

Role of Hostile Witness in Criminal Justice and Administration: Issues and Challenges

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ABSTRACT

The Indian Judiciary follows an adversarial system which requires evidence supported by a witness to do justice. This implies that witnesses are important players in the judicial system that help the judges to arrive at a correct factual finding. In a search of truth, witnesses act as a shining sun that illuminates the face of justice. In the absence of any legislative protection and welfare measures, such instances of danger have encouraged them to turn hostile which has been the major reason for the downfall of conviction rate. Witness turning hostile leads to the failure of justice resulting into the wrong acquittal of the accused. This paper highlights the problems that arise in the criminal justice system due to hostile witnesses coupled with the ill-treatment faced by the witnesses during the trial that encourages them to turn hostile. The authors juxtapose the current laws in India dealing with witnesses and the measures adopted in other Nations along with the guidelines laid down by various international organizations. Further, a comprehensive analysis Witness Protection Scheme, 2018 has also been done. This paper concludes by stressing on the need for enacting a comprehensive legislation aimed at the welfare and protection of witnesses.

Key Words: Witness, Hostile, Criminal Justice, Jurisprudence

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1. INTRODUCTION

There are numerous stances where the courts have nullified the testimony of the witness on the basis of him turning hostile. Be it the criminal justice system of India or of any other country. Hostile witnesses create a major problem in achieving the ends of justice. Majorly, the Court faces difficulty in disposing of a case when an important witness turns out to be hostile as the Indian judiciary runs on an adversarial system, relying upon witnesses. Therefore, witnesses turning hostile results in the delaying of cases, making it impossible to reach a just and fair decision.

One such incident of witness turning hostile occurred in the year 2013, when Anil Ambani, the chairman of Reliance Communications, was brought as a witness in the 2G spectrum case and asked for the veracity of statement given by him under Section 161 of CrPC, he evaded his previous statement by stating that he doesn't remember what he has said two years ago. When the prosecution cross-examined him by asking questions relating to the Board meetings, etc., he relucted to answer any of them and took the plea of forgetfulness. Therefore, the Court has to declare him Hostile. Nevertheless, Anil Ambani didn't face any legal repercussions for his actions but the 2G spectrum case was affected as he was a prime witness in that case. This paper extensively deals with the circumstances which make a witness hostile, consequences on the cases involving hostile witnesses, provisions in Indian laws, suggestions for dealing with the problem of a hostile witness along with international stance on the problem.

2. HOSTILE WITNESS AND ITS IMPORTANCE IN A CRIMINAL CASE

A witness possesses paramount status in the criminal justice system of any country. According to the words of legal philosopher, Bentham, "witnesses are the eyes and ears of justice." A criminal case demands the availability of evidence whether direct or circumstantial which must be verified by witnesses who have solemnly affirmed to tell the truth. At the beginning of the trial, the prosecution gets a chance to begin his case by producing witnesses in support of available evidence produced by him to verify its veracity. The witness undergoes a series of questions prescribed by law which is further corroborated with the other shreds of evidence present to determine the facts. Hostile witness means a witness, who, on being called

by a party to testify the facts in his own favour, either acts against the party calling him or remains silent. This situation arises particularly when the witnesses refused to support their earlier stated version of facts which consequently leads to the weakening of a criminal case and interferes with the court's voyage to the shores of justice and fair trial.

This term has its origin in the Common law tradition and was intended to provide adequate safeguards to prevent the witnesses from ruining the cause of the party calling. This action is considered to be per se destructive not only because it ruins the painstakingly constructed cases by the prosecution but also wastes the time of the courts and makes a mockery of the investigation process. It should be duly noted here that a witness cannot be declared hostile merely because his statement is in favour of another party.¹ It must be properly established by putting forward such information that is sufficient enough to indicate that the witness is not desirous of telling the truth to the court or is trying to suppress the truth.² The Supreme Court of India in *State Tr. P.S. Lodhi Colony v. Sanjeev Nanda*³ observed that there is growing trend of witness turning hostile, primarily in high profile cases, either due to monetary allurements or life threats thereby eroding people's faith to demand justice. There are two criteria for determining the degree of hostility of witness as per Section 154 of The Evidence Act which are as follows:

1. Whether there is any belief of statement to be false?
2. Whether the witness is legally bound to state the truth?

3. EVOLUTION OF THE CONCEPT OF HOSTILE WITNESS

3.1 Ancient Hindu Period-

Under the English Law, there are three categories of witnesses, viz., and favourable, adverse and hostile witness. Justice Wilde differentiated between adverse and hostile witness and stated that an adverse witness is the one who gives evidence which is contrary to the

¹*Satpaul v. Delhi Administration*, AIR 1976 SC 294.

²*Luchiram Motilal Boid v. Radha Charan Poddar*, AIR 1922 Cal 267.

³*State Tr. P.S. Lodhi Colony v. Sanjeev Nanda*, 2012 (7) SCALE 120 (SC).

expectations of the party calling him, while a hostile witness is the one whose manner of providing evidence shows that he is not desirous of telling the truth to the court⁴.

Subsequently, Chief Justice Porter in *Wawanesa Mutual Insurance Co. v. Hanes* has also distinguished between an adverse witness and hostile witness.⁵ According to him, the term ‘adverse’ is more comprehensive than ‘hostile’ and therefore an adverse witness is the one who is opposed to the interests of the party calling him. In the same case, the ‘adverse testimony test’ was laid according to which if a witness is giving evidence that is against the interest or is proved adverse to the party calling him, then the witness will be regarded as a hostile witness.

3.2 Evolution in Indian Law-

Under Indian Law, although the term “hostile witness” is not expressly defined anywhere, the *Indian Evidence Act* deals with it without defining the same by permitting the party calling the witness to cross-examine the witness if he is declared hostile by the court on the basis of his previous testimony.⁶ The Supreme Court of India (hereinafter “SC”) has defined ‘hostile witness’ as a witness who is not covetous of telling the truth at the instance of the party calling him.⁷ There are several reasons responsible for a witness turning hostile and the primary ones are discussed in later parts of this paper. As of now, there is an absence of concrete codified law that could deal with the challenges faced by the witnesses so as to avert them from turning hostile. The hostility of witnesses has the tendency of not only weakening the foundation of the administration of justice but also obliterating it.

