

JUDICIAL APPROACH TOWARDS PROTECTION OF WITNESSES

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ABSTRACT: Witnesses do play an vital role in the criminal administration system. They are considered to be eyes and ears of the criminal justice system. There have been a number of laws dealing with the protection of witnesses, in order to save them from any kind of threat, intimidation, etc. But none of the laws has been properly tries to protect the interests of the witnesses. This recent paper has been written in order to evaluate the laws prevailing within the society, in respect of protection of witnesses. Further, an attempt has been made to point out all the challenges in order to have a proper legislation in respect of that. This paper has emphasized on the judicial attitude towards protection of witnesses, along with certain suggestions.

INTRODUCTION: Witness is considered to be the most important part and indispensable of the criminal justice system. The witnesses' role is inevitable in our system. The witness is considered to be the backbone of the trial. The only and only aim of our Indian criminal justice system is to find and to punish the accused or wrong doers, so that proper justice should be imparted and confidence of the people in the law and order remains with a positive attitude.

The term 'witness' means: "‘Witness’ means any person, who possesses information or document about any crime regarded by the competent authority as being material to any Criminal proceedings and who has made a statement, or who has given or agreed or is required to give evidence in relation to such proceedings."¹

In most of the cases, where there is involvement of influential and powerful people, then it has become the usual practice for the witnesses to retract from their original statements. It is all because of intimidation and threat to their own & family member's lives and also the damage to the property. The scene gets more and more crucial and worse when the witnesses get to know or realizes that there is neither any law for them which may protect their interests, nor any legal obligation taken by the state for providing them with full & adequate security, in case of emergency; then only that situation becomes very much dangerous to them. And they decide to set their back and feels retraction from the statements is the safest option for them. What India needs & the most important requirement now-a-days, is a Witness Protection programme & its proper and effective implementation; that can guarantee & assure the witnesses that will not be harmed in any way, whether in respect of getting threat from the accused or accused known's; or any kind of intimidation, etc.; which would ensure the justice.²

HISTORY: In ancient period, the Dharma sutra reveals the manner how the witnesses could be examined and tested. According to Manu, the witnesses should not be examined in the absence of the parties to the case and thus, the parties must be there when the witnesses are getting examined. The chapter eighteen of the Manu Smriti specifically deals with the litigation, judicial conduct, the qualifications, the questioning procedure to the witnesses, oath and ordeals, etc. ³ According to Kautilya's Arthashastra, there are certain type of people who can't be the witnesses, i.e., co-partners, creditors, debtors, enemies, maimed person or the persons who has been convicted by the government for the commission of any offence, even once in their lifetime.⁴

In Medieval era, the witnesses' evidences are divided into two: Oral and Documentary evidences. There has been specified certain people, who has not considered as competent witnesses; like the insolvents, drunkards, gamblers, etc. This was a great initiative, which has been followed now also.

¹ Witness Protection Scheme, 2018.

² Sinjini, "Witness Protection: Problems faced and Need for a Protection Program in India" *available at:* <https://www.lawctopus.com/academike/witness-protection-problems-faced-and-need-for-a-protection-programme-in-india/> (last visited on March 2, 2020).

³ Patrick Olivelle, *Manu's Code of Law: A Critical Edition and Translation of Manava Dharma Sutra* (New Delhi, 2006).

⁴ R. Shamasastri, *Kautilya's Arthashastra* 199 (Sri Raghuvver Printing Press, Mysore, 1956).

In Modern era, all the persons shall be competent and capable of giving their statement and able to testify before the Court, unless the Court is of the opinion and is satisfied that the witnesses are unable to get and form an understanding regarding the questions asked to them, or prevented from giving proper & rational answers to those questions, which may be by tender years of the witness, due to the extreme old age of witness, and because of any disease whether of body or mind; or any other cause of the same kind. The explanation attached to it lays down that a lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them..⁵

