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LAW RELATED TO WITNESS PROTECTION IN INDIA

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ABSTRACT

The paper aims at giving an analysis of the condition of witnesses and the status of their security in the judicial process. The analysis will be based on various law commission report, article and court judgments based on which it will be seen that are there any special provision or laws provided for the protection of witness. The paper also aims at exploring another aspect of mental health of a witness after going through a tough judicial proceeding with reference to 154th law commission report. Various sections of Cr. P.C. and IPC will be too analysed as to see does these codes provide for any special procedure for witness protection or punishment for threatening a witness for giving false statement in the court.

INTRODUCTION

In India there are many cases pending in which justice have to be delivered but have we ever thought that the case which are closed with judgment delivered, in how many of such cases is justice actually delivered. According to a report in India in almost 95% or the cases the criminals are set free due to lack of evidence and 70% of such cases are won by criminals because of hostile witness, who fearing their life or reputation change their statements in the court which leads to lack of evidence and failure on the side of justice. As on January 2017 there are almost 1248 acts and statutes in India but there was not even a single statute in his large no. for protection of witness in India. Many countries like USA, Australia and even some of the developing nations have made different laws for protecting their witnesses from turning

hostile. Some of these measures even extend to the extent of changing the country of the witness to protect his life and identity but in India there are very less instances where the witness has been provided with states security as in the Ketan Thriodkar case were the Bombay high court provided security to the ex-journalist Ketan thirodkar.¹⁹²⁴

The value of a witness can be known from the saying that witnesses are the ears and eyes of the court that play an important role in achieving criminal justice. Thus, the law commission too in its 14th, 154th, 172nd, 178th and 198th report said about the importance of protecting the witness not only physically but also protecting his mental health which is harmed by the slow judicial process and inadequate facilities he faces in the court and thus many recommendations were too given for welfare of witness. We have seen in the Asaram case, Unnao rape case and the Best Bakery case where due to the lack of protection to witness the cases fail leading to acquittal of the accused, thus the court too in many judgments felt the need of providing proper protection to the witness but the lack of executive will in this regard has led to no progress in this regard. In the following chapters we shall discuss the issue in detail.

CHAPTER I

DO WE NEED A SEPARATE STATUTE FOR WITNESS PROTECTION?

We talk about the slow and weak judicial system in India every now and then but have we ever thought about why does our Judiciary fails to provide proper justice to the victims in criminal cases?

The answer lies in the incompetence of the weak criminal justice system in India which needs to be amended and reviewed considering the present and future effectively of the present system. In India 95% of cases are won by the criminals because in 70% of these

¹⁹²⁴ <http://www.legalserviceindia.com/articles/witnesses.htm>

cases the witnesses turn hostile either because of the mental trauma his or her family has to face or the fear of physical harm to his or his close one's life forces him to go back from his statement. In most of the developed countries there are statutes made for the protection of witness in their country which goes up to the limit of shifting the witness to other country to protect the witness with the expenditure taken by the government, but in India even after 70 years of being republic and trying to have an independent judiciary very less steps are taken to have an independent witness which is evident with the lack of proper statute to protect the witnesses who are the eyes and ears of the court which play a vital role in ensuring free and fair trails which is not only a fundament right but also a human right and thus the protection of witnesses should be the foremost priority of the state government to uphold the principles of criminal justice in India.

Various reports of law commission, courts and even the apex court of the country have time and again felt the need for a witness protection statute in India. The Hon'ble Supreme Court in *Zahira Habibullah Sheikh & Anr. v. State of Gujarat & Ors.* has categorically stated that if the witnesses get threatened and forced to give false evidence that would not result in a fair trial.¹⁹²⁵

The court observed that the lack of protection from the states leads to hostility to witness, Clearly, threat to life, induced by coercion, compulsion, violence, etc., may often result in witnesses from contracting from truth, even if the same may go against their conscience or will and thus they doesn't give out truth which lead to non-fulfillment of fair trial.¹⁹²⁶ The court in the *NHRC V. State of Gujarat and Ors* too mentioned the need and importance of witness protection in which the state has a major role to play.

*"As a protector of its citizens it has to ensure that during a trial in the court the witness could safely depose the truth without any fear of being haunted by those against whom he had deposed."*¹⁹²⁷

The law commission too in its 154th report stated that there is a plenty of justification for reluctance of witness to come forward to attend to court promptly in obedience to summons.

This is justified by the sections of I.P.C. which lay out punishments for non-attendance to summon by public servant with an imprisonment up to 6months or fine or both.