4. PROVISIONS IN INDIAN LAW FOR DEALING WITH A HOSTILE WITNESS

4.1 Indian Evidence Act, 1872

Under the Indian legal system, there are certain provisions dealing with hostile witnesses and those are discussed in this section. **Section 118** of the Indian Evidence Act, 1872 lays down

⁴S.C. Sarkar, *Sarkar's Commentary on the Law of Evidence* (16th ed. 2007) 460.

⁵*Wawanesa Mutual Insurance Co v. Hanes* [1961] OR 495 P 499.

⁶The Indian Evidence Act, 1872, s. 154.

⁷*Gura Singh v. State of Rajasthan*, AIR 2001 SC 330.

the qualifications of the persons who are competent to testify. Moreover, **Section 154** of the Indian Evidence Act is regarded as the prime provision dealing with hostile witnesses. It empowers the court to permit a party to cross-examine his witness if the witness has given and unfavourable evidence against the party calling him. In the said provision, a hostile witness is nowhere defined, but the sole intent of the provision is to determine the truth when a witness retracts from his previous testimony.⁸

4.2 Code of Criminal Procedure (CrPC)

Section 160 of the CrPC empowers the police officer conducting an investigation to require the compulsory attendance of any person who seems to possess something related to the facts and circumstances of the case and if a notice is being served to such a person by the police officer, then he is bound to attend.⁹ Section 160 is read with Section 161, and any statement recorded under Section 161 can be reduced to writing, provided that it is not an oath or affirmation.¹⁰ There shouldn't be any unusual delay as it will lead to throwing doubt on the authenticity of prosecution,¹¹ but this delay can be justified if proper explanation is given.¹² However, the statement made to the police officer which is reduced to writing will not be admissible in a court of law.¹³ By virtue of Section 145 of the Indian Evidence Act, 1872, such statement may be used to cross-examine the witness if he contradicts it.

With respect to **Section 162** of CrPC which talks of the inadmissibility of statement made before a police officer, the 4th Report of National Police Commission stated that this provision is operating at a great disadvantage to the police officers as the witnesses feel that they are in no way bound by the statement made before the police officer and they could easily deviate from it at any subsequent stage of proceeding without any penal actions against them.¹⁴ The Law Commission in its 41st report has opined that a contradiction arises when the

⁸S.C. Sarkar, Sarkar's Commentary on the Law of Evidence (16th edn, 2007) 460.

⁹Code of Criminal Procedure, 1973, s. 160.

¹⁰ Code of Criminal Procedure, 1973, s. 161(3).

¹¹*Ram Singh v. State of MP*, 1989 Cr LJ NOC 206 (MP); *BrijNandanRai v. State of Bihar* 1922 Cr LJ 942 (Pat).

¹²*JodhaKhodaRabari v. State of Gujrat* 1992 Cr LJ 3298 (Guj).

¹³ Code of Criminal Procedure 1973, s. 162.

¹⁴N. Krishnaswamy Reddy, Fourth Report of the National Police Commission, 1980.

statute prohibits the admissibility of a statement made before police officer in a court of law and allows the use of such statement for cross-examining the witness at the same time.¹⁵

Under **Section 164** of CrPC, the police officer is required to produce the witness before a magistrate and the magistrate is required to record the statement of the witness. This statement is recorded under an oath and is regarded only as substantive evidence as a conviction of a person cannot be based upon this. This statement may also be used to contradict the further statements of the witness and if it is found at any later stage of the proceeding that the witness has made a false statement, then the witness can be booked under the offense of perjury under the IPC. As it creates a fine balance between the interests of both the accused and the investigating agency, the SC has observed that Section 164 of CrPC will be insignificant if the procedure prescribed therein is not held mandatory.¹⁶

Section 171 of CrPC protects the witness from any inconvenience that may be caused while he is on his way to the court by providing that, on his way to the court, the witness shall not be required to accompany any police officer and shall not be subjected to unnecessary restraint or inconvenience.

Section 273 of CrPC prompts that except in cases where it has been already provided, all the evidence has to be taken in the presence of the accused or his pleader in his absence, during the course of the proceedings. However, the SC has held that despite the necessity of the presence of accused under Section 273, it is dependent upon the discretion of the court to examine the witness using video conferencing¹⁷ without the physical presence of accused, as video recorded evidence has been held to be admissible in *Maharashtra v. Dr. Praful B. Desai*.¹⁸

For the purpose of reimbursement of necessary expenses of the witness, Section 312 of CrPC provides that a criminal court, may order for the payment of reasonable expenses on the part

¹⁵The Law Commission of India, *The code of criminal procedure*, 1898 (Vol 1, 1969).

¹⁶*State of UP v. Singhara Singh*, AIR 1964 SC 358.

¹⁷*Sakshi v. Union of India*, 2004 (6) SCALE 15.

¹⁸*State of Maharashtra v. Praful Desai*, 2003 4 SCC 601.

of the Government, that have been incurred for the purpose of any trial, inquiry or any other proceeding before such court.

4.3 Indian Penal Code

Under **Section 191** of the Indian Penal Code, giving false evidence is an offense. It provides that if a person who is legally bound by an oath or a provision of law to state the truth makes a false statement which is known or believed by him to be false, then the person is said to be liable for giving false evidence. **Section 193** of the IPC talks about intentionally giving false evidence at any stage of a judicial proceeding and it also prescribes imprisonment of up to 7 years and also fine for the offense of giving false evidence.¹⁹

Apart from the criminal consequences, there are certain other legislations that provide for the protection of the identity of the witness such as Terrorist and Disruptive Activities (Prevention) Act, Unlawful Activities Prevention Act, Juvenile Justice (Care and Protection of Children) Act, etc.

