



Research Paper

Witness Protection Jurisprudence in India: A Critical Analysis

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ABSTRACT: According to Bentham, witnesses are the eyes and ears of justice. Witnessing turning hostile in high-profile cases is a common phenomenon during trial procedures in India. Conducting a fair trial is a cardinal principle of criminal procedure to ensure justice for both the accused and the victim. India is a country where the accusatorial system is being followed, and the prosecution itself claims it will be an independent umpire. In such a situation, independent witnesses play an important role in imparting a fair trial to the victim. The witness should be treated as a guest, but our system continually neglects and insults them without thinking twice. However, giving testimony before a court of law is a fundamental right under article 21 of the Indian constitution. The threat, criminal intimidation, and other external pressure compel the victim and witness to turn hostile, thereby making a mockery of justice. An independent and impartial witness himself was forced to consider his life being ruined because he witnessed a crime. The need for a comprehensive witness protection program has been emphasised in many law commissions report. There are certain provisions in special and general statutes which is favourable to witnesses though cant be considered as protection in the strict sense. There is no law to address the issues of witnesses holistically. However Witness protection bill of 2015 failed to secure a minimum vote to become an Act, and .in 2020, a victim and witness protection and assistance bill was introduced in the council of states till now, no Act was passed. Supreme Court in MahenderChawla v Union of India approved the Witness protection scheme 2018 to protect the witness. But the scheme suffers from lacunae. The paper mainly focuses on the evolution of witness protection jurisprudence in India. The article also examines the reasons witnesses turn hostile and its impact on criminal trials in India. Furthermore, the article critically analyses the effectiveness of the witness protection scheme, 2018, to curb the incidents of witnesses turning hostile and how it affected conviction rates in India. Finally, the paper also highlights the need for comprehensive legislation to protect the witness.

KEYWORDS: Witness Protection Scheme 2018, Witness Protection, India, Hostile Witness, Criminal Trial

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I. INTRODUCTION

Witnesses are the foundation of successful criminal justice systems, as their cooperation with law enforcement and judicial agencies are essential to the successful prosecution of crimes. Witnesses must be safeguarded against criminal suspects' intimidation or physical threats in order to defend the rule of law. [1] In India, the adversarial system was set up, with the accused receiving unconditional support. Many times, the prosecution makes it plain that it will operate just as an umpire. In that case, the evidence of an independent witness is critical to ensure that the trial is fair to the victim. External and internal pressures pose a hazard to witnesses. Criminal justice reforms are possible only when the system safeguards the victim and witnesses.

The court's responsibility is to conduct criminal trials impartially and independently, striking a fair balance between unjustified conviction and unjust acquittal. [2] Witnesses play a crucial part in ensuring a fair trial. However, a witness should be independent, impartial, and unbiased in order to serve the goal. Witness testimony aids the court in determining the truth based on the facts and circumstances of the case.

According to Bentham, "Witnesses are the eyes and ears of Justice" [3]. The law requires witnesses to give statements under oath because the testimony of an honest witness is the foundation of justice. The testimony of a witness may result in the accused's conviction or acquittal. The ocular witness's credibility cannot be questioned even if an expert opinion exists. The speed with which justice is delivered and the length of time it takes is mainly determined by the witness's impartial and independent evidence during the trial. In a criminal

trial, witnesses do not always have to testify in favour of the prosecution and against the accused. What matters and is of importance is that a witness must testify to the truth without fear or pressure and of his or her own free will and consent. The competence of the criminal justice system to function effectively is primarily dependent on the willingness of witnesses to provide information and evidence without being threatened or enticed. Witnesses in India are in a terrible predicament. Due to the failure of the criminal justice system in this country, witnesses are no longer ready to come forward to testify. Witnesses are regarded as a class that has been purposefully overlooked. The witness is hopeless as he faces the accused party's rage, pressure, and intimidation, which threatens his life and existence. The situation becomes even worse when he discovers that the state has no legal obligation to provide him with security. In today's society, the incidence of hostile witnesses is escalating rapidly; we have developed rules for punishing hostile witnesses even though our legislators were not yet willing to make laws for witness protection.

