

## WITNESS PROTECTION SCHEME

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“Witnesses are the eyes and ears of justice”- JEREMY BENTHAM

### INTRODUCTION

The witness is considered one of the most important aspects of the criminal justice system. It is because of them that the court considers enough substance for a reasonable decision to be drawn. The witness input may directly affect the conviction or acquittal of an accused, and it is therefore important that such witness should be shielded from the wrath of external forces capable of changing his stance on a particular case.

This article aims to highlight the features of the Witness Protection Scheme, 2018, the importance of witnesses, the need for such scheme, legal framework and case studies.

### DEFINING WITNESS

‘Witness’ is not defined anywhere in the Code of Criminal Procedure, 1908 or the Indian Evidence Act, 1872. The Black’s Law Dictionary defines it as: “In the primary sense of the word, a witness is a person who has knowledge of an event. The most direct means of gaining knowledge about an event is by looking at it, the ‘witness’ gains the impression of a person who is present at and observes a transaction.”<sup>64</sup>

Further, The Witness Protection Scheme, 2018 defines ‘witness’ as: ‘Witness’ means any person, who possesses information or document about any crime regarded by the competent authority as being material to any Criminal proceedings and who has made a statement, or who has given or agreed or is required to give evidence in relation to such proceedings.”

<sup>64</sup> Henry Campbell Black, *Black’s Law Dictionary*, (West Publishing Company, 2<sup>nd</sup> ed., 1910).

## IMPORTANCE OF WITNESSES

The role of a witness is very important in the criminal justice system of any country. The judge needs the help of witnesses to complete the case. The **Committee on Reforms of Criminal Justice System**<sup>65</sup> while highlighting the importance of witness states:

“By providing evidence of the commission of crime, the witness performs a sacred duty of assisting the court to find out the truth. For this reason, the witness swears in the name of God or confirms that he is speaking the truth, the whole truth, and nothing but the truth. He/she performs an important public duty to assist the court in determining the guilt of the accused in the case. He submits himself to cross-examination, and cannot refuse to answer questions on the ground that questions punish him.” (Page 151)

The Supreme Court has identified the key position of witnesses in relation to a fair trial: “A fair trial is the one in which witnesses are not threatened or compelled to give false evidence against the accused”.<sup>66</sup>

## REASONS FOR WITNESS TURNING HOSTILE

The threat to the lives of witnesses is one of the main reasons why they withdraw their previous statements during the trial. There is little in the law apart from these provisions to shield witnesses from external attacks, inductions, or intimidations. Political pressure, fear of the police and the lack of fear of the perjury law, unsympathetic law enforcement machinery and corruption are some of the other reasons why witnesses turn hostile during the trial.<sup>67</sup>

In *Swaran Singh v. State of Punjab*<sup>68</sup>, it was held that-

The witnesses are harassed a lot. They come from far-away places and see the case being adjourned. They have to appear in the court several times on their own. Lawyers also play an important role in this process. Sometimes the witness is threatened, maimed, or even bribed. Witnesses have no protection. By adjourning the case the court becomes a party to such a

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<sup>65</sup> Government of India, *Report of Committee on Reforms of Criminal Justice System*, (Ministry of Home Affairs, 2003).

<sup>66</sup> *Zahira Habibulla H. Shiekh and Another v. State of Gujarat & Ors.*, (2004) 4 SCC 158.

<sup>67</sup> *Hostile Witness: Emerging challenges & issues*, [https://shodhganga.inflibnet.ac.in/bitstream/10603/8788/14/14\\_chapter%205.pdf](https://shodhganga.inflibnet.ac.in/bitstream/10603/8788/14/14_chapter%205.pdf).

<sup>68</sup> (2000) 5 SCC 68

miscarriage of justice. The court does not give respect to the witness. For these reasons a person avoids becoming a witness and because of this administration of justice is hindered. (Para 37).

Likewise, in *Sakshi v. Union of India*,<sup>69</sup>

Here, a writ petition was filed u/a 32 of the Constitution by way of PIL, by Sakshi which is an to provide for legal, medical, psychological etc assistance to women who are a victim of any sexual abuse or harassment.

The sight of the accused may evoke an element of intense fear in the mind of the victim or witnesses or may shock them. This fear may prevent the victim from giving full details of the incident, which may result in a miscarriage of justice. Therefore, a screen or some similar arrangement can be made where the victim or witnesses do not need to undergo the trauma of seeing the body or the face of the Accused. (Para 32).

