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WITNESS PROTECTION IN INDIA: THE JUDICIAL ENDEAVOUR

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Abstract

A criminal case is built upon edifice of evidence including witnesses whether it is direct evidence or circumstantial evidence. Many developed countries across the globe provides for the witness protection laws but woefully in India, there is no such legislation framed with regard to this issue. It is due to lack of such legislation that the witnesses are under precarious situation. In numerous cases the judiciary played the constructive role to provide different means and methods to the protection of witnesses which lead to the significant amount of encouragement to establish Witness Protection Programs in India

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Introduction

In a democratic country like India, crime rate is increasing at a burning speed but as far as justice is concerned, it is not of parallel pace to it. A criminal case is built upon edifice of evidence including witnesses whether it is direct evidence or circumstantial evidence. As per the present scenario of our judicial system witnesses are taken for granted in a way that they are harassed, bribed, maimed or even abducted at times. But on the other hand in cases those of white collar crimes or cases involving corrupt politicians, there is a casualty of witnesses becoming hostile. Many developed countries across the globe provides for the witness protection laws but woefully in India, there is no such legislation framed with regard to this issue. It is due to lack of such legislation that the witnesses are under precarious situation. However providing protection to witnesses might be tedious in a country with a limited police force but undoubtedly it is a key aspect of administration of justice. Their each and every statement is very important as it has a magic force to change the course of the whole case.¹

According to Bentham, "witnesses are eyes and ears of justice". It is trite law that justice should not only be done but it should be seen to have been done.² Witnesses are to be produced before Judges, who in turn should subsume the protection of witnesses along with their power of administering justice. Not only the parties to suit but additionally the witnesses too have a right to fair trial. "Free and fair trial is sine qua non of Article 21 of the Constitution." It is the duty of judge to play a constructive role thereby providing different methods for the protection of witnesses. In numerous cases the judiciary played the constructive role to provide different means and methods to the protection of witnesses which lead to the significant amount of encouragement to establish Witness Protection Programs in India. These cases are discussed as follows:-

STATUTORY PROTECTION TO WITNESS: POSITION UNDER INDIAN LAW

The Code of Criminal Procedure, 1973 provides for trial in open court³ and also provides for in-camera trials⁴ for offences involving rape.⁵

¹Retrieved from< <http://www.legalserviceindia.com/article/I259-Witness-Protection-Programme.html>> accessed on 05/01/2016 at 1.30p.m.

²Retrieved from< <http://www.legallyindia.com/Criminal-law/silent-witnesses-why-india-needs-better-witness-protection-laws-and-why-we-can-t-only-blame-the-goondas>> accessed on 05/01/2016 at 9.30a.m.

³ Sec 327 of The Code of Criminal Procedure, 1973.

⁴ Sec 327(2) of The Code of Criminal Procedure, 1973.

The Supreme Court in *State of Punjab V. Gurmit Singh*⁶ held that if the witness or victim is protected it would enable the victims of crimes to be a little comfortable and answer the questions with greater ease in not too familiar surroundings. Trial in camera would not only be in keeping the self-respect of the victim of (the) crime and in tune with legislative intent but is also likely to improve the quality of evidence of a prosecutrix because she would not be so hesitant or bashful to depose frankly as she may be in the open court, under the gaze of (the) public. The improved quality of her evidence would assist the court in arriving at the truth and sifting truth from falsehood.

Special provisions for Trial in Child Sex Abuse or Rape Cases

The Supreme Court of India in *Sakshi V. Union of India*⁷ observed: “the whole inquiry before a court being to elicit the truth, it is absolutely necessary that the victim or the witnesses are able to depose about the entire incident in a free atmosphere without any embarrassment....The mere sight of the accused may induce an element of extreme fear in the mind of victim or the witnesses or can put them in a state of shock. In such a situation he or she may not be able to give full details of the incident which may result in miscarriage of justice. Therefore, a screen or some such arrangement can be made where the victim or witness do not have to undergo the trauma of seeing the body or face of the accused.”

WITNESS PROTECTION UNDER SPECIAL STATUTES IN INDIA Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA)

In *Kartar Singh v/s State of Punjab case*⁸, the Hon'ble Supreme Court upheld the validity of Section 16(2) and (3) of the Terrorist and Disruptive Activities (Prevention) Act 1987 (TADA) which gave the discretion to the Designated Court to keep the identity and address of a witness secret upon certain contingencies; to hold the proceedings at a place to be decided by the Court and to withhold the names and addresses of witnesses in its orders. The court further held that the right of the accused to cross-examine the prosecution witnesses was not absolute but was subject to exceptions.

