

Statutory Witness Protection in India: A Cardinal Urgency

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ABSTRACT: The inception of administration of justice is largely centered upon witnesses coming forward and deposing without pressure or enticement before a Court of law. The very institution of the criminal justice system gets annihilated if witnesses are threatened and incapacitated from tendering substantive evidence to the Court. The criminal justice system must endeavor to accomplish the intricate balance of conflicting interests of the accused, the victim and the society. The necessity of fairness permeates in every practice and process of law. It is beyond the bounds of possibility to pursue truth and preserve the operating principles of a fair and just trial without credible and valuable evidence. The prevailing state of affairs in India with respect to conduct of legal proceedings is not very assuring. In the absence of any statutory protection, the witnesses are debilitated in every which way from giving a truthful testimony, leading to the derailment of the entire trial. This paper aims to study the significance of the role of a witness in a criminal trial, the inadequacy of current laws in India for protection of witnesses and its implications along with a comparative study with the laws and witness protection programs across the world. This paper follows the approach of secondary research and seeks to add to the existing literature with respect to criminal justice system and the need to protect the witnesses while exploring the measures undertaken in this regard globally. The author concludes with highlighting the imperative need for an independent legislation for witness protection in order to vindicate and uphold the concept of fair trial.

Keywords : Hostile, Justice, Fair Trial, Witness Protection, Threat.

I. INTRODUCTION

Free and fair trial is *sine qua non* of Article 21 of the Indian Constitution. It is an established principle that justice should not only be done but must be seen to be done.

The primary objective of a criminal justice system is to guard the society against criminal conduct, deter the law-breakers and sanction those who violate or attempt to violate the laws of the land. Criminal law consists of substantive and procedural law. Substantive law deals with definition of offences and prescribes punishment while the latter lays down the procedure to be followed by the enforcement agencies. Multiple players are charged with the role of fulfilling this object. Law enforcement agencies, adjudicatory bodies and correctional institutions are the foremost components established by the government to enforce the laws and punish the offenders. Two main statutes that deal with adjudication of criminal cases in our country are the Indian Penal Code, 1860 and the Code of Criminal Procedure, 1973, being substantive and procedural respectively. An effective criminal justice system constitutes methodical investigation in order to identify the course of action leading to the crime. The mechanism of evidence by way of systematic collection and presentation in a court of law, in civil as well as criminal matters, enables the adjudicatory bodies to effectively dispute or prove a fact. This is where the role of a witness comes into play.

A witness may be defined as a person who gives evidence or deposes before a judicial tribunal. The word 'evidence' originates from the Latin word *evidens* or *evidere*, which means: "to show clearly; to make clear to the sight; to discover clearly; to prove."¹ Under the Indian Evidence Act, 1872, evidence has been categorized into:

- a) Oral and;
- b) Documentary evidence.

The provisions of the Code of Criminal Procedure and of the Evidence Act comprehensively provide for depositions of a witness and the procedure and rules regarding their admissibility in the proceedings before a Court. The role of a witness in a criminal trial for administration of justice cannot be overemphasized. The evidence presented before a court helps in proving or undermining the veracity of criminal liability. It is the basis of conviction or acquittal of an accused person. However, mere establishment of procedures and laws does not ensure accomplishment of justice. Enacting laws is of little use if its implementation is not effective. Gaining the confidence of citizens in the law enforcement agencies and adjudicatory bodies is of utmost importance. The whole system fails in its objective when the society lacks faith and belief in its efficacy. Inordinate delay in deciding a criminal trial, ineffective collection of evidence by the investigating agencies, insufficient protection administered to witnesses constitute some of the factors which affect the functioning of the system.

II. IMPORTANCE OF WITNESS PROTECTION IN CRIMINAL JUSTICE SYSTEM

Pendency of cases in the Indian District Courts as well as the Apex Court is in a dismal state. As on November 1, 2017 more than 50 thousand cases are waiting to be heard in the Supreme Court.² One of the many factors to which this dismal state of legal affairs can be attributed is the fact that India has one of the worst judges to population ratio in the world with only 17 judges per million population in 2014, as per a 2011 census and sanctioned strength of judges of the Supreme Court, the 24 high courts and numerous subordinate courts, as compared to 50 in most of the developed nations.³ The unfortunate state of litigants and under-trials languishing in the prisons still persists and is far from better. As on February 1, 2018, the 24 high courts have a sanctioned strength of 1,079 judges, but with 403 vacancies, they are functioning with 676 judges. Delay in

¹ Kahsay & Andualem, MEANING, NATURE AND PURPOSE OF EVIDENCE LAW, Abyssinia Law (2012), <https://www.abysinnialaw.com/about-us/item/932-meaning-and-nature-of-evidence-law> (Last visited Jul 7, 2018).

² S. Kanu, *Vacancies Haunting Supreme Court*, THE NEW INDIAN EXPRESS, March 3, 2018, <http://www.newindianexpress.com/thesundaystandard/2018/mar/03/vacancies-haunting-supreme-court-1781641.html> (Last visited Jul 7, 2018).

