one of the parties had blatantly lied regarding the absence of knowledge of preponement of hearing, the Court did not punish the party for perjury because the parties had been litigating for the past twenty nine years.[32] However, such an offhand attitude towards the offence shakes the belief of the masses in the Indian judicial system.

In *K.T.M.S Mohd. v. Union of India*[33], it was held that no offence is made out against a person under the said Section merely because two contradictory statements were made at different stages of judicial proceedings. The person can only be convicted when he intentionally gives the false evidence by making inconsistent statements.

Section 194 and Section 195 mete out stricter punishment. These deal with giving of false evidence with an intention to procure conviction of capital offence and imprisonment for life or a term of seven years or more respectively.

According to Section 199, if a person makes a false statement in a declaration which is receivable as evidence, then he is punishable in the same manner as if he gave false evidence.

Section 195(1) (b) of the Code of Criminal Procedure bars any Court from taking cognizance of offences laid out in Section 193 to Section 196 unless there is a complaint in writing of that Court or by an officer of that Court or another Court to which such a Court is

[28] Abdul Majid v. Krishna Lal Nag; (1893) 20 Cal 724
[29] Queen v. Sheik Edoo; (1865) 2 WR (Cr) 9
[30] AIR 2001 SC 2204
[31] Chandrapal Singh And Ors. v. Maharaj Singh And Anr, (1982) 1 SCC 466
[32] M. G. Dass v. Smt. N. Raghubir Singh /Ravi Bir Singh decided on 6th May 2011
[33] AIR 1969 SC 7

subordinate. Section 340 mentions the procedure to be adopted in case of offences laid down in Section 195(1)(b).Section 344 provides a summary procedure in cases involving false evidence.

Before an inquiry is initiated under Section 340(1), three conditions need to be complied with. The first condition is that a prima facie case is made out. The second condition is that, it is necessary to allow prosecution under Section 193 of the Indian Penal Code in the interests of justice[34].The third condition is that the witness should be allowed to show cause as to why he should not be punished.[35]

In *Zahira Habibullah Sheikh & Anr v. State of Gujarat & Ors (Best Bakery Case*)**[36],** it was observed that that Zahira Sheikh, a witness whose testimonies were heavily relied on, had backtracked and changed her statements quite a few times. The Supreme Court ordered the Registrar General to conduct an inquiry so as to ascertain which version given by Zahira Sheikh was correct. The Court also directed Zahira Sheikh to give a detailed account of her assets. The Inquiry officer pointed out that she had changed her stance at various stages and she could not offer reasonable explanation for certain receipts of income. The Officer concluded that the money that was offered to Zahira Sheikh made her testify in a certain manner before the Trial Court. In light of such recordings, Zahira was held guilty of contempt of Court. It was observed that if cases like these are left unpunished, the judicial system would be adversely affected. The Court stressed upon the need of a fair trial and observed that it was high time to deal with the problem of hostile witnesses. The Court punished Zahira with an imprisonment for a term of one year along with a cost of Rs.50000. Her assets were also attached for a period of three months.

This case was one of the few cases where an action against perjury was taken. The Courts are generally wary of initiating proceedings in case of perjury in order to reduce the burden on the Courts. However, considering the fact that perjury is a serious offence which jeopardizes a fair trial, it becomes all the more important that the Courts do away with the lenient approach and impose the punishment which is laid down in Section 193 of the Indian Penal Code in order to set up an example and restore the faith of the masses in the judicial system of the country.

[34] K. Karunakaran v. T. V. Eachara Warrier, 1978 AIR 290
[35] 2008 AIR 2965
[36] Decided on 8th March 2006, Appeal (Crl.) 446-449 of 2004

Another case wherein the Court took necessary steps against perjury was the case of *In Re: Suo Moto Proceedings against Mr. R. Karuppan, Advocate*[37]**.** In this case, the Respondent, R. Karrupan, claiming to be the President of Madras High Court Advocates Association. The respondent had filed a writ of Quo Warranto against the Chief Justice of India contending that CJI had achieved superannuation in 1999. He also filed an affidavit to that affect. He prayed for determination of the Chief Justice's age too.

Here, it becomes pertinent to note that the President of India had resolved the Chief Justice's age in 1991 when he was a High Court judge.