LEGAL PROVISIONS IN RESPECT OF WITNESS PROTECTION: There have been a number of laws and provisions prevailing in current scenario for the protection of witnesses from any kind of atrocities. Indian Penal Code, Criminal Procedure Code, and Indian Evidence Act provides for the different kind of provisions dealing with the protection of the witnesses, like in

a) Criminal Procedure Code, 1973: Section 160(2), Section 171, Section 173(6), Section 177, Section 195A, Section 200, Section 202(2), Section 243(2), Section 273, Section 284 (2), Section 299, Section 309, Section 311, Section 312, Section 327, and Section 437.

b) Indian Evidence Act, 1872: Section 33, Section 148, Section 149, and Section 151-152.

c) Indian Penal Code, 1860: Section 195A and Section 228A.

d) Special Statutes in India: The Bengal Suppression of Terrorist Outrages Act, 1932, Terrorist and Disruptive Activities (Protection) Act, 1987, Juvenile Justice (Care & Protection) Act, 2000, Prevention of Terrorism Act, 2002 (POTA), The Unlawful Activities (Prevention) Amendment Act, 2004, and The National Investigation Agency Act, 2008.

But despite of being there a number of laws on this, the newspapers are still filled with daily news of bribing, intimidating, threatening and even killing of witnesses, which ultimately lead to the prevailing of injustice within the society.

JUDICIAL APPROACH TOWARDS WITNESS PROTECTION: In National Human Rights Commission v. State of Gujarat⁶, the Supreme Court observed, “no law has yet been enacted, not even a scheme has been framed by the Union of India or by the State Government for giving protection to the witnesses.” The main points which the Court has emphasized in this particular case, regarding the scheme are:

- The committees could be formed at various levels, whether at District level, or at lower level;
- Anyone can apply for the protection which is needed by the witness, be it any police officer, any social activist, the advocate of the parties to a case, or any NGO on behalf of the witness that they need protection for this and this reason;
- After the filing for the application for the need of protection, i.e. security, by anyone, then its decision is necessary to be taken within 15 days of its filing;
- The Applicant who has filed an application for the protection of the witness, he has a legal right too, to put forward or challenge the order in a appellate Court, given at lower level, in case they are not satisfied with the decision and that appeal will ordinary be heard by the panel of concerned police headquarters;
- The Police to whom the responsibility has been given, has to recheck the protection after 90 days;
- In case, the witness retracts from the statement, then protection given to him or her can be withdrawn at any time;
- The protection which is to be provided to the witnesses, that will be free of cost, because they are assisting the Court in the arrival of a just and a fair decision;
- The time period for the need of security, has to be clearly stated at the time of applying for the application by the witness or any attorney, etc., on that behalf, and at the time of granting such protection also.

The Apex Court, in its pronouncements & judgements, has put forward the issue regarding the security of the witnesses, and has laid emphasis particularly dealing with the identity of the witnesses in order to protect; and a witness protection programs, in a various no. of decision. Some of them are like National Human Rights Commission v. State of Gujarat⁷, People Union of Civil Liberties v. Union of India.⁸

⁵ Ratanlal & Dhirajlal, *The Law of Evidence* (Lexis Nexis, 24th edn., 2016).

⁶ (2009) 6 SCC 767.

⁷ *Supra* note 28.

⁸ (2003) 10 SCALE 967; *Sakshi v. Union of India*⁸ (1999) 6 SCC 59; and *Zahira Habibulla Sheikh v. State of Gujarat* (2004) 4 SCC 158.

Moreover, according to the PUCL, i.e., People's Union for Civil Liberties, pertaining to the Best Bakery case⁹, there are basically and most prominently the two most important causes for witnesses' retracting from their statements, are: 1st is when the police has incorrectly recorded the statements of the concerned witnesses; and 2nd one was only and only because of the "intimidation and other methods of manipulation by accused or defence counsel."

In Zahira's case, Court also observed that, "Legislative measures to emphasize prohibition against tampering with witnesses, victims or informants, have become imminent and inevitable need of the day. It also added that Witness protection programs are imperative as well as imminent in the context of alarming rate of somersaults by witnesses. One of the reasons may be that they do not have courage to depose against an accused because of threats to their life, more so when the offenders are habitual criminals or high-ups in the Government or close to powers, which may be political, economic or other powers including muscle power."