³ Government Of India, APPOINTMENT OF JUDGES (2016), <http://pib.nic.in/newsite/PrintRelease.aspx?relid=137288>. (Last visited July 7, 2018).

disposal of cases ranges from 5 to 25 years.⁴ While the sanctioned strength of the judges has gone up in the past few years, the pace of the work hasn't shown considerable or proportionate improvement.

India is not new to the phenomena of backlog and delays. However, where it loses the faith of the citizens, action must be taken. Where the parties to a case perceive the process itself as a punishment and not as a mechanism to resolve disputes, the system needs to be revisited. The number of pending cases keeps mounting and the litigants are faced with even fainter prospects of their cases being disposed of quickly. The legal impasse leading to overcrowded prisons and never ending cases shakes the confidence of the society in the legal system and its efficacy. Major part of the country's progress depends on a strong and effective judiciary system. Cooperation of necessary parties in a criminal trial is indispensable for effective prosecution. It is the salutary duty of every witness who has the knowledge of the commission of the crime, to assist the State in giving evidence. However, due to dreary state of affairs, getting cooperation from requisite parties is all the more strenuous. Merely increasing the number of judges does not guarantee a faster adjudication of cases because it does not rule out adjournments and inordinate delays in our judicial system.

The exercise of judicial power is sacred. Absence of quality testimonial evidence makes the trial a mere formality and would be violative of the right of the parties to a fair and informed judgement. A layman would quiver at the prospect of getting trapped in the slow moving wheels of Indian judiciary. The impact on people involved in a criminal trial is intense. The victims and witnesses often back out owing to the mental, physical, financial and emotional agony suffered in the legal logjam. Absence of speedy justice gives rise to vigilantism. The need for reforms has never been stronger. By presenting evidence relating to the commission of an offence before a court of law, a witness performs the sacrosanct duty of assisting the court to discover the truth of the matter and come to a conclusion. Owing to this reason, the witness is either made to take an oath in the name of God or solemnly affirms to speak the truth, the whole of the truth and nothing but truth. A fair trial is one in which bias or prejudice for or against the accused, the witnesses, or the cause that is being tried is eliminated.⁵ Where the witness is threatened into giving false evidence, the atmosphere cannot be said to be conducive to fair trial. Failure to hear material witnesses inevitably leads to denial of fair trial. The procedure followed should not be detested or act as an impediment for a person becoming a witness. Adequate support and protection leads to requisite cooperation thereby enabling the criminal justice system in bringing perpetrators of crime to justice. Effective witness protection measures ensure that they are assisted and protected, not only during the trial but before and after the trial as well.

⁴ C. Nithya, *A Unique Remedy to Reduce Backlog in Indian Courts*, <http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=4a5ad044-6b7e-4d1b-93cb-d0f1bf117bcf&txtsearch=Subject:%20Criminal> (Last visited Jul 7, 2018).

⁵ *Zahira Habibulla H. Shiekh & Anr. v. State of Gujarat & Ors.*, (2004) 4 SCC 158.

III. REASONS FOR TURNING HOSTILE

In recent times, the instances of witnesses turning hostile at trial due to threats, is no longer restricted to cases of grievous offences like terrorist acts. Various methods are employed to deter witnesses from appearing before the court to present evidence. Retracting of previous statements by a witness results in breakdown of the trial. A witness is considered to be hostile when he gives a statement before police with respect to commission of an offence out of his knowledge but retracts it or changes his stance when deposing before the court during trial. While there is nothing to declare a witness as hostile under the Indian Evidence Act, Section 154 vests discretion in the court to permit a person who calls a witness to put any question to him which might be put in cross-examination. Section 145 of the Act permits cross-examination of any witness as to previous statement made by him in writing. A witness is said to be hostile if he tries to suppress the truth thereby injuring the cause of the party that calls him. Such evidence should be discarded as unworthy of credit. However, every inconsistency in the statement of a witness cannot be used to contradict the case of prosecution *per se*.⁶

There are numerous reasons for witnesses turning hostile during a trial. In most of the cases, witnesses face the rage of accused persons who hold power or are in a position of authority. In the infamous case of *Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi)*⁷, 80 witnesses had turned hostile, which led to his acquittal by the lower court, though reversed by the higher courts. The landmark judgement of *Zahira Habibulla*⁸ case (“Best Bakery”) throws light on the issue of witness protection apart from the quality and credibility of evidence before the Court. The trial for the infamous Sohrabuddin fake encounter case is also facing the same setback. Number of hostile witnesses touched a staggering 80.⁹ Such blatant cases of witnesses turning hostile portray the extreme side of influence and power in a country where seeking justice is already in a dismal state. Such witnesses can be charged under Section 191 of the Indian Penal Code under which a person giving false evidence can be imprisoned for seven years along with a fine. However, charge for perjury is rarely pursued.

IV. WITNESS PROTECTION- INTERNATIONAL CRIMINAL JUSTICE PERSPECTIVE

The international criminal justice system acknowledges the averseness of victims and witnesses in testifying before international tribunals in the form of various protective measures. The fear of arrest and prosecution and the fear of being traumatized post confrontation with the accused make the witnesses reluctant. The need to set up victim assistance and witness protection measures has been recognized internationally.

⁶ *Atmaram & Ors. v. State of Madhya Pradesh*, (2012) 3 MLJ (Cr1) 117 (SC).

