

WITNESS PROTECTION: A STEPPING STONE TO RESTORATIVE JUSTICE

Ms. Neha Singh

Ph.D. Research Scholar

University Department of Law, Patna University.

And

Prof. (Dr.) Mahammad Sharif

Principal, Patna Law College & Research Supervisor,
Faculty of Law

Patna University, Patna

Best Citation - Ms. Neha Singh & Prof. (Dr.) Mahammad Sharif, WITNESS PROTECTION: A STEPPING STONE TO RESTORATIVE JUSTICE, 2 (4) & 39 of 2022, IJLR.

Abstract

Witnesses play a decisive role in criminal trial. They serve as edifice on which the very institution of Criminal Justice System rests. Their testimony assists in tracing out the guilt of the accused and enables successful prosecution of criminal offenders. Hence, it is imperative to provide adequate protection to witness so as to ensure free flow of justice without any hindrance. Howsoever, the prevailing state of affairs in India in respect of witness protection seems to be quite worrisome and is turning deplorable day by day, thereby adversely affecting the quality of deposition and potentially the outcome of a trial. Delay in the administration of justice and inadequate witness protection make them reluctant to participate in the process of law. Daily reports of incidence of violence, harassment, inducement and torture reflect their vulnerability and often make them turn hostile which is glaringly visible in many

of the high-profile criminal cases. Lack of an efficient legal mechanism regulating witness protection is an important reason behind low rate of conviction.

The Witness Protection Scheme, 2018 which was affirmed by the Apex Court in the Landmark Judgement of *Mahendra Chawla v Union of India* would have gone a long way in instilling confidence in witnesses and thereby furthering the cause of justice howsoever, it suffers from various flaws including poor implementation.

The present study analyses the role of witness in the Criminal Justice adjudication, various problems faced by them including reasons of hostility as well as scope for assistance and protection. The researcher has also discussed about the statutory provisions pertaining to witness protection and has attempted to make a comprehensive study of some Witness Protection Programs existing across the globe. The researcher further concludes by highlighting the urgent need for an effective witness protection legal regime so as to uphold the concept of fair trial.

Key Words: Criminal Justice System, Witness, torture, hostility, Witness Protection Program.

I. INTRODUCTION

Every society craves for an effective criminal justice system which largely depends on the willingness of individuals to furnish information and adduce evidence without being threatened or lured. Witness assumes great significance in this regard since their testimonies enables the court to decide the merits of facts and circumstances of the case. They have the potential to alter the course or outcome of trial. Right to free and fair trial has been recognized as one of the Fundamental Rights enshrined under Article 21¹¹⁸ and freedom and independence of witness is inherent in it as laid down by the Apex Court in the case of *Zahira Sheikh v State of Gujarat*¹¹⁹. Therefore, witness protection becomes paramount for exploring truth in the pursuit of justice.

¹¹⁸ INDIA CONST. 1950.

¹¹⁹ *Zahira Sheikh v State of Gujarat*, (2004) 4 SCALE 375.

Though the crucial role of the witness in the justice delivery system has often been recognized still they constitute the most neglected and vulnerable lot. Their condition is highly pathetic and declining day by day which prevents them from coming forward to offer testimony. They have to face the wrath, pressure and intimidation from the accused in absence of any guaranteed security from the state. Besides these, repeated adjournments during trial, delay in the administration of justice, inadequate recognition and allowance, inefficient behavior as well as inconsiderate attitude of the law enforcing agencies towards the witnesses force them to turn hostile which is another problem crippling the justice delivery system. The menace of witness hostility has been dealt in plethora of high-profile cases which reflects the urgent need for incorporating some new provisions in the criminal law so as to balance witness anonymity on one hand and rights of the accused on the other.¹²⁰

The imperative need for witness protection can be realized in view of two aspects. The first one necessitates that all the evidence collected through investigation is not destroyed by witnesses by resiling from their statements given before a court. The other aspect of the problem sheds light on mental and physical vulnerability of witnesses which calls for various welfare and assistance measures.¹²¹

The issue of witness protection has been acknowledged globally. In light of this, various countries have established witness protection programs which aims to provide protection to witnesses and ensures the safety of their lives. There is lack of any comprehensive legislation regulating witness protection in India. Though Indian law provides for some special enactments dealing with witness protection but they are merely confined to some specific cases where government and public at large are affected. Therefore, there is imminent need for robust and effective witness protection laws in India which will not only provide

adequate support and protection to witnesses at all the stages of trial but will also go a long way in checking and eliminating extraneous factors which act as barriers to fair trial.¹²²

II. PROBLEMS & PERSPECTIVES

A witness plays an indispensable role in justice delivery system, since their testimony decides the fate of a trial. However, they often retract from their testimonies due to apathetic attitude of the government as well as threat and intimidation from the accused which may either be before he elicits statement to police officer or at the time of adducing evidence before court or even after the conclusion of the trial.¹²³ The physical and mental vulnerability of witness calls for their protection at all the stages of criminal justice process till the conclusion of the case. Delay in criminal trials due to frequent adjournments, defective investigation as well as lack of protection to witness results in low conviction rate. Low Conviction rate reflects lack of fair trial which is one of the essential attributes of Article 21. The independence and freedom of witnesses is also intrinsic to fair trial which was categorically observed by the Apex Court in *Zahira Sheikh v State of Gujarat*¹²⁴.

The menace of witness hostility is another problem adversely affecting the criminal justice system. Some of the reasons attributing to witness hostility are threat or intimidation, inducement via various means, use of money and muscle power on the witnesses by the accused, Lack of trust in the judicial process due to protracted trials, lengthy procedures, shoddy investigation, lacunae in the Criminal Justice System as well as Absence of any comprehensive legislation checking witness hostility.¹²⁵ It is quite ironical that there is glaring inequality in the availability of rights to

¹²⁰Nicole Gomez, "All about witness protection", Lawyersclubindia, 9th Oct, 2020 <https://www.lawyersclubindia.com/articles/witness-protection-12033.asp> (last visited on 7th June, 2022).

