

REPORT ON
PROTECTION OF WITNESSES

SUBMITTED BY:

NISHANT GAURAV GUPTA

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NATIONAL LAW INSTITUTE UNIVERSITY

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STATEMENT OF PROBLEM

How safe are the witnesses in India and what remedies can be suggested in order to give an effective protection to them in our criminal justice system?

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INTRODUCTION:

According to Bentham, witnesses are the eyes and ears of justice. Their each and every statement is very important as it has a magic force to change the course of the whole case. Therefore, their presence in the court is quite necessary. But unfortunately in our country, the trend is such that the witnesses do not wish to come to the courts to give their statements and evidences because of the fact that they feel unsafe. Even if they come to the court, they tend to turn hostile, thereby opening avenues for the accused to be acquitted. In India, there is no law relating to the protection of witnesses. So their problem gets doubled since they feel insecure and at the same time having no remedy for the injuries caused to them because of that insecurity. This paper intends to analyse the conditions of witness protection in India, how does this assault on witnesses acts as a hurdle in our Criminal Justice System and what remedies can be suggested to remove these hurdles during the administration of Criminal Justice in our country.

WHO IS A WITNESS?

The ordinary meaning of the word “witness” is a person present at some event and able to give information about it.¹ In other words, a witness is a person whose presence is necessary in order to prove a thing or incident. The reason as to why I have started with the dictionary meaning of the word “witness” is that the Code of Criminal Procedure nowhere defined the aforesaid word. In fact, there is no proper definition for witness. Various statutes have tried to define it but none of them have been able to cover all the aspects of it. No definition of witness is provided in Scottish law, though the duties and obligations required of witnesses can be inferred from statute, for example ss.155 and 291 of the Criminal Procedure (Scotland) Act 1995, and from the common law, as, for instance in the case of *HMA v. Monson*². A co-accused is a competent but not compellable witness for another co-accused. In terms of S. 266(9) a co-accused may consent to be called as a witness for the accused or may when giving evidence be cross-examined by the accused. Co-accused become compellable witnesses for both the Crown and Defence if they enter a plea of guilty or have been acquitted or the case against them has

¹ Dorling Kindersley Illustrated Oxford Dictionary, Dorling Kindersley Ltd. & Oxford University Press, 1998 Edition, Page 958

² (1893) 21 R(J) 5

been deserted³. In European Law, no definition of witness is provided in the Convention but case law gives the term a broad definition, describing it as an “autonomous concept”. This interpretation by the European Court does not tie the definition to any specific form of words but allows for full ‘autonomy’ or broad scope in its application. Recommendation R (97) 13 also presents a very wide-ranging definition under which a witness is “*any person, irrespective of his/her status under national criminal procedural law, who possesses information relevant to criminal proceedings*”. Therefore it covers those who do not give their evidence at a trial and even those who make a statement to the police only and not to any prosecution or judicial authority or who have disappeared after making an initial statement. It encompasses witnesses for the prosecution (including complainers and co-accused who ‘turn Queen’s evidence’) and for the defence (including accused persons) although this is not expressly stated. While a co-accused is certainly a competent witness, it is not clear whether he or she can be compelled to give evidence. A case is currently pending before the European Court of Human Rights on this issue. Most of the case law is concerned with prosecution witnesses. It expressly includes experts and interpreters.

There is no definition as to who constitutes a witness even in international law. This can be inferred from treaties and case laws that parties giving testimony in criminal proceedings are generally subject to some rules and guidelines. These parties include what we would commonly understand in domestic law as witnesses, particularly victims where they appear as witnesses in criminal proceedings and other vulnerable categories including children and those with mental conditions. Before the Yugoslav Tribunal both the suspect and accused enjoy the right to silence. Under Article 21(g) of the Statute governing the Tribunal the accused cannot be compelled to testify or confess to guilt. Further guidance is given under the Rules of Procedure and Evidence which state that the suspect should be cautioned and informed of the right to silence before questioning (Rule 42 (A)(iii)). The co-accused cannot be compelled into testifying against a fellow accused. The position of the witness is slightly different. Under Rule 90(F), “a witness may object to making any statement which might tend to incriminate the witness.” However, if the witness does so object, the Tribunal may compel the witness to answer the question. Testimony compelled in this manner cannot subsequently be used as evidence in a prosecution against that witness except for perjury.