⁷ 2001 Cri.L.J. 2404.

⁸ *Supra* note 6.

⁹ PTI, *Sohrabuddin Encounter: Number of Hostile Witnesses Reaches 80*, THE NEW INDIAN EXPRESS, July 5, 2018, <http://www.newindianexpress.com/nation/2018/jul/05/sohrabuddin-encounter-number-of-hostile-witnesses-reaches-80-1838857.html> (Last visited Jul 8, 2018).

The International Covenant of Civil and Political Rights, 1966 (“ICCPR”), to which India is a signatory, provides for the right of open and fair trial to an accused.¹⁰ The accused has a right to be tried in his presence and to obtain the examination of witnesses on his behalf as well as witnesses against him under the same circumstances.¹¹ The rights of the accused are subject to certain restrictions in the interest of justice or in the interest of the private lives of the parties involved.¹²

In case of serious violations of international humanitarian law, the jurisdiction of the International Criminal Tribunal for Yugoslavia (“ICTY”), established in 1993, runs concurrently with the national courts.¹³ The ICTY places reliance on international cooperation as assistance by the States is vital in the interest of international justice. In order to efficaciously carry out its directive, successful investigation and collection of evidence is indispensable. The assistance by the States also extends to witness protection. Article 21 of the ICTY Statute stipulates rights of the defense to examine all his witnesses under the same conditions as witnesses against him. Article 22 deals with the protection of victims and witnesses wherein the Rules of Procedure and Evidence are required to consist measures for protection of victims and witnesses, in addition to in camera proceedings and maintaining anonymity of the witness’ identity. Rule 69 stipulates that in case of exceptional circumstances, the Prosecutor is entitled to apply to a Judge for maintaining the secrecy of the victim’s or witness’ identity, whosoever may be at risk, till the time such person is placed under the protection of the Tribunal. So as not to jeopardize the case of Defense, the identity of the witness shall be disclosed in reasonable time prior to the trial. Under Rule 75, a Trial Chamber is empowered to undertake certain measures for non-disclosure of identity such as doing away with the name and other important information of a victim or witness from the public records of the Tribunal, enabling testimony through in-camera or closed circuit television proceedings in order to avoid confrontation with the accused and controlling the manner of questioning to the victim or witness to prevent any sort of intimidation. The Chamber may also order the press and the public to be excluded from the proceedings in the interest of maintaining secrecy of victim or witness’ identity. For a witnesses to qualify for anonymity, there must be a real fear for safety of the witnesses, were their identity to be disclosed and an objective basis underscoring the fear.¹⁴

Recognizing the heinous crime of genocide and other serious violations of humanitarian law in Rwanda, the International Criminal Tribunal for Rwanda (“ICTR”) was constituted by the United Nations Security Council in 1994 with an aim to contribute towards maintaining peace in the region. The Tribunal has jurisdiction over

¹⁰ Article 14(1) of International Covenant of Civil and Political Rights, 1966.

¹¹ Article 14(3) of International Covenant of Civil and Political Rights, 1966.

¹² *Supra* note 11.

¹³ Article 9 of Statute of the International Criminal Tribunal for Yugoslavia, 1993.

¹⁴ Prosecutor v. Nsabimana, Case No. ICTR-97-29-I, Decision on the Defense Motion to Obtain Protective Measures for Witnesses of the Defense, (Feb 15, 2000).

crimes committed in Rwanda and neighboring States by Rwandan as well as non-Rwandan citizens. It has been observed that the basis of appropriateness of protective measures for the witnesses should not be merely on the representation made by the parties but should be evaluated keeping in view the entire state of security situation affecting the witnesses in question.¹⁵

V. WITNESS PROTECTION LAWS IN INDIA

It is the civil duty of a witness who stands at a trial to speak nothing but the truth. The protection of a witness from threats to his life or property at various spheres is the duty of the State. When a witness is threatened or killed or harassed, it is not only the witness who is threatened but also the fundamental right of a citizen to a free and fair trial is vindicated.¹⁶ India does not have a witness protection law in place currently. Provisions pertaining to victim assistance and witness protection exist in various statutes however there is no single consolidated legislation that extends protection to witnesses.

- **Code of Criminal Procedure, 1973**

As per Section 177 of the Code, in order to secure unbiased and independence evidence, the witness on his way to court shall not be required to accompany a police officer and shall not be subjected to needless restraint or trouble. Section 299 lays down the right of accused to cross-examine the prosecution witnesses. In certain exceptional circumstances where the accused is absconding and cannot be produced before the court, the section provides for examination of witnesses by the prosecution in the absence of the accused. Hence, the accused is lawfully denied his right to cross-examine a prosecution witness in an open court. Open court trial is provided for in Section 327 of the Code. However, where the presiding Judge or Magistrate is of the opinion that public shall not have access for a particular reason, at any stage of any inquiry into or trial of, any particular case, the access to general public may be denied. Where the offence in question is rape, Section 372(2) provides for in camera trial. Trial in camera would not only be keeping the self-respect and confidence of the victim of the crime and in tune with legislative intent but is also likely to improve the value of evidence of a prosecutrix because she would not be so cautious or diffident to depose in a frank manner vis-à-vis in an open court in front of the public.¹⁷ Recording of evidence by way of video conferencing has been held to be admissible in a recent decision of the Supreme Court in *State of Maharashtra v. Dr. Praful B. Desai*¹⁸. Deposing via video conferencing will enable the victim or witness in giving honest answers without any external pressure. Section 173 provides for submission of report by the police officer on completion of investigation. As per Section 173(5)(b), the police officer is required to forward to the Magistrate along with his

¹⁵ Prosecutor v. Rutaganda, Case No. ICTR 96-3-T, Decision on Protective Measures for Defense Witnesses, (July 13, 1998).

