Need for Psychological Check-ups and Medical Treatment to the witnesses of Heinous Crimes

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Abstract

Witnesses are regarded as one of the most indispensable element in the criminal justice system. It is because of them that the trial finds some substance so as to arrive at a fair conclusion. The inputs provided by the witness may have direct bearing on the conviction or acquittal of an accused, hence it is desired that such witness be protected from the wrath of extraneous factors that have the capability to change his stance over a particular case. Extraneous factors in form of corruption or threats form a majority which results in turning of the witness hostile; hence it becomes rudimentary for the state to ensure protection of such witness so as not to alter the prescribed course of justice.

Keywords: Witness, Crime, Justice, Hostile.

Introduction

What is witness protection? What are its main elements? How is it used to strengthen criminal investigations and prosecutions? Are there any universally applicable lessons that are the secret to successful witness protection programmes? Can countries with limited human and financial resources afford programmes like the ones operated and prized by well-funded and well-resourced legal systems? These are some of the questions that the present publication seeks to answer. Some answers will come easily. In most cases, however, experience has shown that, in actuality, practice is complicated.

The ability of a witness to give testimony in a judicial setting or to cooperate with law enforcement investigations without fear of intimidation or reprisal is essential to maintaining the rule of law. Increasingly, countries are enacting legislation or adopting policies to protect witnesses whose cooperation with law enforcement authorities or testimony in a court of law would endanger their lives or those of their families.

Protection may be as simple as providing a police escort to the courtroom, offering temporary residence in a safe house or using modern communications technology (such as videoconferencing) for testimony. There are other cases, though, where cooperation by a witness is critical to successful prosecution but the reach and strength of the threatening criminal group is so powerful that extraordinary measures are required to ensure the witness’s safety. In such cases, resettlement of the witness under a new identity in a new, undisclosed place of residence in the same country or even abroad may be the only viable alternative.

Who is a Witness?

Witness is one who can give a firsthand account of something seen, heard, or experienced. He furnishes ‘evidence’. Witness, in law, in Britain and the United States, is a term used to designate either a person who testifies or gives evidence in a judicial or quasi-judicial proceeding or someone who attests to or is present at the execution of a legal instrument such as a deed, affidavit, or will. An oath is required of every person called to testify at a judicial proceeding. Not every person may be competent to testify as a witness, such as a person of unsound mind. The attendance of a witness at a judicial or quasi-judicial proceeding is compelled by the issuance of a subpoena. However, in this paper, researcher is dealing with the former class of witness who gives...
As per the proposed Bill, “witness” means (i) any person who is acquainted with the facts and circumstances, or is in possession of any information or has knowledge, necessary for the purpose of investigation, inquiry or trial of any crime involving serious offence, and who is or may be required to give information or make a statement or produce any document during investigation, inquiry or trial of such case, and (ii) includes a victim of such serious offence.

There are three categories of witnesses: (i) victim-witnesses who are known to the accused; (ii) victims-witnesses not known to the accused (e.g. as in a case of indiscriminate firing by the accused) and (iii) witnesses whose identity is not known to the accused. Category (i) requires protection from trauma and categories (ii) and (iii) require protection against disclosure of identity.

A reader interested in knowing about the possible varieties of witnesses may refer to Halsbury’s Laws of India. However, the list is not exhaustive. We come across different categories viz; eye witnesses, natural witnesses, chance witnesses, official witnesses, sole witnesses, injured witnesses, independent witnesses, interested, related and partisan witnesses, imimical witnesses, trap witnesses, rustic witnesses, child witnesses, hostile witnesses, approver, accomplice etc.

Role of Witnesses:

Right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying existence of courts of justice. The operating principles for a fair trial permeate the common law in both civil and criminal contexts. Application of these principles involves a delicate judicial balancing of competing interests in a criminal trial, the interests of the accused and the public and to a great extent that of the victim have to be weighed not losing sight of the public interest involved in the prosecution of persons who commit offence.

Witnesses are as important as the lawyers and judges because without the light thrown by witnesses, lawyers and judges would be lost in the jungle of facts and it would be difficult to impart justice. This is the reason why Bentham states that they are eyes and ears of justice. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial.

