



Guardians of Silence: Witness Protection in India

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Abstract:

This article examines the critical issue of witness protection in India's criminal justice system. It analyzes the current state of witness protection measures, their effectiveness, and the challenges faced in implementing robust safeguards for witnesses in criminal proceedings.

The study begins by outlining the importance of witness testimony in ensuring justice and the vulnerabilities witnesses often face, including threats, intimidation, and physical harm. It then traces the evolution of witness protection policies in India, from the recommendations of various Law Commissions to the landmark Supreme Court judgments that highlighted the need for a comprehensive witness protection program.

This research contributes to the ongoing discourse on judicial reform and public safety in India, underscoring the critical role of effective witness protection in upholding the integrity of the criminal justice system.

Introduction

Witness generally plays a significant role as stated by Edward G. Bulwer, "If a crime is committed, the heaven will find its witness." If a crime occurs there is very less possibility of not having a witness of it. Witnesses facilitates in bringing justice by adding inputs provided for the conviction or acquittal of an accused, the onus or the burden of proving a case on the prosecution lightens as witnesses for prosecution becomes very important for the search of the truth. Witness, according to Bentham, are the "eyes and ears of justice," It is entirely fitting to its definition and relevance.

India's legal system is not supportive to witness protection as the judgement that is provided in any case heavily relies on the witness and his testimony. In *Swaran Singh v. State of Punjab*¹, Wadhwa J. stated that "a criminal Case in constructed on the basis of the architecture of evidence, evidence that is acceptable by law." He continued with the fact that "by providing the court evidence through his testimony, a witness performs the important responsibility of helping the court in discovering the truth." It is a holy duty that results in the judgement of the accused. Because of this, the witness is required to take the holy oath in the god's name to tell the truth and the truth only in the words of "I do (swear in the name of God/solemnly affirm) that what I shall state shall be the truth, the whole truth, and nothing but the truth." Even though the role of the witness is significant and widely

¹ AIR 2000 SCC 68.

acknowledged, the environment around the witnesses in this country is excruciating. Due to certain practices both which are morally wrong and illegal, witnesses avoid to provide testimony or be involved in the case as a witness. Over the years, the numbers keep reducing as the witnesses and their family experiences the rage of the accused party.

Historical background

The pursuit of justice heavily relies on the evidences that are presented. One of the most significant pieces of evidence is the testimony of the witness. Over the years, the conditions of the witness seemed to have improved with room for development but the current situation still discourages the witness to be involved in the court proceedings to provide a fair and just decision by the judge. The concept of witness being called in the court to testify is not a new one. It existed in ancient India as Kautilya writes, "The parties shall themselves produce who witnesses who are not far separated either by time or place," in his well-known book "Arthashastra."² The history of our country regarding judicial system teaches us that the state of law that is currently present is not the work of one day but the heavy work of many years that accumulated to the result that is present today. Many forms of evidences were defined in the ancient and human texts. The categorization of the evidences are in three forms- Documents, possession and witnesses. These proofs were listed in the work of Yajñvalkyā.³ To properly understand the role of witnesses in the criminal justice system, history of our country regarding witnesses needs to be examined. The different periods of our country need to be studied, namely

- The Ancient Hindu period,
- The Ancient Muslim period, and
- The British period

Types of witness

Witnesses can be classified in several ways. But to make things easier to comprehend, these kinds of witnesses may be categorized as follows:

I. Based on the Party that a witness is representing:

1. A witness called by the prosecution to testify against the accused in a criminal trial A witness for the prosecution is the accused (P.W.).⁴
2. defence witness: A witness testifying on behalf of the defence is referred to as a defence witness.
3. Adverse or hostile witness: An adverse witness is defined as "an individual who deliberately declines to provide a truthful statement on behalf of the party who summoned them."⁵ The case of Gura Singh v. Supreme Court. According to State of Rajasthan⁶, a "hostile witness is one who is not willing to tell the truth when called

² R.P. Kangle, Kautilya Arthashastra 230 (Motilal Banarsidass Publishers, New Delhi, 8th edn., 2014).