Further, in Para 34 the following guidelines were given for holding trial of child sex abuse or rape:

- i. such arrangements may be made where the victim or witnesses (who may be as vulnerable as the victim) do not see the body or face of the accused;
- ii. the questions put in cross-examination on behalf of the accused to be given in writing to the Presiding Officer of the Court who may put forward them to the victim or witnesses in a language known to them and is not embarrassing for them;
- iii. A person who has been the victim of child abuse or rape should be allowed adequate breaks as and when required to testify in court.

On the evaluation of various cases, the following reasons can be ascertained which make witnesses retracting their statements before the court and turning hostile:

1. Threat/Intimidation.
2. Inducement by various means.
3. Utilization of muscle and monetary power by the accused.
4. Protracted trials.
5. Hassles faced by witnesses during investigation and trial.
6. The non-existence of any clear-cut legislation to check hostility of witnesses.

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<sup>69</sup> 2004 SCC (Cri.) 1645

## CASES OF WITNESS TURNING HOSTILE

The need to protect witnesses has been upheld by the Hon'ble Supreme Court in *Zahira Habibulla H. Sheikh and Another v. State of Gujarat*<sup>70</sup>. The case is also known as “**Best Bakery Case**”.

**Facts-** On February 2002, a business concern known as “Best Bakery” at Vadodara was burnt down by an unruly mob of large number of people. In the ghastly incident, 14 persons died. The attacks were said to be part of retaliation for the killing of 56 people on the Sabarmati Express. Zahira was a key eye witness and many persons besides Zahira were also eye-witnesses.

During the trial in the fast track court, Zaheera turned hostile saying she cannot identify the accused. 37 of the prosecution witnesses, including several eye witnesses, some of whom were relatives of the deceased, turned hostile at the trial. Additional session's judge of Vadodara fast track court acquits all the 21 accused in the cases that were named by Zaheera in her statements before police and NHRC. In the presence of Teesta Setalvad, secretary of Citizens for Justice and Peace, Zaheera gives a statement on oath before NHRC about how she was forced to retract her statements in court. She also named those who have threatened to withdraw her statement.

While reversing the acquittal and ordering a retrial outside Gujarat, in the State of Maharashtra, the Apex Court made several observations on the question of protection of witnesses. In this case, the Supreme Court observed that “Legislative measures to emphasize prohibition against tampering with witnesses, victim or informant, have become the imminent and inevitable need of the day.” (Para 395)

In another case, *Sidhartha Vashisht @ Manu Sharma v. State of NCT, Delhi*<sup>71</sup>, or the famous **Jessica Lal murder case** where total 80 witnesses turned hostile. A private party was organized where some people were invited and served alcohol. Jessica Lal and one Shyan Munshi were serving the liquor. The prosecution alleges that appellant Sidhartha Vashisht came there along with his friends and asked for liquor. Jessica Lal and Shyan Munshi refused to serve them liquor as the bar was closed. According to the prosecution, the appellant got outraged by the refusal to serve liquor, took his .22 pistol and fired two rounds, first into the ceiling and the second at Jessica Lal,

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<sup>70</sup> AIR 2004 SC 346.

<sup>71</sup> AIR 2010 SC 2352.

which proved to be fatal for her and she died. According to the prosecution, several persons witnessed the incident.

A person named Munshi was a key witness in the case. During the reading of FIR, he said “the statement he gave was recorded in Hindi while he had narrated the whole story in English.” Munshi in his previous statement said he saw two guns that night. He, however, turned from his statement and later said he just saw two gentlemen at the bar counter and nothing about the gun.

## **INTERNATIONAL LEGAL FRAMEWORK**

### **International Covenant on Civil and Political Rights, European Convention on Human Rights and Universal Declaration of Human Rights**

Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.<sup>72</sup> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.<sup>73</sup> Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.<sup>74</sup>

#### **1. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power**

It was adopted by the United Nations General Assembly in 1985. It provides that State should take steps to minimize victims’ distress, protect their privacy whenever possible, and ensure their protection, as well as that of their relatives from intimidation and retribution.<sup>75</sup>

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<sup>72</sup> *International Covenant on Civil and Political Rights*, Art. 14, <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

<sup>73</sup> *European Convention on Human Rights*, Art. 6, [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf).

<sup>74</sup> *Universal Declaration of Human Rights*, Art. 11, <https://www.un.org/en/universal-declaration-human-rights/>.

<sup>75</sup> *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, General Assembly, Art. 6(d), [https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.29\\_declaration%20victims%20crime%20and%20abuse%20of%20power.pdf](https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.29_declaration%20victims%20crime%20and%20abuse%20of%20power.pdf).

