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# Witnesses in the Criminal Justice System

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## ABSTRACT

*“Witnesses are the eyes and ears of justice.” -Bentham*

*Witnesses play a very important role in the criminal justice system but at the same time the most ignored one. The justice system and the reliance on witnesses is not a new practice but within the society for ages. The agencies of the criminal justice system i.e. police, prosecution and courts failed to deal with the witnesses. There are various provisions for the witnesses but not formulated in a proper way. The law commission too is not that proactive in dealing with the issues of witnesses. Many cases in the judicial system emphasise the importance of witnesses but no proper guidelines are ever implemented. The judiciary, legislature and executive are lacking its intent towards the witnesses. The result is intimidation, hostility, perjury etc ending up in compromise with Justice.*

## I. INTRODUCTION

**Criminal justice system** is a medium of social control. The custodians of the justice system enforce the law, adjudicate crime and reform the wrongdoers. Crime is prevalent in the society which is to be prevented from occurring and at the same time protection from crime is to be formulated. Criminal justice system is the bridge between the ends of prevention and protection. So a strong and strengthened criminal justice system is essential-

- To prevent the crime from happening so that a safe and secured society can be established.
- To punish or rehabilitate the offender. Law is not just to punish but to reform the person so that through the system the desired person can be created.
- To ensure justice to the victim through enforcing the right he vests, compensation, relief etc. It is not possible to bring it to the status quo but condolence for justice.

**The government mechanism** is divided into three major wings which involve the various agencies of our justice system.

- LEGISLATURE (the lawmaker)

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- JUDICIARY (the law protector)
- EXECUTIVE ( the law enforcer)

**It can be further divided into the agencies involving-**

- COURT- It has a very important role to play in the justice system. When all doors are closed court is the last resort for the victim. It is not just involved in adjudicating the cases but has the biggest responsibility as a provider of justice. The powers extend to judicial review and activist through which the best can be ensured for the society.
- POLICE- The very first ray of hope for any victim is the police. The closest to the whole case is who is there from the very beginning to the end of the case. He is not just a custodian or agency but responsible to stop crimes, investigating them, recording the statements, making reports, arresting, detaining and what not. It becomes very important for police being vigilant.
- PROSECUTOR- The acquittal and conviction or the justice and injustice depend upon the prosecutor. How well the case is being presented to show each and every fact and circumstance of the case is an important factor in the judicial system. The process runs through trials with complaints, written statements, documentary evidence, oral evidence, examinations, oaths and resulting injustice for a victim and acquittal or conviction for the accused.

**Witnesses in the justice system have a long history.** It finds its place in the works of Kautilya and Yagyavalkya. Dharmashastras are the true source of the justice system. According to Manu, the King presiding over the tribunal shall ascertain the truth and determine the correctness of the testimonies of the witness, the description, time and place of the transaction or incident giving rise to the case as well as the usages of the country, and pronounce the true judgment. Guru Vasista divided the evidence into Lekhya, Sakshi and Bhukhti. In the present-day which means documentary evidence, witnesses and possession respectively. Shastrakartas (Advocates) was enjoined in order to ensure the witnesses speak the truth and before giving evidence the witnesses were required to perform a brief *Sankalpa* (ablution). So SAKSHYA and SAKSHI which is evidence from witnesses have an old recognition in the Ancient Hindu Era. [1]

Similarly in the Ancient Muslim period, Quran is the ultimate source and that too recognises witnesses. In regard to oral evidence the Holy Quran says “O True believers: Observe justice, when you appear as witnesses before God and let not hatred towards any induce to you to do

wrong, but act justly. This will approach nearer to piety. Fear God for God is fully acquainted with what you do.”[2] In another verse, the Holy Quran says that “O: You who believe, be maintainers of justice when you bear witnesses for God’s sake, although it is against yourselves or your parents: or your near relations, whether the party be rich or poor, for God is most competent to deal with them both. Therefore do not follow your low desire in bringing testimony so that you may swerve from justice and if you swerve or turn aside then surely God is aware of what you do”[3]