³ Kane, Pandurang Vaman, History of Dharmashastra Ancient and Medieval Religious and Civil Law in India 304 (Bhandarkar Oriental Research Institute, Poona., 1968).

⁴ 'Prosecution Witness Meaning - Legal Definition' (World Law Dictionary) (Last Visited on 10 May 2024).

⁵ 'Hostile Witness' (Oxford Reference) (Last Visited on May 28 2024).

⁶ [2001] 2 SCC 205.

upon by the party." Leading questions may be allowed to be asked of such hostile witnesses by the party making the call.

II. Considering the witness's stake in the subject at hand:

1. Partisan or interested witness: A witness with a direct personal stake in the outcome of the case is considered interested topic under discussion. In the State of Rajasthan v. Smt. Kalki⁷ case, the Supreme Court of India established the requirements for a witness to qualify as a "interested witness." A witness is only deemed "interested," in accordance with this definition, if "he or she derives some benefit from the result of a litigation, in the decree in a civil case, or in seeing an accused person punished."

2. uninterested witness: A witness who is uninterested in the subject matter is referred to as such.⁸ For example, if a spectator witnesses a guy being assaulted on the street and he is not connected to the parties, then he is considered an unbiased witness.

III. Depending on who provides the evidence:

1. Expert witness: "A witness qualified by knowledge, skill, experience, training or education to provide a scientific, technical, or other specialized opinion about the evidence or a fact in issue" is what Black's Law Dictionary defines as an expert witness. An expert witness is defined as "someone who has made the subject upon which he speaks a matter of particular study, practice, or observation; and he must have a special knowledge of the subject" in State of Himachal Pradesh v. Jai Lal⁹. Medical officials and handwriting specialists are a few of instances of expert witnesses.

2. A young observer: Every person under the age of eighteen is considered "a child" under the United Nations Convention on the Rights of the kid.¹⁰ Additionally, in India, the age of the child's age has been set at eighteen. A witness who is younger than eighteen is considered a kid witness. Young witnesses are especially vulnerable since they are easily manipulated and may be tutored. However, the Court cannot discount the testimony of minor witnesses. The "Supreme Court of India" ruled in Panchhi v. State of U.P.¹¹ that a child's testimony is credible if it is backed up by sufficient proof.

Legal framework in India

The criminal laws in India were deliberately designed by the British government to permit the persecution of Indians while outlawing it for natives. Under this technique, a witness's perspective would not have been appropriate. Independent India was given an extensive legal system built by the British Parliament, which is still in operation today. As a result, contemporary criminal law frequently disregards the rights and protections afforded to witnesses.

Stages of examination of witnesses

⁷ [1981] 2 SCC 752.

⁸ Black's Law Dictionary (9th edn, 2009) 1740.

⁹ [1999] 7 SCC 28.

¹⁰ The United Nations Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) art 1.

¹¹ [1998] 7 SCC 177.

"Interrogation of witnesses" is what is meant by "examination of witnesses." "Putting a number of queries to the witness by the parties or their attorneys with a view to acquiring matters in dispute and putting them before the Court"¹² is what this type of interrogation entails.

One of the most important steps in the process of having the attorneys for the prosecution and defence examine witnesses is to question them about their credibility. This is a chance for both sides to reverse the situation by questioning the dependability of the witnesses from the other side. When they appear as witnesses, they also attempt to persuade the court of the veracity of the witnesses' testimony. Chapter X of the Act solely addresses the questioning of witnesses. Three phases make up the order in which witnesses are questioned, as stipulated by Section 138:

(i) Examination-in-chief: When a witness is called, the calling party first questions him about pertinent facts. The "examination-in-chief" is the title of this investigation. "To elicit facts favourable to the case of the party conducting the examination" is the primary goal of this investigation.¹³

(ii) Cross-examination: If the opposing or adverse party so desires, it may question the witness about pertinent facts following the conclusion of the examination-in-chief. This subsequent kind of "Cross-examination" is the term for the examination. Section 146 states that cross-examination questions that "test the veracity of the witness, discover his position in life, and to shake his credibility by injuring his character" are permissible. In the Indian Penal Code, Sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376B, and 376E prohibit asking "questions in the cross-examination to the victim as to the general immoral character, or previous sexual experience" if the question relates to "consent" in relation to rape and related offenses "Cross-examination is an acid-test of the integrity of the statement made by the witness on oath in examination-in-chief," it was said in the case of *Kartar Singh v. State of Punjab*¹⁴. In addition, the Court stated three goals for the cross-examination:"

- (1) to undermine or destroy the witness's credibility as evidence of his opponent;
- (2) to extract information from the opposition party witness that supports the lawyer's client during the cross-examination; and
- (3) to demonstrate the untrustworthiness of the witness by casting doubt on their credibility.