¹²¹¹²¹ 1 GIRISH ABHYANKAR & ASAWARI ABHYANKAR, WITNESS PROTECTION IN CRIMINAL TRIALS IN INDIA, 115 (Thomson Reuters, Greater Noida, 2018).

¹²² Prashant Rahangdale, "Witness Protection: A Comparative analysis of Indian and Australian Legislation", Journal of the Gujarat Research Society, <https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=3923979> (last visited on 7th June, 2022).

¹²³ Sneha Mahawar, "Witnesses protection in India", ipleaders, available at <https://blog.ipleaders.in/witnesses-protection-india/> (last visited on 3rd June, 2022).

¹²⁴*Zahira Sheikh v State of Gujarat*, (2004) 4 SCC 158.

¹²⁵ Varinder Singh, "Witness Protection in India: The Judicial Endeavour", 4, *International Journal of Advanced Research*, 370 (2016).

the accused and witnesses in terms of protection. Witnesses have very limited rights in comparison to accused who have been guaranteed several Constitutional and Legal rights. This makes witness turn hostile and brings further stress to the overburdened prosecution, who have to prove the guilt beyond reasonable doubt.¹²⁶

Perjury is an offence under I.P.C and the fear of being penalized for it persuades witness to elicit truth despite threats. However, in India, the scenario is quite different where perjury continues to thrive due to vary casual approach of the courts towards this problem. The Courts in India hardly resort to the provisions relating to perjury against witnesses for giving false evidence.¹²⁷

Neither are the witnesses treated with respect and dignity, nor offered any protection so as to enable them to give depositions in court without fear. Besides this, lack of basic facilities and conveyance such as drinking water, seating, medical facility, travelling allowance makes them hesitant and bit disinclined towards giving evidence.¹²⁸

Thus, it can be concluded that the aforesaid factors undermine the faith of the public in the justice delivery system including witnesses who either show callousness in giving depositions or turn hostile during the course of trial with their changing stance and versions and thereby hindering the effective functioning of the criminal justice system.

III. LAW & LEGISLATIVE ENDEAVOUR

Witness Protection Law in India is merely confined to limited provisions existing in various statutes. Lack of a comprehensive legislation governing witness protection fails to ensure a safe and conducive environment for the

¹²⁶ Ankit Kejriwal, "Need for a witness protection programme – The solution to the problem of hostile witness", Legal Service India, available at <https://www.legalserviceindia.com/article/I259-Witness-Protection-Programme>. (Last visited on 3rd June, 2022).

¹²⁷ C.D. FIELD, LAW RELATING TO WITNESSES, 491 (Delhi Law House, Delhi, 5th edn., 2020).

¹²⁸ Naveena Varghese, "Witness Protection: Problems faced and need for a protection programme in India", Academike, available at <https://www.lawctopus.com/academike/witness-protection-problems-faced-and-need-for-a-protection-programme-in-india> (last visited on 4th June, 2022).

witnesses and makes them reluctant in either coming forward or assisting the court in eliciting material facts. The Government of India realized the gravity of this problem and has made conscious efforts to strengthen the system so as to create a witness-friendly environment by appointing Commissions, Committees and other bodies to suggest reforms in this regard.¹²⁹

Reports of the Law Commission & Committees:

The Law Commission of India has been conscious to this matter and has time and again, suggested on this issue in the form of various reports. The 14th Report dealt with witness protection for the first time and emphasized on the need for adequate arrangement for witnesses in the court house as well as payment of travelling allowance to the witnesses for attending the court in response to summon and orders.¹³⁰ The 4th Report of the National Police Commission acknowledged the plight of the witness and inconvenience caused to them in attending court proceedings.¹³¹ The 154th Report of the Law Commission highlighted the need for instilling necessary confidence in the minds of witness so as to protect them from the rage of the accused but failed to suggest any measure to safeguard them from any physical harm.¹³² The 172nd Report dealt with the review of rape laws and suggested to record testimony of a minor at the earliest possible opportunity before a judge and child support person in case of child sex abuse.¹³³ It further recommended the insertion of a proviso to section 273 of Code of Criminal Procedure, 1973 for enabling the prosecution to request the court to provide a screen so that the child victim may not see the accused during the trial. The Law Commission in 178th Report¹³⁴ suggested to insert

¹²⁹ Sweta Sagar, "Statutory Witness Protection in India: A Cardinal Urgency", International Journal of Law, Management & Humanities, accessed at <https://www.legalserviceindia.com/articles/law-articles-2020.html> (last visited on 4th June, 2022).

¹³⁰ Law Commission of India, "14th Report on Reform of Judicial Administration", (1958).

¹³¹ National Police Commission, "4th Report on handicaps of witnesses", (1980).

¹³² Law Commission of India, "154th Report on the Code of Criminal Procedure, 1973" (1996).

¹³³ Law Commission of India, "172nd Report on Review of Rape Laws" (March, 2000).

¹³⁴ Law Commission of India, "178th Report on Recommendations for amending various enactments both Civil and Criminal" (December, 2001).

section 164A in the Code of Criminal Procedure, 1973 to provide for recording of statement of material witnesses before Magistrates in case of offences punishable with ten years imprisonment or more. The Committee on the Reforms of Criminal Justice System submitted a report with 158 recommendations pointing out the vulnerability of the witness and to provide justice to them. Section 195 of IPC was introduced by virtue of Criminal Law Amendment which also amended Section 195 of Code of Criminal Procedure, 1973 and Section 154 of the Indian Evidence Act, 1872. Further, the Committee on Reforms of the Criminal Justice System¹³⁵, headed by Justice Dr. V.S. Malimath submitted a voluminous report addressing various factors which act as hurdle in quick disposal of criminal cases leading to the derailment of the trial and one of them was ordeal of the witnesses during the trial process and its implication. Therefore, it suggested a separate law for witness protection to ensure safety of witnesses at all stages of the trial. The 198th Law Commission Report¹³⁶ discussed at length the subject of 'Witness Anonymity and Witness Protection'.