In British India, the Courts established under the provisions of the Royal Charter in Bombay, Madras and Calcutta were following the English rules of the Law of Evidence. In Mofussil Courts which were situated outside the Presidency Towns, there were no definite rules relating to the Law of Evidence. The Courts enjoyed unfettered liberty in the matter of admission of evidence. Presently, the term “witness” is not defined in any Indian statute. However, the legal understanding of the term is quite apparent. A witness may be defined as one who gives evidence in a case; an indifferent person to each party, sworn to speak the truth, the whole truth, and nothing but the truth. The Black's Law Dictionary defines a witness as one who sees, knows, or vouches for something or one who gives testimony, under oath or affirmation in person or by oral or written deposition, or by affidavit.

“Whenever man commits a crime heaven finds a witness,” says Edward G. Bulwer. Witness is therefore inevitable. Witnesses can have a pivotal role in bringing the offender to justice. Witness assumes additional significance in the adversarial system of criminal justice where the onus of proving the case lies on the prosecution and the witness of prosecution becomes important in the pursuit of exploring the truth. The status of witness in the court is that of a friend and supporter to the cause of justice. The testimony given by the witnesses enables the court to decide the merit of facts and circumstances of the case. Therefore, the truthfulness of the witness’s testimony becomes the cornerstone of justice and hence the witness is made to offer a statement under oath. The statement of a witness may lead to the conviction or acquittal of the accused. The speedy justice or delay in justice delivery also depends, to a great extent, on the quality of the statement given by the witness during the trial. On the whole, the successful functioning of the criminal justice system largely depends on the readiness of individuals to furnish information and tender evidence without being threatened or lured.

**Even after such importance witnesses face a lot of difficulties dealing with the agencies of the justice system i.e. the police, prosecution and court.**

1. Maltreatment/misbehaviour

2. Forced/pressurized/lured to twist statement/intimidation/violence
3. Apathy/indifference/neglect
4. No assurance of protection
5. Dealing with women, children and victims as witnesses
6. Prolonged waiting/no place for waiting
7. Loss of work/wages
8. Frequent adjournment
9. No information/guidance
10. Dealt at par with accused

These problems result in the biggest problem of the criminal justice system 'hostility'. It is not defined in the statutes but Section 154 deals with 'hostile witnesses'. Section 154 empowers the Court as discretion to permit the persons who call a witness to put any question to him which, might be put in cross-examination by another party. Such questions will include Leading questions (Section 143 of Evidence Act), Questions relating to his previous statements (Section 145 of Evidence Act), Questions that tend to test his veracity to discover who he is and what is his position in life or to shake his credit (Section 146 of Evidence Act).

Perjury is another bad result of problems in the criminal justice system. Perjury in a general sense is considered as lying. The legal understanding about perjury means lying or making verifiable false statements on a matter under oath or affirmation in a court of law or in any of various sworn statements in writing. Perjury is a crime because the witness/ accused has sworn to tell the truth and, for the credibility of the court, witness testimony must be relied on as being truthful. Perjury is considered a very serious crime as it could be used to usurp the authority of the courts, resulting in miscarriage of justice.

The biggest reason for perjury and hostility is Criminal Intimidation. Section 503 of IPC says that whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of anyone in whom that person is interested, with intent to cause alarm to that person or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threats, commits criminal intimidation. It is punishable under section 507 while anonymous intimidation is provided under section 506. The Indian Penal Code punishes anyone who threatens another with injury to his person, property or reputation or to the person or reputation of anyone that such person is interested in. There must be an intention to cause

alarm to such person or cause that person to do any act or omit to do anything in order to avoid the execution of such threat. The offence is so defined in Section 503 and the punishment is prescribed under Section 506. The fact that threat has to be real was emphasised in the case *Rangaswami v State of Tamil Nadu* [4] that in case the threat is merely construed by the 'victim' then the person accused of criminal intimidation is to be given the benefit of doubt. Arijit Pasayat, J presiding in the Orissa High Court in the case *Amulya Kumar Behera v Nagabhushana Behera* [5] laid down the essentials of the offence.