## 2. UN Convention against Transnational Organized Crime

Witness should be supported by support personnel, such as counselors, starting with the initial report and lasting until their help are no longer needed. As a matter of paramount interest witnesses will have their privacy protected.<sup>76</sup>

### WITNESS PROTECTION SCHEME, 2018

The objective of the scheme is to ensure that there is no prejudice in the investigation, prosecution, and trial of criminal offenses because witnesses are usually intimidated or frightened to give evidence without protection from violence or other criminal recrimination.

#### 1. The Law Commission of India, Fourteenth Report

The Law Commission noted in its Fourteenth Report that there is no provision to be found in courts for the witnesses' convenience when they come to court. In several states the witnesses must wait under the trees in the courthouse grounds or in the courthouse verandahs. They are not given cover from the heat and storm. There are no conveniences of any sort. The committee observed that it is imperative that the witnesses in court houses be provided with proper conveniences.<sup>77</sup>

#### 2. The Law Commission of India, Forty Second Report

Here, it was discussed for the first time the issue of threatening and harassing witnesses. The issue of threatening and bribing of witnesses was mentioned in chapter eleven of the report. In this chapter, the Commission proposed three new sections, penalizing certain illegal acts that affect proper judicial administration. The quantum of punishment proposed, though, was not enough. It is not enough just to punish the person accused of threatening a witness; the threatened witness should also be given adequate relief in the form of identity or physical protection, as required in a particular case.<sup>78</sup>

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<sup>76</sup> *UN Convention against Transnational Organized Crime*, ECOSOC, Art. 24 and 26, <https://www.un.org/en/ecosoc/docs/2005/resolution%202005-20.pdf>

<sup>77</sup> Law Commission of India, 14<sup>th</sup> Report on '*Reform of Judicial Administration*', 1958.

<sup>78</sup> Law Commission of India, 42<sup>nd</sup> Report on, '*Indian Penal Code*', 1971.

### 3. The Law Commission of India, One Hundred and Fifty Fourth Report<sup>79</sup>

The report gave various suggestions like-

- a. All necessary measures to create a good atmosphere that instills confidence in the minds of the witnesses must be implemented immediately.
- b. All causes on the part of witnesses of aversion and reluctance should be removed. Such an initiative should be there by handling them in a pleasant way and giving them self-confidence by providing them sufficient security, right from the stage of their police test.
- c. Sufficient trust must be built in the witnesses minds that they would be shielded from the accused's wrath.

### 4. The Law Commission of India, One Hundred and Seventy Second Report

The genesis of the present report was in the writ petition filed by an organization known as Sakshi to the Supreme Court in 1997, which had an interest in women's issues. The petitioner had applied for some changes to the statutory provisions regarding the rape offence. One of the suggestions put forward by the petitioner was that there should be a provision either in the Code of Criminal Procedure or in the Evidence Act that a minor who has been sexually assaulted should not be required to give his or her evidence in the presence of the accused as it will certainly traumatize the minor. The Law Commission recommended incorporating a proviso to section 273, Code of Criminal Practice, 1973.<sup>80</sup>

### 5. The Law Commission of India, One Hundred and Seventy Eighth Report

In this Report, the Law Commission found that experience indicates that when the accused happens to be a wealthy and/or influential individual or member of mafia gangs, the witnesses most frequently become hostile either because of the inducements or threats given to them or because of the promises made to them. The Commission noted that adequate steps to avoid these incidents should be formulated.<sup>81</sup>

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<sup>79</sup> Law Commission of India, 154 Report.

<sup>80</sup> Law Commission of India, 172<sup>nd</sup> Report on 'Review of Rape Laws', 2000.

<sup>81</sup> Law Commission of India, 178<sup>th</sup> Report on 'Recommendations for Amending various Enactments, Both Civil and Criminal', 2001.

## **6. The Report of the Committee on Reforms of Criminal Justice System, Government of India, Ministry of Home Affairs, 2003**

The Committee chaired by Justice V.S. Malimath discussed various issues faced by the witnesses in the Chapter Eleven, entitled “Eyewitnesses and Perjury”. The sufferings of witnesses were addressed in depth in Chapter. It also highlighted various inconveniences suffered by the witnesses in the court premises. The report contained 158 recommendations.

Witnesses risk threat at the accused side. It has highlighted various inconveniences at court premises suffered by the witnesses. It is respected that the committee has recommended that identity of witnesses be protected in cases of serious threats and danger to the witness life.