Statutory Provisions:

The Code of Criminal Procedure, 1973: Section 171 provides that witness shall neither be required to accompany a police officer on his way, nor be subjected to unnecessary restraint. Section 327 of the Code deals with trial in open court as well as camera trial in case of sexual offences so as to repose confidence in victims of crime. Section 173(5)(b) of the code requires the police officer to submit its report before magistrate which includes the statement of all those persons whom the prosecution seeks to examine as its witness and such recorded statements may not be disclosed to the accused once the police officer forms an opinion in the interests of justice and reasons for it must be submitted to magistrate. Section 312 of the Code further provides for payment of reasonable expenses by the Criminal Court to complainant or witnesses for the purpose

of any inquiry, trial or other proceeding. Section 406 & 407 of the Code deals with power of the Supreme Court and High Court to transfer cases and appeals respectively if in their opinion, it will serve the interest of justice. Section 195 A of the Code requires a witness to file a complaint in case they are threatened to give false evidence.¹³⁷

Indian Penal Code, 1860: Section 228A of the Code prohibits disclosure of identity and publication of names of the victim of certain offences. Section 195A of the code penalizes for threatening any person to give false evidence.

Indian Evidence Act, 1872: Section 134 of the Act bars the requirement of any particular number of witnesses to prove a fact and hence sheds light on this maxim "evidence has to be weighed and not counted. Proviso to Section 132 of the Act provides defense to witness which stipulates that any answer which a witness is compelled to give will neither subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer. Section 138 of the Act lays down the manner in which witnesses shall be examined. Section 146 of the Act affords defense to the witness by permitting only lawful questions to be asked during cross-examination. Section 148 of the Act empowers a court to decide as to the relevancy of questions asked during cross-examination.¹³⁸

Prevention of Terrorism Act, 2002: Section 30 of the Act whose validity was upheld in the case of PUCL v UOI¹³⁹ affords protection to witness and preserves anonymity. However, this Act has been repealed. This provision was similar to Section 16 of the TADA Act, 1987, the validity of which was upheld in Kartar Singh's case¹⁴⁰. These Acts affords anonymity to witnesses in case of grave offences so

¹³⁷ Prem Chandra, "Rights and Protection of Witness under the Law", Legal Service India, accessed at <<https://www.legalserviceindia.com/articles/law-articles-2021.html>> (last visited on 4th June, 2022).

¹³⁸ DR. MEENA KETAN SAHU, WITNESS PROTECTION 130 (Y.S. Book International, New Delhi, 2014).

¹³⁹ PUCL v UOI, (1997) 1 SCC 301.

¹⁴⁰ Kartar Singh v. State of Punjab, 1994 (3) SCC 569.

¹³⁵ Government of India, "Report of the Committee on Reforms of Criminal Justice System" (Ministry of Home Affairs, 2003).

¹³⁶ Law Commission of India, "198th Report on Witness Identity Protection and Witness Protection Programs" (August, 2006).

as to protect them from the risk of menace to their life, property or family.

The Unlawful Activities (Prevention) Amendment Act, 2004.

Section 44 of the Act provides for witness protection and stipulates that proceedings under this Act be held in camera if the court so desires.

Juvenile Justice (Care and Protection of Children) Act, 2015.

Section 21 of the Act prohibits publication of name, address, picture or other particulars relating to juvenile. However, it may be allowed in the interests of juvenile provided permission is granted for the same by recording reasons in writing.¹⁴¹

Delhi High Court Guidelines, 2017.

The Delhi High Court formulated guidelines for setting up of special centers for vulnerable witness in view of directions laid down by the Apex Court in *The State of Maharashtra v Bandu*.¹⁴²

- a) Vulnerable witness shall be allowed to visit the court before trial so as to get acquainted with the surroundings.
- b) Legal assistance shall be provided by the Court to the vulnerable witness.
- c) The Court shall explain to the vulnerable witness to hear questions properly and answer them correctly.
- d) The Court shall ensure confidentiality to witness.
- e) The Court shall provide for protective measures to the vulnerable witness in case his life is in danger.

Patna High Court Guidelines, 2022

The Patna High Court has framed guidelines for recording of evidence of vulnerable witnesses in light of directions issued by the Apex Court in *Smruti Tukaram Badade Vs. State of Maharashtra*.¹⁴³

- a) Pre-trial visit of witnesses to the court.
- b) Facilitation of legal assistance and legal aid to the witnesses by the court.
- c) Right of the vulnerable witness to be informed of the proceedings of the case.
- d) Provision for waiting area for vulnerable witness.
- e) Duty of the Court to provide conducive environment for witnesses.
- f) Proceedings to be conducted in camera.
- g) Protection of privacy and safety of vulnerable witness.

Witness Protection Scheme, 2018

The Witness Protection Scheme is the first legal enactment regulating witness protection. It was approved by the Supreme Court by exercising powers emanating from Constitution¹⁴⁴ in the landmark case of *Mahendra Chawla v Union of India*¹⁴⁵ and has come a long way in providing protection to witness and ensuring fair trial. The salient features of this scheme include:

The Threat Analysis Report in the scheme categorizes threat perception and provides for suggestive measures affording adequate protection to witness and his family. The Scheme provides for categorization of witness in three categories in proportion to the threat or danger. Class A category includes those witnesses whose family members have received life threat during the proceedings. Class B category includes those whose safety, reputation and property are at stake including their family members during the investigation and Class C category are those who have received only threats of harassment including their family

¹⁴¹ I GIRISH ABHYANKAR AND ASAWARI ABHYANKAR, WITNESS PROTECTION IN CRIMINAL TRIALS IN INDIA 84 (Thomson Reuters, Uttar Pradesh, 2018).