**There is no proper enactment for the witnesses and issues related to them which is very much required looking into the importance of witnesses in the criminal justice system but there are various provisions in different statutes, especially in Evidence Act and Criminal Procedure Code.**

**(A) Indian evidence act**

**Section 118** Who may testify-All persons shall be competent to testify unless the Court considers that they are prevented from understanding the question put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind or any other cause of the same kind.

**Section 119** Witnesses unable to communicate verbally.

**Section 120** Parties to Civil Suit, and Their Wives or Husbands.

**Section 132** Witness not excused from answering on ground that answer will criminate

**Section 133** Accomplice

**Section 134** Number of witness

**Section 138** Order of examinations- Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

**Section 140** says that a witness who has been called to testify about the character may be cross-examined and re-examined. This is unlike English law.

**The Indian Evidence Act has provisions dealing with the hostility of witnesses.**

**Section 145** says about cross-examination as to previous statements in writing.

**Section 146** generally lay down that when a witness is cross-examined he may be asked questions that tend to test his veracity, i.e. how credible and reliable he is. Secondly, it is to test his identity and position and most importantly to shake his credit by injuring his character

**Section 147** When Witness to Be Compelled to Answer – If any such question relates to a

matter relevant to the suit or proceeding, the provisions of Section 132 shall apply thereto.

**Section 154** This becomes the main section that hints towards hostile witnesses. It says that “The Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.” This means that when a party calls a witness who turns hostile, some material has to be shown that the witness has reviled from what he stated during the investigation and then if the court grants permission then only questions can be put. The court has discretionary powers in this regard. The court can rely on that part of the evidence of hostile witness which is credible and rejects the rest which is not worth it.

**Section 155** Impeaching credit of Witness – The credit of a witness may be impeached in the following ways by the adverse party, or with the consent of the Court, by the party who calls him:

- By the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;
- By proof that the witness has been bribed, or has accepted the offer of a bribe or has received any other corrupt inducement to give his evidence;
- By proof of former statement inconsistent with any part of his evidence which is liable to be contradicted;
- When a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

**(B) Criminal Procedure Code, 1973**

**Section 160:** Police Officer’s Power to Require Attendance of Witnesses.

**Section 171:** Complainant and witnesses not to be required to accompany police officer and not to be subject to restraint.

**Section 271:** Power to issue a commission for examination of a witness in prison.

**Section 273:** Evidence to be taken in presence of the accused.

**Section 280:** Remarks respecting the demeanour of the witness.

**Section 284:** When attendance of witness may be dispensed with and the commission issued.

**Section 287:** Parties may examine witnesses - the parties may with the permission of the court examine or cross-examine the witness.

**Section 299:** Record of evidence in absence of accused.

**Section 309:** Power to postpone or adjourn proceedings.

**Section 311:** Power to summon material witness, or examine person present- Any court may, at any stage of any inquiry, trial or another proceeding under this Code, summon any person as it's a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.

**Section 312:** Expenses of complainants and witnesses.

**Section 315:** Accused person to be a competent witness- Any person accused of an offence before a Criminal Court shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial:

**Section 316:** No influence to be used to induce disclosure-Except as provided in sections 306 and 307 no influence by means of any promise or threat or otherwise, shall be used to an accused person to induce him to disclose or withhold any matter within his knowledge.

### **The concern for witnesses goes through various cases and reports-**

#### *State v. Santosh Kumar Singh*

In the rape-cum-murder of a Delhi University law student Priyadarshini Mattoo in 1996, the judge recorded his displeasure over shoddy work by the investigating agency and said: "Though I know that he is the man who committed the crime I acquit him, giving him the benefit of doubt, the system of criminal justice in India is biased in favour of the accused and the imbalances in the rights available to offender and victim are glaring. The offenders in the criminal justice system have a range of rights, (both constitutional and legal), the victims and more particularly, witnesses, have a limited range of rights, (expressed and implied) certain privileges and protection accorded to them through the judicial discretions of the judges. [6]