4.4 Terrorists and Disruptive Activities Act, 1987 (TADA)

Section 16 of TADA explicitly provided for the protection of the identity of witnesses by prescribing the mode of proceedings to be held in camera. It also stated that the designated Court shall take all such measures that it deems fit in order to protect the identity and address of the witness. In the subsequent years, TADA was repealed by Prevention of Terrorism Act, 2002 (POTA). Section 30 of POTA also talks about protecting the identity of witnesses and states that the proceedings under POTA should be held in camera, if the special court so desires. It also states that the special court should take all reasonable measures that it deems fit to protect the confidentiality of the identity provided that it is satisfied that the life of such witness is in danger. Section 44 of Unlawful Activities (Prevention) Amendment Act, 2004 talks about the protection of witnesses in the same way as POTA does.

4.5 Juvenile Justice (Care and Protection of Children) Act, 2000

¹⁹Indian Penal Code 1860, s. 191.

In this regard, **Section 21** of the Juvenile Justice (Care and Protection of Children) Act, 2000 also lays emphasis on the protection of the identity of the witnesses by prohibiting any detail that has the tendency of revealing the identity of the witness or the victim associated with any proceeding under the Act.²⁰

4.6 Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989

Moreover, **Section 15A(6)** of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 empowers the Special Court or Exclusive Special Court which is trying a case under the Act, to provide complete protection to the victim, his dependent, informant or witnesses in order to secure the ends of justice. Further, **Section 15A(8)** of the Act also provides for the protection of the identity and addresses of the victim, his dependent, informant or witnesses, if an application is made by them in this regard.

There are other provisions which stress upon the protection of identity such as Section 372(2) CrPC which prompts that the trials involving offense of rape be held in camera and Section 228A of IPC which talks about the protection of identity of the victim.

5. JUDICIAL TREND TOWARDS ADDRESSING THE ISSUE OF HOSTILITY

According to the reports of the National Crime Record Bureau 2019, there has been a sharp decline in the conviction rates which was merely 50.4%. Notwithstanding this, Kerala emerged as the best performer with a conviction rate of 85.1% in the year 2019 whereas Bihar emerged as the worst performer with a small figure of just 6.1%.²¹ Considering the old figure in this respect is that of 1953, which recorded decent rate of conviction of 60% although it received a tremendous decline after the 70s dropping to less than 40% in 2012.²² On analyzing these figures, it was observed that witness turning hostile is one of the reasons behind low conviction rates resulting in acquittal of the accused. The following are some of the major reasons that encourage the key witnesses for turning hostile particularly in high profile cases and grave offenses.

²⁰Juvenile Justice (Care and Protection of Children) Act, 2000, s 21.

²¹*National Crime Record Bureau Report* (Ministry of Home Affairs, 2019).

²²Divya Shukla, *An Analytical study of decreasing Rate of Conviction in India* (4thedn, 2018) 91-94.

- **Delay in Disposal of Cases:** Frequent Adjournments without examining the witnesses and delay in disposal of cases play a vital role in encouraging a witness to turn hostile and extend the witnesses' ordeal. The police investigation and trial often take a long period which also leads to the fading of memory. As a consequence, when a witness is summoned upon after years for verifying the facts, it becomes facile to find contradictions in contrary to the statement made to the police under section 161 of Code of Criminal Procedure at the time of filing the case. In light of this, section 309 of the Code of Criminal Procedure directs that there shall not be a delay in examining the witnesses and the same must be done in an expeditious manner.²³ Further, the court shall refrain from giving adjournment which, in turn, may trouble the witness to have psychological and financial stress, unless necessary, for the reasons to be recorded in writing.²⁴ However, there is no strict provision which might encourage courts to adhere with this provision strictly.²⁵ To deal with this, an amendment should be introduced to impose costs against the party who deliberately obtains frequent adjournments on flimsy grounds.²⁶
- **Inadequacy of Allowances:** The Law Commission in its 154th report has concluded that the allowances paid to the witnesses are very meagre because the rates of allowances against the expenses incurred are quite inadequate.²⁷ Nevertheless, section 312 of the CrPC has been incorporated to provide allowances to the witness, but it is subjected to the discretion of the court.²⁸ The word 'reasonable' has not been defined anywhere in the Act which creates a sense of ambiguity as to what types of expenses shall be covered under the domain of reasonable expense incurred by the witness.²⁹ Even the Supreme Court has recognised the grief of witness and expressed that:³⁰

²³Code of Criminal Procedure, 1973, s. 309.

²⁴S.C. Sarkar and P.C. Sarkar, *Law of Criminal Procedure* (8th edn, 2004) 1013.

²⁵*State of Uttar Pradesh v. Shambhu Nath Singh*, 2001 (4) SCC 667.

²⁶MALLIMATH COMMITTEE, *Report of the Committee on Reforms of Criminal Justice System* (2003) 295.

²⁷The Law Commission of India, 154th report on *The Code of Criminal Procedure (Act No 2 of 1974)* (Vol I, 1996).

²⁸Code of Criminal Procedure, 1973, s. 312.

²⁹Purnima Khanna, Viney Kapoor, 'Importance of Witness Protection in the Criminal Justice System of India' (May 9 2020) Shodhganga <<http://hdl.handle.net/10603/103375>> (Last Modified 27 March 2021).

³⁰*Swaran Singh v. State of Punjab*, AIR 2000 SC 2017.

“...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.”

The discretion rests with the Magistrate to decide whether the expenses incurred by the witness for appearing before the Court appears to be plausible. However, it is mandated that such discretion shall be exercised on sound principles and not arbitrarily.³¹ The Apex Court shall lay down appropriate guidelines to make the procedure less cumbersome and they shall be reimbursed proportionately according to the expenses incurred throughout the court proceedings.