The statement given by the witnesses helps the court to a great extent to frame the facts and circumstances of the case. It is for this reason that they are expected to tell the truth. It is said that witness are weighed, they are not numbered. Their relevance can only be ascertained by the statements given by them and also the evidence produced by them though not in quantity but in quality. If a fact is fully proved by two witnesses, it is as good as if proved by a hundred.⁴

However in the present paper, I shall be using the term witness in the light of our Criminal Justice System and that too under the offences relating to the death sentence or life imprisonment. Section 161 of CrPC 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

³ s.266(10)

⁴ Mr. Justice Buller in *Calliand v. Vaughan*, 1798; also see H.L. Menkin’s Dictionary of Quotations on Historical Principles from Ancient and Modern Sources, Collins, London and Glasgow, 1982 Edition, Page 1311

on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.⁵ Such person shall be bound to answer all questions relating to such case put to him by such officer.⁶

And the witness is person whose statement has been recorded by the investigating officer under Section 161 of CrPC in a case punishable with death or life imprisonment. By answering the questions whatever asked by the investigating officer he contributes to a great extent to framing the facts and circumstances of the case and also its after effects. Therefore the court expects the witness to give true information the criminal hunt becomes easier.

IMPORTANCE OF WITNESSES

The role of a witness is paramount in the criminal justice system of any country. In this context Bentham said that witnesses are the *eyes and ears of justice*. Wadhwa J. said, “A criminal case is built on the edifice of evidence, evidence that is admissible in law. For that, witnesses are required whether it is direct evidence or circumstantial evidence.⁷ Thus a witness is an important party in a case apart from the complainant and the accused. “By giving evidence relating to the commission of an offence, he performs a sacred duty of assisting the court to discover the truth. It is because of this reason that the witness either takes an oath in the name of God or solemnly affirms to speak the truth, the whole of the truth and nothing but truth. He/she performs an important public duty of assisting the court in deciding on the guilt or otherwise of the accused in the case. He submits himself to cross-examination and cannot refuse to answer questions on the ground the answer will incriminate him”.⁸ He has to give all the information correctly otherwise he will have to face the trial under Section 190 of the Indian Penal Code (hereinafter the “IPC”) and thereafter may be penalized under Section 193-195 of the same for the aforesaid offence.

The crucial part played by witnesses in bringing offenders to justice is central to any modern criminal justice system, since the successful conclusion of each stage in criminal proceedings, from the initial reporting of the crime to the trial itself, usually depends on the cooperation of witnesses. Their role at the trial is particularly important, in adversarial systems where, where the prosecution must prove its case by leading evidence, often in the form of oral examination of witnesses, which can then be challenged by the defence, at a public hearing. A number of factors have led to increased attention on the role of witnesses in criminal proceedings, not only in India, but also at the international level. Perhaps the two most important have been the emergence of interest in the status of the victims in criminal procedure and the significant rise in terrorist and organized crimes.⁹

The importance of a witness has been acknowledged particularly in crimes such as terrorist offences, drugs trafficking and crimes committed by organized groups. The European

⁵ Section 161(1), CrPC, 1973

⁶ Section 161(2), CrPC, 1973

⁷ Wadhwa J. in Swaran Singh v. State of Punjab, (2000)5 SCC 68 at 678

⁸ Committee on Refoms of Criminal justice System, Headed by Justice Mallimath,, Volume I, Page 151

⁹ The Scottish Executive Central Research Unit, Briefing Paper on Legal Issues and Witness Protection in Criminal Cases, by Mark Mackarel, Fiona Riatt and Susan Moody, Dsepartment of Law, University of Dundee.

Union, for instance has adopted a Resolution (23 November 1995, 95/C 32704) on the Protection of witnesses in the Fight Against International Organized Crime. The difficulties faced by the witnesses include life-threatening intimidation against themselves and their families. Where such witnesses are police informers or police officers, further investigations and crime prevention activities may be hampered because of inadequate witness protection. However, other witnesses can also face difficulties, including witnesses to crime within the family or close community, witnesses in sexual offence cases and other witnesses who are vulnerable for personal reasons.¹⁰

The prosecution mainly relies on the oral evidence of the witnesses for proving the case against the accused. It is for this reason that witnesses deserve a special treatment in such cases. But unfortunately, what's happening in the courts is totally reverse especially in the courts of other country where there is no law relating to treatment and protection of witnesses.

CONDITION OF WITNESSES IN INDIA

Unfortunately in India, there is no law relating to the protection of witnesses as in developed countries like UK, US, Canada and Australia. As a result of this, the witnesses are not at all treated properly. And at the same time they and their family members are also not secure since they are sometimes subjected to life threatening intimidations. Now a days the vulnerability of the witnesses is so prominent, that even the courts have broken their silence and have appealed for the witness protection law. In the case of *Swaran Singh v. State of Punjab*¹¹, Wadhwa J. while delivering the judgment expressed his opinion about the conditions of witnesses in the following words:

“the witnesses ...are a harassed lot. A witness in a criminal trial may come from a far-off place to find the case adjourned. He has to come to the Court many times and at what cost to his own-self and his family is not difficult to fathom. It has become more or less a fashion to have a criminal case adjourned again and again till the witness tires and he gives up. It is the game of unscrupulous lawyers to get adjournments for one excuse or the other till a witness is won over or is tired. Not only that a witness is threatened; he is abducted; he is maimed; he is done away with; or even bribed. There is no protection for him. In adjourning the matter without any valid cause a Court unwittingly becomes party to miscarriage of justice. A witness is then not treated with respect in the Court. He is pushed out from the crowded courtroom by the peon. He waits for the whole day and then he finds that the matter adjourned. He has no place to sit and no place even to have a glass of water. And when he does appear in Court, he is subjected to unchecked and prolonged examination and cross-examination and finds himself in a hapless situation. For all these reasons and others a person abhors becoming a witness. It is the administration of justice that suffers. Then appropriate diet money for a witness is a far cry. Here again the process of harassment starts and he decides not to get the diet money at all. High Courts have to be vigilant in these matters. Proper diet money must be paid immediately to the witness (not only when he is examined but for every adjourned hearing) and even sent to him and he should not be left to be harassed by the subordinate staff. If the criminal justice system is to be put on a proper pedestal, the system cannot be left in the hands of unscrupulous lawyers and the sluggish State machinery. Each trial should be properly monitored. Time has come that all the Courts, district Courts, subordinate Courts are linked to the High Court with a computer and a proper check is

¹⁰ ibid

¹¹ Swaran Singh v. State of Punjab, (2000)5 SCC 68 at 678

made on the adjournments and recording of evidence. The Bar Council of India and the State Bar Councils must play their part and lend their support to put the criminal system back on its trail. Perjury has also become a way of life in the law Courts. A trial judge knows that the witness is telling a lie and is going back on his previous statement, yet he does not wish to punish him or even file a complaint against him. He is required to sign the complaint himself which deters him from filing the complaint. Perhaps law needs amendment to clause (b) of Section 340(3) of the Code of Criminal Procedure in this respect as the High Court can direct any officer to file a complaint. To get rid of the evil of perjury, the Court should resort to the use of the provisions of law as contained in Chapter XXVI of the Code of Criminal Procedure..”

The witnesses, who are considered to play a vital role in the proceedings, have to face a lot of hurdles during the administration of the criminal justice system. We shall now discuss it one by one.

- a) First of all, when a witness is called to a court, to give statements, they sometimes have to come all the way from their remote town or village where they reside. He is not at all paid for his traveling expenditure. If a witness is from the poor strata of society or say of the labour class, then he has to sacrifice his one day work and has to come to the court just to answer a few questions. Even in this case he is neither compensated nor does the court reimburses his travel expenditure.
- b) When he some how reaches the court, he is not at all treated in a proper manner. The Mallimath Committee has expressed its opinion about such witnesses by saying, “*The witness should be treated with great respects and should be considered as a guest of honour.*”¹² When a witness goes to the court for giving evidence or statements, there is hardly any officer of the court, who is there to receive him, provide a seat and tell him where the court, he is to give evidence is located or to give him such other assistance as he may need. In most of the Courts, there is no designated place with proper arrangements for seating and resting while waiting for his turn to be examined as a witness in the court. He is not even asked for a glass of water. Similarly, toilet facility and other amenities like food and refreshment are not provided.
- c) All these things are quite enough to frustrate a witness. But this frustration is at its zenith when he comes to know that the case, in which he has to appear, has been adjourned. It is quite a common scene. In fact, it is a fashion in India to adjourn a case. This is also perhaps the main reason for the huge backlog of cases in India. This adjournment demoralizes the witness to such an extent, that when he is called for appearance next time, he has to think several times before deciding whether to go or not. A few more adjournments like these, and he voluntarily gives up and refuses to come to the court to give statements, evidences or for the cross – examination. Now this act of the witness has many a times proved to be a blessing for the accused, who normally gets acquitted in such cases due to lack of evidence.

¹² Committee on Refoms in Criminal Justice System, Headed by Justice Mallimath,, Volume I, Page 151

- d) Now if he some how comes forward to for cross-examination by the defendant, then he is subjected to a lot of harassment. He is being cross-examined in such a way that he is under an immense mental pressure while answering the questions asked to him.

Not only this, in order to get rid of this cross examination as early as possible, either he will give false statements or to make the matter worse, he will turn hostile i.e. he will retract from his previous statement. And in case of latter, Mr. Soli Sorabjee, the former Attorney General has rightly said, "*Nothing shakes public confidence in the criminal justice delivery system more than the collapse of the prosecution owing to witnesses turning hostile and retracting their previous statements.*"¹³ One of the main reasons for the large percentage of acquittals in criminal cases is of witnesses turning hostile and giving false testimony in criminal cases. But why do the witnesses turn hostile? Generally the reason is the unholy combination of money and muscle power, intimidation and monetary inducement. In the sensational cases like the BMW and Jessica Lal murder case and most recently, the Best bakery case, where the Human Rights Commission intervened when the witnesses changed their statements in the court due to lack of protection to them and their families whereas in the earlier cases, i.e. the BMW and Jessica Lal case, most of the eye witnesses did not open up to pin point the possible reason which compelled them to change their stand. The fact is that the accused to intimidate the witnesses because there was and is no program available under which after the assessment of the need for protection to a particular witness, the administration could give him/her the requisite security cover.