The Court noted that the Registry of the Supreme Court had received a petition stating that the Association had not authorized the respondent to file a writ petition.

In his writ petition the Respondent had contended that the controversy regarding the Chief Justice's age had not be resolved. However, it was noted that the controversy was settled by way of a press note which was issued by the Government of India on 23rd October 2000. The Respondent contended that the note reached him on 23rd December 2011.Here he tried to conceal the fact that that the press note was relied on in a case where the Respondent appeared as an advocate on 20th December 2011.

The Respondent was held to be guilty of perjury and gross criminal contempt of court because he knew that the age of Chief Justice had been determined by the President of India and yet he proceeded on to file an affidavit stating that the Chief Justice had reached super annuation in 1991.The Respondent was punished with an imprisonment for six months.

In rape cases, the testimony of the prosecutrix is considered to be sufficient and generally corroboration is not to be done unless there are compelling circumstances.[38] However, when this right starts to be abused, it becomes imperative that the Court takes the requisite action as stigma attached with a rape case for an accused too is difficult to wash away. In *Mahila Vinod Kumari v. State of M.P*[39], the prosecutrix filed a report against two men on the ground that they had raped her. However, during trial she denied that she had been raped. She also denied filing any report. Cognizance for the offence of perjury was taken under Section 344 of Code of Criminal Procedure and she was punished with an imprisonment for three months.

[37] AIR 2001 SC 2204
[38] State of Punjab v. Gurmit Singh and Ors., 1996 AIR 1393
[39] (2008) 8 SCC 34

In the above-mentioned case, the Court also discussed the ambit of Section 344 and Section 340 of the Code of Criminal Procedure. The Court observed that the rationale behind enacting Section 344 was to remove the nuisance of perjury. Section 344 provides for an additional summary procedure. However, if action cannot be taken under Section 344, recourse can be taken to Section 340. The Court listed the salient features of Section 344, which are:

(1) Court of Sessions and Magistrate of First Class can take cognizance in case of perjury.
(2) It is only at the time of delivery of judgment or final order, can the power under Section 344 be exercised.
(3) An opportunity to show cause should be granted to the offender.
(4) Punishment only to the extent of imprisonment up to three months or a fine up to Rs. 500 can be imposed.
(5) As per Section 351, the order of the Court holding a person guilty of perjury is appealable.
(6) The sentence is not to be imposed until disposal of appeal or revision.

In a case where the petitioner had the habit of levelling false allegations against judges, when he would realize that they were not going to rule in his favor, the Court held that the petitioner was guilty of perjury. The Court, in the interest of justice, refused to exercise its inherent powers to quash proceedings against the petitioner.[40]

The Court in *Narmada Shankar v. Dan Pal Singh*[41] effect of perjury is not nullified even if the witness states that his earlier statements were untrue. The Court has to see if the person admitted to his guilt out of self realization or not. The Court did not hold the witness liable in this case because he was a subordinate and it was difficult for him to resist the orders of his seniors to give false evidence.

In *Shrimati Gayatri Debi v. M/S. Raja Ram Dal Mill & Ors*[42]**,** the Kolkata High Court observed that Section 340 of the Criminal Procedure Code cannot be used when an adverse party seeks to take revenge from the opposite party for merely making a wrong statement. The facts and circumstances of the case have to be looked at. In this case, cognizance under

[40] M.S. Jaggi v. Registrar, High Court Of Orissa,1983 CriLJ 1527
[41] 1966 CriLJ 834
[42] Decided on 8th October 2013

Section 340 was not taken because the wrong statements were not made so as to take undue advantage.

EVIDENTIARY VALUE OF STATEMENTS OF HOSTILE WITNESSES

In case in which a witness turns hostile, the whole statement of a witness is not discarded. Instead, the prosecution can rely on the reliable part of the statement to strengthen its case. The parties can take advantage of such portions of evidence which are beneficial for them. The courts can consider whether the testimony made by such witness can be relied upon or not. In various cases, the evidentiary value of testimonies of hostile witnesses has been discussed.

The Supreme Court in *Himanshu @ Chintu v. State of NCT of Delhi*[43] held that, the evidence of a hostile witness remains admissible and the dependable portion of the evidence which is acceptable and duly corroborated by some other reliable evidence can be relied on by the court.