- **Impolite treatment of Witnesses:** Despite being recognized as a backbone in the decision-making process, the facilities provided to witnesses are insufficient. It has been observed in the 154th Report of Law Commission that the witnesses are inhumanely treated in the court such as adjournment of a case after making the witness wait for the whole day, non-consideration of witness' convenience while fixing the next date and taking up harsh steps against the witness if he is unable to turn up on the said date. The veracity of these concerns has been properly identified by the Law Commission in its 154th Report wherein it is stated that:

*"In the present system a poor witness is caught between the devil and deep sea if he fails to attend the court, he shall be penally liable and if attends, he undergoes an agonizing experience resulting in great inconvenience and loss."*³²

Further, it has been reiterated in the Mallimath Committee report that the witnesses are treated very shabbily by the system. There is no adequate facility for their seating and drinking water.³³ They have to wait outside the courts for long and end up finding their cases adjourned or are sometimes subjected to prolonged and unchecked cross-examination.³⁴ They are not treated with respect by the police and are subjected to hectic legal procedures. As a result, they get exhausted with this inhumane treatment

³¹KV Baby v. Food Inspector, 1994 Cr LJ 3421.

³²The Law Commission of India, 154th report on *The Code of Criminal Procedure (Act No 2 of 1974)* (Vol I, 1996).

³³MALLIMATH COMMITTEE, *Report of the Committee on Reforms of Criminal Justice System* (2003) 295.

³⁴Purnima Khanna, Viney Kapoor, 'Importance of Witness Protection in the Criminal Justice System of India' (May 9 2020) Shodhganga <<http://hdl.handle.net/10603/103375>> Last Modified 27 March 2021.

and turn hostile to avoid being called again and again thereby affecting the merits of the case.

- **Frequent threats to life and property:** Threat to the life of witnesses or their family members is the most prevalent factor responsible for discouraging the witnesses to give their testimony in most of the high profile cases like rape, gang rapes or murder, etc.³⁵ Nevertheless, punishment for criminal intimidation of witnesses has been incorporated under section 195-A of IPC. In the case of *Union of India v. V. Sriharan*³⁶, the Apex Court stated that:

“The witnesses turn hostile apparently because of the threat meted out to them by the hardened and professional criminals and gangsters. It is the inability of the State machinery to protect or guarantee the life and dignity of a common man who helps to achieve the justice.”

These practices lead the witnesses to turn hostile thereby leading to the acquittal of the accused. To tackle these incidences, it was suggested by the Court that threatening of witnesses shall be considered as a ground for the cancellation of bail.³⁷ Enactment of witness protection scheme by the Legislature is the need of the hour for achieving criminal justice as recognized by the Apex Court in the case of *National Human Rights Commission v. State of Gujarat*.³⁸ However, some categorical Acts provide for the protection of witnesses like the Whistle Blower Act, 2011, Prevention of Child from Sexual Offences Act, 2012, the Scheduled Caste and Tribes (Prevention of Atrocities) Act 1989 but there has been no formal legislative structure laid down by Parliament yet.

- **Use of Money Power:** In most of the high-profile cases involving accused belonging to strong political or rich family backgrounds, money power is used to allure the witnesses for not co-operating with the investigation process or for turning hostile.³⁹ One such use of money power is observed where the police are unable to identify the witness, stock witnesses, though not a party to the case is being used by the police for giving false

³⁵*Kartar Singh v. State of Punjab*, 1994 (3) SCC 569.

³⁶*Union of India v. VSriharan*, 2016 7 SCC 1.

³⁷*Ram Govind Upadhyay v. Sudharshan Singh*, 2002 3 SCC 598.

³⁸*National Human Rights Commission v. State of Gujarat*, 2003 (9) SCALE 329.

³⁹*Zahira Habibullah H Sheikh v. State of Gujarat*, 2004 (4) SCC 158.

testimony regarding the incident in reciprocation for a meagre amount of money. These types of witnesses are highly prone to favour the accused on being offered a more preponderant sum of money thereby making a mockery of the whole judicial process.

6. CONSEQUENCES OF WITNESS TURNING HOSTILE

- **Offense of Perjury:** Giving false testimony before the court which the witness believes to be false exposes him to the offense of perjury.⁴⁰ The practice of giving false evidence implies attempting fraud on the judicial process when the person is legally bound by the oath made by him to state the truth. Section 8 of the Indian Oath Act, 1873 states that the Court is empowered under law to penalize the witness for the offense of perjury.⁴¹ Further, section 191 of the Indian Penal Code acts as a safeguard against those witnesses who deliberately deviate from their earlier version of statement recorded under the supervision of Magistrate under S. 164 of Code of Criminal Procedure.⁴²

When a witness wilfully tries to conceal the truth before the Court but accepts his false statement through cross-examination, still, his admission of false statement should not be allowed to dilute his offense of perjury.⁴³ The proper test to determine this is whether the witness himself corrected his error before getting exposed.

- **Low Conviction Rates:** The efficiency of the criminal justice system can be ascertained from the conviction rates by analyzing the numerical figure of cases undergoing a trial to that of conviction ordered in those reported cases. According to the National Crime Record Bureau Report, 2018, for the offense of murder under Indian Penal Code, the number of case trial was 16,867 and the total conviction ordered under this head was merely 391.⁴⁴ According to the recent survey by the Directorate of Civil Right

⁴⁰Dr. Shabnam Mahlawat, *Hostile Witnesses and Evidentiary Value of their Testimony under the Law of Evidence* (2ndedn, 2017).

⁴¹ Indian Oath Act, 1873, s. 8.

⁴² Aakash Chaturvedi, Shivangi Sharma, *Witness and Hostile Witness: Emerging Issues and Challenges* (6thedn, 2016).