HOSTILE WITNESS

Today the main cause for the high acquittal rate in our criminal justice system is the witness turning hostile. It is because of this reason that I would like to discuss it under a special heading. The term "hostile" witness has its genesis in the Common Law. The function of the term was, to provide adequate safeguard against the "contrivance of an artful witness" who willfully by hostile evidence "ruin the cause" of the party calling such a witness. It was felt that such actions are per se destructive, not only of the interests of the litigating parties, but also in the quest of the courts to meet the ends of justice.

It is pertinent to mention, that the "safeguard" as envisaged under the Common Law, consisted of contradicting witnesses with their previous statements or impeaching their credit (which normally as a rule was not allowed) by the party calling such witnesses. To initiate the "safeguard", it was imperative to declare such a witness as "hostile". For this purpose, Common Law laid down certain peculiarities of a 'hostile' witness, such as, "not desirous of telling the truth at the instance of the party calling him" or "the existence of a 'hostile animus' to the party calling such a witness."

The domestic law differs to a significant degree in this respect. Firstly, the provision (S.154 of The Indian Evidence Act, 1872) only talks about permitting "such questions as may be asked in cross-examination". Secondly, the law nowhere mentions, the need to declare a witness as 'hostile' before the provision can be invoked. Thirdly, the judicial consideration (under S.154) is only to be invoked, when the Court feels that "the attitude disclosed by the witness is destructive of his duty to speak the truth".

¹³ The Indian Express, October 26, 2003, The Columnists, Witness Protection by Soli Sorabjee.

Since the guilt of the accused is proved to a great extent on the basis of the evidence or the information given by such a witness, therefore perjury or the giving of false evidence has to be severely censured. Perjury today has also become a way of life in the Courts. In some cases the judge knows that whatever the witness is saying is not true and is going back on his previous statement. The Judge here ignores this fact and does not even file a complaint against him.

From the above, we can conclude that whereas the Common Law seeks to categorize witnesses as "hostile" or "adverse", for the purpose of cross-examining, the Indian law endeavours not to make such a distinction. All that the law seeks to do is elicit hidden facts from the witnesses for the sole purpose of determining the truth.

The Best Bakery case has generated a heated debate in this area. The drama began with Zahira Sheikh, the prime witness in the Best Bakery case, turning hostile, along with 37 out of the 43 other witnesses. Zahira, the daughter of the Best Bakery owner witnessed the barbaric killing of 14 people, which included employees of the bakery and members of her family on March 1, 2002, in the post-Godhra carnage. The carnage, said to be the worst of its kind in the history of independent India, gained notoriety due to the overt support and complicity of the state machinery in the riot.

After a trial that lasted for more than a year, the trial court acquitted all the 21 accused because of lack of evidence. The verdict delivered by Justice H H Mahida on June 27 was challenged by an NGO, 'Citizens for Justice and Peace' and the National Human Rights Commission (NHRC) on the basis of discrepancies in the manner in which the case was handled. Some of the arguments in this regard are as follows:

- From the very beginning the Gujarat government was accused of being biased in the investigation of riot cases. This was due to the discriminatory treatment meted out to the Godhra and post-Godhra culprits. While the former were arrested under POTA and denied bail, the post Godhra accused were allowed to be released on bail and intimidate the witnesses. This was also reflected in the explicit support provided to securing justice for the Hindu victims while deliberately overlooking the plight of the Muslim victims, many of whom suffered at the hands of the state machinery, especially the police, and the local Hindu leaders who were accused of instigating and leading the mobs.
- The fast track court, which was set up for the purpose of trying the riot cases speedily, took a year to dismiss the case. This provided ample scope for the accused to threaten or bribe the witnesses for not giving statements against them. Zahira's case was a classic example. A year ago, this gutsy girl had identified the perpetrators and given their names to the police. However, repeated threats to her life and honour forced her to withdraw her statement. The fact that Zahira was escorted by the BJP MLA, Madhu Shrivastav, to the court premises is worth mention in this regard. It shows the kind of pressures that the witness must have been put through. The trial court did not bother to look into the reasons why so many witnesses, including Zahira, turned hostile. Neither did it take into account the statements made by the witnesses before the police under Section 161 of the Criminal Procedure Code.

In its petition seeking retrial in the Best Bakery and some other cases (Godhra train carnage trial, the Gulbarg Society riots case, the Naroda-Patia riots case, and the Sardarpura

case) outside Gujarat, for the safety of the witnesses and ensuring a fair trial, the NHRC stated that:

- The concept of a fair trial is a constitutional imperative recognized in Articles 14, 19, 21, 22 and 39-A, as well as by the Code of Criminal Procedure 1973.
- Article 14 of the International Covenant on Civil and Political Rights, which has been ratified by India, and is now a part of the Protection of Human Rights Act (1973), recognizes the right to fair trial as a human right.
- When the right to fair trial is violated, it not only violates certain Fundamental Rights under the Constitution, but also violates basic human rights.
- Whenever a criminal goes unpunished, it is the society at large that suffers, because victims get demoralized and criminals are encouraged.

