

WITNESS PROTECTION-Bird's-eye view

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A witness is an indispensable aid in the justice dispensation system in any civilized society. Now-a-days we hear a lot of squabbles about unceremonious acquittals in sensational criminal cases. Most of them are on account of defection of loyalty of witnesses. Causes for defection may be various. Is the lack of witness protection one of them? My earnest attempt is to highlight the necessity and importance of effective witness protection measures, with a special thrust on criminal justice dispensation.

A witness happens to be the eyes and ears of the Court. But then, what is the plight of a witness who comes forward to depose before a court with a full sense of duty and conviction. Hon'ble Supreme Court in *Swaransingh Vs. State of Punjab*¹ expressed deep concern about the predicament of a witness in the following words.

“A criminal case is built on the edifice of evidence, evidence that is admissible in law. For that witnesses are required, whether it is direct evidence or circumstantial evidence. Here are the witnesses who are a harassed lot. A witness in a criminal trial may come from a far-off place to find the case adjourned. He has to come to the Court many times and at what cost to his own-self and his family is not difficult to fathom. It has become more or less a fashion to have a criminal case adjourned again and again till the witness tires and he gives up. It is the game of unscrupulous lawyers to get adjournments for one excuse or the other till a witness is won over or is tired. Not only that a witness is threatened; he is abducted; he is maimed; he is done away with; or even bribed. There is no protection for him. In adjourning the matter without any valid cause a Court unwittingly becomes party to miscarriage of justice. A witness is then not treated with respect in the Court. He is pushed out from the crowded courtroom by the peon. He waits for the whole day and then he finds that the matter adjourned. He has no place to sit and no place even to have a glass of water. And when he does appear in Court, he is subjected to unchecked and prolonged examination and cross-examination and finds himself in a hapless situation. For all these reasons and others a person abhors becoming a witness. It is the administration of justice that suffers. Then appropriate diet money for a witness is a far cry. Here again the process of harassment starts and he decides not to get the diet money at all.”

¹ AIR 2000 S.C. 2017

Invariant is the theory that the trauma of a person witnessing a crime starts from the crime scene itself. Aggressors pose open threat with wielded weapons to the so called eye witness right at the time of commission of the crime. During the course of investigation also a witness may suffer harassment, threat etc. at many hands. Pre-deposition and post-deposition periods are generally traumatic for a truthful witness.

A reader interested in knowing about the possible varieties of witnesses may refer to Halsbury's Laws of India (Butterworths - 2000 edition – Vol.15). However, the list is not exhaustive. Therein 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, inimical witnesses, trap witnesses, rustic witnesses, child witnesses, hostile witnesses, approver, accomplice etc. The group called "hostile witnesses" is the species culled out for considering the subject on hand.

The usage "hostile witness" does not find a place in the Indian Evidence Act, 1872. Authorities are not unanimous with regard to the meaning of the words "adverse", "unwilling" or "hostile" and the draftsman of the Evidence Act has, in view of the conflict, refrained from using any of those words in the Act. The matter is left entirely to the discretion of the court. A witness is considered adverse when, in the opinion of the Judge, he bears a hostile animus to the party calling him and not merely when his testimony contradicts his proof.

Common causes for hostility or adversity exhibited by the witnesses are the following.

- i) Threat/intimidation
- ii) Inducement by various means
- iii) Allurement/seduction
- iv) Disillusionment caused by the delay in the judicial process
- v) Hassles faced by the witnesses during investigation and trial.

For various other reasons also a witness may turn hostile. Accused/adverse party may be responsible for the volte-face shown by the witness in categories (i) to (iii). In other cases, the entire criminal justice system, including the trial courts, could be held responsible. Here comes the relevance of the observations made by the Apex Court in *Swaransingh's case*.

Recently, Hon'ble Supreme Court in "**Best Bakery Case**", (*Zahira Habibulla H. Sheikh and Another Vs. State of Gujarat and Others*)² came down heavily on the State administration in general and the investigating agency in particular for rashly and negligently handling their duties and abdicating their responsibilities. The categoric finding is that the whole

² (2004) 4 SCC 158

machinery of a State failed in maintaining the confidence of public in the justice delivery system. Apex Court in strong words reminded the trial Courts to be alive to the reality about the witness hostility. One of the predominant points taken note of by the Hon'ble Supreme Court is the lack of witness protection in our country. The principles stated in the above decision have been reiterated by the Hon'ble Supreme Court in the contempt proceedings taken up against *Zahira Habibulla H. Sheikh and Another*³ Apex Court highlighted the importance and primacy of the quality of trial process. It has been observed that if the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralyzed. Following excerpt from the said decision will be appropriate in this context.

“ The incapacitation may be due to several factors like the witness being not in a position for reasons beyond control to speak the truth in the court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by the courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle truth and realities coming out to surface rendering truth and justice to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness. 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.”