¹⁴² The State of Maharashtra v Bandu, Criminal Appeal No. 1820 of 2017.

¹⁴³ Smruti Tukaram Badade v State of Maharashtra, Criminal Appeal No. 1101 of 2019.

¹⁴⁴ INDIA CONST. art. 141 & 142.

¹⁴⁵ Mahendra Chawla v Union of India, Writ Petition (Cr.) No. 156 of 2016.

members.¹⁴⁶ It further provides for Witness Protection Fund and guarantees full identity protection to the witness and their family members during the investigation. Various protective measures enshrined in the scheme include installation of security cameras at witness house, in-camera hearings maintaining confidentiality, constant monitoring of the call records, Regular patrolling, providing emergency contact numbers to witness as well as relocation and rehabilitation of witness based on Threat Analysis Report.¹⁴⁷

Though, Witness Protection Scheme is a laudable step in the direction of witness security, howsoever, it suffers from certain loopholes which are as follows:

- It provides protection for a limited duration of three months at a time.
- The orders passed under the scheme derives its basis mostly from the recommendations made in the threat analysis report by the police officials who are often prone to corruption and political pressures.
- The strict enforcement of the scheme seems to be practically difficult in absence of any penal provisions for violation of confidentiality and preservation of records.
- The Scheme also lacks any provision providing for work, education, occupation of the witnesses.¹⁴⁸

Therefore, the scheme failed in its object due to lack of proper implementation and accountability and hence, the need of the hour is to enact a comprehensive legislation in this direction.

IV. JUDICIAL APPROACH

¹⁴⁶ AnanthaKrishnan G, "India now has a witness protection program in place" The Indian Express, Dec.6 2018, <<https://indianexpress.com/article/india/india-now-has-a-witness-protection-programme-in-place-5480579/>>.

¹⁴⁷ Editorial, "What is Witness Protection Scheme" The Indian Express, Dec. 6, 2018, <https://indianexpress.com/article/india/india-now-has-a-witness-protection-programme-in-place-5480579/>.

¹⁴⁸ Sanjeev Kumar & Abhishek Goyal, "Witness Protection: Safeguarding the eyes & ears of justice", 23rd April, 2020, available at <https://www.mondaq.com/india/trials-appeals-compensation/914274/witness-protection-safeguarding-the-eyes-and-ears-of-justice> (last visited on 3rd June, 2022).

The Judiciary plays a vital role in interpreting the laws formulated by the Legislature and filling the existing gaps, if any, in the administration of Justice. However, in the absence of legislation, it also has a task of pointing out the lacuna and guide the legislature in fixing it by framing a suitable legislation. The Concept of Fair trial entails an equitable balance between the rights of accused and victims, which judiciary must strive to achieve.¹⁴⁹ The Supreme Court of India and various High Courts have pronounced some milestone judgements highlighting various issues related to witness Protection and have tried to confer a certain degree of protection to witnesses and victims by filling the gap in the Criminal Justice System.¹⁵⁰ The evolved judicial process with regard to witness protection are as follows:

In *Bhagwan Singh v. State of Haryana*¹⁵¹, where the Apex Court dealt with veracity of testimony of a hostile witness held that an accused may be convicted on the basis of such testimony.

The Apex Court in *State of U.P. v Ram Prasad Mishra*¹⁵² held that the evidence of hostile witness will not be discarded outright and must be scrutinized properly and so much of such evidence which supports either prosecution or accused may be accepted to that extent.

In *Swaran Singh v State of Punjab*¹⁵³, Justice Wadhwa stated the plight of witnesses during court proceedings where they are often treated inhumanly and provided with no assistance. They have to attend court and face prolonged examinations and cross examinations in absence of any payment. Sometimes witness is also threatened, maimed or bribed.

¹⁴⁹ Ishan Arun Mubdiri, "Witness Protection in India", ipleaders, Dec 22, 2021 available at <https://blog.ipleaders.in/witnesses-protection-india/#:~:text=The%20Witness%20Protection%20Scheme%20in,the%20State%20by%20giving%20evidence>. (Last visited on 1st June, 2022).

¹⁵⁰ I GIRISH ABHYANKAR AND ASAWARI ABHYANKAR, WITNESS PROTECTION IN CRIMINAL TRIALS IN INDIA 114 (Thomson Reuters, Uttar Pradesh, 2018).

¹⁵¹ *Bhagwan Singh v. State of Haryana*, AIR 1976 SC 202.

¹⁵² *State of U.P. v Ram Prasad Mishra*, AIR 1996 SC 2766.

¹⁵³ *Swaran Singh v State of Punjab*, (2000) 5 SCC 68 at 678.

In *Sakshi v Union of India*¹⁵⁴, the Apex Court emphasized on the urgent need for witness protection law and installation of camera between two connecting rooms during the trial was also suggested. The Court pointed out certain guidelines regarding the procedure of taking of evidence from a child witness and stressed on the need for special protection to victims of sexual abuse during recording of their statement in court.

*Zahira Sheikh v State of Gujarat*¹⁵⁵, is a landmark judgement where the Supreme Court reiterated the immediate need for a witness protection program in light of alarming rise in the number of hostile witnesses. In this case Zahira who was sole eyewitness to alleged killings of communal rage, alleged that she turned hostile and was forced to give false testimony on account of coercion. Witness hostility leading to acquittals was also seen in the high-profile case of *Manu Sharma v State*¹⁵⁶, commonly known as Jessica Lal Murder Case.