Malimath Committee Report adequately explains the role of Witnesses in Criminal Justice Administration in the following words:

“Witness is an important constituent of the administration of justice. By giving evidence relating to the commission of the offence he performs a sacred duty of assisting the court to discover truth. That is why before giving evidence he either takes oath in the name of God or makes a solemn affirmation that he will speak truth, the whole of truth and nothing but truth. The witness has no stake in the decision of the criminal court when he is neither the accused nor the victim. The witness performs an important public duty of assisting the court in deciding on the guilt or otherwise of the accused in the case. He sacrifices his time and takes the trouble to travel all the way to the court to give evidence. He submits himself to cross-examination and can not refuse to answer questions on the ground that the answer will criminate him. He will incur the displeasure of persons against whom he gives evidence. He takes all this trouble and risk not for any personal benefit but to advance the cause of justice.”

Examination of Witnesses and Law in India:

Examination of witnesses forms one of the key steps in the four essential steps of criminal trial. As far as back as 1932, the Section 31 of Bengal Suppression of Terrorist Outrages Act empowered the Special Magistrate to exclude persons or public from the premises of the Court in order to protect the identity of certain witnesses. Apart from this, there are other provisions also under Indian laws which speak about dealing with witnesses.

Evidence Act - Under S.151 and 152 of Indian Evidence Act, 1872, victims and witnesses are protected from being asked indecent, scandalous, offensive questions, and questions intended to annoy or insult them. Otherwise, there is no other provision for
protection of witnesses, as against threats, intimidation or any inducement whereby they are prevented from telling the truth. Very often, when an accused is released on bail, one of the terms and conditions imposed by the Court on the accused is that he shall not tamper the evidence, or approach the witnesses.

**Hostile Witnesses** – Section 154 of the Evidence Act prescribes for dealing with the hostile witnesses. Hostile witness has not been defined under the Act. A ‘hostile witness is one who from the manner in which he gives evidence shows that he is not desirous of telling the truth to the Court. Where a party calling a witness and examining him discovers that he is either hostile or unwilling to answer questions put to him, he can obtain permission of the Court to put questions to him which may be put to him by way of cross-examination. The problem of hostile witnesses is increasing and one of the main reasons for the same is lack of witness protection measures.

**Indian Penal Code** – Disclosing the identity of the victim under section 376, section 376A, section 376B, section 376C or section 376D of IPC is punishable. However, this protection does not extend to the witnesses.

**Perjury** – Giving false or misleading testimony under oath amounts to committing the offence of perjury. Perjury is punishable since the time of Manu19. This is another evil in the criminal justice administration. Chapter XI of IPC provides for the offence of giving false evidence (offence against public justice). and Section 340 of the Cr.P.C. states the procedure for the prosecution for contempt of lawful authority of the public servants, for the offences against public justice and for the offences relating to documents given in evidence. Section 340 of Cr.P.C. prescribes the procedure with dealing such offences.

**Criminal Procedure Code** – Normally the criminal trial is to be conducted in an open court, however, the Judge presiding may order that the public generally, or any particular person, shall not have access to, or be or remain in, the room building used by the Court. The inquiry into and trial of rape or an offence under section 376, section 376A, section 376 B, section 376C or section 376D of the IPC shall be conducted in camera. As a principle of natural justice the accused is entitled to the statements recorded under sub-section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub-section (6) of section 17323. Further, Section 273 of Cr.P.C. mandates that all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused or, when his personal attendance is dispensed with, in the presence of his pleader. Section 200 to 202 provides for examination of witnesses in front of complainant by the Magistrate.

**Special Acts** – Section 16 of Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) and 30 of the Prevention of Terrorist Act, 2002 (POTA) provided for the protection of witnesses.

**National Investigation Agency** – Recently, in the wake of Mumbai Terror Attacks, NIA Act 2008 was passed in which there is a provision for witness identity protection. For the reasons to be recorded in writing proceedings under this Act may be conducted in camera. If the Special Court is satisfied on an application made by the witness or the Public Prosecutor that the life of such witness is in danger, it may, for reasons to be recorded in writing, take such measures as it deems fit for keeping the identity and address of such witness secret and avoid mentioning their names in the judgments and records. Whoever contravenes, shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to one thousand rupees.