Attempting to convert the petition into a public interest litigation aimed at improving the criminal justice system in India, the NHRC requested the apex court to exercise its powers under Article 142 of the Constitution to lay down guidelines and directions in relation to protection of witnesses. This encompasses crucial aspects of their safety before, during and after trial.

Later on she boldly demanded the case to be tried in Maharashtra as she was feeling “unsafe”. The whole case was shifted to Mumbai, where there was a special court to try the case. But in a U-turn on November 3, 2004, Zaheera filed an affidavit before Vadodara collector saying she was pressurised by NGO activist Teesta Setalvad to name innocent persons as accused before the special court in Mumbai conducting the re-trial. With Teesta's support, Zaheera had earlier moved the Supreme Court for its re-trial outside Gujarat. Following her petition, the apex court had ordered transfer of the case to a Mumbai court and also rapped the state government regarding protection to riot witnesses.

In the retrial, of the Best Bakery Case on the 22nd of December, 2004, Zahira turned hostile. And Manjula Rao, the special public prosecutor, began the examination of Zaheera. Rao, had yesterday concluded the cross-examination of Sehrunissa Sheikh, Zaheera's mother. Sehrunissa said neither she nor any of her family members had accepted money to turn hostile. During examination by prosecutor Manjula Rao, Zaheera told the designated judge Abhay Thipsay that her maternal uncle, Quaser, was not present in the Best Bakery when it was set on fire by a group of persons on March one, 2002. In her police statement, Zaheera had said that Quaser was present at the bakery at the time of the incident. In police records, however, he is shown as missing. Zaheera further told the court that she had signed only one document and that was the FIR. However, Zaheera said, she did not know the contents of the FIR. Zaheera, a key eye witness, also said she did not see anything on the day when the Best Bakery was set on fire as there was lot of smoke and fire all around and missiles were thrown by the mob at the terrace of the bakery where she and others had taken shelter. Zaheera said only her sister Sabira was on the first floor of the bakery when it was set on fire. However, police records show that Sabira and some others including Shabnam and Ruksana, were present on the first floor.

Soon after this, the prosecutor declared her hostile as she did not support the prosecution's case. Now what can we say about this case? The whole case is in a mess now and no doubt the politicians are to be blamed for this. What I think is that Zahira Sheikh was threatened and was

forced to change her statement. This case clearly shows that the witnesses like her have lost the faith in the judicial system of our country.

At the same time it is noteworthy that there has been no pressure from the government's side to effect a speedy trial of the case. The system has failed these witnesses, who now fear for their lives and are thus turning hostile. The government should have provided for the security of the riot victims.

However it cannot be denied that there can be a possibility that Zahira could have taken money for changing her stand. It is possible that she asked for a huge compensation for retracting her statement. But all said and done, witnesses really do not have much incentive or guarantee from the government to stick to their statements. Justice in this much-hyped case is possible only after the root cause of the incident is ascertained.

Following this, Zahira should freshly testify for all the counts and in case she backs off. The law should punish her severely on the ground of perjury and abuse of the court process. Due to her the case is now more of a public drama rather than a criminal trial. The media too has a tremendous responsibility. Instead of sensationalising issues, they must endeavour to present a constructive and analytical account of such situations.

Besides, there may be similar situations in the future. And in order to ensure that justice is delivered, the courts and the law should make provisions for guaranteeing the safety of witnesses and to reward them for their bravery.

Also, the public needs to get together and pressurise the government to speed up such cases and give its final verdict as soon as possible.

NEED FOR A WITNESS PROTECTION PROGRAMME IN INDIA

Witness protection program and witness protection laws are simply the need of the hour. In fact, it is the absence of these laws that has helped in further strengthening the criminals and offenders. But ironically, in India, such programs and laws are a far cry from reality, where leave alone protection, the witness is not even treated with respect or asked for water. Most developed countries have well formulated and comprehensive witness protection programs to safeguard witnesses in important criminal cases. For example, the US has the Victim and Witness Protection (1982), the Victims' Rights and Restitution Act (1990) and Australia has the Protected Disclosures Act (1994). Unfortunately, despite the high rate of crime and low rate of conviction, India has not drawn up even a rudimentary framework to protect witnesses in crucial cases. The onus of protecting witnesses rests with the police, who have a dubious reputation in discharging this duty. The traditional exclusive dependence on the police to protect the witness has proven ineffectual in building the confidence of witnesses to take risks for bringing the guilty to justice. With the nexus between the police and criminals coming to light at regular intervals, this process has suffered a further setback.