Also certain sections of Cr. P.C make it a compulsion rather than a choice for a witness to appear in court on a specified date and time. The form 33 of Cr.P.C. i.e. summon to Witnesses, even states that "you are hereby warned that, if you shall without just excuse neglect or refuse to appear on the said date, a warrant will be issued to compel your attendance." Thus it becomes a duty of the court also to ensure the protection of witness if it wants a witness to compulsorily attend and give a statement risking his life. Even if the witness turns hostile and gives a false statement on oath in the court and false evidence in court, he will than too given a punishment of 3years without he being at a fault just to save his and his family's life. Seeing such pity condition of witness the law commission in the report observed that *"Necessary confidence has to be created in the minds of the witnesses that they would be protected from the wrath of the accused in any eventuality."*¹⁹²⁸

There have been many cases in the past where the courts and even the common public has felt and urgent need for witness protection as the cases in which the witnesses give statements different from that given before proceedings, in some cases non-appearance of witnesses in the court and sometimes even unnatural death of an witness before hearing.

¹⁹²⁵ *Zahira Habibullah Sheikh & Anr. v. State of Gujarat & Ors.* (2006) 3 SCC 374
¹⁹²⁶ *Mabender Chawla and Ors. v. Union of India (UOI) and Ors.*, 2019 (14) SCC 615

¹⁹²⁷ Writ Petition (Crl.) No. 109/2003

¹⁹²⁸ 154th Report of the Law Commission of India on the "Code of Criminal Procedure, 1973"

1. **Best bakery case 2002:** The case was related to the 2002 Gujarat riots in which the 21 accused were acquitted on the basis of lack of evidence by the local court and also as 37 out of 73 witnesses turned hostile including the “Star witness Zaheera Sheikh” as she changed her statements every time and even admitted to the Sunday Express that she lied in the court because she feared life and was later termed one year simple imprisonment and 50,000 fine on the charges of perjury by The Supreme Court of India. The court observed this case as a classic example of where evidences were tampered and witnesses won over.¹⁹²⁹

2. In **Salman Khan hit and run case 2002** too, an eye witness who admitted to have seen the accused get out of the driver’s seat denied his statement in 2014. Another witness named Ravindra Patil was a Mumbai police constable appointed as the state’s bodyguard for him was the first person to inform the nearby police station and also, he did admit in that Salman Khan, the accused, was driving the car after consuming alcohol at JW Marriott and was responsible for the accident. The constable remained absent from court hearings on various occasions and thus the magistrate issued a non-bailable warrant against him for his presence and he was later arrested by the police and suspended from the job for his absence from job, one of his friend also admitted that Patil acquired some sudden wealth.¹⁹³⁰

The above cases show the importance of an witness in any case and how their statements change the entire case and are thus rightly said the eyes and ears of the court, therefore it becomes necessary to give them all kind of protection which is not only physical but also mental and psychological so as to protect an important evidence of the case and deliver justice.

CHAPTER II

LAWS & GUIDELINES FOR PROTECTION OF WITNESS

¹⁹²⁹ ZahiraHabibullah Sheikh v. State of Gujarat 2006(3)SCC 374

¹⁹³⁰<https://indianexpress.com/article/opinion/columns/the-life-death-of-ravindra-patil-salman-khan-bodyguard-hit-and-run-case/>

Since the 1958 many NGOs, Law commissions, Jurists and even courts at various level have felt the need for a proper statute for witness protection but the parliament of the country has not felt it necessary to enact a statute in this regard. Even the Supreme Court in various pronouncements like in the case of best bakery case, NHRC vs. State of Gujarat, People’s Union for Civil Liberties (PUCL) v. Union of India, etc. felt the need of the statute and has termed it as the duty of state and not an obligation which they do on the witness by protecting them. The Delhi High court even gave certain guidelines for witness protection till a proper statute is formed in the case Ms. Neelam Katara vs. Union of India & Ors. (2003):

The court in the Judgment gave the definition of witness under this guideline as a person whose statement has been recorded by the Investigating Officer under Section 161 Cr.P.C. and said that whether such witness requires protection or not shall be decided by the competent authority which will a member of the Delhi Legal Services Authority based on an application given by the witness, and if needed than to what extent and the duration of protection will be decided by the same authority keeping in mind the nature of crime committed, importance of witness, risk to his life and the cost of providing protection. While taking statement under section 161 of Cr. P.C. it shall be the duty of the officer to make the witness aware about the Witness protection guideline and it shall be the duty of police commissioner to provide security to the witness based on the order from the competent authority.

In this particular judgment the court overruled the scope of corruption which will be involved in this case and also the time duration under which the competent authority should act with respect to the application to him as without any time period to act the application would be kept unseen for a long time.