¹⁶ Himanshu Singh Sabharwal v. State of Madhya Pradesh & Ors., AIR 2008 SC 1943.

¹⁷ State of Punjab v. Gurmit Singh, 1996 SCC (2) 384.

¹⁸ 2003 (4) SCC 601.

report the statements recorded under Section 161 of all the persons whom the prosecution seeks to examine as its witnesses. However, a statement recorded under Section 161 need not be disclosed to the accused once the police officer forms such an opinion in the interests of justice and reasons for the same must be stated to the Magistrate.

Section 406 and 407 deal with the power of SC and HC to transfer cases and appeals respectively if the court is of the opinion that it serves in the best interest of justice. Section 312 provides for payment of reasonable expenses by criminal courts incurred by the witness or complainant for attending the court. The Supreme Court in the *Best Bakery* case ordered a shift in the venue from Gujarat to Maharashtra where an issue regarding witness protection besides the quality and credibility of the evidence was raised before the Court. Where a witness or any person is threatened or induced to give false evidence in relation to any offence, Section 195A empowers such a person to file a complaint.

- **Indian Penal Code, 1860**

Section 228A of the IPC lays down the provisions barring the publishing of identity of the victim of certain offences relating to rape while providing for certain circumstances under which the identity can be disclosed. Hence, there must not be any printing or publishing of any matter in relation any of the mentioned offences without prior permission of the court.

- **Indian Evidence Act, 1872**

The term evidence as defined in Section 3 of the Act covers:

- a) Evidence of witnesses and;
- b) Documentary evidence

Section 134 of the Act stipulates that no particular number of witnesses is required to prove a fact and gives recognition to the maxim “*evidence has to be weighed and not counted*”. The testimony of a single witness is sufficient if the court considers it worthy even without corroboration provided the credibility is not shaken by any adverse circumstances appearing on the record against him. The courts give weight to the quality and not in the quantity of evidence. Proviso to the Section 132 affords a defense to the witness that any answer he is “compelled to give” shall not subject him to any arrest or prosecution or be proved against him in any criminal proceedings except prosecution for giving false evidence. *Fisher v. Ronalds*¹⁹ was one of the earliest decisions under the English law to have dealt with privilege afforded to a witness. Section 138 of the Act provides for the manner of examining a particular witness and also impliedly bestows upon the party, a right of examination-in-chief, cross-examination and re-examination. As per Section 33, in certain exceptional circumstances, where

¹⁹ 1852 (138) ER 1104.

cross examination cannot take place, previous deposition of the witness can be taken into consideration as relevant for the purpose of subsequent proceedings on satisfying certain conditions given in the section. Section 148 empowers the Court to decide whether a question proposed to be asked to a witness is proper or improper based on its relevancy to the suit or proceeding. The purpose of this section is to prevent unnecessary hassle to the witness when it is irrelevant with respect to the issues in the matter. Section 146 of the Act gives protection to a victim of rape from unnecessary and vexatious questioning regarding her past character that has no relevance to the issues of the case.

- **Prevention of Terrorism Act, 2002**

Witness who comes forward and deposes before a court of law in grievous offences like terrorist acts runs a greater risk of menace to his life, property or his family. Section 30 of the Act gives recognition to grant of protection to such a witness and preserve anonymity. Where the Court records reasons in writing or is of the opinion that the life of the witness is in danger, proceedings can be lawfully undertaken in camera. The validity of the section is upheld in *PUCL v. Union of India*.²⁰ However, POTA has been repealed with effect from 21.9.2004. In *PUCL*, the Court referred to *Gurubachan Singh v. State of Bombay*²¹, and other cases, and observed that one cannot shy away from the reality that several witnesses do not come to depose before the Court in serious cases due to fear of their life. The provisions of Section 30 are similar to those in Section 16 of the TADA, 1987, the validity of which was upheld in *Kartar Singh's*²² case already. Anonymity of witnesses is to be provided only in exceptional circumstances when the Special Court is satisfied that the life of witnesses is in jeopardy.

- **The Unlawful Activities (Prevention) Amendment Act, 2004**

This Act applies to unlawful activities inclusive of terrorist acts. Section 44 of the Act provides for protection of witnesses and is on the same lines as S. 30 of POTA, 2002.

- **Juvenile (Care and Protection of Children) Act, 2000**

Section 21 of the Act establishes rule against publication of name, address or other particulars relating to juvenile in conflict with law, which can lead to determination of identity of the juvenile. Disclosure of identity may be allowed in the interests of the juvenile provided permission is granted for the same by recording reasons in writing. Making any picture of the juvenile public is also prohibited.²³ The idea is to strike a balance between the right of a witness as to his/her life and liberty and the right of the community in the effective prosecution of

²⁰ 2003(10) SCALE 967.