As a result, the opposing side has the chance to cast doubt on a witness's credibility in front of the court. When a witness is being cross-examined over a prior pertinent remark, without presenting the writing to him; but, if the text is used to refute him, the relevant passages must be shown to him.¹⁵

Under Section 147, a witness is "bound" to answer a question on his character during cross-examination "if a witness is asked a question regarding his character, which is directly relevant to the suit or proceeding," even if the answer may implicate him. The creation of Section 132 functional in this instance. Nonetheless, the Court has the authority to determine whether or not the witness can be forced to respond to a question if it is unrelated to the current proceedings. When using its authority, the Court must take a number of things into account.¹⁶ If the imputation communicated materially influences the Court's judgment "as to the credibility of the witness on

¹² 'Examination of Witnesses/ASR' (Dr. MCR HRD Institute Module) (Last Visited 10 May 2024).

¹³ 6'Examination-in-Chief' (Oxford Reference) (Last Visited 21 May 2024).

¹⁴ (1994) 3 SCC 569.

¹⁵ The Indian Evidence Act 1872, s 145

¹⁶ The Indian Evidence Act 1872, s 148.

the matter to which he testifies," then the inquiry is deemed appropriate.

Constitutional provisions

The Indian criminal code was purposefully created by the British government to allow for the persecution of Indians while forbidding it of natives. A witness's viewpoint would not have been suitable under this method. The British Parliament constructed a comprehensive legal framework for independent India that is still in use today. In light of this, modern criminal law regularly ignores the privileges and rights granted to witnesses. With this, the modern interpretations of Article 21 of the constitution have led to the recent developments of the features of the criminal procedure.

Article 21 clearly read that: "Protection of life and liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law."¹⁷

Supreme Court has interpreted Article 21 as a "process established by law" for the benefit of the citizens. In the case of Maneka Gandhi¹⁸ took the new shot at the method of constitution's mandate in Article.21 as "fair, just, and reasonable."¹⁹ Since then, there have been further instances when the need for a fair procedure has been reiterated.

The right to "freedom and expression" protected by Article 19(1)(a) of the Indian Constitution, which has been construed to encompass press freedom, is also the foundation for the right to a public trial. In the instances of Dinesh Trivedi v. Union of India and Express Newspapers v. Union of India²⁰, this was decided.

The Indian evidence act, 1972

According to Section 3 of the Indian Evidence Act of 1872, "evidence" is defined as follows:

Evidence consists of and signifies: -

- Any remarks made by witnesses in front of the court regarding the facts under inquiry are considered oral evidence.
- All documents filed with the court for review are called documentary evidence.

Both cross-examination and re-examination authorization are covered in the definition of "all statements" found in Section 3 of the Act. The Latin word evidens, sometimes known as evidere, meaning "to show clearly," "to clarify in sight," "to find clearly," "to be sure obviously to resolve," or "to prove."

Chapter IX "On Witnesses" (from Section 118 to 134) and Chapter X "On Witness Examination" (from Section 135 to 165) include the law's witness requirements. The set of guidelines that control direct witness evidence is known as the Law of Evidence. The Act's Sections 135 to 166 deal with interrogating witnesses (both inclusive), and any fact may be shown by the direct testimony of a witness who is entitled to full credit (Section 134). The amount of trustworthy evidence needed for a court ruling is covered under Section 134 of the Indian Evidence

¹⁷ Article.21, The constitution of India,1950

¹⁸ AIR 1978 SC 597.

¹⁹ AIR 1997 SC 95.

²⁰ (1997) 4 SCC 306.