The record of convictions in communal riot cases is much worse. For example, in the 1984 anti-Sikh riots, not a single person has been found guilty till date. According to Asghar Ali Engineer, a scholar who has made an extensive study of communal riots in India, the rate of acquittal is more than 90 percent. Gujarat is proving no exception.

A witness protection program is critical not only in riot cases, which are known for their abysmally low rate of conviction, but also in combating organized crime. Protection of witnesses is very important in the investigation and prosecution of organized crime as they (witnesses) are subject to intimidation by the accused, many of whom are mafia dons and underworld elements indulging in nefarious anti-national activities like arms and drugs smuggling, human trafficking, terrorism, and money laundering. Complacency in this regard can be detrimental to the security environment of the nation as criminal elements get emboldened by the lackadaisical approach of the law enforcing agencies in bringing them to justice. Only the fear of stringent legal action can act as a check. This requires an effective witness protection program, involving all the three concerned agencies – police, government and judiciary. The political will to initiate this program should be displayed by the government; the legal aspects can be looked into by the judiciary, and, the execution can be entrusted to the police.

It should be noted that in cases where the witness is also the aggrieved party or victim of the criminal act in question, they face dual risks:

- i) reconciling with their past trauma and;
- ii) fear of not inviting additional danger to themselves and their loved ones. In these situations, witness protection programs can act as the much needed support system.

The key to a witness protection program is the safety and security of witnesses before, during and after trial, which is missing in all these areas. Security after trial is virtually non-existent in India. In this situation how could one expect Zahira to muster the courage to give testimony by risking their lives? She boldly demanded a retrial outside Gujarat (preferably Mumbai) and the trial was shifted to Mumbai. ***But did that make a difference?***

But denying a retrial would unleash other repercussions. Not sure of receiving justice, victims tend to lose faith in the governance processes or look for alternate recourses. Both situations are dangerous. While the former undermines the effectiveness of governance, the latter will impact adversely on national security. As Julio Ribeiro, former Director General of Police, Maharashtra and Governor of Punjab, aptly put it in an interview¹⁴, *“If people who have seen their mothers and sisters raped and burnt before their eyes have no hope of getting justice, they will turn into terrorists and why are we talking about ISI and Pakistan when we are doing their job for them by creating terrorists?”*

RECOMMENDATIONS

As we have come to know by reading this paper that there is no law relating to the protection of witnesses in India. So all we need is stringent laws in this area in the form of amendments in CrPC and enactment of a separate legislation. An important step in this area has been taken up by the Ministry of Home Affairs, by forming a Committee on reforms in the Criminal justice system, headed by Justice Mallimath, former Chief Justice Karnataka High Court, also known as the Mallimath Committee Report. This Committee analyzed the whole criminal justice system and also made the possible recommendations in various areas. The committee also analyzed the conditions of witnesses in India and have tried to make suitable recommendations in the form of amendments in various provisions in CrPC and also other recommendations relating to the treatment of witnesses in the courts. But the committee only asked what to do but not how to do. In other words, although it has highlighted the miserable

¹⁴ Times of India dated 10 September 2002

conditions of the witnesses in India and made recommendations for their protection, but it has not gone into much details.

Also the Law Commission of India in its 154th Report has dealt with the conditions of witness in our system and has requested the legislature to make suitable laws without any further delay. The 14th Law Commission had referred to this aspect while submitting its report (154th Report) on the Code of Criminal Procedure. After considering the earlier reports of the Commission, the reports of the National Police Commission and the responses it received pursuant to the circulation of its Working Paper, the Commission suggested the following measures:

- (a) *“It is necessary to amend section 164 CrPC so as to make it mandatory for the investigating officer to get statements of all material witnesses questioned by him during the course of investigation recorded on oath by the magistrate. The statement thus recorded will be of much evidentiary value and can be used as previous statement. Such recording will prevent the witnesses turning hostile at their free will. Such a change will also help the Police to complete the investigation and submit a final report on the basis of such statements made on oath and on other facts and circumstances stated as recovery, etc.”* Accordingly, the Commission suggested introduction of sub-section (1A) in section 164. The Commission however felt that adoption of this course would require recruitment of a good number of additional magistrates, which course, it thought may not be immediately feasible - though this course was the most desirable one.
- (b) The other alternative measure suggested by the 14th Law Commission was to retain the existing provisions in sections 161, 162 and 172 of the Code of Criminal Procedure and to provide some checks against the witnesses turning hostile. The suggested measures were: *taking the signature of the witness, if he is literate, on his statement, giving a copy of the statement to the deponent under acknowledgement and thirdly to send copies of the statements to the appropriate magistrate as well as to the superior Police officers*¹⁵.

