

PLIGHT OF WITNESSES IN INDIAN JUDICIAL SYSTEM- A BIRD'S EYEVIEW

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A. Introduction

"I swear in the name of God that what I say is the truth and nothing but the truth". This is the oath taken by many as they embark on the path of obligation, assistance and duty as a witness in the Indian justice system. The role of witnesses is paramount in the criminal justice system of any country. In this context Bentham has rightly said that *witnesses are eyes and ears of justice*. But in reality the question which arises is that, how many of them can or will conform to the earnest vow he/she takes? And if they can not or will not then what are the reasons behind it? The obvious reason behind it in Indian judicial system is that, often the justice to these witnesses is gravely compromised. The twin monsters of money and muscle in many cases, especially in those involving influential sections of the society, lead to the witnesses turning hostile and retracting their early statements. The *BMW case* where there were constant flip flops by the lead witness, the *Jessica Lal case* where 32 of the prosecution's witnesses recanted or the *Best bakery case* where the witnesses alleged that they were misguided by a social activist, are some of the prime examples of situations where they have changed sides.²

A deep concern about plight of a witness who comes forward to depose before a court with a full sense of duty and conviction has been pointed out by the Apex Court as, [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. Here are the witnesses who 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. As a consequence of which the administration of justice that suffers.³

In the present article the author discusses how the law relating to the protection of witnesses is inadequate and also focuses on the need for a witness protection program.

B. Statutory Framework Pertaining to Witnesses in India.

The usage "hostile witness" does not find a place in the Indian Evidence Act, 1872. Authorities are not unanimous with regard to the meaning of the words "adverse", "unwilling" or "hostile" and the draftsman of the Evidence Act has, in view of the conflict, refrained from using any of those words in the Act. The matter is left entirely to the discretion of the court. A witness is considered adverse when, in the opinion of the Judge, he bears a hostile animus to the party calling him and not merely

when his testimony contradicts his proof.

Common causes for hostility or adversity exhibited by the witnesses are the following.

- i) Threat/intimidation
- ii) Inducement by various means
- iii) Allurement/seduction
- iv) Disillusionment caused by the delay in the judicial process
- v) Hassles faced by the witnesses during investigation and trial.⁴

For various other reasons also a witness may turn hostile. Accused/adverse party may be responsible for the volte-face shown by the witness in categories (i) to (iii). In other cases, the entire criminal justice system, including the trial courts, could be held responsible. Here comes the relevance of the observations made by the Apex Court in Swaran singh's case⁵.

To understand the meaning of hostile witness, we have to understand the process by which a witness becomes 'hostile'. The Code of Criminal Procedure, 1973, Chapter XII deals with the police powers to investigate. The Code of Criminal Procedure, 1973, s. 161(3)⁶ vests in police officers the power to record statement of witnesses. However, these statements are not admissible in court by virtue of s. 162(1).⁷ The aim of s. 162 is to protect accused persons from being prejudiced by statements made to police officers who may coerce the witnesses. Therefore, the witness has to restate in the court the statements that he made to the police. Here the statements recorded by the police constitute a reference to which the veracity of the witness may be tested. . If the witness goes back on his/her earlier he/she may have turned hostile.

Recently the Criminal Law (Amendment) Act, 2005 has amended the Penal code, Code of Criminal Procedure and Evidence Act. Above Act has introduced Section 195A⁸ to the Penal Code, whereby threatening or inducing any person to give false evidence is made punishable. By virtue of the said amending Act, Section 195 of Cr.P.C. has also undergone changes. Section 154 of Evidence Act empowers the court to permit the person who calls a witness to put any question to him which might be put in cross examination by the adverse party. Judicial pronouncements aplenty are available to fortify the proposition that the testimony of a hostile witness need not be discarded for the reason of hostility alone. The amending Act has created a sub section to Section 154 of Evidence Act, whereby the above mentioned principle has been incorporated in the statute.

We are yet to perceive the effect and impact of these provisions. However, the said provisions are not a complete solution in itself in the matter of witness protection. From the above discussion it is crystal clear that law dealing with witness protection in India is not adequate.

C. Instances of Witness Turning Hostile

C.1. Priyadarshini Matoo Case

"Though I know he is the man who committed the crime, I acquit him, giving him the benefit of doubt."

This shocking statement of the Additional Sessions Judge, G.P. Thareja in **Ms. Priyadarshini Mattoo case**, while acquitting the accused reflects the deplorable state of our criminal justice system. This is one of the cases to have triggered public indignation over the miscarriage of justice at the instance of high profile and influential accused Santosh Kumar Singh, son of Former Senior IPS Officer J.P. Singh. Over the years corruption in the judicial system coupled with political influence

has become so rampant that it has in turn resulted in distortion of the entire Indian Judiciary.

