

# Role of Judiciary in Protecting Witnesses in the Criminal Justice System: A Critical Analysis

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**Abstract:** Witnesses are the eyes and ears of the Criminal Justice System. Witnesses being the only spectator of an offence are the indispensable aid in the Criminal Justice Delivery System but are yet at a vulnerable position that they turn victims at several instances. Starting from the investigation stage to the trial proceedings of the court witness assist the Court in every possible way to punish the accused person by deposing every relevant fact which can lead to a fair justice delivery and conviction of the accused person without getting any gain. Witnesses are often subjected to threatening, inducement, harassment, and different kinds of intimidation to them and also their family members. Due to this, in many cases due to lack of Witness Protection Laws the witnesses not getting adequate protection they become victims. Unlike the accused, the witnesses or victims have no rights for their protection. And when the state agencies fail to do their duty, as has often happened in many cases in the recent past, the witnesses turn out to be a victim and subsequently left to suffer injustice silently. Protection of witness is also one of the attributes of fair trial which is guaranteed under Article 21 of the Constitution of India wherein proper safety and security should be ensured. But due to lack of effective Witness Protection Regime and statutory framework for giving protection in our country the witness has lost confidence when it's about their safety and security. This has also given rise to high acquittal rate and decrease in convictions in the justice administration system. The Judiciary has actively given importance for having witness protections Laws in India and at the same time has enumerated the duties of Witnesses towards the state when the state is providing protection.

Keywords: Witness protection, Criminal Justice System, Adversarial system, Intimidation, Article 21 of constitution.

## 1. INTRODUCTION

Witnesses plays a pivotal role in any Criminal Justice System. Witnesses true disposition decides the fate of the case and in the process, they possess the sacred duty in speaking the truth and details about the case which they have knowledge of the relevant facts relating to the matter under enquiry. It is because of them that the trial finds some substance so as to arrive at a fair conclusion. The evidence provided by the witnesses no doubt has direct bearing on either conviction or acquittal of an accused person. The fact that role of witnesses is indispensable in the Criminal justice system as they help the state in securing evidence in the court of law by the process the State has equal responsibility to provide protection who fear any kind of threat or intimidation. So, it is desired that such witness be protected from the wrath of extraneous factors and that's the reason why there was a need of having a Witness Protection Law in India. Some of the factors like corruption, intimidation, threat of murder, etc are reasons as to why these witnesses are turning hostile or are hesitated to be witnesses during the trial. Since under Article 21 of the Constitution of India provides Right to life and liberty to the Citizens of India so it is duty of the State to ensure that Right to life of witnesses and victims to be protected and proper safety and security to be ensured. Due to lack of legislative stand on the issue on providing protection to witnesses so that they can depose without fear, the judiciary has actively played an important role through its verdicts from time to time in highlighting the importance of protecting the witnesses in the Criminal justice system. If the system can bring the confidence among the witnesses to depose without any fear, then the judiciary will no longer face situations where the witnesses turn hostile in cases.

## 2. METHODOLOGY

For carrying on the current research, the author has adopted qualitative approach. Along with primary authority i.e., different relevant statutes, secondary sources such as many relevant peer-reviewed journals, books, related reports, and reliable websites are reviewed in the accomplishment of the study.

## 3. ANALYSIS AND DISCUSSION

### Who is a Witness?

The word witness has not been defined in our Indian Evidence Act, 1872 nor in our Code of Criminal Procedure 1973. However, with the slow developments in bringing out the importance of witnesses in the Criminal Justice system we now have definitions of witness in the Unlawful Activities (Prevention) Act, 1967, TADA and POTA etc and specifically now in the Witness Protection Scheme of 2018.

According to Black's Law Dictionary, "A witness is a person who has knowledge of an event as the most direct mode of acquiring knowledge of an event is by seeing it, the term 'witness' has acquired the sense of a person who is present and observes a transaction".

According to Section 3(ed) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015 "A witness as 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 an 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 includes a victim of such offence"

Witness Protection Scheme, 2018 defines witness as, any person, who possesses information or document about any offence [1]. The scheme has provided for the categorization of witnesses on the basis of threat perception. The categorization is more or less similar to the Delhi Witness Protection Scheme, 2015. It categorizes witnesses into category A, B and C on the basis of threat suffered by witnesses and their family members and phase of the criminal proceedings during which it is suffered.

## 4. LAW COMMISSION OF INDIA POSITION ON WITNESS PROTECTION

The Law Commission of India has on several occasions recommended the incorporation of a comprehensive law on Witness Protection in India. The Commission in its reports has highlighted several issues faced by witness during different stages of a trial or even after completion of trial and taking these issues seriously the Law Commission of India have given suggestions in its various reports.