**International Witness Protection Laws:**

Under article 24 of the United Nations Convention against Transnational Organized Crime (General Assembly resolution 55/25, annex 1), States parties are to take appropriate measures to provide effective protection from retaliation or intimidation for witnesses who give testimony in cases involving transnational organized crime. The measures envisaged include physical protection, the relocation and non-disclosure or limitations on the disclosure of the identity and whereabouts of the witness and the introduction of evidentiary rules to permit testimony to be given in a manner that ensures the witness’s safety. States parties are to consider entering into agreements or arrangements with other States for the relocation of witnesses (para. 3). The provisions of the article apply also to victims
insofar as they are witnesses (para. 4).

Under article 26 of the Organized Crime Convention, States parties are required to take appropriate measures to encourage persons who participate or have participated in organized criminal groups to cooperate with law enforcement authorities for investigative and evidentiary purposes. Pursuant to paragraph 4 of that article, such persons are to be afforded protection in accordance with the provisions of article 24.

The protection of victims and/or witnesses is also explicitly addressed in the protocols to the Organized Crime Convention, specifically in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (General Assembly resolution 55/25, annex II, articles 6 and 7) and the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (Assembly resolution 55/25, annex III, articles 5 and 16).

The Conference of the Parties to the United Nations Convention against Transnational Organized Crime, at its second session, held in Vienna from 10 to 21 October 2005, identified witness protection as one of the areas that would be used to periodically review the status of implementation of the Convention and its related Protocols. An overview of the responses of States parties is included in the analytical reports submitted to the Conference at its third session, held in Vienna from 9 to 18 October 2006.

At its third session, the Conference requested its secretariat to collect and make available to States parties successful practices in the investigation of offences covered by the Protocols and in the protection and assistance measures offered to victims of trafficking in persons and smuggled migrants. It also identified witness protection as an area in which technical assistance could be provided to support the implementation of the two Protocols and as a cross-cutting issue for both the Organized Crime Convention and the Protocols thereto (CTOC/COP/2006/14, para. 1, decisions 3/3 and 3/4). In addition, in the Bangkok Declaration on Synergies and Responses:

In addition, in the Bangkok Declaration on Synergies and Responses: Strategic Alliances in Crime Prevention and Criminal Justice (General Assembly resolution 60/177, annex), adopted by the Eleventh United Nations Congress on Crime Prevention and Criminal Justice, Member States recognized the importance of giving special attention to the need to protect witnesses and victims of crime and terrorism and committed themselves to strengthening, where needed, the legal and financial framework for providing support to such victims, taking into account, inter alia, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Assembly resolution 40/34, annex). On the recommendation of the Commission on Crime Prevention and Criminal Justice, the Economic and Social Council, in its resolution 2005/16, encouraged Member States to exchange their experiences with and information on action taken to provide effective protection for witnesses in criminal proceedings involving transnational and national organized crime and for their relatives and all other persons close to them.

- **Position in USA** – In the United States, the Organised Crime Control Act, 1970 and later the Comprehensive Crime Control Act, 1984 authorised the Witness Security Program. The Witness Security Reform Act, 1984 provides for relocation and other protection of a witness or a potential witness in an official proceeding concerning an organised criminal activity or other serious offence. Protection may also be provided to the immediate family of, or a person closely associated with, such witness or potential witness if the family or person may also be endangered on account of the participation of the witness in the judicial proceeding.

The Attorney General takes the final decision whether a person is qualified for protection from bodily injury and otherwise to assure the health, safety and welfare of that person. In a large number of cases, witnesses have been protected, relocated and sometimes even given new identities. The Program assists in providing housing, medical care, job training and assistance in obtaining employment and subsistence funding until the witness becomes self-sufficient. The Attorney General shall not provide protection to any person if the risk of danger to the public, including the potential harm to innocent victims, outweighs the need for that person’s testimony.
Position in UK – Under the English law, threatening a witness from giving evidence, is contempt of Court. So also any act of threat or revenge against a witness after he has given evidence in Court, is also considered as contempt. Recently the U.K. Government has a law known as Criminal Justice and Public Order Act, 1994 which provides for punishment for intimidation of witnesses. S.51 of the Act not only protects a person who is actually going to give evidence at a trial, but also protects a person who is helping with or could help with the investigation of a crime.