For the protection of witness (Victim itself in cases of rape or child abuse) the supreme court in the Sakshi v. UOI 2004 case and the law

commission report no. 172 by recommending amendments to section 273 of Cr. P. C. has led to amendment to section 273, which now states that where a statement of victim of less than 18 years in rape or sexual offences cases is to be recorded, the court should take enough measures to ensure that such woman who is a witness herself should not be confronted by the accused while at the same time ensuring the right of cross-examination of the accused. This became an exception to section 273 which says that evidence should be taken in the presence of accused.

There are some exceptions to Section 273. In *Sakshi vs. Union of India*: 2004(6) SCC 15, the Apex Court cited section 273 of the Code of Criminal Procedure, 1973, and stated that, despite section 273's requirement that evidence be taken in the presence of the accused, the court may examine the witness using a video screen, as video recorded evidence has now¹⁹³¹ been held to be admissible by the Supreme Court.¹⁹³²

Other than this amended section of Crpc, the IPC too lays down provision for punishment of 7 years or fine or both for injury to any 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.¹⁹³³

Also section 228A is an attempt to safeguard the identity of a witness, who is alleged or found to be victim of crime stated from section 376 to 376E of IPC, by putting a bar on publishing of name or any matter which may make known the identity of the victim in these cases.

The above sections of IPC lack in some way or the other are the section 228A is only limited to the victims of sexual offences and the section 195 A of IPC only lays down the punishment for threatening of witness and lack in measures to be taken to prevent such crime.

The Cr. P. C., I.P.C and the Indian evidence act all have failed to provide the necessary precautions to be taken to protect a witness's

life or reputation rather the Cr. P.C. has made provisions for warrant against the witness who fails to obey a summon of court, thus is very important and crucial with respect to witness protection to changes in the Cr. P.C. and including provisions for protection of witness such as, protection of identity of witnesses, in camera proceedings, police protection, etc. in not only cases of sexual offence but also in case which involve punishment of imprisonment of more than 7 years or life imprisonment or death sentences.

LAW COMMISSION'S TAKE ON THE ISSUE:

The law commission had given many reports in the past with respect to protection of witnesses and amendments to the criminal procedural court in this regard. Along with the law commissions the Nation police commission in its 4th report too talked about the necessity of witness protection India.

14th Law commission report 1958:

The report was the first report in Indian criminal law where the issue of inadequate arrangements for witnesses was brought first to light and gave the recommendations for providing proper allowances and Batta to the witness and that should be realistic and also the procedure for the remuneration was recommended to be made simple.

154th Law commission report 1996:

The report brought out the pity condition in which witnesses are in the Indian judicial system are. The witnesses are treated very badly as they have to face problem because of lack of facilities for them. They are treated without respect in court and even they have to wait for hours in the court leaving their all work for giving evidence and statements for which they sometimes come from faraway places and for which they are not even remunerated properly and even if they are eligible for remuneration, they have to undergo a long and delayed procedure.

The condition is even worse if the witness is a prosecution witness and in cases involving influential or powerful defendants the witness has to even face the wrath of the accused. Thus

¹⁹³¹ *Sakshi vs. Union of India*: 2004(6) SCC 15

¹⁹³² *State of Maharashtra vs. Dr. Praful B. Desai* 2003(4) SCC 601

¹⁹³³ Section 195A of IPC, 1860

it becomes necessary for the courts as well as the state to create necessary confidence of safety has to be created in the minds of the accused that they will be saved in any eventuality from the wrath of the accused.

The report also brought to light that there is no option for witnesses to avoid such situation by not going court because if they do so they will have to face a production warrant by the court and thus the report stated that, "there is plenty of justification for the reluctance of witnesses to come forward to attend Court promptly in obedience to the summons".

172nd Law commission report 2000:

The report was mainly in the interests of victims of child sexual abuse which gave some recommendations for protection of child witness which are:

I Allowing the judge to use a videotaped interview of the child's statements in the presence of a child care representative;

(ii) Obtaining a complete and candid account of the actions complained of by allowing a child to testify through closed circuit television or from behind a screen;

(iii) The judge may only conduct the minor's cross examination based on written questions requested by the defense after reviewing the minor's testimony;

(iv) Whenever a child is needed to give testimony, appropriate breaks should be provided when and when the child requires them.

The Commission considered the above recommendations along with other issues raised and the order of the Supreme Court and gave its 172nd Report on 25th March, 2000 and in the case *Sakshi vs. Union of India* the court too felt the need of inclusion of the above recommendations as an exception to section 273 of Cr. P. C.