In *State of Punjab v Gurmit Singh*¹⁵⁷, the Apex Court laid down that the trial of rape cases shall be in the camera, rather than in the open court and tried by the lady judges as much as possible, thereby ensuring comfortable environment for the victim that can make her statement effective.

In *State of Maharashtra v Praful Desai*¹⁵⁸, the Court allowed the recording of testimony of witness via video Conferencing in certain circumstances.

The Apex Court in *Gurbachan Singh v State of Bombay*¹⁵⁹, upheld the provision which required absence of accused during cross-examination and stated that presence of accused may be dispensed in certain cases where safety would be in danger and witness out of fear may not be able to depose freely in presence of the accused.

*NHRC v State of Gujarat*¹⁶⁰, explicitly dealt with the concept of fair trial where a PIL was filed by the NHRC for seeking retrial since the witnesses were forced to change their statement in favor of the accused by the accused himself, thereby vitiating the trial. The Court also laid down various guidelines for ensuring safety and protection to witnesses as well as to instill confidence in them so that they depose freely in court. Few steps that should be taken in this regard include ensuring safe passage for the witnesses, to and from the court, providing protection to witnesses in their place of residence as well as relocation of witness to another state or another place in the same state.

In *Naresh Mirajkar v State of Maharashtra*¹⁶¹, The Supreme Court held that an order to prevent publication of the evidence of witness during the course of trial is valid, provided it is passed with the purpose of obtaining true evidence so as to aid in the administration of justice.

*Neelam Katara v Union of India*¹⁶² is a famous case where Delhi High Court laid down the dictum for protecting the witness from turning hostile, which is one of the prime reasons behind low conviction rate. These guidelines comprise various factors to be considered by the Competent Authority while granting witness protection such as nature of risk to the security of witness, nature of investigation in the criminal Case, the importance of witness in the matter, value of evidence given or agreed to be given by the witness and cost of providing police protection to the Witness. The Investigating officer is obligated to inform the witness in writing that he can avail witness protection by approaching the competent authority and it is the duty of the police commissioner to provide protection to the witness in respect of whom an order directing police protection has been passed.

In *Delhi Domestic Working Women's Forum v Union of India*¹⁶³, the Apex Court realized the necessity of

¹⁵⁴ *Sakshi v Union of India*, (2004) 5 SCC 518.

¹⁵⁵ *Zahira Sheikh v State of Gujarat*, (2004) 4 SCALE 375.

¹⁵⁶ *Manu Sharma v State*, (2010) 6 SCC 1.

¹⁵⁷ *State of Punjab v Gurmeet Singh*, 1996 SCC (2) 384.

¹⁵⁸ *State of Maharashtra v Praful Desai*, 2003 (4) SCC 601.

¹⁵⁹ *Gurbachan Singh v State of Bombay*, AIR 1952 SC 221.

¹⁶⁰ *NHRC v State of Gujarat*, (2003) (9) SCALE 329.

¹⁶¹ *Naresh Mirajkar v State of Maharashtra*, 1966 SCR (3) 744.

¹⁶² *Neelam Katara v Union of India*, ILR (2003) II DEL 377.

¹⁶³ *Delhi Domestic Working Women's Forum v Union of India*, (1995) 1 SCC 14.

Anonymity for victims of rape so that they are not traumatized and tormented by the experience of deposing in the court.

In *Kartar Singh v State of Punjab*¹⁶⁴, the Apex Court upheld the validity of Section 16 of TADA Act which provided for identity protection of witnesses.

In *PUCL v Union of India*¹⁶⁵, the Constitutional validity of provision of POTA was challenged which was upheld by the court which provided for in camera proceedings so as to ensure identity protection to witness by keeping their identity confidential. It was also stated that court must strive to maintain a fair balance between the rights of witnesses, rights of accused and the interest of the public.

In *Smruti Tukaram Badade v State of Maharashtra*¹⁶⁶, the Apex court laid down various guidelines with the object of ensuring a safe and conducive environment for recording the evidence of vulnerable witnesses.

Though the Indian Judiciary has made commendable efforts in the arena of witness protection by laying down guidelines in various cases, howsoever its proper implementation seems to be a far-fetched dream in absence of any legislative backing. Therefore, it still has a long way to go in creating a safe environment for witnesses.

V. INTERNATIONAL PRACTICES

The importance of witnesses in criminal trials has acquired worldwide attention which is reflected in various International Instruments where the need for protecting witnesses from intimidation, threats and harm has been recognized such as United Nation Convention against Transnational Organized Crime, Declaration of Basic Principles of justice for victims of crime and abuse of

power, United Nation Convention against corruption, United Nation Office on Drug and Crime etc.¹⁶⁷

The United Nation Convention against Transnational Organized Crime requires the Countries to take appropriate measures to protect witnesses.¹⁶⁸ The United Nation Office on drug and crime has also made laudable efforts in developing a set of guidelines regulating procedural protection as well as establishment of witness protection units.¹⁶⁹ The International Criminal Tribunal for Rwanda laid down rules for protection of victims as well as witnesses in accordance with the directions of ICC.¹⁷⁰

The first paragraph of Declaration of basic principles of justice for victims of crime and abuse of power defines victims of crime as “person who individually and collectively have suffered harm including physical and mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights through acts or omissions that are in violation of criminal laws and they are the ones who need protection.” According to this Declaration, necessary measures should be taken by the States to ensure safety to witnesses as well as their family members from intimidation and retaliation.¹⁷¹

The United Nation against Corruption of 2003 also mandates the state parties to take appropriate measures to provide effective protection to witnesses who give testimony concerning offences covered by the Convention.¹⁷²

The United Nations Economic and Social Council has also adopted guidelines containing provisions which ensure fair

¹⁶⁷ DR ABHISHEK ATREY, LAW OF WITNESSES 386 (Lawman’s, New Delhi, 2014).

¹⁶⁸ UN Convention against Transnational Organized Crime, 2000, art. 24.