II. DEFINITION

The term "witness" refers to a person who has made a statement, or who has given or accepted or is required to give evidence in regard to such proceedings, and who possesses information or documents about any crime recognised by the competent authority to be material for any criminal proceeding.

Indian evidence act does not give a direct definition for the witness, but under section 3, evidence means and include oral and documentary evidence alone." *All statements which the court permits or required to be made before it by witness, in relation to the matter of fact under inquiry, is called oral evidence.*"

According to section 2(k) of the Witness protection scheme 2018, "*Witness means any person, who possesses information or document about any offence*".

III. THE COMPETENCY OF THE WITNESS

A witness can be defined as a person who gives or is required by the court to give evidence to the court. All other judicial and quasi-judicial courts and forums receive evidence through witnesses. While dealing with the witness as a medium of evidence, three important considerations arise:

According to section 118 of the Indian Evidence Act, any person who is able to understand the question posed to them and is able to give rational answers based upon those questions.

- a. Competency and qualification of witnesses;
- b. Liability of ensuring presence and testimony of witnesses in the court; and
- c. The grounds for disqualification of the testimony[4]

In order to prove the facts, the evidence must be submitted to the court. There is a difference between the competency of a witness and the compellability of a witness. A legally competent witness must provide evidence. Section 118 of the Indian Evidence Act of 1872 concerns the competency of witnesses. The competency of a person to testify as a witness is a condition precedent[5]. If the witness cannot be prevented from appearing in court to testify, the witness is deemed capable. Competency refers to the legal competency to provide evidence in a court of law. It is said that when the judge must refuse his testimony in accordance with the law, the witness has no right to testify.

IV. CONCEPT OF HOSTILE WITNESS

Hostile witness has not been defined in Indian law. A "hostile witness" is someone who refuses to disclose the truth at the instance of the party who has summoned him [6].

The 4th National Police Commission Report, noted that

"prosecution witnesses are turning hostile because of pressure of accused and there is need of regulation to check manipulation of witnesses" [7].

The trend of witnesses turning hostile is due to various other factors. It could be fear of testifying against the accused/delinquent, political pressure, family pressure, or other sociological issues. It is also possible that witnesses are corrupted with monetary considerations.

V. EVIDENTIARY VALUE OF STATEMENT GIVEN BY HOSTILE WITNESS

In a criminal prosecution when a witness is cross-examined and contradicted with the leave of the court, by the party calling him, his evidence cannot, as a matter of law, be treated as Washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of his testimony which he finds to be creditworthy and act upon it[8].

In *Basappa @ Basavaraj S/O Chandappa v The State of Karnataka*[9], honourable Supreme Court of India observed that

"In a criminal prosecution when a witness is cross-examined and contradicted with the leave of the court, by the party calling him, his evidence cannot, as a matter of law, be treated as Washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of his testimony which he finds to be creditworthy and act upon it[10].

In *Syad Akbar v. State of Karnataka*[11], the Supreme Court held that declaring a witness hostile is no ground by itself to reject his testimony in toto. His testimony not shaken on material points in cross-examination cannot be brushed aside. If in a given case, the whole of the testimony of the witness is impugned, and in the process, the witness stands squarely and totally discredited, the Judge should, as a matter of prudence, discard his evidence in toto.[12]"

VI. WITNESS- IN NEED OF PROTECTION

The capacity of a witness to testify before the court of law or cooperate with investigations without fear of intimidation is playing crucial role in upholding the rule of law.[13]. The system, unfortunately, treats the witnesses inhumanely. When witnesses arrive at the court and have to wait for extended periods of time, there are no facilities available to them, and in most of the cases their cross-examination is in an unreasonable manner and occasionally harsh.[14]. The witnesses are not treated with due courtesy and consideration; nor are they protected. Witnesses turning hostile is a common feature[15]. Delay in the disposal of cases affords greater opportunity for the accused to win over the witnesses to his side by threats or inducements. There is no law to protect the witnesses[16].