²¹ AIR 1952 SC 221.

²² 1994 SCC Cr. 899.

²³ Section 21(1) of the Juvenile (Care and Protection of Children) Act, 2000.

persons guilty of heinous criminal offences on the one hand and the right of the accused to a fair trial, on the other.

VI. JUDICIAL TREND

It is the foremost function of the State and of the Court of law to conduct a free and fair trial and come to a final verdict after perusing all the records presented, in a fair manner. The Judge has a quintessential role to play in ensuring the same. The role of a Judge is to strike a fair balance between the rights of the accused as well as the victims. The aim of a criminal trial or the role of the prosecution is not to indict the accused but to ensure a fair procedure. In order to achieve the same the Judge should see to it that the witnesses are not intimidated or influenced to manipulate their deposition before the court. Where the witnesses are pressurized, the trial is reduced to a mere travesty of the criminal justice system. The judiciary has time and again commented on the dire need and significance of witness protection in India.

The Hon'ble Supreme Court observed in *NHRC v. Gujarat*²⁴ that granting protection to witnesses is essential as in most of the sensational and controversial cases, trials do not begin until witnesses are won over. Criminals often have contact with the police and influential people causing distress and coercion to the witness into changing his/her statement before the court. With respect to the veracity of testimony by a hostile witness, in *Bhagwan Singh v. State of Haryana*²⁵, the Supreme Court held that evidence of a hostile witness is no bar to conviction of an accused. In *State of U.P. v. Ramesh Prasad Misra*²⁶, the Supreme Court opined that evidence of a such a witness must be scrutinized closely and will not be discarded totally whether in favor of accused or prosecution. The testimony of such a witness should be assessed in the same manner like that of any other witnesses.²⁷

In *Swaran Singh v. State of Punjab*²⁸, the Supreme Court emphasized on the pitiful condition of witnesses. The Apex Court stated that witnesses come from far off places to depose before the court only to see the matter adjourned multiple times. They are subjected to prolonged examinations, not given place to sit in the courtroom and harassed a lot throughout the trial. Alarmed by the rising cases of witnesses turning hostile, the Supreme Court in the *Best Bakery* case expressed concern that merely showing concern without taking any positive action amounts to betraying public trust in the system. With respect to measures for doing away with confrontation with the accused, in *Sakshi v. Union of India*²⁹, use of trial cameras was suggested as a measure to offer protection to victims of sexual offences. In the historical case of *State of Maharashtra v. Praful*

²⁴ (2010) 15 SCC 22.

²⁵ AIR 1976 SC 202.

²⁶ AIR 1996 SC 2766.

²⁷ *Shyama v. State of Rajasthan*, 1977 WLN 278.

²⁸ (2000) 5 SCC 68 at 678.

²⁹ (2004) 5 SCC 518.

*Desai*³⁰, the Supreme Court held that witness examination through video conferencing is valid in certain cases and the same falls under 'procedure established by law' under Article 21 of the Constitution. Where disclosure of the identity of the witness may be detrimental to public interest and aborts the very process of administration of justice, an effective hearing can be undertaken *sans* cross examination of the witness by the accused person.³¹ Such a right is not fundamental to the accused.³² These rulings will go a long way in protecting the rights of victims and witnesses.

In order for a trial to be fair, it must be conducted in harmony and unanimity. In *G.X. Francis v. Banke Bihari Singh*³³, the Supreme Court opined that if reasonable grounds are made out, transfer of the case should be allowed so as not to undermine the public confidence in the fairness of the trial. A friendly ambience for fair and unprejudiced trial is quintessential.³⁴ Where the prosecution reasonably apprehends that the accused is tampering with the witnesses into changing their statement, the Court may, on such grounds, cancel the bail granted to the accused.³⁵

Balancing the right of an accused to an open trial and the right of a witness to maintain anonymity, the Supreme Court in *Naresh Shridhar Mirajkar. v. State of Maharashtra*³⁶ held that an order to prevent the publication of evidence given by a witness is valid provided it was passed with an aim to obtain true evidence in the matter and assist the administration of justice. Where the Court determines that circumstances are such that it becomes impossible for witnesses to depose fearlessly in an open trial due to apprehension of danger, a retrial may be allowed.³⁷ In cases where the threat to a witness persists even after the trial, owing to certain conditions, the authorities may extend the protection accordingly.³⁸ In a bid to prevent witnesses from turning hostile, the Delhi High Court set up certain guidelines to be made applicable in cases where the accused is punishable with death or life sentence, however not limited to them.³⁹ The need to establish a Competent Authority, factors to be considered while conferring protection and duties of the police are some of the aspects touched upon by the Court.

Perusal of various judgements given by High Courts and the Apex Court concerning the issue of witness protection reveals a startling state of affairs. The menace of witness hostility is leading to erosion of public trust

³⁰ *Supra* note 19.

³¹ *A. K. Roy v. Union of India*, AIR 1982 SC 710.