¹⁶⁹ UN Office on Drugs and Crimes, Good Practices for the protection of witnesses in Criminal Proceeding involving organized crime (2008) available

at https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/Good_Practices_for_the_Protection_of_Witnesses_in_Criminal_Proceedings_Involving_Organized_Crime.pdf (last visited on 2nd June, 2022).

¹⁷⁰ Dr. Meena Ketan Sahu, Witness Protection 100 (Y.S. Books, New Delhi, 2014).

¹⁷¹ Declaration of Basic principles of Justice for Victims of Crime and Abuse of power, 1985, art.6(d).

¹⁷² UN CONVENTION AGAINST CORRUPTION, 2003, arts. 32, 37(4).

¹⁶⁴ *Kartar Singh v State of Punjab*, 1994 (3) SCC 569.

¹⁶⁵ *PUCL v Union of India*, 2003 (10) SCALE 967.

¹⁶⁶ *Smruti Tukaram Badade v State of Maharashtra*, Criminal Appeal No. 1101 of 2019.

treatment and special protection to child victims and witnesses involved in criminal justice process.¹⁷³

Few countries have enacted witness protection legislation such as United States of America, Canada, Australia, United Kingdom etc. Therefore, in this chapter, a comparative study of the law and working of the system reflecting the dynamics of best practices in witness protection regime has been made.

- **United States of America:** The Organized Crime Control Act of 1990 which laid basis for the Federal Witness Security Program has come a long way in providing effecting protection to witness and their family by providing housing, medical care, job training, employment and sufficient funding for their subsistence in the relocation area. The three major organizations managing witness protection in U.S.A are United States Marshals Service who are assigned with the task of ensuring health, security, safety of non-incarcerated program participants, Office of Enforcement Operations which authorizes the induction of witnesses in the program whose lives are at stake, as a result of their testimony against drug traffickers, terrorists and organized crime members and the Federal Bureau of Prisons which maintains custody of incarcerated witnesses.¹⁷⁴ The U.S. Supreme Court has recognized the right of identity protection of witnesses where their personal safety is at stake, in various landmark judgements such as *Smith v Illinois*¹⁷⁵, *United States v Palermo*¹⁷⁶, *United States v Rangel*¹⁷⁷ etc.
- **United Kingdom:** The Criminal Justice and Public Order Act, 1994 provides punishment for witness intimidation. Threatening a witness from giving evidence amounts to contempt under the English Law.

The Youth Justice and Criminal Evidence Act provides effective protection to the intimidated witness by setting out a range of measures such as screening the witness from the accused, evidence by live link, evidence to be given in private.¹⁷⁸ Besides these, **the Sexual Offences (Amendment) Act 1992** provides anonymity protection to the victims of rape or other sexual offences. Hearings by way of camera during proceedings are also allowed by the Crown Court if there is any possibility of disorder as laid down in the case of *Scott v Scott*¹⁷⁹.

- **Australia:** The Australian Witness Protection Act, 1994, which lays the foundation of National Witness Protection Program regulates witness protection in Australia, where the commissioner of the Australian Federal Police is assigned with the task of providing assistance and protection to witness.¹⁸⁰ The Witness Protection Program constituted under the Witness Protection Act 1991 is a comprehensive legislation regulating witness protection. It lays down a broad definition of witness which includes “a person who, for any other reason, may require protection or other assistance under this Act.”
- **Canada:** Witness Protection Act, 1996 is a comprehensive legislation governing witness protection in Canada. It aims to promote law enforcement by facilitating the protection of persons who are involved directly or indirectly in providing assistance in law enforcement matters.¹⁸¹ The protection measures conferred to a witness include relocation, accommodation, change of identity as well as counseling and financial support to ensure the security of witness. The induction of witness to the program is determined by the commissioner of Police on a recommendation by a law enforcement agency or an international criminal court or tribunal on the basis of

¹⁷³ UN ECONOMIC AND SOCIAL COUNCIL RESOLUTION, 2005/20.

¹⁷⁴ Saatif, “Need for a witness protection law in India”, Legal Service India, <https://www.legalserviceindia.com/articles/law-articles-2021.html> (last visited on 3rd June, 2022).

¹⁷⁵ *Smith v Illinois* (1968) 390 US 129.

¹⁷⁶ *United States v Palermo*, (1969) 410 F 2d 468 (7th Circuit).

¹⁷⁷ *United States v Rangel*, 534 F.2d 147 (9th Circuit).

¹⁷⁸ Youth Justice and Criminal Evidence Act 1999, § 17.

¹⁷⁹ *Scott v Scott*, 1913 AC 417 P.435.

¹⁸⁰ Australian Witness Protection Act 1994, § 8(3).

¹⁸¹ Witness Protection Program Act, 1996, § 3.

certain factors such as nature of risk to the security of witness, nature of the inquiry, investigation or prosecution involving the witness and importance of witness in the matter, Cost to be incurred in maintaining the witness in the program and alternate methods of protecting the witness without admitting him to the program.¹⁸²

- **South Africa:** Witness Protection Act, 1998 is the statute which provides for establishment of witness protection office within the department of justice. The Director of the office is responsible for protection of witness and related persons and exercises control over witness protection officers and other security officers.¹⁸³

Therefore, it can be rightly said that International Criminal Jurisprudence has made rapid strides in the field of witness protection. The present study reveals that witness protection measures adopted by every state are almost common depending upon the socio-economic conditions of that state.

