

Need for protection of witnesses in India.

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“You cannot witness for me, being slain” - William Shakesphere (Henry VI Part I)

**Abstract:** It is very unfortunate, that there are no laws for the protection of witnesses in India. The ability of a witness to give testimony in a judicial setting or to cooperate with law enforcement, investigation without fear of intimidation or reprisal is essential to maintain the rule of law. With the changing times and increase in the crime rate there is requirement of a noble solution There is an urgent need to bring forth a bill of right to preserve and protect victims'/witnesses' rights, justice and due process.

**Key-words:** Witness, Criminal Justice, Law Commission, International law, Criminal Court.

**Prologue:** Witness protection is protection of a threatened witness or any person involved in the justice system, including defendants and other clients, before, during and after a trial, usually by police. witness is the most important factor in any legal proceedings right from the ancient period. Witness Identity Protection may require during investigation, inquiry and trial while Witness Protection Programmes apply to the physical protection of the witness outside the Court. It is accepted today that Witness Identity Protection is necessary in the case of all serious offences wherein there is danger to witnesses and it is not confined to cases of terrorism or sexual offences<sup>1</sup>.

With the changing times and increase in the crime rate there is requirement of a noble solution and also effective administration of criminal justice through agencies such as the court ,police, prison,e.t.c. the main role is to be performed by investigation of crime. In the investigation and prosecution of crime, particularly the more serious and complex forms of organized crime, it is essential that the witness, the cornerstones for successful investigation and prosecution ,have trust in criminal justice systems. Witnesses need to have the confidence to come forward to assist law enforcement and prosecutorial authorities .They need to be assured that they will receive support and protection from intimidation and the harm that criminal groups may seek to inflict upon them in attempts to discourage or punish them in attempts to discourage or punish them in attempts to discourage or punish them from cooperating .

There are three categories of witnesses: (i) victim-witnesses who are known to the accused; (ii) victims-witnesses not known to the accused (e.g. as in a case of indiscriminate firing by the accused) and (iii) witnesses whose identity is not known to the accused. Category (i)

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<sup>1</sup> <http://indiankanoon.org/doc>

requires protection from trauma and categories (ii) and (iii) require protection against disclosure of identity.<sup>2</sup>

In category (i) above, as the victim is known to the accused, there is no need to protect the identity of the victim but still the victim may desire that his or her examination in the Court may be allowed to be given separately and not in the immediate presence of the accused because if he or she were to depose in the physical presence of the accused, there can be tremendous trauma and it may be difficult for the witness to depose without fear or trepidation. But, in categories (ii) and (iii), victims and witnesses who are not known to the accused have a more serious problem if there is likelihood of danger to their lives or property or to the lives and properties of their close relatives, in case their identity kept secret at all stages of a criminal case, namely, investigation, inquiry and trial.

The right of the accused for an open trial in his or her presence, being not absolute, the law has to balance that right of the accused as against the need for fair administration of justice in which the victims and witness depose without fear or danger to their lives or property or those of their close relatives.

A witness happens to be the eyes and ears of the Court. But then, what is the plight of a witness who comes forward to depose before a court with a full sense of duty and conviction. Hon'ble Supreme Court in *Swaransingh Vs. State of Punjab*<sup>3</sup> expressed deep concern about the predicament of a witness in the following words.

“A criminal case is built on the edifice of evidence, evidence that is admissible in law. For that witnesses are required, whether it is direct evidence or circumstantial evidence. Here are the witnesses who are a harassed lot. A witness in a criminal trial may come from a far-off place to find the case adjourned. He has to come to the Court many times and at what cost to his own-self and his family is not difficult to fathom. It has become more or less a fashion to have a criminal case adjourned again and again till the witness tires and he gives up. It is the game of unscrupulous lawyers to get adjournments for one excuse or the other till a witness is won over or is tired. Not only that a witness is threatened; he is abducted; he is maimed; he is done away with; or even bribed. There is no protection for him. In adjourning the matter without any valid cause a Court unwittingly becomes party to miscarriage of justice. A witness is then not treated with respect in the Court. He is pushed out from the crowded courtroom by the peon. He waits for the whole day and then he finds that the matter adjourned. He has no place to sit and no place even to have a glass of water. And when he does appear in Court, he is subjected to unchecked and prolonged examination and cross-examination and finds himself in a hapless situation. For all these reasons and others a person abhors becoming a witness. It is the administration of justice that suffers. Then appropriate diet money for a witness is a far cry. Here again the process of harassment starts and he decides not to get the diet money at all.”

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<sup>2</sup> Law Commission Of India 198th Report On Witness Identity Protection And Witness Protection Programmes

<sup>3</sup> AIR 2000 S.C. 2017

### **Reasons For Witnesses Turning Hostile**

Common causes for hostility or adversity exhibited by the witnesses are the following.

- i. Threat/intimidation
- ii. Inducement by various means
- iii. Allurement/seduction
- iv. Disillusionment caused by the delay in the judicial process
- v. Hassles faced by the witnesses during investigation and trial.
- vi. Absence of witness protection programs .