#### *Gura Singh v. the State of Rajasthan*

It was held in this case - "It is a misconceived notion that merely because a witness is declared hostile his entire evidence should be excluded or rendered unworthy of consideration. A criminal trial where a prosecution witness is cross-examined and contradicted with the leave of the Court by the party calling him for evidence cannot, as a matter of general rule, be treated as washed off the record altogether. It is for the Court of the fact to consider in each case whether as a result of such cross-examination and contradiction the witness stands discredited

or can still be believed in regard to any part of his testimony. In appropriate cases, the Court can rely upon the part of the testimony of such witness if that part of the deposition is found to be creditworthy.” [7]

*Zahira Habibulla H Sheikh And Anr. V. Sate of Gujrat*

In the Best Bakery case, the witness turned hostile because of intimidation to her life. To threaten a witness is an offence and if a witness complains of being threatened by the accused or someone outside the trial acting in favour of the accused, the bail bond for the accused may be cancelled. It is also the duty of the state to protect the witness. However, in this case, the state neither protected the interests of the victims nor sincerely sought to render justice. [8]

*NHRC vs. the State of Gujarat*

Where it said that ‘no law has yet been enacted, not even a scheme has been framed by the Union of India or by the state government for giving protection to the witnesses’. The Supreme Court said ‘that there comes the need for protecting the witness as time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the Court and justice triumphs and that the trial is not reduced to a mockery. Legislative measures to ensure prohibition against tampering with witness, victim or informant, have become the imminent and inevitable need of the day.’ [9]

*PUCL v. Union of India*

The PUCL said that there were two ways to explain why witnesses turn hostile. The first is that the police had recorded the statements incorrectly. The second and more plausible was that the police had recorded the statements correctly but were retracted by the witnesses because of ‘intimidation and other methods of manipulation’. Another major reason for this growing menace is protracted trials. The working of the judicial process is very slow. Several dates are fixed for cross-examination of witnesses, who becomes frustrated because of being summoned again and again only to find that the date is adjourned. This frustration takes its toll, and the witness decides to turn hostile to get rid of the harassment. [10]

*State v. Sanjeev Nanda*

The brazenness that was seen in the BMW case where the lawyers were caught in a sting operation by a TV channel for bribing a key witness to turn hostile is a real slur on the judicial history of this nation. Such instances call for strict penal action. The experiences in many sensational cases wherein the witness turned hostile lead us to look at the legal remedy of this criminality which too often involves “buying” of a witness by influential accused can be

handled only by strictly enforcing the penal law on perjury. [11]

*State v. Siddarth Vashishta*

There is no evidence to suggest they were intimidated into twisting their statements. But it is likely that they felt beleaguered by a trial that dragged on for seven years. Preventing witnesses from turning hostile does not mean merely making them feel more secure. The Jessica Lal case suggests it is also about making it less troublesome and inconvenient for them. [12]

*Swaran Singh v. the State of Punjab*

Underlining the significance of witness, Wadhwa J. said, "A criminal case is built on the edifice of evidence, evidence that is admissible in law. For that, witnesses have required whether it is direct evidence or circumstantial evidence." It was further observed by him - "By giving evidence relating to the commission of an offence, he performs a sacred duty of assisting the court to discover the truth. It is because of this reason that the witness either takes an oath in the name of God or solemnly affirms to speak the truth, the whole of the truth and nothing but truth. He/she performs an important public duty of assisting the court in deciding on the guilt or otherwise of the accused in the case. He submits himself to cross-examination and cannot refuse to answer questions on the ground the answer will incriminate him" [13]

*The Law Commission of India*

Law Commission in its 14<sup>th</sup> Report [14] and the National Police Commission in its 4<sup>th</sup> Report [15] thoroughly examined and recommended substantive measures to alleviate the difficulties of witnesses. In its 154<sup>th</sup> Report [16] the Law Commission specifically observed, "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." The Law Commission, further, in its 198<sup>th</sup> Report [17] carried out an exhaustive study on Witness Identity Protection and Witness Protection Programmes, inter alia, observing that there was an absence of Witness Protection Programmes in India, dealing with the protection of victims and witnesses, outside Court proceedings. Accordingly, the Law Commission proposed and annexed "Witness (Identity) Protection Bill, 2006" along with its Report. However, no Draft Bill regarding Witness Protection Programmes was proposed.