But the Law Commission found a difficulty as far as the introduction of first recommendation is concerned. The difficulty was in recruitment of as many more magistrates as may be required, if the first measure suggested by it were to be introduced. Therefore the Commission suggested the following alternative in its 178th Report¹⁶:

“In all offences punishable with ten or more years imprisonment (with or without fine) including offences for which death sentence can be awarded, the Police shall have the statements of all important witnesses recorded under section 164 by a magistrate.” Indeed, it would be more appropriate, if this is done at the earliest opportunity i.e. at the very inception of the investigation. It is well-known that generally witnesses stick to truth at the early stages but may change in course of time. If their statement is got recorded by a magistrate at the earliest opportunity, that will also furnish guarantee of the truth of the

¹⁵ The Law Commission of India, 154th Report on the Code of Criminal Procedure 1973, Volume 1, 1996

¹⁶ The Law Commission of India, 178th Report on Recommendations For Amending Various Enactments, Both Civil And Criminal, December 2001

statement as well. This is the general belief, though this cannot be stated as a definite or universal proposition. Adopting this course would not require recruitment of a large number of additional magistrates. The present number would suffice.

In April 2003, a High Level Committee headed by Justice VS Malimath was appointed by the Home Ministry to reform the existing criminal justice system. The Committee said that the time has come to enact a law putting in place a Witness Protection Program in India as well. Recommending the witness Protection Program, the Malimath Committee however, did not focus on any particular case. It spoke generally of the need to check the growing trend of hostile witnesses. The Committee said nothing beyond making a bald recommendation of adopting such a law. It made no effort to go into how the concept of witness protection program may be adapted to the legal topography of India. It did not deal with the obvious issue whether a witness protection program is a luxury that a poor country like India can afford. Thus the Report was not complete per se.

Recently, the Delhi High Court issued guidelines to the police on providing protection to witnesses to curb the menace of their turning hostile leading to acquittal of accused in heinous crimes. This decision given by a bench comprising Justice Usha Mehra and Justice Pradeep Nandrajog on a petition filed by Neelam Katara whose son Nitish was allegedly kidnapped from a marriage party in Gaziabad by Rajya Sabha MP DP Yadav's son Vikas and his nephew Vishal and killed in February last year. The guidelines were as follows:

- 1) Member Secretary, Delhi Legal Services Authority would be competent authority who on, receipt of a request on a witness, decide "whether a witness requires protection, to what extent and for what duration", the court said.
- 2) However the protection would be available only to witnesses who were to depose in cases punishable with death sentence or life imprisonment.
- 3) In deciding whether to grant protection to a particular witness, the Competent Authority "shall" take into account the nature of the risk to the security of witness emanating from the accused or his associates and the nature of probe or the criminal case.
- 4) The authority shall also consider the importance of the witness and the value of evidence given or agreed to be given by him/her besides the cost of giving protection to him or her.
- 5) While recording the statement of witness under Section 161 of the CrPC, it would be the duty of the investigating officer to make the witness aware of these guidelines and also the fact that in case of any threat he/she can approach the Competent authority.
- 6) Once the competent authority decides to extend the protection to a particular witness, it "shall" be the duty of the police Commissioner to provide protection to him or her.

The court further said that the guidelines shall operate for the protection of witnesses till enactment of a suitable legislation. So we see that both Law Commission and the

Courts have felt the need for an effective witness protection program in India. In the light of the reading so far, the following recommendations can be made.

- a) **Perjury** - Since the guilt of the accused is proved to a great extent on the basis of the evidence or the information given by such a witness, therefore perjury or the giving of false evidence has to be severely censured. Perjury today has also become a way of life in the Courts. In some cases the judge knows that whatever the witness is saying is not true and is going back on his previous statement. The Judge here ignores this fact and does not even file a complaint against him. Section 340 of the Criminal Procedure Code, 1972 states the procedure for the prosecution for contempt of lawful authority of the public servants, for the offences against public justice and for the offences relating to documents given in evidence.

Section 340(3) of Criminal Procedure Code states:

A complaint made under this section shall be signed-

- a) Where the Court making the complaint is the High Court, by such officer of the High Court as the Court may appoint;
- b) In any other case, by the presiding officer of the Court.

It is respectfully submitted that Section 340(3)(b) needs to be amended, empowering any officer of the Court to file a complaint against such witnesses, thereby putting an end to the notion of bought over or hostile witnesses.

The High Courts also have to be vigilant in these matters if the criminal justice system is to be put on a proper pedestal. The system cannot be left at the mercy of the state machinery. In today's computer age, it's about time that all lower courts are linked up with their respective High Courts with a computer. A proper check should be maintained on the adjournments and recording of evidence. Further, the Bar Council of India and the State Bar Councils must play their part and put the criminal justice system back on track.

Another method could be to videotape recording of statements which would obviate allegations of coercion by the investigating agencies. This may not be practicable in all cases.