The Supreme Court in the case of *Atmaram and Ors. v. State of Madhya Pradesh*[44], held that each and every inconsistency in the statement of a hostile witness cannot contradict the case of the prosecution per se. It is the duty of the court to examine whether such inconsistency is against the interest of the prosecution or not.

In *Rameshbhai Mohanbhai Koli & Ors. v. State of Gujrat*[45],the Court held that the relevant parts of the testimony of a hostile witness can be put to use by the prosecution as well as the defence It was also noted that the due to the lack of ability of people to absorb all the details, certain discrepancies can be present.

In *State Of U.P v. Ramesh Prasad Misra And Anr*[46], the accused who was earlier convicted for murdering his wife was later acquitted of all charges by the Allahabad High Court. Thus, an appeal was filed before the Supreme Court to set aside the acquittal. The Supreme Court noted that under Section 161 of Code of Criminal Procedure, PW-2 & 6- who were also advocates, had stated that they heard a quarrel between the respondent and the victim. They

[43] (2011) 2 SCC 36
[44] Decided on May 12,2012
[45] [2010] 14 (ADDL.) S.C.R. 1
[46] 1996 Supp(4) SCR 631

also stated that they had seen a man of white complexion of an age around 30- 35 years entering the house on the night of the murder and leaving the next day. However, the witnesses later resiled from their statements. The Apex Court condemned the fact the witnesses being advocates, who have a duty to uphold the law were shying away from truth. The Court also reproached the High Court for excluding the evidence of the hostile witnesses. It was observed that the statements should not have been excluded under Section 32 of the Evidence Act as the evidence was relevant under Section 8 of the Act which deals with motive, preparation and previous conduct. The Court held that the testimony of a hostile witness can be accepted if furthers the case of the prosecution or the accused. The testimony can also be "subject to close scrutiny" and the portion of the testimony that is in line with the case of the prosecution or the defence may be accepted. The Court upheld the conviction of the accused.

This view was reiterated by the Supreme Court in *Khujji @ Surendra Tiwari v. The State of Madhya Pradesh*[47].

In *Bhagwan Singh v. The State of Haryana*[48], the appellant was a police constable who was convicted under Section 165-A of the Indian Penal Code which deals with abetment of an offence under Section 161 of IPC. Section 161 deals with taking of gratification other than legal remuneration by a public servant. The appellant, who had discovered a crime under Section 411 of IPC, arrested Rameshwar Dass. He recovered gold coins from him. However, to help Dass in exchange of money, he approached Jagat Singh (PW-1) to replace the gold coins with ordinary coins. Although Jagat Singh accepted the offer, he reported that the DSP (PW-6). PW-1 was ordered to meet the appellant so that a raid could be conducted. The meeting was arranged and the raid was conducted. The story of the prosecution was established by the testimonies of various witnesses including PW-1 and PW-6. Two of the witnesses turned hostile. The Public Prosecutor cross examined PW-1 as two of the co accused were not referred by him in the examination in chief. However, there was no need for the cross examination. The counsel for the appellant contended that since PW-1 was cross examined, therefore he had turned hostile and the testimony of the hostile witness could not be relied on. Thus, the appellant should be acquitted. The Court rejected this contention and

[47] 1991 AIR 1853
[48] 1976 SCR (2) 921

held that a person could be convicted on the basis of a testimony of a hostile witness if the evidence was corroborated. The Court upheld the conviction of the appellant.

SOME LANDMARK CASES WHERE THE WITNESSES TURNED HOSTILE

Himanshu Singh Sabharwal v. State Of M.P. And Ors (Professor H.S. Sabharwal's Case)[49]

A transfer petition was filed by the deceased's son, Himanshu Sabharwal. Late Prof. Sabharwal was brutally beaten up. The incident was witnessed by various police personnel, media persons and other people. His death was projected to be an accident. Various witnesses including police personnel had turned hostile. The petitioner contended that the due to threat and coercion the witnesses had turned hostile and the justice was adversely affected. It was also contended that the hostile witnesses were not cross examined by the Public Prosecutor and the Trial Court did not fulfil its duty under law. The Court observed that fair trial is manifest in our practice and procedure. It was pointed out that the courts should not turn a blind eye when oppressive acts have been indulged in. Fair trial is absent when witnesses are threatened or coerced. It is the duty of the courts to ensure a fair trial. The Court observed that, "The Courts have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witnesses." The Court noted that if the Public Prosecutor does not act in the proper manner, the courts cannot remain indifferent to such lapses. The Court ordered transfer of the case and allowed the petitioner to suggest two names for the role of the Public Prosecutor for the case.