In State v. Sanjeev Nanda,¹⁰ the Supreme Court held that retraction by the witnesses, is the growing & a disturbing trend, "Witness turning hostile is a major disturbing factor faced by the criminal courts in India. Reasons are many for the witnesses turning hostile, but of late, we see, especially in high profile cases, there is a regularity in the witnesses turning hostile, either due to monetary consideration or by other tempting offers which undermine the entire criminal justice system and people carry the impression that the mighty and powerful can always get away from the clutches of law, thereby eroding people's faith in the system."

In Jessica Lal's case¹¹ (Manu Sharma v. NCT Delhi), all the key witnesses has turned hostile and none of them identified the culprit who was son of a powerful Haryana Minister. This clearly shows the influence of the political people on the criminal justice administration.

In Ambica Prasad v. State (Delhi Administration)¹², the prosecution witness who had lodged the FIR immediately that he has been threatened and was being compelled by the accused family for not speaking the truth. After considering that, the High Court observed that the accused party was very much stronger in respect of money power and muscle power. Therefore, there is no doubt to say that the powerful people do influence our judicial system and hampers the justice.

In Gurbachan Singh v. State of Bombay¹³, the Supreme Court laid focused on a provision of the Bombay Police Act, 1951 and upheld its validity that specifically refused permission to a detenu to cross-examine the witnesses who had deposed against him. The Court has observed that it is necessary in order to ensure that the fair trial has taken place. And it was held that, "the law was only to deal with exceptional cases where witnesses, for fear of violence to their person or property, were unwilling to depose publicly against bad character." However, in a case of G.X. Francis v. Banke Bihari Singh¹⁴, the Court has emphasized on the need for a congenial atmosphere, so that the witnesses could give their testimony without any kind of hindrance and fear. This kind of atmosphere is mandatory and that could only be achieved if proper protection is to be given to all the witnesses concerned.

In Kartar Singh v. State of Punjab¹⁵, the Supreme Court has tried to decide upon the matter dealing with the identity of the witnesses and it has held that Section 16 (2) and (3) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) is totally valid, which has provided the discretion to the Court, "to keep the identity and address of a witness secret upon certain contingencies; to hold the proceedings at a place to be decided by the court and to withhold the names and addresses of witnesses in its orders."

In Delhi Domestic Working Women's Forum v. Union of India¹⁶, the Apex Court of India has laid stress, "on the need of maintenance of the anonymity of the victims of rape", who would be playing an important role as a key witnesses in trials. This is necessary in order to respect the privacy of the woman concerned, and also to save them from being dragged in unnecessary judgments of the society. The trial of the cases of rape offences has to be done in-camera and the same has been

⁹ *Ibid.*

¹⁰ (2012) 8 SCC 450.

¹¹ (2010) 6 SCC 1.

¹² 1992 CriLJ 1478.

¹³ AIR 1952 SC 221.

¹⁴ AIR 1958 SC 209; *Maneka Sanjay Gandhi v. Rani Jethmalani* (1979) 4 SCC 167.

¹⁵ (1994) 3 SCC 569.

¹⁶ (1995) 1 SCC 14.

mandated by the Section 327 (2) and (3) of the Cr.P.C,¹⁷ and the same was reiterated in a case of State of Punjab v. Gurmit Singh¹⁸.

In Sakshi v. Union of India¹⁹, the Supreme Court after considering the 172nd Report of the Law Commission of India, has laid down that certain safeguards should be there, in order to protect the victims, especially the victim which is of child sexual abuse, that are necessary in order to ensure a fair and a just trial; so that the confidence of the people within the judiciary can only and only be enhanced.

There is not only the need and requirement for the protection of the witnesses, but also the most importantly necessity of the witnesses, is the financial assistance. The Criminal Procedure Code, 1973 provided for the reasonable expenses to be paid to the witnesses by the Govt. under Section 312 of it, and the same came into the limelight in a case of Swaran Singh v. State of Punjab²⁰.