The Prevention of Terrorism Act, 2002 (POTA)

In *People's Union of Civil Liberties v/s Union of India*⁹, the Supreme Court considered the validity of Section 30 of The Prevention of Terrorism Act, 2002 which deals with 'protection of witnesses'. The court upheld the validity of a similar provision subject, of course, to certain conditions which form part of Section 30 now. The present position is that Section 30(2) requires the court to be satisfied that the life of a witness is in danger to invoke a provision of this nature. Furthermore, reasons for keeping the identity and address of a witness secret are required to be recorded in writing and such reasons should be weighty. In order to safeguard the right of an accused to a fair trial and basic requirements of the due process a mechanism can be evolved whereby the special court is obligated to satisfy itself about the truthfulness and reliability of the statement or disposition of the witness whose identity is sought to be protected.

In *Twin Blast case*¹⁰, 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. This officer allegedly circulated Xerox copies of a document bearing the name of the witness and the registration number of his vehicle. A couple of days later, a crime branch officer is believed to have leaked his address in Kandivali- a distant Mumbai suburb- to the media persons. The police had failed to realize that Pandey was an important prosecution witness in a very sensitive case. Since the police are yet to arrest more persons in regard to this case, Pandey is a crucial witness in identifying such persons. In such cases the police should take extra precaution and issue a circular or directive to all officers in the department to maintain silence on all the investigations. 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.

⁵ Sec 376 and 376A to 376D of Indian Penal Code, 1861

⁶ 1996(2) SCC 384

⁷ 2004(6) SCALE 15

⁸ 1994 Cr.L.J. 3139 (SC)

⁹ 2003 (10) SCALE 967

¹⁰ Retrieved from <https://en.wikipedia.org/wiki/25_August_2003_Mumbai_bombings> accessed on 10-1-2016

The Unlawful Activities (Prevention) Amendment Act, 2004, Juvenile Justice (Care and Protection of Children) Act, 2000 also contains provisions for Witness Protection but as such no particular law has been enacted so far

PROTECTION AGAINST PUBLICATIONS

Publication of name, address and identity of witness by Media

In *Bimal Kaur Khalsa v/s Union Of India*¹¹, the Full Bench of the Punjab and Haryana High Court held that the identity, names and addresses of the witnesses may be disclosed to the accused before the trial commences; but the court would like to qualify it by observing that it should be subject to an exception that the Court for weighty reasons in its wisdom may decide not to disclose the identity and addresses of the witnesses especially if the potential witnesses whose life may be in danger.” It may stop the dissemination of the information regarding the address and identity of a prosecution witness by ensuring that his name and address and the identity are not given publicity by the media. In this way the High Court provides for protection of the witness from the media but does not deal with all the aspects of the problem.

Publication of identity of Rape Victim in judgements by the Court.

In *State of Punjab v/s Ramadev Singh*¹² the Supreme Court held that the restriction does not relate to printing or publication of judgement by High Court or Supreme Court. But keeping in view the social object of preventing social victimization or ostracism of the victim of a sexual offence for which section 228-A IPC has been enacted, it would be appropriate that in judgement, be it of Supreme Court, high Court or lower Court, the name of the victim should not be indicated.

Publication of evidence of witness to the Accused

In *Naresh Shridhar Mirajkar v/s State of Maharashtra*¹³, the witness protection came up for consideration before the Supreme Court in somewhat unusual circumstances in a defamation case. In this case the witness for the offence repudiated in the witness box all statements earlier made by him. With the permission of the High Court, he was cross-examined by the defence, but he maintained his stance. Later the defence came to know of some other proceedings where the witness had substantially stated what was alleged by the defence. Accordingly, the defence recalled him to the witness box. At that stage, the witness sought protection of the High Court against the publication of his evidence because, he said, the publication of his earlier evidence had caused him business losses. Protection against publication of his evidence was given by the High Court and affirmed by the Supreme Court because it was “thought to be necessary in order to obtain true evidence in the case with a view to do justice between the parties.” This may well be the only case in which the business interests of a witness were sought to be protected rather than the witness himself. It is a novel and unexplored dimension to witness protection.

JUDICIAL DIRECTIONS & GUIDELINES FOR THE PROTECTION OF WITNESSES

Direction to Central and State Government:

In *NHRC v/s State of Gujarat*¹⁴, the Apex court observed, no law has yet been enacted, not even a scheme has been framed by the Union of India or by States in protection to the witnesses. The Court has laid down certain guidelines for ensuring of a sense of confidence in the mind of the victims and their relatives, and to ensure that witnesses depose freely and fearlessly before the court. Following are the steps shall be taken:

- (a) Ensuring safe passage for the witnesses to and from the court precincts,
- (b) Providing security to the witnesses in their place of residence wherever considered necessary, and
- (c) Relocation of the witnesses to another State wherever such a step is necessary.