³² *Gurbachan Singh v. State of Bombay*, AIR 1952 SC 221; *Hira Nath Mishra v. Principal, Rajendra Medical College, Ranchi*, AIR 1971 SC 1260.

³³ AIR 1958 SC 209.

³⁴ *Maneka Sanjay Gandhi v. Rani Jethmalani*, (1979) 4 SCC 167.

³⁵ *Gur Charan v. State*, AIR 1978 SC 179; *Mahboob Dawood Shaikh v. State of Maharashtra*, AIR 2004 SC 2890; *Panchanan Misra v. Digambar Misra*, AIR 2005 SC 1299; *Kalyan Chandra Sarkar v. Rajesh Ranjan*, (2004) 7 SCC 528.

³⁶ 1966 SCR (3) 744.

³⁷ *Sunil Kumar Pal v. Phota Sheikh*, AIR 1984 SC 1591.

³⁸ *Paramjit Kaur v. State of Punjab*, (2008) 152 PLR 185.

³⁹ *Neelam Katara v. Union Of India*, ILR (2003) II Del 377.

in its own system. The judiciary has intervened on multiple levels to prevent this disastrous development.

VII. ANALYSIS OF THE WITNESS PROTECTION BILL, 2015

The Witness Protection Bill of 2015 is India's first concrete step that aims to provide for mandatory protection of witnesses outside the courtrooms who come forward to assist the law enforcement agencies and face extreme pressure and threats especially when the accused in question is in a powerful and influential position.

Under the Bill, a witness is given the option to apply for protection within the jurisdiction of the police station that he falls under or at the court during any stage of the proceedings.⁴⁰ The Police Officer is given the power to investigate the threat and subsequently submit a report on the same to the court. The Applicant shall be provided with protection with respect to any harm to his life, property and to associated people in a bid to influence the stand of such witness.⁴¹ The term "associated people" refers to any person who stands in relation or has connection with the witness. The Bill, however, dispensed with the need to lay down any guidelines or factors in order to determine the need to confer protection. Absence of a broad set of parameters bequeaths a lot of discretion on the authority and hence, unwraps the leeway to misuse of the power. The Bill also fails to provide for duties of the witness once the protection has been bestowed.

The Bill recognizes three stages in the process of law during which protection must be provided to the witness:

- a) Investigation stage
- b) Trial stage
- c) Post trial stage if deemed necessary by the court if the threat perception still persists

The range of measures covered under the Bill include maintaining anonymity of the witness in matters pertaining to criminal offences for the specific duration of the trial or permanently as requested by the witness⁴², protecting the residential address of the witness and redacting the same from all official records,⁴³ allowing cross examination to be conducted via two way camera⁴⁴ and allowing the witness to be present in all trials via in-camera proceedings.⁴⁵ If need be, the witness shall have the choice to, temporarily or permanently, change his/her identity⁴⁶ or place of residence.⁴⁷ The Bill does not address the possibility of witness facing threat or harassment post the permanent change of identity or residence of the witness. Under the Bill, the witness shall be provided with an option to practice an alternate occupation. In case the same is not possible,

⁴⁰ Section 3 of the Witness Protection Bill, 2015.

⁴¹ Section 4 of the Witness Protection Bill, 2015.

⁴² Section 5(4)(d) of the Witness Protection Bill, 2015.

⁴³ Section 5(4)(e) of the Witness Protection Bill, 2015.

⁴⁴ Section 5(4)(f) of the Witness Protection Bill, 2015.

⁴⁵ Section 5(4)(a) of the Witness Protection Bill, 2015.

⁴⁶ Section 5(4)(b) of the Witness Protection Bill, 2015.

⁴⁷ Section 5(4)(c) of the Witness Protection Bill, 2015.

the appropriate Government must undertake to provide allowance to the witness commensurate to his/her standard of living. However, in a country like India with a severe job crunch, the feasibility of providing the witness with an alternate employment must be questioned. Further, the financial viability of providing the witnesses with allowance is also doubtful. Also, in cases of sexual offences against women, among other offences, the anatomy of intimidation and terrorization goes beyond mere physical threat. In such a case, merely providing physical protection in the form of round the clock constables is not adequate.

The Bill also provides for constitution of National Witness Protection Council (“NWPC”)⁴⁸ and State Witness Protection Council⁴⁹ by the Central Government and State Governments respectively. The NWPC shall, in coordination with other agencies, be responsible for laying down policies and framework for the witness protection program, protection of details of the witnesses, evaluation of the efficiency of witness protection program, among other functions.⁵⁰

Currently, the position of a witness in India is not promising. The Witness Protection Bill was introduced in the Parliament in 2015. Police and public order is a State Subject under the seventh schedule of the Indian Constitution. The State Governments and the Union Territories have failed to reach a common ground with respect to the Bill. Delhi is the first State in the country to introduce a Witness Protection Scheme. Though it is an effort made in the right direction, the Scheme needs a lot more work with respect to measures, manpower and funds.

VIII. COMPARISON OF WITNESS PROTECTION LAWS

After years of development in the field of litigation practice, the role of a witness testifying at a trial, civil and criminal, is regarded very highly and considered quintessential. Without this crucial instrument of evidence, the justice system is handicapped. The practical difficulty of adducing quality evidence from witnesses in criminal trials owing to lack of formal protection to a witness is being acknowledged globally.