For various other reasons also a witness may turn hostile. Accused/adverse party may be responsible for the volte-face shown by the witness in categories (i) to (iii). In other cases, the entire criminal justice system, including the trial courts, could be held responsible.

### **Position In India**

Terrorists and Disruptive Activities Act, 1985: (TADA) (since repealed) introduces witness anonymity for the first time. In the year 1985, Parliament enacted the TADA to deal with terrorist activities and it rightly felt that unless sufficient protection is granted to victims and witnesses, it is not possible to curb the menace. Sec 13 of that Act provides a procedure to protect witness identity. Both aspects of anonymity and witness protection will have to be ensured in all criminal cases involving grave crimes not limited to terrorist crimes. The implementation of such a law would involve drawing up

- (a) procedures for granting anonymity to witnesses and also
- (b) introducing Witness Protection Programmes as well in which personal protection is granted to the witness; sometimes by shifting the witness to a different place or even a different country; or by providing some money for maintenance or even by providing employment elsewhere.

Recently the criminal law (amendment) Act, 2005 (No. 2 of 2005) has been enforced w.e.f. 16.4.2006. The said act has amended The Penal Code, Code Of Criminal Procedure and Evidence Act. The above act has introduced section 195 A to The Penal Code, whereby threatening or inducing any person to give false evidence is made punishable. By virtue of the said amending act, section 195 of Cr.P.C has also undergone changes. Section 154 of Evidence act empowers the court to permit the person who calls a witness to put any question to him which might be put in cross examination by the adverse party. Judicial pronouncements aplenty are available to fortify the proposition that the testimony of a hostile witness need to be discarded for the reason of hostility alone. The amending Act has created a sub section to Section 154 of Evidence Act, whereby the above mentioned principle has been incorporated in the statute. 'we are yet to perceive the effect and impact of these provisions. However, the said provisions are not a complete solution in itself in the matter of witness protection.

## **Judicial activism**

In recent time the judiciary has been giving significant amount of encouragement to establishing witness protection programs in India.

In one such instance, the Delhi High Court, has on 14th October 2003, certain guidelines have been issued by Usha Mehra and Pradeep Nandrajog., JJ on a petition filed by Neelam Kataria, whose son Nitesh was allegedly murdered by Rajya Sabha MP D.P. Yadav's son Vikas and nephew Vishal. The ruling is an attempt to check witnesses from turning hostile under threats from the accused. The guidelines are as follows:-

1. The Court has also made it compulsory for the investigating officer of a case to inform the witness about the new guidelines.
2. The Court has appointed the Member Secretary of the Delhi Legal Services Authority to decide whether a witness requires police protection or not.
3. The competent authority shall take into account the nature of security risk to him/her from the accused, while granting permission to protect the witness.
4. Once the permission is granted, it shall be the duty of the Commissioner of Police to give protection to the witness.

The High Court said that its order would operate until legislation is passed in this regard.

## **Instances Where Witness Protection Was Provided**

*Naroda- Patia*: Mohammad Shakur Sayyad, a victim of the Naroda-Patia carnage in the year 2002, who was also a key witness in that case, was attacked and beaten up brutally by a group of thirty people, while he was sitting outside his shop at the Faisal Park Society in Vatva, he was provided with only one police guard. In *Ketan Thirodkar case*, the Bombay High Court had given police protection to an ex-journalist Ketan Thirodkar. The High Court, in this case, had given Thirodkar police protection only for a limited period. In *Twin Blast case*, the role of witnesses and the issue of their protection has come in for much discussion after Shivnarayan Pandey, the taxi driver who gave clues in the August 25th 2003 Twin Blast case had to be given extra protection by the Mumbai Police.

The identity of the witness (Pandey) in this case was leaked to the media by an inspector on the day of the blasts. In this case the Mumbai police have contravened Section 30 of the Prevention of Terrorism Act (POTA), by failing to protect the identity of the prosecution witness.

The prosecution, in a large number of cases including the BMW and the Jessica Lal murder cases, beside the ones registered under the Terrorist and Disruptive Activities Act (TADA), 1987 has time and again failed due to the backing out of witnesses. The fact is that the accused are able to intimidate the witnesses because there was and is no program available under which, after the assessment of the need for protection to a particular witness, the administration could give him/her the requisite security cover. In April 2003 a High level Committee headed by Justice V.S. Malimath (former Chief Justice, High Court of Gujarat) was appointed by the Home Ministry to reform the existing criminal justice system.

The committee said nothing beyond making a bald recommendation of adopting such a law. It made no effort to go into how the concept of witness protection program can be adapted to the legal topography of India.

