

WITNESS PROTECTION MECHANISM IN INDIA – HEEL OF ACHILLES

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I. INTRODUCTION

“Witnesses are the eyes and ears of justice”

-Jeremy Bentham

Witness plays a crucial role in the criminal justice delivery system. Witnesses are instrumental to the Court in the process of framing the facts and circumstances of the case by giving testimony. In the quest for the truth and to bring the offender to the justice, it is required that witnesses depose in Court without fear, threat or pressure of any sort. However, the forlorn reality of the situation prevalent in India depicts the unwillingness of the witnesses to come forward and offer assistance to the Court. There is an incessant trepidation, intimidation and a threat to life from the accused, lurking in the minds of the witnesses.

While a witness performs his public duty, he has his life, liberty, family, property and reputation at stake. This is exacerbated by the fact that there is no legal state responsibility to shield the witnesses from such threats. The unscrupulous tactics of the accused of using threat and force to intimate the witnesses make the base of fair trial shaky. It is a matter of concern as these tactics would misled the Court and would perverse the justice. This poses an obligation on the State to repose the faith and confidence of the witnesses by ensuring effective and efficient protection of life from the wrath of the accused party. This sordid state of affairs should provoke the State for remediation of this Gordian knot.

The key assumption of this paper is that if the witness turns hostile due to intimidation or allurement or is unwilling to come forward to depose, the objective of the entire criminal justice system becomes frustrated. This can led to erroneous decision. A wrong conviction or acquittal is against the interests of the society and even worse when the Conviction rate of Indian Penal Code (IPC) Crime Cases has come down to 46.8% in 2016 as per National Crime Records Bureau data.¹ With a low conviction rate and high rate of crime, the present

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paper intends to analyze the prevalent conditions of witnesses in India and the problems that arise in the absence of the protection mechanism.

Despite the fact that witness assumes a significance role for the disposal of justice still the term ‘witness’ has not been defined in any Indian statute. According to the Black’s Law Dictionary a witness is defined as one who sees, knows or vouches for something or one who gives testimony, under oath or by oral or written deposition, or by affidavit.² However, the word ‘witness’ is used in various provisions of Indian Evidence Act, 1872 and the Code of Criminal Procedure, 1973. The present study is in the context of witness as mentioned in Section 161 Cr.P.C which states that “any Police officer making an investigation...or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case”.³

II. NEED FOR PROTECTION OF WITNESSES

History repeats itself, first as tragedy, then as farce”

-Karl Marx.

As remarked by the Supreme Court in 2002 that witnesses turning hostile has become “*a way of life in the law courts*” and such instances are brimful of the Indian judicial history. The immensity and frequency both have drastically increased in the recent years. The 111th Report on the Criminal Law (Amendment) Bill, 2003 by the Parliamentary Standing Committee on Home Affairs stated that the Committee is made to understand that conviction rate in criminal cases is as low as ten percent due to perjury. Perjury is committed by the witness on his/her own volition or under threat/ allurements/inducement of third party.⁴

The aberration from the protection of witness can be seen in the landmark cases of Jessica Lall, Prof. Sabharwal and Best Bakery case where the high-handed accused persons

¹National Crime Records Bureau, *Crime in India (2016) Statistics*, (November 1, 2019, 11:04 a.m.), <http://ncrb.gov.in/StatPublications/CII/CII2016/pdfs/NEWPDFs/Crime%20in%20India%20-%202016%20Complete%20PDF%20291117.pdf>.

² BLACK’S LAW DICTIONARY, 1596 (Bryan A. Garner ed., West Group 1999).

³Code of Criminal Procedure 1973 § 161, cl. 1.

⁴Parliamentary Standing Committee on Home Affairs, *The Criminal Law (Amendment) Bill, 2003*, Report no. 111, (2005).

manhandled the criminal justice system to their advantage by intimidating, threatening and even executing the witnesses, thereby affecting their testimony. It is submitted that the trend in the high profile cases depicts that the witness turns hostile due to fear and threat to his life and of his family in the absence of any protection mechanism. *“Those who cannot remember the past are condemned to repeat it”* as put in words by George Santayana we should keep in mind the past experiences which necessitates the implementation of Witness Protection Programme in India.

Unlike India, various foreign jurisdictions have enacted Witness Protection Programmes (WPPs) by assuming the responsibility of protecting the witnesses for the delivery of justice. The United States of America has a strict mechanism to protect the witnesses and is one of the most successful endeavors in this direction. The reason for enactment of WITSEC was to extend protection to witnesses involving organized crimes, which was later on extended to other serious offences. On the other hand, the objective behind the enactment of protection programme in Italy was to extract information from the “collaborator of justice” in return for protection. India should take a lesson from these nations and should enact legislation on the parallel lines.

III. JUDICIAL RESPONSE

“...The time must surely come, For the laws to fit the times...”

- John Mayall.

In order to achieve the ends of justice, the law should be dynamic and not static. It is the role of the Court to ensure fair trial and witness protection is one of its significant aspects. The Indian Courts have played a major role in the development of existing legal mechanism to protect the witnesses.