Act. Under section 134 of the Evidence Act, the expression "evidence must be weighed, not counted" is now officially accepted. It's a proven conviction that can be documented with the testimony of a single eyewitness, provided that there are no adverse circumstances in the record against you.

The court won't require the testimony of any further eyewitnesses because the incident may have happened at a time or location where no other eyewitness could have been present. In actuality, courts place greater weight on the Caliber of evidence than the volume of it.²¹ The order in which witnesses are introduced and questioned is now determined by law and practice pertaining to civil and criminal processes, respectively, and in the lack of such law, at the discretion of the Court. The sequence in which the parties must present their evidence in criminal cases is governed by the Code of Criminal Procedure (Attendance of Persons Confined or Detained in Prisons), the Code of Civil Procedure²² (Evidence in Inquiries and Trials), the Code of Procedure in Summary Trials, and Chapter XIII.

Evaluations of witness testimony should normally focus more on the quality of the evidence presented in a case than on the witness's ability to persuade the court during the hearing.²³

The Indian Penal Code, 1860

In accordance with Section 228A of the Indian Penal Code, "Any person who prints or publishes the name or anything that may identify the person against whom it has been discovered or who is claimed to have committed the rape would face a two-year imprisonment and a fine." This protection is meant to keep the rape victim's identity a secret from the public and prevent the media from stigmatizing her in the event that it is discovered.²⁴

The Code of Criminal Procedure

For rape offenses, the Criminal Procedure Code of 1973 establishes both open court and interior proceedings. If the trial were conducted in private, the victim or witness would just have to provide his testimony. The victim/witness finds it difficult to testify freely because they are afraid of the public and the media. In the State of Punjab v. Gurmit Singh case²⁵, the Hon'ble Supreme Court declared, "To safeguard the witness or the victim would make it easier for the victims of crime to feel a bit more at ease in a less familiar setting and answer these questions more readily." Because the prosecutor would not be intimidated or deterred from deposing the victim, in-camera trials are more likely to respect the victim, be consistent with the law, and increase the quality of the evidence presented by the prosecution. A higher caliber of evidence would enable the court to dive further into the facts and distinguish fact from fabrication.

In addition, Sections 207 and 208 were passed, establishing a comprehensive process for ensuring fair trials and providing copies of police reports and other materials to the accused (copies of statements and documents shall be handed to the accused in other cases triable by the Court of Sessions). In accordance with Section 273, the accused must see the evidence. In front of their abusers, victims often express themselves openly, especially

²¹ Kartik Malhar v. State of Bihar, (1996) 1 664.

²² Order XVIII, The Code of Civil Procedure, 1908 (Act 05 of 1908).

²³ 1986 Cr L J 571.

²⁴ Sec. 228A, The Indian Penal Code, 1860 (45 of 1860).

²⁵ (1996) 2 SCC 384.

when women and children are involved. The Law Commission of India has suggested adding a proviso to Section 273 so that the Court can respond correctly and keep evidence of a minor who has been accused of sexual assault from being discussed. The minor is under 16 years old.

Section 177 of the Code²⁶ states that a witness cannot be subjected to unjustifiable limitations or disadvantages when they are going to court in order to collect unbiased testimony from them. If required, they can also be provided with protection for their appearance. The court must swear in the plaintiff and any present witnesses, if any, in accordance with Section 200 of the Code of Criminal Procedure.²⁷ The Code of Criminal Procedure's Section 202(2) permits the Magistrate to make witnesses swear under oath if he thinks it is essential²⁸. A list of the prosecutor's witnesses must be provided before a summons or warrant can be issued against an accused person, according to Section 204(2) of the Code²⁹.

Role of judiciary

Since the dawn of time, justice and legality have been connected. Justice has always been the goal of the legal system. The law must be adaptable and sensitive to societal shifts in order to achieve this. Following a discussion of the reasons why the judge ought to be involved in the program to protect witnesses, the relevant legislation must be passed by the legislature. The answer is straightforward: the court must conduct an impartial trial and make a determination in light of the facts presented. The judge must strike a balance between the accused's entitlement to receive an impartial trial and the prosecution's or victim's rights to be heard.