⁴³G.S. Bajpai, *Witness in the Criminal Justice Process: A study of Hostility and Problems associated with Witness*, Centre for Civil and Criminal Justice Administration National Law Institute University Bhopal (2009)

Enforcement, hostile witnesses contribute a major share of 26% as a reason for the low conviction rate.⁴⁵

- **Testimony of Witness turning hostile not to be discarded:** In some cases, even if the witness is declared hostile as per section 154 of the Evidence Act, their testimony is not discarded altogether.⁴⁶ On turning hostile, the witness is further subjected to cross-examination as per the procedure prescribed by law to negate the adverse testimony of the hostile witness by the party calling him.⁴⁷ Nevertheless, it is the discretion of the Court to look into the authenticity of testimony in light of the other corroborative evidences to verify whether it should be relied upon or not.⁴⁸
- **Loss of faith in Judiciary:** Owing to the frequent incidences of harassment of witnesses resulting in the wrong acquittal of the accused in grave offenses leads to the loss of faith in judiciary imposed by public.⁴⁹ These incidences form the notion in the mind of common people that justice can be achieved only by the influential people through the use of money and power.

7. NEED FOR LEGISLATION ON WITNESS PROTECTION

The efficacy of the criminal justice system is indicated by the willingness of the victims and the witnesses to come forward to testify and report the crimes committed against them. The concern of the protection of witnesses was not recognized merely in this decade, but, way back in the year 1952 in the case of Gurbachan Singh v. State of Bombay where the Court ordered the shifting of accused for security reasons.⁵⁰ A Witness Protection Bill was introduced in the Lok Sabha in the year 2015 with the objective of providing a safer environment to the witnesses. However, the Bill was not passed further on account of non-consensus among the states. Now, the Apex Court has finally come with a resolution concerning witness protection.

⁴⁵G. S. Bajpai, *Witness in the Criminal Justice Process: A study of Hostility and Problems associated with Witness* Centre for Civil and Criminal Justice Administration National Law Institute University Bhopal (2009) 41.

⁴⁶*Krishan Chander v. State of Delhi*, AIR 2016 SC 298.

⁴⁷*Sakshi v. Union of India*, 2004 5 SCC 518; *Kushal Rao v. State of Bombay*, 1958 SCR 552.

⁴⁸*Anil Rai v. State of Bihar*, 2001 SCC (Cr) 1009.

⁴⁹Purnima Khanna, Viney Kapoor, 'Importance of Witness Protection in the Criminal Justice System of India' (May 9 2020) Shodhganga <<http://hdl.handle.net/10603/103375>> Last Modified 27 March 2021.

- **Witness Protection Scheme 2018:** In the recent cases like *Sakshi v. Union of India*⁵¹ and *NHRC v. State of Gujarat*⁵², the Court stressed that there is a dire need to come up with legislation for the protection of witnesses. The Apex Court while defining fair trial in the case of *Zahira Habibullah H. Sheikh v. State of Gujarat* said that, “if the witnesses get threatened or are coerced to give false evidence, that also would not result in a fair trial.” No country can afford to expose its morally correct citizens to the peril of being harassed by the gangster, goons or rapists.⁵³ With this objective, the Court finally came up with a Witness Protection Scheme 2018 in the case of *Mahendar Chawla v. Union of India*⁵⁴ which was a first of its kind in the country as an effective measure for protecting the interest of witnesses.

However, there is no specific legislation on this and has been told to be passed by the Parliament in due course.

Nevertheless, the objective of the scheme is to safeguard the interest of witnesses but the scheme is presented in its nascent form. There is a requirement of further clarification and certain loopholes shall be addressed to make it an effective piece of the scheme.

1. **Allocation of funds:** The scheme provides for the collection of funds through an annual budget of the State government, fines imposed in criminal trials and through charity from philanthropist.⁵⁵ However, it does not talk about the assistance from the funds of the Central Government in certain cases where the state is unable to meet the expenses for the smoother functioning of the programme.
2. **Possibility of undue Influence:** The paramount feature of the Witness Protection Scheme is the analysis of the Threat Perception Report specifying the nature of the threat faced by the witness or his family to their life, reputation or property. However, it has been stated that the report shall be made by the head of police in a district. This leads to the possibility that the police officer

⁵¹*Sakshi v. Union of India*, 2004 5 SCC 518.

⁵²*NHRC v. State of Gujarat*, 2008 16 SCC 497.

⁵³*Zahira Habibullah H Sheikh v. State of Gujarat*, 2004 4 SCC 158

⁵⁴*Mahinder Chawla v. Union of India*, 2019 14 SCC 615.

⁵⁵*The witness protection Scheme, 2018 rule 4.*

may be subjected to dilute the threat level on account of political pressure in high profile cases which is quite obvious. Rather, it is suggested that the report shall be made by the officers who are specially trained for this purpose with clean service backgrounds in the Witness Protection cell under the direct supervision of concerned High Court to evade politicization.

3. **Absence of Deterrence:** The entire witness protection scheme lacks penal provision providing punishment in case of breach of witness's critical information and identity by the officials. There is a requirement of deterrence under Rule 13 of the scheme which shall encourage the officials to refrain from revealing witness identity against political and monetary benefits.⁵⁶ A clause shall be inserted, which will act as a deterrence under this rule which provides as follows: *Any other authority or unauthorized individual who access any record, document or information in relation to the proceedings under this scheme without an order from a concerned court shall be in the contempt of court and be liable to criminal proceedings.*⁵⁷

However, the provision under Rule 6(e) of the scheme that provides to meet the person under threat directly to ascertain the level of threat is a welcoming one. Additionally, Rule 6(b) provides for interim protection of the witness depending upon the urgency owing to the imminent threat. In this provision, there is a requirement of insertion of the time limit in these critical moments for the protection of witness through the amendment reading, *"within a reasonable time, the time not being extended to more than 24 hours"*.

4. **Inclusion of Associate People for Protection:** The Witness Protection Scheme provides for the protection of witnesses along with their family members. The definition of a family member under Rule 2(d) of the Scheme includes parent/guardian, spouse, live-in partner, siblings, children, grandchildren of the witness. However, the relevant section failed to include other people who has some bearing or connection with or has an association or connection with the

⁵⁶ NR Madhava Menon, *A Training Manual for Police on Human Rights*, NLSIU Human Rights Publication Centre, Bangalore (1997) 343.