The Supreme Court has tried to focus on the matter of the protection of the witnesses and specifically emphasized on the need of implementing the procedure laid down in Section 309 of Code of Criminal Procedure, 1973 and thus, has stated in a case of State of U.P v. Shambhu Nath Singh²¹, that it is the requirement of Section 309, that the trial must continue day to day, without any kind of adjournments and where the adjournment is necessarily required, then only it shall be given with 'special' reasons are there and that too, to be recorded by the Court. Otherwise, taking adjournments would become a usual practice and it would harm or affect the just decision of the case.

The Supreme Court, in Sakshi v. Union of India,²² has point out the necessity of the witness protection specially in a cases where the witness or victim is one of the case related to child related offence and the Apex Court, while dealing with the case, has suggested that there should be special & adequate provisions in the law for the protection of the witnesses.

In a case,²³ the Apex Court, has upheld that the recording of evidence by using the method of video conferencing; is totally permissible and as per the law. There is no harm in recording the statement of the witnesses by video conference mode.

The judiciary has tried its level best for the protection of the witnesses. But the protection of the witnesses is not possible properly without the proper and adequate legislation which would deal with each and every aspect of the witness protection. Therefore, after the detail analysis of the various cases and the judgments given by the Apex Court and all other Courts, it is very much visible that the witnesses turn hostile, not only because of threat, harassment; but there are other reasons for the same also. Some of them has been given following:

Absence of a Witness Protection Programme; Delay in Disposal of Cases and Frequent Adjournments; Non-payment of Allowances; Lack of proper sufficient facilities in Courts; Threat to their own and their family member's lives; Political pressure or the pressure from the powerful persons; Luring of witness by various means, which can be immovable, movable property or by any other way; Incorrect statements recorded by police; Slow working of the judicial process,²⁴ Compromises and settlements between parties; Time wastage of the witnesses; Counsels does not deal with witnesses properly; Heavy workload on Courts; Corruption; Harassment by police; Pity on accused; Long disposal of cases; Duress by underworld; Language issues; Overall lack of courtesy; Delay in decision of Courts; Adjournments of cases making the way for bribing the witnesses; Asking of objectionable, annoying, and insulting questions to witnesses; Chances of raising enmity with the party against whom testimony is to be given, etc.

Thus, it is crystal clear that in India, witnesses were and are turning hostile due to the involvement of political influences of powerful individuals; due to corruption & bribery at its peak, etc. leading to injustice in the society at large. Though witnesses are provided with certain kind of protection against threat, intimidation or any inducement; but they are all inadequate without a particular law specifying the one & only law on the protection of witnesses.

¹⁷ Criminal Procedure Code, 1973.

¹⁸ (1996) 2 SCC 384.

¹⁹ (2004) 6 SCALE 15.

²⁰ AIR 2000 SC 2017.

²¹ 2001 (4) SCC 667.

²² (1999) 6 SCC 591.

²³ *State of Maharashtra v. Dr. Praful B. Desai*, 2003 (4) SCC 60.

²⁴ Witness Protection Scheme available at: <https://www.iastoppers.com/witness-protection-scheme-mains-article/> (last visited on April 2, 2020).

SUGGESTIONS²⁵: Separate Legislation, Proper Implementation of Laws, Witness Protection Cell, Compensation to the witnesses, Special Training to Police, New techniques, Awareness, Speedy disposal of cases, and Financial Assistance, etc.

CONCLUSION: After considering all of the above points, it is pretty much clear that the witnesses do plays an essential role in the criminal justice system. There is no specific law on the protection of witnesses in India, which also influences the hostility of the witnesses affects the criminal trial system very badly.

Witness Protection provisions have been there under the certain Acts, Statutes and Codes, but none of these is complete in itself to save and secure the interests of the witness. One of them may lack in certain specific manner, and the other one may suffer loophole in any other way. Thus, none of them are sufficient in order to save the witnesses. Hence, to have a particular specific law which only and only deals with the protection of witnesses, is an instant need of an hour.

²⁵ Naveena Varghese, National University of Advanced Legal Studies, Kochi; “Witness Protection: Problems Faced and Need for a Protection Programme in India” *available at:* lawctopus.com/academike/witness-protection-problems-faced-and-need-for-a-protection-programme-in-india/ (last visited on Feb 19, 2020).