VII. WITNESS PROTECTION

Protecting the evidence of witnesses from the danger of their turning 'hostile' has received limited attention at the hands of Parliament in some special statutes dealing with terrorism; there is an urgent need to have a comprehensive legislative scheme dealing with the second aspect of physical protection of the witness as well. Further, both aspects of anonymity and witness protection will have to be ensured in all criminal cases involving grave crimes, not limited to terrorist crimes[17].

VIII. NEED FOR A WITNESS PROTECTION LAW

Witness plays a very significant role in the delivery of justice. In the case of *Krishna Mochi v. State of Bihar*[18], Supreme Court observed, "the society suffers by both wrong convictions and wrong acquittals". Most of the cases witness turning hostile due to threat to life, limb, relative, or property.

IX. LAW COMMISSION REPORTS & OTHER REPORTS RELATED TO THE WITNESS PROTECTION

The Law Commission has been highlighting the necessity for a comprehensive witness protection mechanism in India. Following are the law commissions and other relevant reports which have given room for witness protection in its report .

First-ever reference to witness protection in India was made in the Indian Law Commission's 14th Report in 1958. . The 154th Report of the Law Commission[19] incorporated a chapter on protection and facilities to witnesses. The 172nd Report[20] and the 178th Report[21] laid emphasis on protection of witnesses from the accused. The fourth Report of the National Police Commission (1980) acknowledged the troubles undergone by witnesses attending proceedings in courts. Malimath Committee on Reforms of Criminal Justice System, 2003 also emphasised the need for witness protection. 198 th Report of the Law Commission of India titled as "Witness Identity Protection and Witness Protection Programmes, 2006" is dedicated to the subject

9.1. Recommendations made by the Malimath committee[22]

To overcome the hurdles faced by the witness , the Committee has made the following recommendations:

"(I) (i) Witness who comes to assist the court should be treated with dignity and shown due courtesy. An official should be assigned to provide assistance to him.

(ii) Separate place should be provided with proper facilities such as seating, resting, toilet, drinking water etc. for the convenience of the witnesses in the court premises.

(II) Rates of traveling and other allowance to the witness should be reviewed to compensate him for the expenses that he incurs. Proper arrangements should be made for payment of the allowances due to the witness on the same day when the case is adjourned without examining the witness he should be paid T.A. and D.A. the same day.

(III) A law should be enacted to give protection to the witnesses and their family members on the lines of the laws in the USA and other countries.

(III) Courts should list the cases in such a manner as to avoid the witnesses being required to come again and again for giving evidence. The trial should proceed on day to day basis and granting of adjournments should be avoided. The Judge should be held accountable for any lapse in this behalf. High Court should ensure due compliance through training and supervision.

(IV) Evidence of Experts falling under Sections 291, 292 and 293 of the Code may as far as possible be received under Affidavit.

(V) DNA experts should be included in Subsection 4 of Section 293 of the Code.

(VI) The witness should be provided a seat for him to sit down and give evidence in the court.

(VII) The Judge should be vigilant and regulate cross-examination to prevent the witness being subjected to harassment, annoyance or indignity. This should be ensured through training and proper supervision by the High Courts.

9.2 Witness protection under 198th Report of the Law Commission

The witness protection is covered in the 198th Report of the Law Commission of India, titled "Witness Identity Protection and Witness Protection Programmes, 2006." The first part of this report is about witness identity protection, and the second part is about witness protection programmes. A Witness Identity Protection Bill was also appended to the bill. [23]. The Commission has not issued a draft bill in relation to Witness Protection Programs, but it has issued suggestions on the subject of "Witness Protection Programs." The Commission proposed that the costs of "Witness Protection Programs" be shared equally by the Central and State governments. Apart from changing the witness's identification, other methods for witness protection are also provided when the circumstances demand it. [24]

The commission also recommended concrete steps and amendments to criminal law that would strengthen witness protection programmes. The Law Commission had also recommended witness protection at all stages of investigation, and trial and even post-trial. But like other reports and recommendations, there has been very little action on its findings, while witness intimidation and harassment continue.