State TR. P.S. Lodhi Colony New Delhi v. Sanjeev Nanda (1999 Delhi hit and run case)[50]

In this case, one Sanjeev Nanda while driving a BMW car ran over some people. Main prosecution witnesses turned hostile. The Court noted that on reading of the testimonies of the hostile witnesses with other evidence, the guilt of the accused was proved. The Court relied on *State of U.P v. Ramesh Mishra and Anr.*[51] Wherein it was held that evidence of a hostile witness cannot be discarded in totality if it is in furtherance of the prosecution or defence's case. However, it can be subject to close scrutiny. Reliance was also placed on *K.*

[49] AIR 2008 SC 1943
[50] (2012) 8 SCC 450
[51] AIR 1996 SC 2766

Anbazhagan v. Superintendent of Police and Anr.[52] Wherein it was held that if the credibility of the witness is not totally impeached, then that part of the testimony which is reliable can be acted upon. The Court held that the Courts should not act as mute spectators and should ensure that the truth is disclosed. It was noted that, "Criminal judicial system cannot be overturned by those gullible witnesses who act under pressure, inducement or intimidation".

Jessica Lal murder case[53]

On April 29, 1999, a model who also worked as a celebrity barmaid was shot after she refused to serve a drink to two young men in a crowded restaurant. After the incident, Manu Sharma, the main accused absconded for an entire week. When the trial started in August 1999, four prime witnesses changed their testimonies and turned hostile. As a result, the whole case of the prosecution was weakened and all the nine accused were acquitted by the Sessions court on the ground of insufficient evidence. But in March 2006, an appeal by the police was admitted in Delhi High Court on the basis of production of new evidences against all the accused and hence, a conviction order was passed against all of them.

Salman Salim Khan v. State of Maharashtra (Salman Khan hit and run case)[54]

Salman Khan had allegedly run over pavement dwellers while driving drunk. Ravindra Patil, a key witness, died in 2007, was termed to be not 'wholly reliable'. He had apparently changed his testimony many times. The Court observed that even if his testimony was partially reliable, corroboration was needed which could not be ultimately done. He had not mentioned the fact that Salman Khan was drunk during the filing of the FIR, he stated so after the blood reports came. Later he turned hostile. Thus, Salman Khan was acquitted of all charges by the Bombay High Court due to lack of evidence

Varun Gandhi's hate speech case[55]

Varun Gandhi was charged for making hate speeches. He contended that the cases had been filed against him with a political motive. However, he was acquitted in the case. All

[52] AIR 2004 SC 524
[53] 2001 Cri.L.J. 2404
[54]CR APPEAL-572-2015
[55] http://www.millenniumpost.in/NewsContent.aspx?NID=22335 last visited on 03.04.2016

witnesses in the case had turned hostile. The journalist, who had taped the speech, stated in the Court that he had not listened to the speech.[56]