⁵⁷ Witness Protection Bill, 2015, s. 6(3).

witness, threat to whom could affect the witness's action.⁵⁸ To deal with this, the marginal note shall be replaced with "Associated People". The objective of this scheme shall be achieved only when the witness feels a safer environment from all extent to state the truth.

8. NEED OF PSYCHOLOGICAL ASSISTANCE IN WITNESS PROTECTION PROGRAM

The most untouched aspect in dealing with the problem of hostility is the psychological impact and measures to rejuvenate the effect. Participation in criminal justice as a witness can be a great source of anxiety. Psychological counselling has been recommended for ages in all the criminal trials, concretely for victims and witnesses. The witness and the victim undergo a plethora of emotional and mental tortures from family, society and accused even consequently leading them to depression and anxiety. Ignoring the fact as to how much they are paramount in criminal justice, these tortures encourage them to get away from revealing their grievances and truth in front of the court. According to a survey conducted by the Centre for Criminology and Victimology in 2015, out of 16 cases of sexual assault, only 2 cases were reported where the victim received psychological assistance.⁵⁹ The 198th Law Commission report on witness protection recommended that it must be ensured that the witnesses and victim receive psychological assistance along with other benefits.⁶⁰

The UN Guide of Good Practices for the protection of witness provides: "*Psychological assistance must be provided to witness to instil confidence before and during the trial to cope with the psychological and practical implications of testifying in a court of law*".⁶¹ In a number of countries, police, prosecutors and the judicial system have institutionalized psychological assistance such as the United Kingdom, Portugal etc. In Australia, under the National Witness

⁵⁸ Witness Protection Bill, 2015, s. 4.

⁵⁹ Centre for Criminology and Victimology, *Towards Victim Friendly Responses and Procedures for Prosecuting Rape: A Study of Pre-trial and trial stages of Rape Prosecutions in Delhi* (2015).

⁶⁰ The Law Commission of India, 198th Report on *Witness Identity Protection and Witness Protection Programmes*, (2006).

⁶¹ United Nations Office on Drugs and Crime, *Good practices for the protection of witnesses in criminal proceedings involving organized crime* (2008).

Protection Program, a psychologist has been appointed who can be called upon in case a witness required assistance to testify before a court of law.

Drawing inspiration from these countries, there must be a provision for psychological assistance under the Witness Protection Scheme, 2018 which would enable the witnesses to gain confidence and the competency to cope with the trauma of all categories faced during the trial. Nevertheless, the cost incurred in providing these services has been a major concern in implementing these services for most of the countries. Irrespective of these reasons, the Indian judicial system is required to adopt these mental assistance services to witnesses to ascertain fair justice. Particularly, when the country is facing such a low conviction rate on account of witnesses turning hostile due to mental tortures, an effective psychological mechanism is the need of the hour.

9. LEGAL POSITION IN OTHER NATIONS

9.1 United States of America

The law on witness protection in the United States of America can be traced back to the *Organised Crime Control Act* which was passed in the year 1970. It empowered the Attorney General to grant security to the witnesses who have appeared or are appearing in cases involving organized crimes.⁶² Security was to be granted under the supervision of the Attorney General and the Act also provided relocation along with a new identity to the threatened witness.

Subsequently in the year 1984, the *Organised Crime Control Act* was repealed by the *Witness Security Reform Act*. Under the new Act, the Attorney General is empowered to necessary actions in order to protect the witness from bodily injury as well as any social or psychological harm.⁶³ He is also empowered to enable the witness in establishing a new identity by providing suitable documents. The witness may also be provided housing and other necessary

⁶² United Nations Office on Drugs and Crime, *Good Practices for the Protection of Witnesses in Criminal Proceedings involving Organised Crimes* 8(2008).

⁶³ Yvon Dandurand, Kristin Farr, *A Review of Selected Witness Protection Programmes* (2010) 33.

things that are required to meet basic living expenses. However, the protection is liable to be impeached by the Attorney General, if the witness breached any terms of the MoU.

9.2 Australia

The Parliament in Australia has enacted the Victorian Witness Protection Act, 1991 in order to facilitate the security of persons who have become part of a criminal proceeding as witnesses.⁶⁴ Under Section 3A of the Act, the Chief Commissioner of Police is empowered to take necessary actions that he deems fit for the protection of the witness and his family members. Under Section 3B of the Act, the Chief Commissioner is required to enter into an MoU with the witness that contains the terms and conditions of the witness protection. The protection can be terminated under Section 16 of the Act if the witness fails to abide by the terms of the MoU or he himself asks for such termination.

In the National Capital Territory of Australia, there is a separate legislation, the Witness Protection Act, 1996, which is quite similar to the Victorian Witness Protection Act, 1991. The only difference is that in the Victorian Witness Protection Act, 1991, the Chief Commissioner of Police is empowered to take necessary actions in the interest of protection of the witness, while in the Witness Protection Act, 1996, this power is vested with the Chief Police Officer. Apart from this, all the provisions are almost similar in both the legislations.

9.3 Netherlands

The Supreme Court of Netherlands has held in a number of cases that the testimony of anonymous witnesses can be used in criminal cases due to which the Parliament came up with a succinct solution by enacting the Witness Protection Act, 1994.⁶⁵ Through this Act, the Legislature laid down two categories of anonymous witnesses. The first comprised of those who have probabilities of incurring problems in connection with their testimony or interference in the exercise of their daily profession. These witnesses are to be granted limited anonymity and are heard by the Trial Court or the examining magistrate.

⁶⁴The Victorian Witness Protection Act (Act 15 of 1991).

⁶⁵The Witness Protection Act (Act No 1 of 1994).

The second category comprised of those who have a fear of life, health or socio-economic existence. They are to be granted full anonymity, based on the discretion of the examining magistrate. For the grant of full anonymity, the primary conditions that are to be fulfilled are, the witness must be recognized as a threatened witness by the examining magistrate and there must be a serious criminal case in question for which remand or detention is permitted.