- **United Kingdom**

In the backdrop of inadequate and incompetent legal regime catering to the needs of distressed witnesses assisting the court by way of their testimony, Youth Criminal Justice and Evidence Act, 1999 (“YCJEA” or “the Act”) was enacted with the aim of modernizing the criminal justice system. It sought to enhance the ability of the courts to accommodate special needs of witnesses who face intimidation. The primary objective is to enable the witnesses to depose without fear and add to the quality of evidence by way of laying down special measures to afford protection and assistance to the witnesses. The Act is structured in three Parts, seven

⁴⁸ Section 8 of the Witness Protection Bill, 2015.

⁴⁹ Section 12 of the Witness Protection Bill, 2015.

⁵⁰ Section 9 of the Witness Protection Bill, 2015.

Chapters and seven Schedules. Part I deals with establishment of referral panels, referral orders of young offenders to such panels and conditions for the same. However, this Part has been repealed.

Part II constitutes of certain provisions aimed to assist the vulnerable witnesses in giving evidence. Section 16 and Section 17 of the Act lays down grounds for availing assistance. Some of the special measures of protection include screening witness from accused⁵¹, option of giving testimony through a live link from a location outside the court⁵², ability to testify in private⁵³ and chief⁵⁴ and cross-examination⁵⁵ via video recorded evidence. Certain measures are instituted specifically with respect to sexual offences. Restrictions are imposed on questions concerning the sexual history of the complainant unless considered related to a relevant issue in the case.⁵⁶ The aim must not be to merely undermine the complainant's credibility. The discretion lies with the court to determine if such evidence or line of questioning is relevant thereby limiting the circumstances in which such examination can be called for. The court must be satisfied that excluding such evidence will lead to an unsafe conclusion on any relevant issue of the matter in question. The Act further provides for restriction of publication of any matter pertaining to any person while under the age of 18 if the court is of the opinion that the publication is likely to lead to identification of the person as connected with the matter in question.⁵⁷ Anonymity aims to reduce the distress caused due to identification of the person connected with the matter thereby enhancing the quality of evidence.

- **China**

The People's Republic of China seeks to address the issue of witness protection to an extent by way of incorporating certain measures in the Criminal Procedure Law of the People's Republic of China, 1979 ("Criminal Procedure Law") and Criminal Law of the People's Republic of China, 1997 ("Criminal Law").

With respect to witness testimony, the People's Court was given the power to compel the witness to appear to give testimony where such a witness fails to appear without good reasons.⁵⁸ Where the witness fails to appear before the court to give testimony without justified reasons, in grave circumstances, he/she could be detained for not more than ten days with the permission of the president of the court. While power to admonish a witness is given, security measures to protect the life of witness or his/her close relatives are also provided for. Article 61 of the Criminal Procedure Law insures protection from intimidation, humiliation or retaliation against a witness or his close relatives. Such a person shall be investigated for criminal responsibility or be punished for

⁵¹ Section 23 of the Youth Criminal Justice and Evidence Act 1999.

⁵² Section 24 of the Youth Criminal Justice and Evidence Act 1999.

⁵³ Section 25 of the Youth Criminal Justice and Evidence Act 1999.

⁵⁴ Section 27 of the Youth Criminal Justice and Evidence Act 1999.

⁵⁵ Section 28 of the Youth Criminal Justice and Evidence Act 1999.

⁵⁶ Section 41 of the Youth Criminal Justice and Evidence Act 1999.

⁵⁷ Section 45 of the Youth Criminal Justice and Evidence Act 1999.

⁵⁸ Article 188 of the Criminal Procedure Law of the People's Republic of China, 1979.

violation of public security in accordance with law. Certain protective measures are enlisted with respect to crimes threatening State security, drug related crimes, terrorist activities, organized crimes and such other offences that include maintaining confidentiality of names, addresses and other personal information of the witness or his/her close relatives, ability to give testimony without being personally present in the court, restricting certain persons from contacting the witness or his/her close relatives and other such measures deemed necessary to afford protection.⁵⁹ Where a witness is of the opinion that his/her personal security or that of his/her close relatives is threatened, application for protection may be made with a people's court or public security organ.

As a punitive measure to protect the witness from distress, Article 307 of the Criminal Law stipulates that where a defendant or agent ad litem coerces the witness into giving testimony or changing his testimony in contradiction to the facts shall be punished with an imprisonment not exceeding three years. In case of graver circumstances, imprisonment may be for a term not less than three years but not exceeding seven years. Further, restricting a witness from testifying by way of violence, threat, bribery or any such means shall entail imprisonment of not more than three years or in certain serious cases, imprisonment shall not be less than three years but less than seven years.⁶⁰ Article 308 of the Criminal Law provides for fixed term imprisonment or criminal detention for any person who retaliates against a witness. A judicial officer who by means of violence extorts testimony from a witness shall be punished with an imprisonment of fixed term or criminal detention.⁶¹

The Chinese law consists of both preventive and punitive measures. However, apart from the general protective measures for the witnesses, the law fails to stipulate any criteria or a structured scheme to include a witness in the protection program or to effectively undertake the enlisted measures. While the punitive measures must be appreciated, the subjects of the measures are only limited to the witness and not his family members or close relatives who face every possibility of retaliation and hence, should have been brought under the ambit of protection. The property of the witness, which faces as much risk of reprisal as his/her personal safety, finds no mention in the protection measures.