Yet despite the earlier directions of the Apex Court, given in this regard to the Central and the State Government to enact a law for witness protection, no action has been taken by either of the two Governments.

Direction to the Police and Delhi Legal Service Authority

It is the duty of the executive to fill the vacuum by executive orders because its field is coterminous with that of the legislature, and where there is inaction even by the executive, for whatever reason, the judiciary must step in exercise of its constitutional obligation to provide a solution till such time as the legislature acts to perform its role

¹¹ AIR 1988 P&H 95.

¹² AIR 2004 SC 1290

¹³ (1996) 3 SCR 744

¹⁴ (2008) 16 SCC 497

by enacting proper legislation to cover the field of witness protection. In *Ms. Neelam Katara v/s Union of India*¹⁵, the Delhi High Court issued certain guidelines which operate for the protection of witnesses till enactment of a suitable legislation.

Direction to Court

In *Harish C Tiwari v/s Baiju*¹⁶, the Supreme Court observed that if need be the courts have the necessary power, by issuing directions for the protection of witnesses to fill the vacuum till such time the legislature steps in to cover the gap or the executive discharges its role.

PLIGHT OF THE WITNESSES

In *Swaran Singh v/s State of Punjab*¹⁷ the Supreme Court of India 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. 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. 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.”

ROLE OF THE STATE IN PROTECTING THE WITNESS

In *Zahira Habibulla H. Sheikh and Another v/s State of Gujarat and Others*¹⁸, the apex court was emphatic on the role of the State to play in protecting the witnesses. It has been observed that as a protector of its citizens, the State has to ensure that during the trial in the Court the witness could safely depose the truth without any fear of being haunted by those against whom he had deposed. Supreme Court reminded the State that it has a constitutional obligation and duty to protect the life and liberty of the citizen.

WITNESS PROTECTION LAWS AND PERJURY

Perjury is rising in the absence of witness protection laws. In India, offence of perjury dealing with false and fabricated documents has been defined under Section 191 of IPC and Chapter XI of IPC. A series of judicial pronouncements on the law of perjury have therefore incessantly stressed on the urgency of having a broad-based legislation on witness protection so that the high rate of acquittals in criminal cases could be curbed by assuring the witnesses that they will be kept out of harm's way after they testify against powerful and influential people.¹⁹

IMPORTANCE OF WITNESS IN CRIMINAL JUSTICE SYSTEM

In criminal cases, witnesses have an substantial role to play as the facts cannot be determined without them. It is only the witnesses who can prove the case if the testimony of the victim is insufficient.

In *Bharat Singh Rawat vs State Nct Of Delhi*²⁰ on 12 March, 2014, the Delhi High Court observes the importance of witness in criminal justice system. "Witnesses" as Bentham said: are the eyes and ears of justice. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no

¹⁵ ILR (2003) II Del 377 260

¹⁶ 2002 (5) SCC 294

¹⁷ AIR 2000 SC 2017

¹⁸ (2006) 3 SCC 374

¹⁹ Retrieved from <<http://archive.indianexpress.com/news/perjury-rising-in-absence-of-witness-protection-law/1119283/>> accessed on 06/01/015 at 11.59 a.m.

²⁰ CRL.A. 830/2013

longer can constitute a fair trial. The incapacitation may be due to several factors, like the witness being not in a position for reasons beyond control to speak the truth in the Court or due to negligence or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by Courts on account of frequent turning of witnesses as hostile, either due to threats, lures and monetary considerations at the instance of those in power, political clouts and patronage and innumerable other corrupt practices stifle truth and realities coming out to surface rendering truth and justice. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the Court and justice triumphs and that the trial is not reduced to a mockery. Doubts are raised about the roles of investigating agencies.

CRITICAL EVALUATION OF CASES RELATING TO PROTECTION OF WITNESSES

In *Naroda- Patia case*²¹; 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. According to him Akram Ahmed, an anti social element of that locality while assaulting him along with other people of the abovementioned group was shouting "You are very fond of deposing before the Nanavati Commission, aren't you?" Sayyad, who lost his three children in the Naroda-Patia massacre, had deposed before the Nanavati Commission on 1st October 2003 naming several persons in the mob. He is one of the key witnesses in the case and had also been provided with one police guard. The guard however had retired for the day when Sayyad was attacked. The neighbours of Sayyad maintain that Akram Ahmed had been threatening others not to depose before the judiciary during the Naroda trial. About forty-five families of Naroda-Patia have refused to go back to the area after the riots. What is shocking in this case is that such a key witness (in this case Sayyad), was provided with only one police guard who, surely, would have looked to save his own life rather than that of the witness he was protecting, when the crowd of thirty people attacked.