X. WITNESS PROTECTION LAWS IN INDIA

Witness protection under Indian law can be broadly classified as two, the first one is law which contain some provision regarding witness protection and the second category deals with laws which exclusively deal with witness protection

1. Anyone who tries to induce or influence a witness to give false evidence, is subject to a seven-year sentence under Section 195A of the Code of Criminal Procedure (Amendment) Act, 2008. This modification is a first step in the correct path. When sections 149 to 152 are read combined with section 148 of the Indian Evidence Act, 1872, a witness is shielded from improper cross-examination, which is often necessary. [25]. The identity and address of witnesses must be protected under Section 16 of the Terrorist and Disruptive Activities (Prevention) Act, 1987. In-camera trials are also mentioned in the Act. S.17 of the National Investigation Agency Act of 2008, S.22 of the Unlawful Activities (Prevention) Amendment Act of 2004, the Criminal Law (Amendment) Act of 2005, and S.30 of the Prevention of Terrorism Act of 2002 have all addressed the issue. [26]. In the same manner Juvenile Justice (Care and Protection of Children) Act, 2015, Whistle Blowers Protection Act, 2011, Protection of Children from Sexual Offences and Tribes (Prevention of Atrocities) Act, 1989 also contain provisions safeguarding the witness [27].

2. In *Mahender Chawla v Union of India*, the Supreme Court recognised the Witness Protection Scheme 2018 and declared that it will be "law" under Article 141/142 of the Constitution until competent legislation on the subject is enacted by Parliament or state legislature, and the centre, state and union territories shall enforce the same in letter in spirit.

XI. WITNESS PROTECTION SCHEME 2018

The scheme stands for protecting witness. According to section 2(k) of the scheme "Witness means any person, who possess information or document about any offence" [28].

The scheme will be looked after by "Competent Authority" which means "a Standing Committee in each district chaired by the District and Sessions Judge with Head of the Police in the district as Member and Head of the Prosecution in the district as its Member Secretary" [29].

Section 2(b) of the scheme deals with "Concealment of Identity of Witness" that: "means and includes any condition prohibiting publication or revealing, in any manner, directly or indirectly, of the name, address and other particulars which may lead to the identification of the witness during investigation, trial and post-trial stage. Following are the key features of the scheme" [30].

1. "An application for a protection order under the plan can be made in the appropriate form with supporting documentation with the Competent Authority of the District where the offence was committed through its Member Secretary.
2. When the Member Secretary of the Competent Authority receives an application in the prescribed form, it shall issue an order directing the Assistant Commissioner of Police (ACP) / Deputy Superintendent of Police (DSP) in charge of the concerned Police Sub-Division to submit a Threat Analysis Report.
3. Depending on the urgency of the situation due to an impending threat, the Competent Authority may issue interim protection orders for the witness or his family members while the application is on-going.
4. The Threat Analysis Report must be completed quickly and confidentially, and it must be delivered to the Competent Authority within five working days of receipt of the order.
5. The Threat Analysis Report will categorise the threat perception and advise protective steps to ensure the witness or his family is adequately protected.
6. While processing the application for witness protection, the Competent Authority shall communicate with the witness and/or his family members, employers, or any other person deemed fit, preferably in person and, if that is not possible, by electronic means, to determine the witness's protection needs. The Competent Authority will hold all hearings on witness protection applications in secret, maintaining complete confidentiality.
7. An application must be decided within five working days of the Police Authorities receiving the Threat Analysis Report.
8. The State's Witness Protection Cell or the Trial Court, as the case may be, will carry out the Competent Authority's Witness Protection Order. The State's Chief of Police will be responsible for the overall implementation of all witness protection orders issued by the Competent Authority. The Department of Home of the State, on the other hand, will carry out the Competent Authority's Witness Protection Order for a change of identity and/or relocation.
9. After a Witness Protection Order is issued, the Witness Protection Cell is required to provide a monthly follow-up report to the Competent Authority.
10. If the Competent Authority determines that the Witness Protection Order needs to be revised or an application is filed in this regard, a new Threat Analysis Report will be requested from the Assistant Commissioner of Police (ACP)/Deputy Superintendent of Police (DSP) in charge of the concerned Police Sub-Division after the trial is completed.
11. Part VI of the Gazette Notification states: "The State should give extensive publicity to this Scheme." Witnesses must be informed of the existence of the "Witness Protection Scheme" and its key characteristics by the I.O. and the Court.
12. There is also a provision for "Expense Recovery": "In the event that the witness has filed a false complaint, the concerned Government's Home Department may initiate proceedings for the recovery of the expenditure incurred from the Witness Protection Fund."
13. There is also a provision for "Review": "In the event that the witness or the police authorities are aggrieved by the Competent Authority's judgments, a review application may be filed within 15 days of the Competent Authority's passing of the orders[31]."