A fair trial has to be equitable for the accused, the prosecution, and any victims. To ensure a fair trial, the judge is expected to think outside the box. It is the duty of a judge to guarantee that witness testify in court free fear of intimidation or threats, and to offer appropriate protection when needed. This dissertation discusses a number of exaggerated media situations where the judge's inappropriate witness protection obligations led to the defendant's exoneration. The killing of Jessica Lal³⁰ is the most renowned case that has sparked concerns about how the Indian legal system operates, especially with regard to the admission of evidence.

Out of the hundreds of persons present at the crime scene, only a small number of them testified in court. Furthermore, the court disregarded the evidence of individuals who tried to testify against the accused due to procedural mistakes, such as the absence of records attesting to their presence at the scene of the crime, mistaking a phone call to the police reporting the occurrence for a formal police report, and so on. These formal barriers combined with a significant legal mistake resulted in the exoneration of the offender. It was left to the media to highlight the case's shortcomings once more and persuade the court to reverse its ruling.

Instead of proceeding blindly while they carefully analysed the evidence and documented the facts, the judge could have lessened the likelihood of hardship encountered by the witnesses/victims and their families by

²⁶ Sec. 177, The Code of Criminal Procedure, 1973 (Act 02 of 1974).

²⁷ *Id.*, Sec. 200.

²⁸ *Id.*, Sec. 204(4).

²⁹ *Id.*, Sec. 204(2).

³⁰ Sidhartha Vashisht, *Manu Sharma v. State (NCT of Delhi)*, (2010) 6 SCC 1.

providing a more reasonable explanation for the witnesses' hostile behaviour at the end of the case. The history of the court would not have included this kind of mistake if the witness had appeared in court and provided an explanation. The truth is that the defendant coerced witnesses because the government lacked the authority to give the necessary security covering after assessing which witnesses needed to be protected, and this procedure is still in place. Under the heading "Role of the Judiciary," an attempt has been made to look at cases concerning witness protection as well as how the court has helped by providing a range of strategies and tactics for witness protection.

Leading cases

The following quote highlights the significance of victims: "Since the beginning of the legal system, it has been acknowledged that the primary purpose of courts of justice is the discovery, validation, and establishment of truth. *Zahira Habibulla Sheikh v. State of Gujarat*, 2004.³¹" Both in civil and criminal contexts, the common law is infused with the guiding principles of a fair trial. Applying these principles requires a careful judicial balancing of conflicting interests in criminal trials; the public, accused, and victim interests must all be taken into consideration while keeping the public interest in the prosecution of offenders front and center.

In *Gaurav Jain v. Union of India*³², the Indian Supreme Court issued a number of directives pertaining to the welfare and rehabilitation of others who had been victims of similar crimes. The Court stated that in order to effectively enforce rescue and rehabilitation of the victims of such trafficking, three C's are required: counseling, cajoling by persuasion, and coercion as a last resort. These issues are covered by the Juvenile Justice (Care and Protection of Children) Act of 2000 and the Immoral Traffic (Prevention) Act of 1956.

The Supreme Court emphasized in *Delhi Domestic Working Women's Forum vs. Union of India*, 1995³³ that in all rape trials, the victims' "anonymity" must be maintained to the extent necessary to protect their identity from the public and media, even though it also outlined the broad parameters that can assist them. The court also noted that victims of rape always perceive their trial as a horrific event. Giving testimony in court has been an unpleasant and damaging experience, and victims have frequently stated that they believe the criminal trial's cross-examination to be an even worse experience than the actual rape.

Union of India v. Sakshi, 2004. It is important to remember the Supreme Court's observations in this particular instance. The judge noted:

Since the goal of a court's investigation is to discover the truth, it is imperative that the victim or any witnesses be allowed to testify freely and without fear of embarrassment regarding the entire incident. The victim, witnesses, or all three may experience shock or intense dread at the mere sight of the accused. He or she might not be able to provide all the specifics of the incident in such a case, which could lead to an injustice.

³¹ AIR 2006 SUPREME COURT 1367, 2006 (3)

³² AIR 1997 SC 3021

³³ 1995 SCC (1) 14,