*Neelam Katara v. Union of India*

Pertinently, in the Hon'ble High Court at Delhi had also, as early as the year 2003, issued certain directions/ guidelines for the protection of witnesses, till suitable legislation was brought on the statute books. [18]

*Rajubhai Dhamirbhai Baria and Ors. v. The State of Gujarat and Ors.*

The High Court of Bombay stressed the State's role to evolve machinery for the purpose of giving protection to the witnesses in sensitive matters. In a proceeding before the Apex Court, directions were specifically issued to the States to indicate the steps taken/ to be taken for witness protection. At the same time, the (then) learned Attorney General for India was also requested to provide his suggestions in the form of a draft scheme. [19]

*Mahender Chawla and Ors. v. Union of India*

The Court specifically observed that one of the main reasons for the witnesses to turn hostile is that they are not accorded appropriate protection by the State. Clearly, a threat to life, induced by coercion, compulsion, violence, etc., may often result in witnesses contracting from the truth, even if the same may go against their conscience or will. [20]

*Witness Protection Scheme, 2018*

Pursuant thereto and based on the recommendations of several States/ Union Territories, "Witness Protection Scheme, 2018" ("Scheme") was finalized by the Central Government, in consultation with National Legal Services Authority. Subsequently, the Hon'ble Court vide its judgment dated 05.12.2018 noted a paramount need to have a witness protection mechanism/ scheme in India. However, considering the absence of a statutory regime, the Scheme was duly adopted and declared to be law by the Hon'ble Court, in terms of Article 141 of the Constitution, until a suitable law in this regard was framed. The Witness Protection Scheme, 2018 envisages means ensuring the protection of life/ safety of witnesses in events ranging from; providing a police escort to witness up to Courtroom or using audio-video means for recording the testimony of such witness to steps ensuring anonymity, temporary residence in a safe house, providing new identity, relocation of witnesses, etc., in extreme cases.

**There is a need to understand the importance of witnesses and treat them the way they deserve for which it is necessary to implement the following-**

1. Fresh structural and legislative arrangement.
2. Identify and prioritize who needs protection.
3. Police, prosecution and courts to show sensitivity towards the witnesses.
4. National Plan for Witness policies, assistance and protection.
5. Single legislation is not in bits and pieces under various acts.
6. Department to look after such matters.

7. Legislature is more compensatory than punitive.
8. To ensure the spirit of section 309 crpc and adjournments as required.
9. Computer networking in the justice system.
10. Bail to be given keeping in mind the security of victims and witnesses.
11. Discontinuance of employment of witness to be redressed.
12. Adequate quantum of compensation for witnesses too as for the victims.
13. Obligations of police and prosecution must be put under proper regulations.
14. Adversarial is good but the good aspects of the inquisitorial need to be adopted like adequate powers to the judges in the trial.
15. NGOs and other bodies to be made instrumental for safeguarding the rights of witnesses and victims.

**In a nutshell, it can be said that-**

The role, importance, issues and problems of witnesses have always been to be in the back seat. The accused and the victims are not the only people to be concerned about. The criminal justice highly depends on the evidence and which raises the need to have a proper mechanism where witnesses get the desired priority. Yes, provisions are there, it developed too but not to the extent which makes it useful for the system. More comprehensive steps are required from all three wings i.e. the legislature, executive and judiciary. The agent's courts, police and prosecution need to understand their duties. Focus is required towards-

- Problems of witnesses at various levels
- Hostility and perjury
- Protection of witnesses
- Assistance to witnesses

The conditions very well come out of the picture. The provisions are well within the knowledge. The cases and reports do explain the situation. The suggestions and recommendations are very much available. So the only need is a push towards this. The criminal justice system has its stakeholders; the victim, accused, police, court, prosecution, government, departments, NGOs, and the strongest which is the public. A step forward for a better justice system because **Law without justice is like a wound without a cure.**

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