Under Section 23(1) of the U.K. Criminal Justice Act 1988, a statement made by a person in a document is admissible in criminal proceedings (without cross-examination) as evidence of any fact of which direct oral evidence by that person would be admissible, if (i) the person who made the statement is dead; or (ii) by reason of his bodily or mental condition is unfit to attend as a witness; or (iii) that the person who made it does not give oral evidence through fear or because he is kept out of the way.

A prominent lawyer of the country, Mr. Fali S. Nariman remarks:

Jurisprudence in the West has accommodated itself to the idea that even though a criminal trial must be “fair” it need not always be “wrinkle-free.”

Cases Relating to Witnesses Protection in India:

India has been a witness of lots of cases in which conviction was not achieved due to the problem of witnesses turning hostile. These witnesses turned hostile because they were not provided adequate protection from the accused and at times were interfered with giving the true testimony. Each time the statement in Jennison v. Backer was defied. The following are the few cases which got attention of public through media due to their peculiar circumstances.

Ø Naroda-Patia: Mohammad Shakur Sayyad had deposed before the Nanavati Commission on 1st October 2003 naming several persons in the mob responsible for the Naroda-Patia massacre. He was one of the key witnesses in the case and had also been provided with one police guard.

Ø Ketan Thirodkar case: Bombay High Court had given police protection to an ex-journalist Ketan Thirodkar, because he had been under threats soon after he had filed the police complaint, which disclosed a series of illegal acts allegedly committed by the police in connivance with the underworld. However, the protection was a temporary one.

Ø Twin Blast case: The identity of the witness (Shivnarayan Pandey, a taxi driver who gave clues relating to the blast in August 2003) in this case was leaked to the media by an inspector on the day of the blasts. This officer allegedly circulated Xerox copies of a document bearing the name of the witness and the registration number of his vehicle. After that an extra protection was extended to the witness.

Ø Jessica Lal: Lack of a substantiate witness protection program was made evident in this case. This case saw several twists over the seven years of its trial, during which as many as 99 of the 100 witnesses turned hostile. However, thanks to the brave witness, Bina Ramani due to whom the killers were finally brought to justice.

Ø Zahira Sheikh – Zahira was an eye-witness to macabre killings in Gujarat, known as Best Bakery case, after the Godhra incident. The case raised an important issue regarding witness protection besides the quality and credibility of the evidence before the court. Zahira went to NHRC stating that she was threatened by powerful politicians not to depose against the accused persons. Supreme Court ordered for a fresh trial outside the State of Gujarat in this case and also ordered for protection of witnesses. But, it is interesting to note that two years later, Zahira was found guilty of perjury by the Apex Court, reason being the several twists and turns in the case due to lack of witness protection and lax attitude of the state.

It is shocking to note that, even in these singular cases the police was not able to extend a proper witness protection. This throws light on the dismal condition of witness protection laws in India. There is a long way to go in having a comprehensive witness protection program for all witnesses in the country.

Conclusion

There are two broad aspects to the need for witness
protection. The first is to ensure that evidence of witnesses that has already been collected at the stage of investigation is not allowed to be destroyed by witnesses resiling from their statements while deposing on oath before a court (problem of hostile witness). Which necessitates the introduction of procedure for maintaining anonymity of witnesses? The other aspect is the physical and mental vulnerability of the witness and to the taking care of his or her welfare in various respects which call for physical protection of the witness at all stages of the criminal justice process till the conclusion of the case (or even after that), by the introduction of witness protection programmes.

The 198th Law Commission Report discusses these problems elaborately, but while proposing for a draft bill it takes care of only the former aspect of witness protection only. The second aspect is only touched upon peripherally by providing mechanisms for recording evidence of witness in camera.

There is an immediate need to have legislative measures emphasizing prohibition against tampering with witness and witness protection not only during the trial but even after the trial.

The State has definite role to play in protecting the witnesses to start with at least in sensitive cases involving those in power, who has political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. As a protector of its citizens it has to ensure that during a trial in court the witness could safely depose truth without any fear of being haunted by those against whom he has deposed.

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**References**