

Protection of Witness under Administration of Justice in India

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Abstract: A welfare state is obligatory to ensure that No person shall be deprived of his life or personal liberty except according to procedure established by law and investigation, prosecution and trial of criminal offences is not prejudiced because of threats or intimidation to witnesses. Witness is an important constituent of the administration of justice. By giving evidence relating to the commission of the offence he performs a sacred duty of assisting the court to discover truth. The National Police Commission in its 4th report referred to the inconveniences and harassment caused to witnesses in attending courts. The Commission reproduced a rather critical and trenchant letter it received from a senior District and Sessions Judge.

Keywords: Administration of Justice, Indian society, witness, protection

1. Introduction

The learned judge gave a litany of grievances and complaints that a witness may have and then said that a prisoner suffers from some act or omission but a witness suffers for no fault of his own. All his troubles arise because he is unfortunate enough to be on the spot when the crime is being committed and at the same time 'foolish' enough to remain there till the arrival of the Police.¹ The need to protect witnesses has been emphasised by the Hon'ble Supreme Court of India in *Zahira Habibulla H. Sheikh and Another v. State of Gujarat*². While defining Fair Trial, the Hon'ble Supreme Court observed that "If the witnesses get threatened or are forced to give false evidence that also would not result in fair trial".

2. Aspects of Witness Protection

Physical protection and Protection from mental vulnerability are the two basic aspect of witness protection. While the first aspect of protecting the evidence of witnesses from the danger of their turning 'hostile' has received limited attention. The first is to ensure that evidence of witnesses that has already been collected at the stage of investigation is not allowed to be destroyed by witnesses resiling from their statements while deposing on oath before a court. This phenomenon of witnesses turning 'hostile' on account of the failure to protect their evidence is one aspect of the problem. There are witnesses who are known to the accused, not known to the accused.

3. The Examination of Witness under Existing Law

In a criminal trial, the prosecution and defence prepare their respective cases and the prosecution has to first lead evidence. The defence cross-examines the prosecution witnesses to test the veracity of the prosecution case. The accused has the right

to silence and need not normally examine witnesses unless he chooses to examine himself or some defence witnesses and this is generally done in cases where he has a special plea or a plea of alibi. The Indian Evidence Act, 1872 and the Code of Criminal Procedure, 1973 lay down a comprehensive legal framework for recording the testimony of witnesses in criminal cases. Section 327 of Cr.PC provides for trial in open court. Whereas as section 207 allows for supply of copies of police report and other Documents to the accused, section 208 (supply of copies of statements and documents to accused in other cases triable by Court of Sessions), and section 273 (evidence to be taken in the presence of accused). Section 299 refers to the right of the accused to cross-examine the prosecution witnesses. These provisions are intended to guarantee an open public trial with a right to the accused to know the evidence gathered by the prosecution and also a right to cross-examination to safeguard the interest of the accused. The reason behind enacting these provision is that the accused is presumed to be innocent unless proved guilty beyond reasonable doubt. Section 200 of the Code of Criminal Procedure provides that a Magistrate shall examine upon oath the complainant and the witnesses present, if any. Under section 202 (2) of the Code of Criminal Procedure, in an inquiry, the Magistrate may, if he thinks fit, take evidence of witnesses on oath. Moreover, section 204 (2) of the Code provides that no summons or warrant shall be issued against accused unless a list of the prosecution witnesses has been filed. For the examination of witnesses, the Magistrate shall fix a date under section 242 in case of warrant cases instituted on police report and under section 244 in cases other than those based on police report.

4. Protection of Witness under Existing Law

Except in cases of rape where Section 327 (2) of the Code of Criminal Procedure, 1973 provides for in camera proceedings

¹ The National Police Commission of India, 4th Report, 1980

² 2004 (4) SCC 158 SC

other than this there are no general statutory provisions in the Code of Criminal procedure for the protection of witness in a criminal trial. Evidence as defined in section 3 of the Indian Evidence Act, 1872 means either oral evidence or documentary evidence. The depositions of witnesses and documents included in the term 'evidence' are two principal means by which the materials, upon which the Judge has to adjudicate, are brought before him. In a criminal case, trial depends mainly upon the evidence of the witnesses and, the provisions of the Code of Criminal Procedure, 1973 and of the Evidence Act, 1872 exhaustively provide for the depositions of the witness and the rules regarding their admissibility in the proceedings before the Court. The Evidence Act further refers to direct evidence by witnesses. As to proof