In the case of *Neelam Katara v. Union of India & Ors*⁵, the Delhi High Court while pointing out the importance of protection of witnesses observed that *“the edifice of administration of justice is based upon witness coming forward and deposing without fear or favour, without intimidation or allurements in Courts of Law. If witnesses are deposing under fear or*

⁵*Neelam Katara v. Union of India & Ors*, (2004) 4 SCALE 375.

*intimidation or for favour or allurements, the foundation of administration of justice not only gets weakened, but in cases it may even get obliterated*⁶. It is the first case in which the court issued certain guidelines relating to the witness protection. These guidelines find a mention in the Delhi Witness Protection Scheme, 2015.

In the case of Vineet Narian v. Union of India⁷, the Supreme Court directed the constitution of a mechanism on the parallel lines as that of the Director of Prosecution in England, consisting of competent men. In another important case of Swaran Singh v. State of Punjab⁸, the provision of Section 312 of the Code of Criminal Procedure, 1973 was under consideration which provides for the expenses payable to the witness and it was observed that: "Not only that a witness is threatened; he is maimed; he is done away with; or even bribed. There is no protection for him."⁹

The Hon'ble Supreme Court came down with a heavy hand in the case of Zahira Habibulla H. Sheikh and Another v. State of Gujarat and Others¹⁰, pointing at the failure of the state machinery in maintaining the confidence of public. The Supreme Court explicitly reminded that the problem of hostility is a reality and a fact of Indian Criminal justice delivery system. The court pointed out that there is no legal framework devised for the witness protection in India and it is the state responsibility to ensure the same. It was stated that in sensitive cases where the accused is clothed with political power or could make use of muscle or money power, the protection to the witnesses should be provided.¹¹

It is submitted that the Indian Judiciary has played a constructive role by emphasizing on the witness anonymity by non-disclosure and prohibition on publication of the identity of the witness, especially in the cases involving sexual offences like rape and child abuse¹². But despite all the judicial efforts, there is a blatant disregard to these guidelines and directions.

IV. WITNESS PROTECTION SCHEME, 2018 – AN ANALYSIS

⁶*Id.*

⁷Vineet Narian v. Union of India, (1998) 1 SCC 226.

⁸Swaran Singh v. State of Punjab, AIR 2000 SC 2017.

⁹*Id.*

¹⁰Zahira Habibulla H. Sheikh and Another v. State of Gujarat and Others, (2004) 4 SCC 158.

¹¹*Id.*

¹²Sakshi v. Union of India, (2004) 5 SCC 518; Delhi Domestic Working Women's Forum v. Union of India, (1995) 1 SCC 14; Kartar Singh v. State of Punjab, (1994) 3 SCC 569.

In the case of Prem Chand v. State of NCT of Delhi,¹³ a witness was shot dead while police was escorting him in the Court Complex of Delhi to the Lock up. The Supreme Court directed the Union of India for framing the guidelines pertaining to the witness protection. As a result, “Witness Protection Scheme 2018” was prepared by National Legal Service Authority (NALSA) and Bureau of Police Research and Development (BPR & D) according to the apex Court’s direction in the case for the Ministry of Home Affairs. This scheme got approved by the Hon’ble Supreme Court in the case of Mahender Chawla v. Union of India¹⁴, in December 2018 and was put into force as law under Article 141 and 142 of the Constitution of India.

4.1. Key Features of the Scheme

The salient feature of the scheme is the categorization of the witnesses as per the threat analysis. Category A involves threat to life and property of the witness or the family member, Category B includes threat to reputation or property and Category C consists of harassment and intimidation. Hence, the level and type of protection measures depends on the threat perception. The report of Threat Analysis has to be prepared by the Commissioner of Police or SSP in District matters. The protection order is to be passed by the competent authority on that basis. For the purpose of this scheme, the competent authority is Secretary, District Legal Services Authority (DLSA). Various protection measures can be taken by the competent authority including the in-camera trials, monitoring of call records, protection round house, temporary change of residence, installation of security devices like CCTV cameras, etc.

Furthermore, on the request of the witness, special measures can be taken like the change of identity and relocation. By giving new identity, it would include giving new profession and identity documents that would be required. It doesn’t deprive the person his existing rights under the former identity. Financial assistance can also be provided for sustenance and relocation.

¹³Prem Chand v. State of NCT of Delhi, S.L.P. No. 647 of 2017 (S.C.).

¹⁴ Mahender Chawla v. Union of India, Writ Petition (Crl.) no. 156 of 2016 (S.C.).