FACTORS RESPONSIBLE FOR HOSTILITY OF WITNESSES

1. **Absence of Witness Protection Schemes**: Lack of police protection along with proper witness protection schemes are the main reasons as to why the witnesses are hesitant to provide truthful depositions in the court and ultimately retract from their statements. They are afraid of facing the wrath of accused. Thus, in order to protect themselves, they often give inconsistent statements. Measures such as Witness Identity Protection and Witness Protection Programs should be adopted in order to protect the identity and whereabouts of the witnesses. There are certain provisions in Indian Evidence Act which provide for the protection of the witnesses. Section 151 and 152 of the said Act forbid the use of any indecent or scandalous question for inquiry which is likely to insult or cause annoyance to the witness. Apart from these provisions, no other protection is provided to the witness. If proper protection would have been provided to Mohammad Shakur Sayyad in *Naroda Patia case*[57], he would not have turned hostile. It was due to the lack of witness protection schemes only that the victim, also being the prime witness was attacked by thirty people including the accused and was forced to retract from his statement.
2. **Intimidation and threat**: There are many instances in which the witnesses have retracted from making truthful statements either due to frequents threats of retaliation or actual physical violence. Witnesses therefore, make contradictory statements in order to save themselves. In *Swaran Singh's case*[58], the Supreme Court observed that a witness is maimed, threatened or even bribed for making inconsistent statements in courts. The Delhi High Court, in *Neelam Katara v. Union of India*[59], stated that intimidation was the main reason behind witnesses turning hostile.
3. **Use of money and muscle power:** Various inducements or allurements are offered to witnesses to make inconsistent statements and they are thus 'purchased' by the opposite party. The opposite parties approach the witnesses and offer them money so that they take a pre-decided stand in court when they are called upon to testify in

[56] http://www.firstpost.com/india/when-witnesses-go-hostile-from-jessica-lal-to-varun-gandhi-809851.html last visited on 03.04.2016
[57] Sessions Case No.235 of 2009
[58] Swaran Singh v. State of Punjab, 2000 Cr.L.J 2780 (S.C.)
[59] ILR (2003) II Del 377 260,

order to weaken the case of the party for whom such a witness appears in the first place. The perfect example of such a scenario is the *Best Bakery case*[60] wherein one of the prime witnesses Zahira Sheikh turned hostile and made inconsistent statements in court. The whole case of the prosecution was built on her statement and thus, her false testimony weakened the case of the prosecution resulting in acquittal of the accused.

4. **Delayed trials**: Delayed and prolonged trials have a bearing on the hostility of the witnesses. The procedure adopted during a trial is very slow and cumbersome. The hearings are frequently adjourned resulting in hardship and inconvenience to the witnesses. Thus, the victims become frustrated and in order to escape such never ending hearings, they retract from their statements. Despite the fact that Section 309 of Code of Criminal Procedure prevents unreasonable adjournments, no steps are taken to ensure that adjournments are not granted without sufficient cause. The Malimath Committee Report[61] has suggested that it should be made obligatory to impose cost on the party who obtains unnecessary adjournments.

   In *Swaran Singh v. State of Punjab*[62], the Apex Court observed that seeking adjournments have become a fashion and are used by the parties as a tool to delay proceedings. As a result, the witnesses become tired and show hostility to escape such trials.

5. **Lackadaisical attitude towards being involved in criminal proceedings**: Parties are often uninterested appearing in court to testify. This can be due to various factors such as inherent vulnerability of exposure in some cases such as rape cases or lack of adequate knowledge regarding the rules and regulations of the court.
6. **Lack of adequate facilities in courts:** Witnesses often face a lot of hardships and inconvenience when called in the court to testify. No proper facilities are provided for their comfort and convenience. In various states, due to insufficient facilities, witnesses are made to wait under the trees[63] or in the verandahs of the court complex.
7. **Easy availability of bail to the accused**: In cases wherein celebrities, influential or famous personalities are involved, there are great chances that the accused would be granted bail within a short span of time. In such cases, witnesses are often influenced or threatened to make inconsistent statements when called in court to testify.

[60] (2004) 4 SCC 158
[61] 178th Law Commission Report,2003
[62] 2000 Cr.L.J 2780 (S.C.)
[63] 14th Report of first Law Commission

8. **Defaults in payment of allowances**: Section 312, Code of Criminal Procedure states that adequate compensation should be made to a witness for appearing in court. Such compensation is also referred to as 'Diet Money'. According to the said section, adequate compensation is to be paid to persons who are called in court for the purposes of inquiry, investigation or trial. However, the 154th report of the Law Commission of India[64] states that compensation paid to witnesses for appearing in court is inadequate and needs to be revised. Moreover, it is to be ensured that witnesses are compensated whether they are examined or not.
9. **Stock witnesses**: Stock witnesses can be referred to as those people who serve the police by giving false statements. They pretend to have knowledge about the facts of the case. They are unreliable as they do not possess proper information about the case and thus, often retract from their statements under oath.