9.4 Philippines

Philippines has the *Witness Protection, Security and Benefit Act* which provides witness protection, security and benefit through a program that is implemented by the Department of Justice.⁶⁶ A person who has testified; is testifying or will testify regarding the commission of a serious crime, before any judicial, quasi-judicial or investigatory body is entitled to be admitted in the program.

By virtue of **Section 5** of the Act, the witness is required to execute a Memorandum of Agreement containing the terms and conditions of the protection, breach of which could lead to punishments. **Section 8** of the Act contains a provision for the security of the family members of the witness and also a burial benefit of not less than 10,000 pesos to the heirs of the witness, in case of death of the witness.

Under **Section 17** of the Act, any person who interferes with the rights and benefits of the witness guaranteed under the Act or causes any hindrance in the testimony of the witness by delaying or preventing the witness from attending or testifying before a judicial, quasi-judicial or investigatory authority, shall be punished.

9.5 United Kingdom

In the United Kingdom, the witnesses are provided protection by the police and law enforcement agencies under the Serious Organized Crime and Police Act, 2005. **Section 82** of the Act specifically talks about the protection arrangements for the persons at risk. By virtue of **Section 82(5)** of the Act, the arrangement for the protection of witness is made by the

⁶⁶The Witness Protection, Security and Benefit Act (Republic no. 6981).

police and while providing the protection, the nature and extent of the risk of the person's safety, cost of the arrangement, etc. are also taken into consideration.⁶⁷

9.6 Queensland

In Queensland, there is the Witness Protection Act, 2000 and Witness Protection Program is administered by the Crime and Misconduct Commission (CMC). Sections 6 of the Witness Protection Act, 2000 provides for persons who are entitled to be given protection by the CMC and according to it, if the Chairman of CMC considers that if a person is in need of protection from danger arising because of his involvement or help in a criminal proceeding, then that person and his family members may be included in the Witness Protection Programme.

The Parliament of Queensland has also enacted the Evidence (Witness Anonymity) Amendment Act, 2000, which has brought an amendment in **Division 5** of the Evidence Act, 1977 by inserting the term "witness anonymity". After this amendment, the witnesses are issued Witness Anonymity Certificate which ensures their safety and protection.

9.7 Japan

After the amendment in the Code of Criminal Procedure of Japan (CCP) in the year 1999, a comprehensive Witness Protection Programme has been evolved in Japan.⁶⁸ Under Article 96(1)(iv), in relation the Article 89(v) of the CCP, if there is reasonable ground or suspicion that the accused may threaten or cause harm or bodily injury to the witness or his relatives, then the bail application of the accused may be denied on such ground.

10. GLOBAL INITIATIVES FOR WITNESS PROTECTION

At the global level, there have been a number of initiatives taken in order to protect the witnesses as it is essential in securing reliable testimonies, especially in cases that involve serious crimes. This section will be analysing various initiatives that have been taken at the international level to protect the witnesses from any harm.

⁶⁷ The Serious Organized Crime and Police, 2005 Acts 82(4).

⁶⁸ Code of Criminal Procedure, Part I and Part II (Act No. 131 of 1948).

10.1 International Criminal Tribunal

The International Criminal Tribunal for Former Yugoslavia (ICTY) was established in the year 1993 under the 7th chapter of the UN Charter. It was the first international tribunal that was established for the purpose of prosecuting war criminals who are accused of violating international humanitarian law.

The **ICTY** has a special unit constituted as per Rule 34 of Rules of Procedure and Evidence (RPE), namely, the Victims and Witness Section (VWS), dedicated to providing protection to the witnesses regardless of whether they have been called by the defense, prosecution or the chambers.⁶⁹

VWS has trained professional staff which is available 24-hours to help the witnesses in facing their problems relating to social, psychological and practical needs before and after their testimony. VWS has created its own policies and measures in order to ensure that there is no further harm or trauma caused to the witness after testifying.

Rule 69 of the RPE provides that in exceptional circumstances, the Judge or the Trial Chamber may order for non-disclosure of the identity of the witness until he is brought within the protection of the tribunal if an application regarding the danger that is associated with the witness is made by the prosecutor.⁷⁰

Rule 75 of the RPE provides a range of measures for the protection of the identity of the witnesses.⁷¹ It states that upon a request being made by either party or the concerned witness, the Judge or the Chamber may order for taking up of appropriate measures to protect the privacy of the witness, provided that such a measure is not in contravention with the rights of the accused. Usually, the witness is required to give his testimony in an open court but by virtue of **Rule 75(B)**. In order to prevent the disclosure of the identity of the victim, witness or any person associated thereto, the chamber may hold *in-camera* proceedings. **Rule**

⁶⁹ICTY Rules of Procedure and Evidence (as amended on 13 December 2001) Rule 34.

⁷⁰ICTY Rules of Procedure and Evidence (as amended on 13 December 2001) Rule 69.

⁷¹ International Criminal Tribunal for Yugoslavia Rules of Procedure and Evidence, Rule 75 (Adopted on 11 Feb 1994).

75(D) states that wherever necessary, the chamber should control the manner of questioning in order to avoid any harassment or intimidation of the witnesses.⁷²

10.2 International Criminal Tribunal for Rwanda (ICTR)

ICTR was established in the year 1944 by the United Nations Security Council Resolution No. 955.⁷³ It was established to adjudge the people who were responsible for genocide and other serious violations of International Law in Rwanda. Articles 14, 16, 19 and 21 of the ICTR Statute deals with witness protection.⁷⁴

Article 19 reflects that the notion of a fair trial is not restricted to the accused but extends to the victim and witness as well.⁷⁵ Article 19 prompts that the trial chamber shall ensure that full respect is being given to the rights of the accused as well as of the victims and witnesses during the proceeding.