Priyadarshini Mattoo was a 25-year-old law student who was found raped and murdered at her house in New Delhi on January 23, 1996. The Additional Sessions Judge G.P. Thareja in his 450 pages judgment came down heavily on the role of Delhi Police; “There has been particular inaction by Delhi Police”, he said, while commenting that the accused’s father may have used his official position to influence the agencies. “The influence of the father has been there in the matter and there was deliberate inaction” (at the time his father was second in command of the police forces in Delhi). As result of which all the witnesses turned hostile.

On October 17, 2006, the Delhi High Court found Santosh Kumar Singh guilty on both counts of rape and murder and on October 30 of the same year sentenced him to death. On October 6, 2010, the Supreme Court of India commuted the death sentence to life imprisonment. Santosh Kumar Singh, the son of a Police Inspector-General, had earlier been acquitted by a trial court in 1999, and the High Court decision was widely perceived in India as a landmark reversal and a measure of the force of media pressure in a democratic setup. The intense media spotlight also led to an accelerated trial, unprecedented in the tangled Indian court system.⁹

C.2. Jessica Lal Murder Case

Jessica Lal was a model in New Delhi, who was working as a celebrity barmaid at a crowded socialite party when she was shot dead at around 2 a.m. on 30 April 1999. Dozens of witnesses pointed to Siddharth Vashisht, also known as Manu Sharma, the son of Vinod Sharma, a wealthy and influential Congress-nominated Member of Parliament from Haryana, as the murderer.

In the ensuing trial, Manu Sharma and a number of others were acquitted on 21 February 2006. The prosecution had been affected by 32 of their witnesses becoming “hostile”. These included Shayan Munshi, Andleeb Sehgal, Karan Rajput, Shiv Lal Yadav and two ballistics experts, Roop Singh and Prem Sagar.

Following intense media and public pressure, the prosecution appealed and the Delhi High Court conducted proceedings on a fast track with daily hearings conducted over 25 days. The trial court judgment was overturned, and Manu Sharma was found guilty of having murdered Lal. He was sentenced to life imprisonment on 20 December 2006. Subsequently, in February 2011, it was announced that all the 32 Witnesses would be facing charges for perjury.¹⁰

C.3. BMW Hit and Run Case

Sanjeev Nanda moved down six persons by rash and negligent driving of his BMW. During the initial trial, the only survivor, Manoj, said that it might have been a truck that hit them. Since the other five witnesses were dead, Manoj was the only voice. It is widely believed that he had been paid off, and has mysteriously disappeared thereafter. Another witness, Sunil Kulkarni had volunteered to have seen the incident, but the elite defence team was able to discredit him and he was portrayed as having been “put up” by the Delhi Police.

In Sanjeev Nanda’s testimony (in 92 questions over 14 pages), he told Judge S.L. Bayana that he was not driving the car and was not the car’s owner. He said it was his sister’s car and he had nothing to do with the accident.

Sanjeev Nanda spent a few months in jail but was released on bail in May 1999. He was set a surety of a Rs 45 crore (USD 9 million), subsequently reduced to Rs. 15 crore (USD 3 million).¹¹

The case went up for re-trial. Under intense media pressure, the case was tried on a fast-track basis, and on 2 September 2008, Sanjeev Nanda was convicted by a Delhi court for mowing down six persons in the nine-year-old BMW hit-and-run case and can face a ten-year prison term.

The BMW case joins a long list of similar cases. A few years back, Puru Raj Kumar, the son of Bollywood Actor Raj Kumar, had run over two pavement dwellers. He had been fined Rs. 35000 (about USD 1000).

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Recently, the issues of 'Witness Identity Protection and Witness Protection Programmes' were taken up by the Law Commission suo motu in the light of the observations of the Supreme Court in *NHRC v. State of Gujarat*¹², *PUCL v. Union of India*¹³; *Zahira Habibullah H Sheikh and Others v. State of Gujarat*¹⁴, and *Shakshi v. Union of India*¹⁵ that a law in this behalf is necessary. More recently the same view was expressed by the

Supreme Court in *Zahira Habibulla Sheikh v. Gujarat*¹⁶. The Court stated in all the above cases that having regard to what is happening in important cases on the criminal side in our Courts, it is time a law is brought forward on the subject of witness identity protection and witness protection programmes. Law Commission also prepared a draft Bill for witness protection.

D. CONCLUSIONS AND SUGGESTIONS

It is high time that the malaise of 'hostile witness' be tackled. No nation may afford to expose its righteous and morally elated citizens to the peril of being haunted or harassed by anti social elements, for the simple reason that they testified the truth in a court of law. Adequate steps must be taken for the protection of witnesses who appear before the court so as to render a helping hand in the dispensation of justice. As long as witnesses continue to go hostile and do not make truthful deposition in Court, justice will always suffer and people's faith in the credibility of judicial process and justice system will continue to erode and shatter.

If the cases like Best Bakery or Jessica Lal are repeated, it would shatter the strength and credibility of our criminal justice system. The government must take a stand on this matter and implement a system that is not a new or novel concept to criminal justice systems around the world. Enough witnesses have turned hostile, enough people have been murdered and yet no solution from the government's side appears to be in the offing. Therefore, it is suggested that the Indian Parliament should implement a witness protection programme.