CONSEQUENCES OF WITNESSES TURNING HOSTILE

The consequences of witnesses turning hostile are-

a) **High acquittal rate**: Hostility is one of the main reasons as to why the acquittal rate in India is increasing at a tremendous rate and the accused are set free. In most cases, the truth remains undisclosed due to which the prosecution fails to prove the charges against an accused beyond reasonable doubt resulting in acquittal of the accused. According to The National Crime Records Bureau, conviction rate went down to 26% in 2007 from 36.2% in 2004 due to witnesses turning hostile.[65] A glaring example of this scenario can be seen in Jessica *Lal murder case*[66], wherein all the nine accused were acquitted by the Sessions Court on the grounds of insufficient evidence. A similar situation was observed in the case of *BMW Hit and Run case*[67] wherein the accused were granted bail as Hari Shankar, the prime witness refused to identify the BMW. A 2015 Report of the Press Information Bureau, titled - 'Conviction under SC/ST Act', indicates the decline conviction rate from 30% in 2011 to 22.8% in 2013. However, the Report also points out that the decline in the conviction rate may be

[64] Fourteenth Law Commission of India, The 154th Report, under the Chairmanship of Mr. Justice K. J. Reddy 1995-1997, in 1996
[65] http://www.lawyersclubindia.com/articles/A-Critical-Analysis-on-Hostile-Witnesses-6257.asp#.VwiDI_l97IU last visited on 07.04.2016
[66] 2001 Cri.L.J. 2404
[67] (2003) 10 S.C.C. 670

influenced by factors such as witnesses turning hostile, delayed prosecution, loss of interest of victims and hostiles due to protracted trials, and lack of corroborative evidence.[68]

b) **Cross-examination by the Party who called the witness:** Whenever a witness makes any inconsistent or contradictory statements hampering the interest of the party who produced such a witness, then the said party can obtain permission from the court to cross examine his own witness by virtue of Section 154 of the Indian Evidence Act. In such a case, whole statement of the witness is not discarded and the prosecution can rely upon any part of the statement for strengthening its case. In *Himanshu @ Chintu v. State of NCT of Delhi*[69], the Supreme Court held that the evidence of a hostile witness, once duly corroborated, can be relied upon by the Court.

c) Criminal Intimidation: Anyone who threatens another with injury to his person, property or reputation or to the person or reputation of anyone that such person is interested in, may be tried for criminal intimidation[70]. Section 503 of the Indian Penal Code defines Criminal Intimidation. The punishment for the same is given under Section 506. Section 507 provides for criminal intimidation by an anonymous communication. In the case of *Rangaswami v. State of Tamil Nadu*[71], the Court observed that the threat complained of should be real.

d) Perjury: A person can be charged with the offence of perjury if he makes any statement in court which he knows or believes to be false. Section 8 of the Oaths Act, provides that a person who is administered an oath is bound to state the truth. Further safeguards have been embodied in the Indian Penal Code. Section 191 discusses the offence of giving false evidence which is made punishable under Sections 193- 195 of the IPC.

SUGESSTIONS TO DEAL WITH THE PROBLEM OF HOSTILE WITNESSES EFFECTIVELY

1. **Amendments to the existing laws**:

[68] http://pib.nic.in/newsite/PrintRelease.aspx?relid=115777 last visited on 07.04.2016
[69] (2011) 2 SCC 36
[70] Section 503, Indian Penal Code
[71] AIR 1989 SC 1137.

- ***Amendments in Section 161 and Section 162 of Code of Criminal Procedure***: According to Section 162, it is not obligatory for a witness to sign his statement under section 161. Rather, statements of witnesses recorded by police under section 161 should be signed by the witnesses so that they can be used for corroboration during the trial. Moreover, this would prevent the witness from making contradictory statements during the trial. According to the 178th Law Commission Report[72], the statement recorded under Section 161 should be read over to the witness and signed by him.
- ***Section 164 of Code of Criminal Procedure***: It had been recommended the said Section should be amended so as to make it obligatory to get statements of all material witnesses recorded by the magistrate on oath[73]. This recommendation of was not adopted as a large number of magistrates would be required to record statements of all the witnesses. Thus, it was later recommended by the Law Commission that in case of offences where the punishment offered is 10 years or more, statement of all the witnesses should be recorded under oath[74].