### **Recommendation by Law Commission Of India**

The law commission in its 14<sup>th</sup> report (1958) referred to ‘Witness-Protection’, but that was in a limited sense. That related to proper arrangements being provided in the court house, the scales of travelling allowance, their daily allowance etc. The National Police Commission Report (1980) again dealt with the inadequacy of daily allowance for the witnesses, but nothing more. The 154<sup>th</sup> report of the Law Commission 1996 contains a chapter on Protection and Facilities to witnesses. The recommendations mostly related to allowances and facilities to be made available for the witnesses. However, one of the recommendations was: “Witnesses should be protected from the wrath of the accused in the eventuality”, but again, the commission did not suggest any measures for the physical protection of the witnesses. The 178<sup>th</sup> report of the Law Commission, again, referred to the fact of witnesses turning hostile, and the recommendations were only to prevent witnesses from turning hostile. The report suggested an amendment to insert S.164 A to the Code of Criminal Procedures, as under:

164 A (1) Any police officer making an investigation into any offence punishable with imprisonment for a period of ten years or more (with or without fine) including an offence which is punishable with death, shall in the course of such investigation, forward all persons whose evidence is essential for the just decision of the case, to the nearest Magistrate for recording their statement.

(2) The Magistrate shall record the statements of such persons forwarded to him under sub-section (1) on oath and shall keep such statements with him awaiting further police report under Section 173.

(3) Copies of such statements shall be furnished to the investigating officer.

(4) If the Magistrate recording the statement is not empowered to take cognizance of such offence, he shall send the statements so recorded to the magistrate empowered to take cognizance of the case.

(5) The statement of any person duly recorded as a witness under sub-section (1) may, if such witness is produced and examined, in the discretion of the court and subject to the provisions of the Indian Evidence Act, 1872, be treated as evidence.

## **International laws**

Under the English law, threatening a witness from giving evidence, is contempt of Court. So also any act of threat or revenge against a witness after he has given evidence in Court, is also considered as contempt. Recently the U.K. Government has a law known as Criminal Justice and Public Order Act, 1994 which provides for punishment for intimidation of witnesses. S.51 of the Act not only protects a person who is actually going to give evidence at a trial, but also protects a person who is helping with or could help with the investigation of a crime.

Under a similar law in Hongkong, Crimes Ord (Cap 200) HK, if the threat or intimidation is directed even as against a friend or relative of the witness, that becomes a punishable offence.

In the United States, the Organised Crime Control Act, 1970 and later the Comprehensive Crime Control Act, 1984 authorised the Witness Security Program. The Witness Security Reform Act, 1984 provides for relocation and other protection of a witness or a potential witness in an official proceeding concerning an organised criminal activity or other serious offence.

A similar program is in Canada under Witness Protection Act, 1996. The purpose of the Act is "to promote law enforcement by facilitating the protection of persons who are involved directly or indirectly in providing assistance in law enforcement matters" [Section 3].

The Australian Witness Protection Act, 1994 establishes the National Witness Protection Program in which (amongst others) the Commissioner of the Australian Federal Police arranges or provides protection and other assistance for witnesses [Section 4].

The Witness Protection Act, 1998 of South Africa provides for the establishment of an office called the Office for Witness Protection within the Department of Justice. The Director of this office is responsible for the protection of witnesses and related persons and exercises control over Witness Protection Officers and Security Officers [Section 4].

In European countries such as Italy, Germany and Netherlands, the Witness Protection Programme covers organised crimes, terrorism, and other violent crimes where the accused already know the witness/victim.

## Suggestions

There is an urgent need to bring forth a bill of right to preserve and protect victims'/witnesses' rights, justice and due process. Such a bill should include the following: To be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process. Such a bill should include the following

- To be informed of victims' constitutional rights.
- To receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury.
- To be informed, upon request, when the accused or convicted person is released from custody or has escaped.
- To be present at and, upon request, to be informed of all criminal proceedings where the accused has the right to be present.
- To be heard at the time of the granting of bail to the accused and sentencing.
- To confer with the prosecution, after the crime against the victim has been charged, before a criminal court.
- To be heard at any proceeding when any post-conviction bail from judicial custody is being considered by a competent court of law.
- To a speedy trial and prompt and final conclusion of the case after the conviction and sentence.
- To frame rules and provide for a witness protection programme which will remain in force not only before the trial, but also thereafter. The rules should also provide for recording of evidence of such witnesses, immediately on filing the charge-sheet, while the rest of the trial could be held in due course. Since tele-conference has been recognised, such witnesses could be examined and cross-examined through tele-conference methods.

## Conclusion

It is high time that we woke up and acted for the protection of the citizens who appear before the courts to testify so as to render a helping hand in the dispensation of justice. *Best Bakery Case, Jasica Lal* murder case<sup>4</sup> and many other like cases, if repeated, would shatter the strength and credibility of our criminal justice system. Every country is expected to make laws to meet the situations prevalent in that country. However, there is nothing wrong, rather it is wise, in imbibing the spirit shown by other countries in the matter of witness protection. No nation can afford to expose its righteous and morally elated citizens to the peril of being haunted or harassed by anti social elements, for the simple reason that they testified the truth in a court of law. Dearth of funds should never be an excuse. It could also perhaps be because of the inadequate protection given to the witnesses, because of which they were influenced to change their earlier statements. But either ways this case portrays the inadequacy of the present justice system in India. If our society fails to be alive to the reality, the plight of an honest witness will be catastrophic and calamitous.

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<sup>4</sup> Murder of model India today, 17 May 1998

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