The committee has recommended for protecting the identity of witnesses in the cases of serious threats and danger to the life of the witnesses. It has also recommended for in-camera proceedings to protect the interests of the witnesses. However, the Report has failed to discuss the need and relevance of physical protection to the witnesses in detail. It is submitted that the issue of physical protection of the witnesses has assumed great urgency in the present scenario.

## **7. The Law Commission of India, One Hundred and Ninety Eighth Report**

In 2006 came the Indian Law Commission’s One Hundred and Ninety Eighth Study on ‘Witness Identity Security’ and ‘Witness Safety Plan’. It has also proposed a draft bill on the protection of witness identity, entitled ‘The Witness (Identity) Protection Bill, 2006’. The report consists of XII Chapters. The Commission highlighted the need for witness protection programs in India to achieve better rates of conviction. It has suggested that programs for witness protection should be confined to cases of a serious nature. It should be noted that in cases where the offense is not serious, but the accused is rich, powerful and influential, the Law Commission has failed to recognize the need for protection and has every chance of influencing or intimidating the witness.

On 6 December 2018, the Supreme Court gave its nod to the approval of the Draft Witness Protection Scheme prepared by inputs from 18 States/Union Territories, various open sources inviting suggestions from police officers, judges and civil society which were finalized by the National Legal Services Authority afterward. The bench comprising Justice A.K. Sikri and Justice

S. Abdul Nazeer has recognized the witness' right to testify within the framework of Article 21 of the Constitution and has confirmed that<sup>82</sup>-

*“The right to testify in courts without any pressure and threat is under severe attack today. If a person is unable to testify in courts due to threats or other pressures, then it is a clear violation of Article 21 of the Constitution.”* (Para 16) Furthermore, within Article 141/142 of the Constitution, the bench considered the scheme to be a ‘law’ and the center and state had to follow it until competent legislation on the same subject was drawn up.

As per the Witness Protection Scheme, 2018, there are **three categories of witness as per threat perception** -

- a. **Category A-** It includes those cases where threat extends to the life of the witness or his/her family members during/after investigation or trial.
- b. **Category B-** It includes those cases where threat extends to safety, reputation or property of the witness or his/her family members during/after investigation or trial.
- c. **Category C-** It includes those cases where the threat is moderate and extends to harassment or intimidation property of the witness or his/her family members during/after investigation or trial.

✓ It also provides for **Witness Protection Fund-**

The program's expenses would be covered through a Witness Security Fund to be set up by States and Union Territories. The states shall make annual budgetary allocation for the fund. The said Fund will be operated under the State/ UT Government by the Department/ Ministry of Home.

✓ **Types of Protection Measures-**

- a. Ensure that the witness and the accused do not face each other during an inquiry or court
- b. Monitoring of phone and e-mail calls;
- c. Arrangement with the telephone company for changing the phone number of the witness or granting an unlisted telephone number to him or her;
- d. Installation of security equipment such as security doors, CCTV, alarms, fencing etc. in the witness's home;
- e. Disguise the witness' identity by referring to him/her with the name or alphabet changed;

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<sup>82</sup> Mahender Chawla and Ors. v. Union of India & Ors., 2019 (3) SCJ 370.

- f. Close security, patrolling frequently around witness' house;
- g. Temporary change of residence to house of a relative or nearby town;
- h. Escort to and from the court and provision for the date of the hearing of government vehicles or state-funded transport;
- i. Keeping of proceedings in camera;
- j. Allowing a support person to remain present during the recording of statement and deposition;
- k. Usage of specially built court rooms for the vulnerable witness which have special arrangements including live video links, one way mirrors and screens, separate passages for witnesses and accused, with the option to change the picture of the face of the witness and to change the audio feed of witness voice;
- l. Ensure expeditious, day-to-day recording of deposition during the trial without adjournments;
- m. Time-to - time granting of periodic financial assistance/contributions to the witness from the Witness Protection Fund for the purpose of relocating, maintaining or beginning a new vocation/profession, if required;
- n. Any other safeguard measures deemed necessary.

## CONCLUSION

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Law is a means to an end, the end being achieving justice. Law cannot stay static, if this goal is to be reached and must adapt due to the transformation of the population. The Witness Protection Scheme, 2018, is a first national-level effort to include comprehensive witness protection that will go a long way in eliminating witness victimization. The witness is known as eyes and ears to law, who play a major part in getting offenders to justice. The scheme seeks to ensure witnesses are provided fair and sufficient security.