- **Canada**

The Witness Protection Act, 1996 was enacted to achieve effective law enforcement and ensure public safety by way of protective measures. The ambit of protection is extended to persons who are directly or indirectly involved in the law enforcement matters by providing assistance to a federal security, defense or safety organization. Any person who is admitted to a designated municipal or provincial program is also included.⁶² A

⁵⁹ Article 62 of the Criminal Procedure Law of the People's Republic of China, 1979.

⁶⁰ Article 307 of the Criminal Law of the People's Republic of China, 1979.

⁶¹ Article 247 of the Criminal Law of the People's Republic of China, 1979.

⁶² Section 3 of the Witness Protection Program, 1996.

Witness Protection Program is established under Section 4 of the Witness Protection Act for easy facilitation of protection. A witness is admitted to the protection program subject to certain conditions laid down in Section 5. Certain factors such as the nature or extent of risk faced by the witness, the nature of assistance given or agreed to by the witness, role played by the witness in the matter, alternate options of providing protection to the witness, economic viability of maintaining the witness in the Program and such other factors as deemed relevant are to be considered in determining whether a witness is to be admitted to the Program or not.⁶³

IX. RECOMMENDATIONS

Loquacity without backing it with resilient action implies mockery of justice. Despite repeated judicial intervention, India has failed to come up with a concrete statutory law for witness protection. In the backdrop of the Bill introduced in 2015, which has failed to find unanimity, it is imperative to evaluate and explore the prospects of having a concrete legislation in India.

- There is a need to lay down broad set of guidelines or develop common standards in order to make a fair and uniform assessment of the need to confer witness protection by the authority. The range of such parameters could be the position or importance of the witness in the matter, nature of the inquiry, the nature of threat to the safety of the witness or his relative, background check of the witness, value of the deposition in the matter and such other factors deemed necessary and relevant, though not exhaustive.
- Once a witness is considered eligible for protection, a contractual agreement must be entered into with the witness/protectee setting out duties and obligations of both the parties. It shall be the duty of the protectee to cooperate with the law enforcement agencies, participate in the trial and give deposition truthfully, meet all the requisite legal obligations, provide obligatory documents and information necessary to protect the witness, refrain from indulging in unlawful activities, etc. In case an agreement cannot be entered into immediately, protection may be provided for a certain limited period of time.
- Grounds for cessation of protection granted to the witness must be laid down. In cases where the protectee fails to cooperate with the authorities, materially misrepresents relevant information, provides false documents or any such contravention of his/her duties, protection must be terminated.
- The practicability of permanent relocation of a witness as a protective measure as stipulated in the Bill is doubtful. Multiple factors such as employment of the witness, family of the witness, adaptability of the witness to a new environment, etc. will have to be taken into consideration making this measure a complex undertaking.

⁶³ Section 7 of the Witness Protection Program, 1996.

X. CONCLUSION

The State has the paramount duty to preserve the confidence of public in the justice system. The Courts of law administering justice must not overlook any oppressive and unjust conduct in the proceedings that jeopardizes the criminal justice system in general and rights of the parties involved, in particular. It cannot be denied that a trial that aims to discover and establish the truth in its entirety ought to be fair in every aspect to all the parties. Every matter should be adjudged before impartial adjudicators. It is not solely the accused that must be dealt fairly with. The idea of a fair trial entangles in it the interests of the accused, the victim, the witnesses and the society. Obstacles that hamper the process of determining the truth are manifold and multilayered. When a witness is threatened or coerced to depose falsely before a court, the trial does not remain to be fair. Use of influence, muscle power, money or threat in order to change the witness testimony is not unheard of, to the extent that it has become a routine. It can be inflicted upon the witness or his family. Failing to hear the testimony of credible witnesses tantamounts to miscarriage of justice. Safeguarding the witness is tremendously imperative in combating crime and criminals.

There is an exigent need to have a robust and effective witness protection law in place to check and eliminate such extraneous factors that act as barriers to a fair trial. The purpose has two facets to it. The first aspect is from the trial point of view and aims to safeguard the investigation process and ensure that witnesses do not go back on their statements given before a court. The second aspect is from welfare viewpoint. The witness must be protected mentally as well as physically from potential harm till the conclusion of trial. The criticality of ensuring witnesses' protection is on par with bringing lawbreakers to justice. The Supreme Court has reflected upon the urgency of having strong witness protection measures in various landmark judgements. Multiple Law Commission Reports have deliberated on the concept of witness protection programs and recommended means to an extent to achieve the same. A criminal trial must never be so undertaken by the prosecution as would result into the conviction of an innocent person. On the other side of the coin, the advancement of a criminal trial must not be hindered by the accused in such a manner that it leads to the acquittal of a fugitive. In the backdrop of disturbing rise in witnesses turning hostile, the significance of having a law that caters to protection of witnesses cannot be overstressed in such a scenario.

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