By virtue of Article 16, a four-division Registry is created for the ICTR,⁷⁶ one of the divisions being the Witness and Victims Support Section which is implemented through the Rules of Procedure and Evidence enshrined in Article 14.⁷⁷ However, Article 14 provides that for the purpose of proceeding before the ICTR, the Judges shall adopt the rules of procedure and evidence of the ICTY with appropriate changes as they deem necessary.⁷⁸

Article 21 for the purpose of creating a fair public trial, limits the rights of the accused and balances with that of the witnesses.⁷⁹ It prompts that ICTR in its RPE shall provide for measures, not be limited to the conduction of in-camera proceedings, for the protection of victims and witnesses.⁸⁰

10.3 International Criminal Court (ICC)

⁷² Measures for the Protection of Victims and Witnesses Rule 75(D) (Adopted on 11 Feb 1994).

⁷³ Resolution 955 adopted by the Security Council at its 3453rd meeting (8 November 1994).

⁷⁴ Resolution 955, Statute of the International Criminal Tribunal for Rwanda, M SCOR (1994).

⁷⁵ Bachrach, Michael, *The Protection and Rights of Victims Under International Criminal Law*, 34 Int'l Law 7 (2000).

⁷⁶ Resolution 955, Statute of the International Criminal Tribunal for Rwanda, M SCOR (1994).

⁷⁷ Directive for the Registry for the International Criminal Tribunal for Rwanda.

⁷⁸ Statute of the International Criminal Tribunal for Rwanda, 1994 art. 14.

⁷⁹ Momeni Mercedeh, *Balancing the Procedural Rights of the Accused against a Mandate to Protect Victims and Witnesses: An Examination of the Anonymity Rules of the International Criminal Tribunal for the Former Yugoslavia* (1997) 41.

⁸⁰ Statute of the International Criminal Tribunal for Rwanda, 1994, art. 21

Under the Rome Statute of the International Criminal Court, the rights of victims and witnesses are elaborated in a more comprehensive form than any other ad hoc tribunal.

Article 68 of the Rome Statute provides for a more complete protection to the victim and witnesses than any other tribunal.⁸¹ Article 68 prompts that it is the duty of the prosecutor to protect the witness by keeping all the information relating to him confidential and anonymous.

In order to protect the witness' identity from being disclosed, **Article 69** of the Statute prompts that the testimony of a witness can be taken outside the courtroom through audio/video recordings and that will be admissible too.

10.4 United Nations Convention against Transnational Organized Crime (UNCTOC)

Article 24 of UNCTOC invites the member nations to build co-operation for taking appropriate measures that are required for protecting the witnesses from threats, corruption, intimidation or bodily injury.⁸²

Although the term "witness" is not expressly defined in the Convention, Article 24 operates by limiting its scope to the persons who give actual testimony in a Court regarding the offenses that have been covered under the Convention.

11. CONCLUSION AND WAY FORWARD

Since ancient times, hostile witnesses are being disregarded and in the present time too, the Courts should not take lenient measures against those who easily retract from their earlier testimony. In almost all the major offenses like rape, murder etc, the witnesses turn hostile on account of life threats, the financial crisis, thereby leading to the collapse of the justice system. The Indian Legislature needs to curb down this menace by effectively addressing the issues and ensuring the dignity of the witnesses. To deal with this, the author has proposed the

⁸¹The Rome Statute, art. 68.

⁸²United Nations Convention against Transnational Organized Crime, 2003, art. 24.

following recommendations which would be helpful in curbing out the menace of hostility in criminal justice.

- A comprehensive law is required to be laid down before the Parliament to give a solid effect to the Witness Protection Scheme, 2018 approved by the Apex Court. The Apex Court has authoritatively mandated to make it operational as a law under Article 141 of the Constitution until efficacious legislation is presented before the Parliament. Unfortunately, no legislation has been presented so far by the Central Government to give effect to a Witness Scheme.
- The Witness Protection Cell under the Witness Protection Scheme 2018 shall be entrusted under the direct supervision of retired Judges of the concerned High Courts or the Supreme Court as per the parameters set up in the Witness Protection Bill 2015. It must be done to avoid politicization and pressure in high profile cases so that the protection of witnesses is not compromised at any stage. Regular monitoring of the program shall be conducted to prevent the misuse of programs and measures to ascertain transparency at all stages shall be adopted.
- The current scheme provides for the protection of witnesses initially for a period of 3 months, provided that the level of the threat must be updated by the monthly report. According to the 198th Law Commission report, it was suggested that the protection shall be provided at four stages namely: investigation, inquiry, trial, and post-trial. Further, section 161 of the CrPC provides that a male under fifteen years of age shall not be required at any place other than the place of his/her residence for the purpose of investigation. This provision shall be amended to include threatened witness also who has been subjected to threats or where his security is at stake. Additionally, psychological assistance must be provided under the scheme to help them cope with mental trauma faced during the trial.
- The witnesses under the Witness Protection Scheme 2018 shall be provided interim protection within 24 hours of receiving the application, in case of an imminent threat to his life or property or to any of his family members. Additionally, the definition of a family member shall be broadened to include all those people, a threat to whom could affect the witness's action. Nevertheless, due to practical limitations, it is not possible

to give protection to every witness. Therefore, security must be provided by properly analysing the situation according to the level of threat.

- Implementing the recommendations made by the 154th Law Commission, the witnesses shall be paid reasonable allowances for the expenses incurred by them on being summoned to appear before the Court. Additionally, the Court shall examine the witness only on the day of being summoned and frequent adjournments/delays in disposal of cases should be avoided meticulously. Besides, general guidelines by the Apex Court shall be laid down especially for the police and prosecutors to treat the witnesses with utmost respect. Proper seating arrangements and availability of drinking water shall be provided for their stay in the court premises in order to avoid any inconvenience.
- Cost shall be imposed upon the defence counsel or accused for seeking frequent adjournments. Further, threatening of witnesses in any form shall be considered as a ground for cancellation of bail as laid down in the case of Ram Govind.⁸³

⁸³ Supra 44