Due to the pressure from judiciary there are some witness protection laws and schemes under states level and it contain similar provisions as that of Witness Protection Scheme ,2018. Following are the schemes and legislation made by the state governments.

- Delhi Witness Protection Scheme, 2015
- Maharashtra Witness Protection and Security Act, 2017
- Odisha- Witness Protection Scheme, 2019
- Haryana Witness Protection Scheme, 2020

11.2 Lacunae in Witness Protection Scheme, 2018

There are so many lacunae in the witness protection scheme , 2018.these lacunae are summed up here.

- There is no provision to protect the dignity of the witness and it is silent about appointing an official to provide assistance to witness as recommended by Mali math committee..
- Scheme does not mentioned about providing proper facilities for the comfort of the witnesses in the courtroom, such as seats, relaxing, restroom, drinking water, and so on.
- Scheme does not contain provision for T.A. or DA
- Scheme also not discussed about issue related to adjournment of case
- The scheme does not contain provision to protect witnesses from harassment

According to witness protection scheme, 2018,State Government must bear the expenditure of "Witness Protection Programmes"

,which is completely opposite of

- the recommendation made by the 198th law commissions report that is the costs of "Witness Protection Programs" must be shared equally by the Central and State governments.
- Protection only last for three months as against 198th Law Commission Recommendations.
- There is provision for identifying categories of witnesses and it shall not serve any purpose
- Threat analysis report prepared by police, there is a high chance they are colluding with influential people

XII.CONCLUSION

To protect the rule of law, witnesses must be able to testify in court or participate in investigations without fear of being threatened or intimidated. Countries are progressively creating legislation or enacting measures to protect witnesses whose cooperation with law enforcement or testimony in court would jeopardise their or their family's lives.[32]. The Witness Protection Scheme of 2018 is India's witness protection statute. In order to protect the witness' dignity, the 2018 Witness Protection Scheme excludes neither the Mali math committee recommendations nor the 198th law commission report recommendations. The criminal court system has no ability to order that the witness be independent and impartial unless proper support is provided. Witness Protection Scheme, 2018 failed to give proper support to witnesses.

However, in 2018, the court conviction rate was 50%, and in 2019, the court conviction rate was 50.4 percentages. [33] Finally, the rate of court convictions in 2020 was 59.2 per cent, the highest in five years. [34] As a result, we can assume that the Witness Protection Program contributed to the increased conviction rate.

Despite its many flaws, the Witness Protection Scheme has made a significant contribution to India's criminal justice reforms. Nonetheless, the strategy does not appear to have addressed the issue completely.

India not only lacks a strong Witness Protection Program, but also has an irresponsible executive and legislature, making the Witness Protection Program a one-man show run by the judiciary. In an adversarial system, the prosecution must show the accused's guilt beyond a reasonable doubt. In this case, witnesses play a vital role by shedding light on the facts and assisting the judge in seeing the truth clearly. In order to defend justice, witnesses should be allowed to give independent and impartial testimony. As a result, the system must safeguard witnesses in order to save the eyes and ears of the law.

Effective witness protection programmes are an important part of a comprehensive criminal justice strategy to protect persons who are critical to the deconstruction of organised crime groups.[35] For making an effective Witness protection program following strategies can be adopted

- a) Legal and institutional assessments;
- b) Legislative assistance;
- c) Awareness raising programmes targeting criminal justice authorities (including judges, prosecutors, police and prison officials);
- d) Training to judges, prosecutors, police and witness protection authorities;
- e) Specialised support and advice to assist in the establishment of witness protection units, including advice on developing standard operating procedures, appropriate structures and staffing arrangements;
- f) Strengthening international cooperation for the protection of witnesses.

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