VI. ISSUES & CHALLENGES

India is a developing nation comprising 25 percent of destitute population. Therefore, the first and the foremost challenge is implementation of costs and infrastructure since the expenditure incurred in providing bodyguards, security, assistance, relocation to another area, etc. would be enormous and requires heavy funding which is practically difficult for a nation like India where a significant chunk of population falls below poverty line and strives for basic needs of sustenance. In absence of adequate allowances and protection, any individual would refrain from testifying at the cost of his family, job, social obligations in the community etc. The recording of statements of witness by a judicial magistrate requires a robust judicial system with increasing number of courts and well-trained staffs which is practically not viable in the current setup where the existing number of courts and

judges are inadequate and insufficient to dispose the pending cases.¹⁸⁴

The problem of corruption in the administration and judiciary as well as political pressure is another pertinent issue which hampers the smooth enactment of law since even if one's identity is kept confidential and relocated to another place and the approved authority if bribed, reveals all the information, the entire system gets debilitated which shakes the trust and confidence of the general public including witnesses in the criminal justice system.¹⁸⁵

There is an imperative need to sensitize the witnesses about their rights, various forms of protection available to them as well as possible reparations since if they are uninformed about their rights, the entire efforts would turn futile and any legislation even though, enacted in this regard would remain defunct.¹⁸⁶

Another challenge is balancing of interests of prosecution in protecting the witness and rights of the accused with regard to anonymity of witness since the provisions of the code are more accused centric. The procedure code provides for open trial proceedings¹⁸⁷ and also lays down exception to this rule by stating that the court may dispense with this requirement and permit the prosecution witness to testify in absence of accused if the accused is not available or has absconded or cannot be found by reasonable means.¹⁸⁸

Allocation of funds and resources for witness protection requires state's cooperation since it is their duty to ensure the same. Therefore, States must acknowledge this fact and fulfill their obligations in this regard so that justice is not denied to society at large.

¹⁸⁴ Ankit Kejriwal, "Need for a witness protection programme – The Solution to the problem of hostile witness", Legal service India, available at <https://www.legalserviceindia.com/article/1259-Witness-Protection-Programme.html> (last visited on 4th June, 2022).

¹⁸⁵ Himeesha Dhaliwal, "Witness Protection law in India: A judicial Endeavour", Indian Review of Advanced Legal Research, available at <https://www.iralr.in/post/witness-protection-law-in-india-a-judicial-endeavour> (last visited on 4th June, 2022).

¹⁸⁶ DR. MEENA KETAN SAHU, WITNESS PROTECTION 204 (YS Books, New Delhi, 2014).

¹⁸⁷ The Code of Criminal Procedure, 1973, § 327.

¹⁸⁸ The Code of Criminal Procedure, 1973, § 299.

¹⁸² Witness Protection Program Act, 1996, § 7.

¹⁸³ Witness Protection Act, 1998, § 4.

VII. CONCLUSION & SUGGESTIONS

A witness has the potential to disturb the balance of justice since their testimonies determines the fate of trial. Thus, witness safety and welfare should be of paramount consideration which has been time and again, emphasized by various Law Commission Reports. However, the current picture reveals a worrisome state of affairs where witnesses are hardly treated with respect and dignity which makes them reluctant in testifying before courts. The lurking fear in the mind of witnesses, especially in high-profile criminal cases either refrains them from giving depositions or forces them to turn hostile as a result of which justice suffers and people's faith in the credibility of judicial process gets shattered. Proper selection of witness, ensuring necessary confidence and perseverance so as to enable them to stand firm till the end with same courage as well as instilling in them a sense of participation in the justice delivery system forms the essential prerequisites of an effective protection regime. Therefore, witness protection programs and laws are the need of the hour which will go a long way in providing an effective criminal justice delivery system by checking and eliminating extraneous factors which acts as barriers to fair trial.

The present study suggests the urgent need for an independent comprehensive legislation regulating witness protection. Some Key recommendations of the present study are as follows:

- Witnesses are required to be identified and prioritized according to the threat in terms of ensuring protection since it is not practically possible to provide protection cover to all the witnesses. A separate Witness Assistance Department is required to be set up for assessing the protection requirement and assistance issues concerning witness.
- A Comprehensive National Policy for witness assistance & protection should be evolved dealing with the issues of witness protection, hostility and witness assistance which may be culminated into a legislation.
- Necessary confidence must be reposed in the mind of witness so that they believe in system support by creation of an impartial agency.
- Witness may be guaranteed with certain basic rights under the proposed legislation such as right to protection from any harm or intimidation, right to give evidence anonymously, right to be treated with gratitude and compassion, right to be informed of the progress of investigation and status of the court proceedings, right to be heard at the time of granting bail to the accused, right to secure waiting rooms in court premises, right to transportation and lodging arrangements, right to information on medical facilities, social services and other NGO programs which provides for counseling, treatment and other support etc.
- The procedural loopholes in the criminal justice system leading to witness hostility and witness reluctance may be addressed by adopting the following ways:
 - a) The court is required to proceed with the trial without any adjournment until all witnesses in attendance have been examined and adjournment should be exercised only in exceptional circumstances.
 - b) The accused or the defense counsel must bear the expense and compensate the witness for loss of money and time if they seek adjournment from the court.
 - c) The police must read over the recorded statements to the witness and get his signature or thumb impression.
 - d) The non-compliance of perjury laws should be dealt strictly.
 - e) The award of bail to the accused should be subject to security concerns of the witness.
 - f) The prosecution should examine the witness perils and apprehensions before the trial and apprise the court for due consideration.
 - g) The identity protection of witnesses must be accorded with due care before filing of chargesheet and according to the individual

- needs of the witness and any sort of media interference in the trial must be prohibited.
- h) Excessive dependence of law enforcing agencies on witness needs to be curtailed by exploring and incorporating advance forensic applications and technological facilities in the investigation and trial process.
 - i) The expenses on witness protection measures should be borne by the state.
 - j) A closed surveillance of trial process through computer networking may be done to avoid unnecessary adjournments.
 - k) All the criminal justice agencies should mutually cooperate in a manner so that the rights of witness proposed in the study could be realized.