4.2. Loopholes and Gaps in the Scheme

From the analysis of the Scheme, it can be said that there are certain loopholes in the scheme. It lacks various vital aspects that are significant for the effective protection mechanism. The scheme can work efficiently only with the holistic action unison of judiciary, legislation and executive. Some of the lacunas are discussed below:

- I. For the implementation of the scheme, there is a need for reforms in the administrative and Police personnel department. Proper training and conferences should be made part of the scheme for the effective operation of the programme. According to the scheme, the threat analysis report is to be prepared by the Police officials. It can be seen from various cases that police becomes the source of threat and giving such power to them will defeat the purpose of the scheme. Hence, the report should be prepared by the Legal Services Authority.
- II. Another problem with the implementation is the delay in the criminal trial. In India, an average criminal case takes eight to nine years for the final disposal due to which many witnesses hostile. Until and unless, some provision is there for the speedy trial, the whole witness protection scheme will remain redundant.
- III. Furthermore, it provides for the protection of identity by maintaining secrecy and confidentiality of the personal information of the witness but it doesn't penalize it. There are no penal consequences for the breach of secrecy. In order to deter people, some sort of seriousness has to be attached for the same by keeping stringent punishment for the disclosure of the information.
- IV. The digitalization in the procedure of filing the application for seeking witness protection will ease the process and it will guard the witness from coming in front and manually making the application. Also, it will make the procedure systematic and fast.
- V. From the analysis done of the position in other nations, the common feature of them all was the Memorandum of Understanding or an agreement between the witness and the competent authority as provided by the respective Acts. This prominent feature is missing in this scheme. An agreement assumes a great importance as it spells out the duties and obligations of the witness to disclose information and to abide by the guidelines of the programme.

- VI. There is no provision for the preparation of the annual report of the functioning of the programme. However, it becomes imperative to table the annual report before both the houses to ensure transparency and accountability of the programme. It will also spell out the lacunas that are required to be filled in the operation of the programme.
- VII. Furthermore, there should be a provision for the international cooperation. The scheme doesn't provide for case where a witness from foreign nations is required in India and admission of such witness under the Protection Scheme.

V. CONCLUSION

“Everything has been said already, but as no one listens, we must always begin again.”

-Andre Gide

Witnesses are the anchor to the successful functioning of the Criminal Justice delivery system in India. They are the linchpin in dispensing of justice and assisting the court to determine the guilt of the accused by their testimony. Hence, witness can make or mar the case as the courts heavily rely on their testimony. But the other side of the story depicts harrowing picture of the abysmal condition of the witnesses in India which demands an immediate attention. In order to prevent shirking of this public duty by the witnesses an endeavor has to be made to weed out the cause behind such deplorable situation.

After making a detailed study, one cannot be oblivious of the practical problem that can hinder the application of such programme in India. First, the cost of implementation and the inadequacy of funds is the major problem as protection measures like relocation and physical protection require huge funds. Second, there is a conflict of rights of the accused and the protection of identity of the witness. Third and most important of all, is the widespread corruption at each level of administrative hierarchy. Even if a mechanism to protect vulnerable witnesses is incorporated, it would be effective only when it is unmarked by the external influences. There are certain suggestions on the basis of the detailed study in order to curb the instances of witness intimidation and for creation of a protection mechanism as proposed below:

- I. A comprehensive Witness Identity Protection as well as Witness Protection Programme should be enacted on the parallel lines adopted by International counterparts without any further delay.
- II. There should be classification of cases on the basis of nature and gravity of threat, nature of offence, importance of evidence of witness in the trial at hand, etc. This will ensure that protection is given in only exceptional and grave cases like drugs dealing, terrorism etc. and not in every other case. Careful review of the cases should be made on prioritization basis so that the programme remains cost effective.
- III. Witness assistance should be provided from the start of the investigation to the punishment of the accused. It includes building trust and confidence in the minds of the witnesses and their family members about the safety of their lives while giving their testimony. Proper allowances without any hassle should be given to the witness.
- IV. The identity of the witness should be concealed. In-camera proceedings should be resorted to for safeguarding the identity of the witness. Facilities like putting up a screening, live link, video conferencing should be used so that the witness is not confronted with the accused to ensure that there is no pressure or influence of any sort. The disclosure of identity by any person should be penalized stringently in order to create deterrence.
- V. Witness protection should be given at all the stages i.e. at the time of investigation and trial, whenever there is an apprehension of injury to the life of the witness or his family members until the threat has ceased to exist.
- VI. A Witness Protection Unit should be established which should be independent in its functioning and outside the political control. This Unit shall be responsible for the provision of protection measures to the witnesses.
- VII. There should all round holistic reforms in the administrative and Police personnel department. Proper training and conferences should be conducted to equip and sensitize them properly for efficient protection of the witnesses.
- VIII. In certain serious crimes, if the Court is of the opinion that the threat suspected is of a grave nature, special protection measures should be put in use like Witness relocation and Change of Identity of the witness. In case of relocation of a witness to a different place, proper facilities, employment avenues, financial assistance for sustenance, etc. should be provided. While in the case of change of identity, the rights vested in the

person on the former identity should remain operative. Cooperation should be done in formulation of new documents pertaining to the identity.

It is high time that the Indian Parliament should enact the Witness Protection Programme as is successfully running in the other foreign jurisdictions for numerous years. The draft Witness Protection Scheme 2018 is surely a way forward in this direction but the present scenario necessitates a comprehensive and polish piece of legislation without any further delay.