In *Zahira Habibulla H. Sheikh and Another Vs. State of Gujarat and Others*,⁴ apex court was emphatic on the role of the State to play in protecting the witnesses. It has been observed that as a protector of its citizens, the State has to ensure that during the trial in the Court the witness could safely depose the truth without any fear of being haunted by those against whom he had deposed. Supreme Court reminded the State that it has a constitutional obligation and duty to protect the life and liberty of the citizen. The question

³ (2006) 3 SCC 374

⁴ 2000 (4) SCC 187

that stares at the society is what step has been taken by us to protect a truthful and earnest witness?

Sec. 16 of the Terrorists and Disruptive Activities (Prevention) Act, 1987 (TADA) and Sec. 30 of the Prevention of Terrorism Act, 2002 (POTA)⁵ are not only in pari materia, but also verbatim. Provisions contained in POTA and TADA were the initial steps taken in the direction of witness protection. The special courts constituted under the respective enactments were authorized to avoid mentioning the names and addresses of the witnesses in the orders/judgments. Further, they were authorized to issue directions for keeping the identity and address of the witnesses undisclosed. Any contravention of those provisions is made punishable under the respective enactments. However, in reality, it was found that those provisions were not adequate for rendering actual protection to the witnesses in sensitive cases.

Recently the Criminal Law (Amendment) Act, 2005 (No.2 of 2006)⁶ has been enforced w.e.f. 16.4.2006. The said Act has amended the Penal Code, Code of Criminal Procedure and Evidence Act.

Above Act has introduced Section 195A to the Penal Code, whereby threatening or inducing any person to give false evidence is made punishable. By virtue of the said amending Act, Section 195 of Cr.P.C. has also undergone changes. Section 154 of Evidence Act empowers the court to permit the person who calls a witness to put any question to him which might be put in cross examination by the adverse party. Judicial pronouncements aplenty are available to fortify the proposition that the testimony of a hostile witness need not be discarded for the reason of hostility alone. The amending Act has created a sub section to Section 154 of Evidence Act, whereby the above mentioned principle has been incorporated in the statute.

We are yet to perceive the effect and impact of these provisions. However, the said provisions are not a complete solution in itself in the matter of witness protection.

In the *Best Bakery Case*, *Jasica Lal murder Case* and in many other serious and sensational cases we witnessed the exodus of hostile witnesses and the resultant acquittal of the accused persons. Public outcry that the justice dispensation system crumbled at least in those cases deserves keen attention. How will we protect the witnesses who wanted to submit the truth, nothing but truth, before a court of law?

Many developed countries have enacted legislations in connection with Witness Protection Programmes. In the United States, the Witness Protection Programme (also known as WITSEC) was established by the Organized Crime Control Act of 1970. Purpose of this legislation is to protect the witnesses from intimidation before their testimony or criminal retaliation thereafter. The

⁵ POTA has been repealed by the Prevention of Terrorism (Repeal) Act 2004; w.e.f. 21-12-2004.

⁶ The Gazette of India-Extraordinary Part II-Section 3, Sub Section (ii); No.348, New Delhi, Wednesday, April 12, 2006, Ministry of Home Affairs Notification-S.O.523 (E)

United States Federal Government both relocates and gives new identities to the witnesses who risk their lives by giving testimony. Government provides financial and employment aid to those persons, who are supported by a moral stand-point. Effective Witness Protection laws and schemes are available in South Africa also. Canada gives witness protection cover under the Witness Protection Act, 1996. The consideration and concern shown by the nations to protect their citizens from harassment, haunting trauma and victimization deserve not only appreciation, but also emulation.

With the terrorist's activities on the rise, Police in our Metropolitan Cities have formulated four point plan to protect vital witnesses involved in sensational cases. State Governments are yet to react in the desired manner. The points are:

- i) Transferring the witnesses from his city of residence to another city.
- ii) Provide a job to the witness similar to one he is/was doing.
- iii) Giving of a new name, identification, ration card and pass port to the witness.
- iv) Government should undertake the responsibility of providing security cover to witnesses and their family.

In some developed countries, even plastic surgery of the witness, to change his identity, is considered as an option.

High level Committee constituted by the Union Government to reform and revamp the existing criminal justice system also felt that the time has come to enact a law for protecting the witness. Nevertheless, the process of law making is in snail speed, snagged in technicalities.

It is no time for a slumber. It is high time that we woke up and acted for the protection of the citizens who appear before the courts to testify so as to render a helping hand in the dispensation of justice. *Best Bakery Case, Jasica Lal* murder case and many other like cases, if repeated, would shatter the strength and credibility of our criminal justice system. Every country is expected to make laws to meet the situations prevalent in that country. However, there is nothing wrong, rather it is wise, in imbibing the spirit shown by other countries in the matter of witness protection. No nation can afford to expose its righteous and morally elated citizens to the peril of being haunted or harassed by anti social elements, for the simple reason that they testified the truth in a court of law. Dearth of funds should never be an excuse. If our society fails to be alive to the reality, the plight of an honest witness will be catastrophic and calamitous.

Tail piece: - "You cannot witness for me, being slain" - William Shakespeare (Henry VI Part I)