2. **Less frequent adjournments**: Frequent adjournments have a bearing on the hostility of witnesses. Section 309 of Code of Criminal Procedure, which ensures speedy trial, has now become a dead provision and frequent adjournments are granted without any reasonable justification.
3. **Substantial value to evidence recorded under Section 164(5) of Code of Criminal Procedure**: The said Section provides for recording the statement of the witness under oath, but the same statement does not have any substantial value. The statement recorded should be used as substantive evidence so that even if the witness retracts from his statement, it can be used against the accused during trial.
4. **Remoulding the process of investigation**: Due to overburdening of the police with the duties of investigation and maintaining law and order, proper investigations are not carried out. Therefore, the 14th Law Commission Report recommended that "the investigating staff should be separated from the law and order police". This will

[72] Sixteenth Law Commission of India, Recommendations for Amending Various Enactments, Both Civil and Criminal, 178th Report
[73] Fourteenth Law Commission of India, 154th Report,
[74] Law Commission headed by Justice B.P. Jeevan Reddy, 177th Report

ensure speedy investigations since the investigating officer has to focus on carrying out fair investigations only.

5. **Need for a comprehensive Witness Protection Scheme**: According to The Law Commission[75], witness protection is needed to ensure that the witness does not retract from his statement during trial. Certain measures to ensure physical protection of witnesses should be adopted. Various Law Commission reports have reiterated this view. Except Section 151 and 152 of the Evidence Act which protect the witnesses from harassment, no other provision provides for protection of witnesses. In the case of *National Human Rights Commission v. State of Gujarat*[76], Supreme Court held that there is no law enacted by the legislature to ensure protection of witnesses. Such a law is need of the hour and should be enacted and properly enforced. In *Zahira Habibulla H Sheikh and Anr v. State of Gujarat and Ors.*[77], the Court emphasized on the need of witness protection schemes in our country by drawing a comparison with countries such as Australia, Canada and USA where such schemes exist.
6. **Stricter enforcement of provisions under the Indian Penal Code dealing with perjury**: In various cases, it has been recognized that the Courts tend to avoid prosecuting hostile witnesses due to the fear of overburdening of Courts. However, such an attitude of Courts shakes the belief of the masses in the judicial system. The Courts should be more proactive while dealing with such cases and should set up an example to reduce such instances in the future. Some also believe that a separate law on perjury should be enacted to curb the malpractice.

CONCLUSION

The witnesses, who play a decisive role in the justice delivery system, should not shirk from their responsibility of helping the truth to see the light of the day. Yet, some of the witnesses choose to violate their oaths due to various factors such as monetary inducements, muscle and political power of the accused, fear due to lack of witness protection schemes, long and protracted trials and lack of adequate facilities given to witnesses. This problem has led to a high acquittal rate which represents a sad state of affairs because in some cases an offender cannot be convicted due to lack of sufficient evidence. Although, safeguards have been

[75] The Law Commission of India Consultation Paper on Witness Identity Protection and Witness Protection Programmes
[76] (2009) 6 SCC 342
[77] Decided on 8th March 2006, Appeal (Crl.) 446-449 of 2004

embodied in the Indian law in the form of Evidence Act, Code of Criminal Procedure and the Indian Penal Code, yet, the problem is still rampant in the country. What is required is that the Courts do not sit as mute spectators, as stated by the Supreme Court in the *Sanjeev Nanda case*[78] and instead should ensure stricter enforcement of existing laws dealing with the problem of hostile witnesses. In very few cases, the punishment laid own for perjury is meted out. The Courts generally refrain from charging witnesses under the offence of perjury due to the fear of overburdening of courts. However, if such an attitude is adopted then an example would not be set and the problem of hostile witnesses cannot be effectively curbed. Apart from stricter enforcement, certain amendments in existing laws also need to be carried out to increase their effectiveness. Witness Protection Schemes also need to be enacted. Such schemes are present in other countries such as USA, Canada and Australia. These can help in removing the fear of testifying against the rich and powerful offenders. Such measures need to be duly adopted by the state in order to effectively deal with the quandary of hostile witnesses.

[78] (2012) 8 SCC 450