178th Law commission report 2001:

That Report dealt with hostile witnesses and the precautions to be taken by police at the stage of investigation so that witness would not be able to prevaricate as they are questioned later at the trial stage.

The Commission recommended three changes: "The insertion of Section 164A in Section 164 of the Code of Criminal Procedure (as suggested in the 154th Report) so that the statements of material witnesses are recorded in the presence of Magistrates.

2. Introducing certain checks so that witnesses are not threatened and change their statement before court, such as taking the signature of a witness on his police statement and sending it to an appropriate Magistrate and a senior police officer.

3. In all serious offences, punishable with ten or more years of imprisonment, the statement of important witnesses should be recorded, at the earliest, by a Magistrate under Section 164 of the Code of Criminal Procedure, 1973.

For less serious offences, the second alternative (with some modifications) was found viable."¹⁹³⁴

The importance of these reports was seen in the court judgments but the recommendations in the 178th report of law commission were finally included in The Criminal Law (Amendment) Bill, 2003 for preventing witnesses turning hostile with some changes and also making a provision to find out whether the witness is going back on his earlier statement because of inducement or pressure or threats or intimidation.

At present we have some guidelines of courts for protection of witnesses and some provisions in different statutes for protection of witness cum victims of crime but which are not enough as there are various important issues in respect to protection of witness which though addressed but are not yet resolved and in an effort to resolve them the **Witness protection scheme, 2018** was introduced on the order of supreme court and adopted and declared as law by the supreme court as per Article 141 of The Constitution of India.¹⁹³⁵

Some important aspects of the scheme are:

1. The scheme was dividing into 6 parts which are all interrelated to each other.

¹⁹³⁴ <https://cjp.org.in/wp-content/uploads/2017/11/law-comm-consultation-paper-on-witness-identity-protection.pdf>

¹⁹³⁵ *Mabender Chawla and Ors. v. Union of India (UOI) and Ors.*, 2019 (14) SCC 615

2. The scheme proposes the creation of a post of competent authority which shall be the secretary of the District legal services authority and who will have the sole authority to take decisions regarding the application of protection from witness.

3. The competent authority based on the application from witness call for and threat analysis report from the commissioner of police or the SSP of the district, which shall be prepared by him only in order to maintain the confidentiality of the witness. The report should also categorize the threat level on the witness and thus suggest measures for his protection if needed. Such report should be submitted before the competent authority within 5 working days from the day of receipt of the order.

4. All such application and should be held in camera to maintain the confidentiality of witness.

5. The report categorizes the threat in 3 levels i.e.:

Category A where the threat is graver and extends to life of a witness or his family members.

Category B comprises that degree where threat is to the safety, reputation, property of witness or family members.

Category C comprises of the degree where threats are more moderate as compared to the threats conceptualized in the categories A and B. Category C extends to harassment or intimidation of the witness or his family members reputation.

6. Based on the category of threat the protection measures are suggested and taken up on the order of competent authority, which shall be implemented by the witness protection cell and in case of identity change of witness, such implementation is the duty of the state home department.

7. The protection measure suggested by the scheme include monitoring of call records or tapping his phone to check warning calls, installation of security equipment as per necessity at his residence, providing transportation to and from the court, providing

the amount of security persons necessary, holding in camera proceedings for recording statement, changing the identity of person by referring to him with a code name for the case, also if required providing him an unlisted no. for his use and safety, ensuring expeditious recording of deposition during trial on day to day basis without adjournments, and 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.¹⁹³⁶

The work of the protection not only ends here, they have to even do monthly follow ups with the witness and submit a monthly report to the competent authority. Also apart from the stated methods any method which the authority seems fit for protection can be taken by him. Apart from the corruption point of view which is neglected in the scheme as all the decisions are taken by only one person which increases the scope of corruption and if this is amended this plan aims to make sure that witnesses are given fair and sufficient protection. This will help a lot long way toward reforming the country's criminal justice system and. As a result, the National Security Scenario will be improved

CONCLUSION

After having a deep study of the matter, it is concluded in this paper that the court and various statutory and non-statutory bodies have a major role to play in the criminal justice system of this country as it is because of judicial pronouncement that a witness protection scheme was adopted nationwide for the first despite of a lethargic approach from the executive body to make a statute in this regard. Also, the scheme which is finally formulated has though many cons but it is not an end rather this can be termed as a beginning in the criminal justices reforms in this country, where courts have a major role to play as played in the matter of witness protection as it was because of the court that a guideline was finally formulated.

¹⁹³⁶ Witness protection scheme 2018

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