In *Ketan Thirodkar case*²², the Bombay High Court had given police protection to an ex-journalist Ketan Thirodkar, because he had been under threats soon after he had filed the police complaint, which disclosed a series of illegal acts allegedly committed by the police in connivance with the underworld. Thirodkar had filed a petition seeking police protection as well as a police enquiry into the police underworld nexus. However, the public prosecutor opposed the grant of police protection on the ground that Thirodkar himself was involved with the underworld. Here the public prosecutor failed to comprehend the fact that:

- a) Thirodkar has admitted his links with the underworld and is ready to face the legal consequences.
- b) That even former criminals/ mobsters are also given police protection if they turn approver. The High Court, in this case, had given Thirodkar police protection only for a limited period, not realizing that the persons that he is to implicate would cause serious injury to him the moment the temporary police protection is removed.

Beant Singh Assassination Case: The case of Balwinder Singh, a prime witness in Beant Singh (former Chief Minister of Punjab) assassination case, shows the state of witness protection in the country. In September 2003, the Punjab and Haryana High Court ruled that it would be appropriate for both the Central and State Government to expeditiously adopt a programme for the protection of witnesses²³. The Court said: "Since it is not for us to direct the administration to formulate the guidelines, rather than leaving the decision on the absolute discretion of the district authorities, who may or may not like to draw upon secret service funds, we would like to bring on record the desirability of the legislature or the administration to try and emulate the advances in this field made in other countries."

Self-Styled Godman "BapuAsaram" Rape Case: A crucial witness in the rape case against the Asaram has been provided with police security, four days after one of the witnesses in the case was shot dead.²⁴ A bench of Justices A. R Dave and A. K Goel directed the trial courts to pass appropriate orders for giving witness protection, if they are threatened.

²¹Dhruv Desai, "Treatment and Protection of Witnesses in India" retrieved from <<http://www.legalserviceindia.com/articles/witnesses.html>> on June 1st, 2015 at 12 pm

²²Dayanand B. Nayak v/s Ketan K. Thirodkar And Anr. 2004 CriLJ 2177 (Bom. HC)

²³ Retrieved from <http://shodhganga.inflibnet.ac.in/bitstream/10603/8788/13/13_chapter%204.pdf> visited on 21-12-2015

²⁴ Retrieved from <<http://www.ndtv.com/india-news/key-witness-in-asaram-bapu-rape-case-gets-security-781731>> accessed on 06/01/2015 at 11.46 a.m.

NEED FOR LAW OF WITNESS PROTECTION

In *Rishipal vs State Of U.P.*²⁵, the Justice Yatindra Singh observed that the incident happened at noon. Six murders were committed. It is not possible that it was not seen by the unrelated or independent witnesses. Yet, no one came forward to depose. While discussing sub-heading 'No Unrelated or Independent Witness --Not Fatal' under third point, we have observed the reasons as to why no one came forward. The IO deposed that no one was coming forward even to get the statement recorded. Even the husband of the Pradhan was terrorised. This indicates that everything is not well with our criminal delivery system. Unless remedied, it may be its death knell. So Witness protection programme is the need of the hour. Witnesses have to have confidence that system will protect them; the system has to instil confidence in them. Witness protection programme is an important aspect of criminal justice system: without it, no reforms are possible. If witnesses are afraid to come forward then irrespective of any measures justice cannot be administered. This case is a pointer. Witness Anonymity and witness protection Programme are important aspects of criminal jurisprudence.

Conclusion

The Indian Judiciary has been trying hard so as to deal out with the problem of witness protection but since there is an absence of such legislation witnesses are not getting that protection as and when needed. Present circumstances are such that it is not being able to provide protection to them. In the recent case, in trial of Mukhtar Ansari (legislator- Bahujan Samaj Party, Lucknow), who was tried for the murder of Jail Superintendent, was acquitted as all the 36 witnesses turned hostile. It was perhaps due to the inadequacy of protection granted to witnesses. Today, under the present situation, our Judiciary is evaluating the American laws pertaining to witness protection. In America, the Federal Witness Protection Program has been created in response to the problems faced by the witnesses who testified against mobsters. Even Canada has enacted Witness Protection Act 1996 (Kanishka Bombay Case) and the judiciary is acting accordingly. Therefore the Indian Parliament should too take a note on this issue and enact a legislature for the same and on the same side judiciary must also indulge in it thereby protecting witnesses so that the cases like Jessica Lal should not be repeated which are shattering the credibility of our criminal justice system.

²⁵2011 Cr.L.J. 2346 (All.)