of facts, direct evidence of a witness who is entitled to full credit shall be sufficient for proof of any fact and the examination of witnesses is dealt with in sections 135 to 166 of the Act. Section 135 provides that the order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedures respectively, and, in the absence of such law, by the discretion of the Court. Section 138 of the Evidence Act not only lays down the manner of examining a particular witness but also impliedly confers on the party, a right of examination-in-chief, cross-examination and re-examination. The examination of witnesses is generally indispensable and by means of it, all facts except the contents of document may be proved. Anybody who is acquainted with the facts of the case can come forward and give evidence in the Court. Under the Evidence Act, the right of cross-examination available to opposite party is a distinct and independent right, if such party desires to subject the witness to cross-examination. It was observed by the Supreme Court in *Nandram Khemraj v State of MP*³ that the weapon of cross-examination is a powerful weapon by which the defence can separate truth from falsehood piercing through the evidence given by the witness, who has been examined in examination-in-chief. By the process of cross-examination the defence can test the evidence of a witness on anvil of truth. If an opportunity is not given to the accused to separate the truth from the evidence given by the witness in examination-in-chief, it would be as good as cutting his hands, legs and mouth and making him to stand meekly before the barrage of statements made by the witnesses in examination-in-chief against him or sending him to jail. Law does not allow such things to happen. There are certain exceptional cases where the previous deposition of a witness can be considered relevant in subsequent proceedings.⁴ Following are the essential requirements of section:-

- a) that the evidence was given in a judicial proceedings or before any person authorized by law to take it;

- b) that the proceeding was between the same parties or their representatives - in - interest;
- c) that the party against whom the deposition is tendered had a right and full opportunity of cross-examining the deponent when the deposition was taken;
- d) that the issues involved are the same or substantially the same in both proceedings;
- e) that the witness is incapable of being called at the subsequent proceeding on account of death, or incapable of giving evidence or being kept out of the way by the other side or his evidence cannot be given without an unreasonable amount of delay or expense

Justice Wadhwa in *Swarn Singh v State of Punjab*⁵ has observed that a 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 harassed a lot not only that witness is threatened; he is abducted; he is maimed; he is done away with; or even bribed. There is no protection for him. The legislature in the year 2000 added a proviso to sub-section (3) of section 146 of the Evidence Act, 1872 thereby giving protection to a victim of rape from unnecessary questioning her about her past character.

5. The Witness Protection Scheme 2018

The Ministry of Home Affairs, Government of India has prepared a draft witness protection scheme in 2018. The scheme is based on the inputs received from 18 States/Union Territories, 5 States Legal Services Authorities and open sources including civil society, three High Courts as well as from Police personnel. The types of Protection measures envisaged under the Scheme are to be applied in proportion to the threat. The same are not expected to go for infinite time, but are expected to be for a specific duration on need basis which is to be reviewed regularly. The measures provided for the protection of the witnesses include the following:-

1. Ensuring that witness and accused do not come face to face during investigation or trial
2. Monitoring of mail and telephone calls;
3. Arrangement with the telephone company to change the witness's telephone number or assign him or her an unlisted telephone number;
4. Installation of security devices in the witness's home such as security doors, CCTV, alarms, fencing etc.;
5. Concealment of identity of the witness by referring to him/her with the changed name or alphabet;
6. Emergency contact persons for the witness;
7. Close protection, regular patrolling around the witness's house;
8. Temporary change of residence to a relative's house or a nearby town; Escort to and from the court and

³ 1995 Cr.L.J 120

⁴ Section 33 of Indian Evidence Act, 1872

⁵ AIR 2000 SC 2017

- provision of Government vehicle or a State funded conveyance for the date of hearing;
9. Holding of *in-camera* trials;
 10. Allowing a support person to remain present during recording of statement and deposition;
 11. Usage of specially designed vulnerable witness court rooms which have special arrangements like live links, one way mirrors and screens apart from separate passages for witnesses and accused, with option to modify the image of face of the witness and to modify the audio feed of the witness' voice, so that he/she is not identifiable;
 12. Ensuring expeditious recording of deposition during trial on day to day basis without adjournments;
 13. Awarding time to time periodical financial aids/grants to the witness from Witness Protection Fund for the purpose of re-location, sustenance or starting new vocation/profession, if desired

Apart from the above measures, any other form of protection measures considered necessary, and specifically, those requested by the witness can be ordered by Competent Authority.

6. Conclusion

The provisions of the Criminal Procedure Code, 1973 and the Indian Evidence Act, 1872 reveals that the accused has a right of open trial and also rights to cross examine the prosecution witnesses in open court. There are a few exceptions to these principles and the Supreme Court has declared that the right to open trial is not absolute and video-screening techniques can be employed and such a procedure would not amount to violation of the right of the accused for open trial. The Code of Criminal Procedure contains a provision for examination of witnesses in camera and this provision can be invoked in cases of rape and child abuse. There is, however, need for extending the benefit of these special provisions to other cases where the witnesses are either won over or threatened, so that justice is done not only to the accused but also to victims. The Witness Protection Scheme, 2018 (Draft) is the first attempt at the National level to holistically provide for the protection of the witnesses which will go a long way in eliminating secondary victimization. The witnesses are the eyes and ears of justice, and thus play an important role in bringing perpetrators of crime to justice.