REFERENCES

1. UN Convention against Transnational Organized Crime, 2000
2. UN Office on Drugs and Crimes, Good Practices for the protection of witnesses in Criminal Proceeding involving organized crime (2008).
3. Declaration of Basic principles of Justice for Victims of Crime and Abuse of power, (1985)
4. UN CONVENTION AGAINST CORRUPTION, 2003
5. UN ECONOMIC AND SOCIAL COUNCIL RESOLUTION, 2005/20.
6. The Australian Witness Protection Act 1994
7. The Youth Justice and Criminal Evidence Act 1999 (United Kingdom)
8. The Witness Protection Program Act, 1996 (Canada)
9. The Witness Protection Act, 1998 (South Africa)
10. THE CONSTITUTION OF INDIA, 1950
11. The Code of Criminal Procedure, 1973 (India)
12. Law Commission of India, "14th Report on Reform of Judicial Administration", (1958).
13. National Police Commission, "4th Report on handicaps of witnesses", (1980).
14. Law Commission of India, "154th Report on the Code of Criminal Procedure, 1973" (1996).
15. Law Commission of India, "172nd Report on Review of Rape Laws" (March, 2000).
16. Law Commission of India, "178th Report on Recommendations for amending various enactments both Civil and Criminal" (December, 2001).
17. Government of India, "Report of the Committee on Reforms of Criminal Justice System" (Ministry of Home Affairs, 2003).
18. Law Commission of India, "198th Report on Witness Identity Protection and Witness Protection Programs" (August, 2006).
19. Bhagwan Singh v. State of Haryana, AIR 1976 SC 202.
20. Delhi Domestic Working Women's Forum v Union of India, (1995) 1 SCC 14.
21. Gurbachan Singh v State of Bombay, AIR 1952 SC 221.
22. Kartar Singh v State of Punjab, 1994 (3) SCC 569.
23. Mahendra Chawla v Union of India, Writ Petition (Crl.) No. 156 of 2016.
24. Manu Sharma v State, (2010) 6 SCC 1.
25. Naresh Mirajkar v State of Maharashtra, 1966 SCR (3) 744.
26. Neelam Katara v Union of India, ILR (2003) II DEL 377.
27. NHRC v State of Gujarat, (2003) (9) SCALE 329.
28. PUCL v UOI, (1997) 1 SCC 301.
29. PUCL v Union of India, 2003 (10) SCALE 967.
30. Sakshi v Union of India, (2004) 5 SCC 518.
31. Scott v Scott, 1913 AC 417 P.435.
32. Smith v Illionis (1968) 390 US 129.
33. Smruti Tukaram Badade v State of Maharashtra, Criminal Appeal No. 1101 of 2019.
34. State of Maharashtra v Bandu, Criminal Appeal No. 1820 of 2017.
35. State of Maharashtra v Praful Desai, 2003 (4) SCC 601.
36. State of Punjab v Gurmeet Singh, 1996 SCC (2) 384.
37. State of U.P. v Ram Prasad Mishra, AIR 1996 SC 2766.

38. Swaran Singh v State of Punjab, (2000) 5 SCC 68 at 678.
39. United States v Palermo, (1969) 410 F 2d 468 (7th Circuit).
40. United States v Rangel, 534 F.2d 147 (9th Circuit).
41. Zahira Sheikh v State of Gujarat, (2004) 4 SCC 158.
42. Zahira Sheikh v. State of Gujarat, (2004) 4 SCALE 375.
43. Girish Abhyankar and Asawari Abhyankar, Witness Protection in Criminal Trials in India (Thomson Reuters, Uttar Pradesh, 2018).
44. Dr Abhishek Atrey, Law of Witnesses (Lawman's, New Delhi, 2014).
45. C.D. Field, Law Relating To Witnesses, (Delhi Law House, Delhi, 5th edn., 2020).
46. AnanthaKrishnan G, "India now has a witness protection program in place" The Indian Express, Dec.6 2018, <<https://indianexpress.com/article/india/india-now-has-a-witness-protection-programme-in-place-5480579/>>.
47. Ankit Kejriwal, "Need for a witness protection programme – The Solution to the problem of hostile witness", Legal service India, available at <https://www.legalserviceindia.com/article/1259-Witness-Protection-Programme.html>.
48. Editorial, "What is Witness Protection Scheme" The Indian Express, Dec. 6, 2018, <https://indianexpress.com/article/india/india-now-has-a-witness-protection-programme-in-place-5480579/>.
49. Himeesha Dhiliwal, "Witness Protection law in India: A judicial Endeavour", Indian Review of Advanced Legal Research, <https://www.iralr.in/post/witness-protection-law-in-india-a-judicial-endeavour>.
50. Naveena Varghese, "Witness Protection: Problems faced and need for a protection programme in India", Academike, <https://www.lawctopus.com/academike/witness-protection-problems-faced-and-need-for-a-protection-programme-in-india>.
51. Nicole Gomez, "All about witness protection", Lawyersclubindia, 9th Oct, 2020 <https://www.lawyersclubindia.com/articles/witness-protection-12033.asp>
52. Prashant Rahangdale, "Witness Protection: A Comparative analysis of Indian and Australian Legislation", Journal of the Gujarat Research Society, <https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=3923979>
53. Prem Chandra, "Rights and Protection of Witness under the Law", Legal Service India, accessed at <<https://www.legalserviceindia.com/articles/law-articles-2021.html>>
54. Saatif, "Need for a witness protection law in India", Legal Service India, <https://www.legalserviceindia.com/articles/law-articles-2021.html>.
55. Sweta Sapar, "Statutory Witness Protection in India: A Cardinal Urgency", International Journal of Law, Management & Humanities, <<https://www.legalserviceindia.com/articles/law-articles-2020.html>>
56. Varinder Singh, "Witness Protection in India: The Judicial Endeavour", 4, International Journal of Advanced Research, 370 (2016).