- b) If the Court thinks it fit, then the identity of the witness should be changed. But this should not confine to merely change of name. If the situation demands, then his face should also be changed through plastic surgery.
- c) If the court thinks that the place where the witness ordinarily resides is unsafe for the witness(es) concerned, then he/she should be shifted to the place which is difficult for the injurer to reach or he should be kept in a place which is though the same locality, where he ordinarily resides but which is not known at least to the interested persons.
- d) Witnesses who come to the court should be treated with dignity and shown due courtesy. He should be provided with an official for his assistance. Also separate place should be provided with proper facilities such as seating, resting, toilet, drinking water etc. for the convenience in the court premises.
- e) The witnesses should be fully compensated for the day when he is in the court because he sacrifices his work to assist the court.

- f) The judge should keep an eye on the defence in order to prevent the witness from harassment, annoyance or indignity during the time of cross-examination.
- g) The witness should be brought to the court only at the sentencing stage. All his statements should be recorded in the isolation at the early stage.

So the recommendations can be summarized in the following words:

- Keeping the identity of witnesses confidential throughout the trial;
- Arranging for a closed door trial or trial by video conferencing;
- Avoiding exposure of the witness to media;
- Ensuring physical safety of the witness and their close relatives by providing bodyguards;
- Bringing them to court only at the sentencing stage; and resettling them by providing a new identity and a safe haven

CONCLUSION

Thus we conclude that we need to enact strict laws on witness protection keeping in mind the needs of the witnesses in our system. Meanwhile the step taken by the Delhi High Court in laying down the guidelines regarding witness protection is worth appreciating. These guidelines should be considered by the legislature while enacting the suitable legislation. Today, under present circumstances, the Indian Government is evaluating the American laws pertaining to witness protection, where gang men after turning approver are given a new name and identity and relocated to a new place. In the USA, the Federal Witness Protection Program was created in response to the dangers faced by the witnesses who testified against mobsters. In a high threat environment including pre-trial conferences, trial testimonials and other court appearances, a round the clock protection is provided to all the witnesses through the U.S Marshall Service. Recently Canada gave witness protection cover under its Witness Protection Act, 1996 to a Sikh woman, Satnam Kaur Reyat, who threw fresh light in the Kanishka Bombing Case.

While the government is presently deliberating over making laws pertaining to hostile witnesses and laws for witness protection, it is imperative to note that witness protection program works on the premise that all the officials involved in the secret exercise of changing somebody's identity are absolutely trustworthy. The plain fact is that the level of professionalism demanded by the witness protection program is considered to be beyond the capability of our police in the existing system, making it as susceptible as it to extraneous influences.

Today, stringent laws against persons giving false evidence and against witnesses that turn hostile are very much the need of the hour. In many cases, it is on the basis of the evidence given by witnesses that the State initiates the prosecution process. However, during the trial of those accused, it is often the case that those witnesses (on the basis of whose evidence the prosecution was initiated), turn hostile resulting in the acquittal of the accused. It is therefore not a question of funds, as they could be generated in due time by some means or the other; but a question put to the integrity of the system upon which thrives the sustainability of the witness protection program as well as the life of the witness and his family.

BIBLIOGRAPHY :

- Basu, N.D., Code of Criminal Procedure, Volume 1 & 2, 9th Edition, 2001, Ashoka Law House, New Delhi
- Chawla, J.S., Criminal Ready Referencer, 2000-2003 with Judicial Analysis, 2003 Edition, ICC Publications, Chandigarh
- Law Commission Reports no. 154 on the Code of Criminal Procedure 1973, Volume 1, 1996
- Law Commission Reports no. 178 on the Recommendations for Amending Various Enactments both Civil and Criminal, December 2001
- Turner Cecil, J.W. Russell on Crime, Volume 2, 12th Edition, 2001 Universal Law Publications Ltd.
- Witness Protection and Integrity of Criminal Trial, a paper presented by Mr. John Spencer and Dr. Maureen Spencer, Middlesex University, London, England, at 2nd World Conference on Modern Criminal Investigation, Organised Crime and Human Rights organized at ICC, Durban, 3-7 December, 2001. Source: <http://www.crimeinstitute.ac.za/2ndconf/papers/spencer.pdf>
- Briefing Paper on Legal Issues and witness Protection in Criminal Cases, by Mark Makarel, Fiona Riatt and Susan Moody, Department of Law, University of Dundee. Source: <http://www.scotland.gov.uk/cru/kd01/green/briefing-01.pdf>
- Dispensing Best Justice part I, II and III, Article by Aisha Sultunat, Research Officer, Institute of Peace and Conflict Studies. Source: <http://www.ipcs.org/ipcs/countryIndex3.jsp?action=showView&kValue=1168&country=1014&status=article&mod=b>
- Hostile Witness, A Critical Analysis of Key Aspects Hitherto Ignored In Indian Law, article written by Suprio Bose, IInd Year, BA LLB.Symbiosis Law College, Pune Source: www.legalserviceindia.com/articles/host.htm
- Treatment And Protection Of Witnesses In India, Written by Dhruv Desai - 4th year law-Symbiosis Society's law college, Pune