In order to protect witness from threats author proceeds further to give some suggestions.

D.1. Constitution of Witness Protection Cell

A witness protection cell should be constituted to provide protection to the witnesses during all stages of trial. It would be an independent body that will lie outside political control. The cell may also arrange for the provision of false identities, relocation and follow up. The members of the witness protection cell should be made liable criminally if they do not discharge their responsibility properly.

D.2. Suspension of Bail

The code of criminal procedure, 1973, contains provisions pertaining to bail. Bail, as per the provisions of the code is a discretionary remedy. Magistrate may grant bail or refuse to grant it if it appears to him that there is eminent danger of tampering with evidence for protecting witness from any threat, in case of bailable

offences, the magistrate may grant bail. But if within a reasonable period the witness make an application for his protection and proves beyond reasonable doubt that there is threat to him magistrate may cancel the bail. To the contrary, in non bailable offences magistrate may suspend the bail application of accused during the pendency of the application of protection made by witness. If after hearing his application the magistrate is satisfied that, the accused has attempted to cause threat to witnesses his bail shall be cancelled. On the other hand, if there is no sufficient evidence on record to prove the fact of threat, accused shall be released on bail. On hearing the application, if, the magistrate is of the opinion that the application has been made by the witness with the intend to harass the accused magistrate shall impose fine upon him. Out of fine so imposed, some compensation shall be awarded to accuse for hassles.

D.3. Transfer of Cases Beyond Territorial Limits

During the pendency of the trial if the magistrate is of the opinion that fair and impartial enquiry or trial cannot be held within the limits of his territorial jurisdiction, meaning thereby the accused or his relative may successfully tamper with the evidence, the magistrate may request to the chief justice of the high court for transfer of such cases. If the chief justice of high court is of the opinion that for a fair trial it is necessary to transfer the case beyond territorial limits of the state he may do so.

D.4. Immediate Protection To The Witness For Eminent Dangers

During the course of investigation of any offence, if the officer in charge of investigating agency is satisfied that, for the purpose of effective investigation of the case, it is necessary to protect the identity of any threaten witness, he may provide such immediate protection to the witness, after bringing the fact to the notice of the immediate superior .

D.5. Protection If Any Person Attempts To Bribe A Witness

If any person attempts to bribe or promise to a witness or to any person related to him for any benefits present or future, if the witness is ready and willing to depose as per the wish of the person who so attempts, the person so attempting shall be punished under section 195-A of the Indian Penal Code 1860. As attempt to bribe a person, creates mental pressure upon him which may result into injury as defined in section 44 of Indian Penal Code.

(Endnotes)

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- 2 Nilima Ravindran “Witness Protection in India: A cry from Reality” <http://www.youthkiawaaz.com/2012/04/witness-protection-in-india-a-far-cry-from-reality/> Browsed on 8th July,2012.
- 3 *Swaransingh v. State of Punjab* AIR 2000 S.C. 2017
- 4 A Harirasad “ Witness Protection A birds eyeview 2006 (1) J V <http://kja.gov.in/article/witnessprotection.pdf> accessed on 7th july,2012
- 5 *Supra* Note 3.
- 6 Section 161(3) The Code of Criminal Procedure, 1973. The police officer may reduce in to writing any statement made to him in the course of examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records.
- 7 Section 162 The Code of Criminal Procedure, 1973. No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it, nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:
- 8 Section 195-A. Threatening any person to give false evidence. Whoever threatens another with any injury to his person, reputation or property or to the person or reputation of any one in whom that person is interested, with intent to cause that person to give false evidence shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both; and if innocent person is convicted and sentenced in consequence of such false evidence, with death or imprisonment for more than seven years, the person who threatens

shall be punished with the same punishment and sentence in the same manner and to the same extent such innocent person is punished and sentenced.

- 9 Santosh kumar Singh v. State through CBI Criminal Appeal No. 87 of 2007.
- 10 Mr.Subhash Chandra Agrawal vs Government Of Nct Of Delhi Appeal No. CIC/SG/A/2010/000684
- 11 Available at, <https://sites.google.com/site/sosevoiceforjustice/prosecute-sanjay-dutt-under-tada>, accessed on 20th July 2016
- 12 2003(9) SCALE 329
- 13 2003(10) SCALE 967
- 14 2004(4) SCC 158
- 15 2004(6) SCALE 15
- 16 2006(3) SCALE, 104

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- Law Commission (2004), "Consultation Paper on Witness Protection", p. 3, available at <http://lawcommissionofindia.nic.in/Summary%20of%20the%20Consultation%20paper%20on%20Witness%20protection%20AND%20Questionnaire.pdf#search=%22consultation%20paper%20on%20witness%20protection%22> (last visited on 19th June, 2012)
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