Firstly, in the 14<sup>th</sup> Report of the Law Commission of India- The inadequate laws for witness protection and their security were addressed wherein the outcome was to give some miscellaneous facilities for witness and some travel allowances. The Law Commission also concluded that if witness is not given basic facilities and most importantly security to them and their family then they might lose trust on justice and avoid deposing evidence before court [2].

Years later, in 1980, the gravity of the situation was illustrated in the 4<sup>th</sup> National Police Commission Report [3], which stated that prosecution witnesses being hostile as a result of pressure from the accused was becoming increasingly normal, and that there were insufficient laws to prevent witness intimidation. The inadequacy of the monetary compensation given to witnesses was also stated in the report. Despite these findings, no specific guidelines for witness protection legislation were made. The 154<sup>th</sup> Law Commission Report in 1996[4], which included an entire chapter on witness facilities and protection, that is the report states that since witnesses must face the wrath of the accused, a sense of trust and security must be instilled in the witness's mind by providing sufficient protection. The Committee recommended that some steps be taken to address the monetary compensation offered on a reasonable basis, and that the witness be treated with dignity in order to eradicate all causes of mental distress. However, no recommendations were made about the physical defense of witnesses, nor was there any suggestion as to how witnesses might be protected from the accused's wrath.

*The 172<sup>nd</sup> Report of the Law commission* has proven to be one of the most important in developing, formulating policy that effectively highlights how the witnesses are to be treated in the case of child abuse. The report recommended the testimony of a minor who has been subject to sexual abuse should be recorded as soon as possible, and also

their statements should be taken through videotaping [5]. The *178<sup>th</sup> Report of the Law Commission* highlights on the issues where witnesses are turning hostile and the procedure which is to be followed during the investigation stage where sufficiently evidence can be collected before these witness turn hostile[6].The Committee on Reforms of Criminal Justice System[7] which is popularly to be known as the Malimath Committee 2003 was the first who highlighted the urgent need for a comprehensive legislature to be enforced to protect witnesses and give them security. After a gradual development for the protection of witnesses in India comes the 198<sup>th</sup> law Commission of India Report: Witness Identity Protection and Witness Protection Programmes where with the help of judiciary who also highlighted the need for legislations in the field of protection to witnesses comes up with a draft of the Witness Identity Protection Bill,2006. The bill substantially covers the problems of vulnerable witnesses and the best practices followed from across the world to protect them [8].

## 5. ROLE OF JUDICIARY ON WITNESS PROTECTION

It is the Court's primary responsibility to perform a free and fair trial and reach a fair conclusion after reviewing all of the evidence presented. "The Judge has a crucial role to play in ensuring that the cases go fairly. A judge's job is to strike a reasonable balance between the interests of the accused and the rights of the victims or the witnesses. The aim of a criminal trial, or the prosecution's position, is to ensure a fair trial, not to convict the accused. In order to do this, the Judge must ensure that witnesses are not intimidated or influenced in order to exploit their depositions in court. The trial is reduced to a travesty in the criminal justice system when witnesses are under duress. The judiciary has time and again commented on the dire need and significance of witness protection in India.

The Hon'ble Supreme Court in *R.K.Anand v. Registrar, Delhi High Court*[9], highlighted the problem of interference in criminal proceedings by way of witness intimidation which further emphasized that need for preventing witness intimidation has become essential so that every cases trial achieves an justified conclusion.

The Hon'ble Supreme Court in *Swaran Singh v. State of Punjab* [10] described the importance of witnesses as under: "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." In this Case the Court has also emphasized on the harassment faced by witnesses when they visit court to depose like that of frequent adjournments, disrespectful behavior of towards the witnesses, not providing adequate travel money etc.

In *National Human Rights Commission v/s State of Gujarat and Ors* [11]., the Supreme Court in this decision highlighted the facet of a fair trial. The Court observed that if the witnesses are not provided with a favorable environment, then they would not be able to depose freely. Therefore, it is the duty of the court to make sure that the witness should submit his testimony without any fear or intimidation. The need for witness protection programs in India is too highlighted stating that for a successful prosecution of criminal cases protection of witness is essential.

The Hon'ble Supreme Court in *Zahira Habibullah Sheikh v. State of Gujarat* [12] states that the Witnesses are the eyes and ears of Justice System and if they are incapacitated from acting as eyes and ears of justice then the trial gets putrefied and paralyzed and no longer the process would constitute a fair trial. The incapacitation may be because of several reasons again like greed of money, fear from opposite party, ignorance etc. The Court has given importance to witness statement in any case hence intimidation of witnesses should be checked with having proper witnesses' protection laws.

In the landmark case of *Mahender Chawla v. Union of India* [13], Hon'ble Supreme Court made an attempt to bring the aspects of protection of the witness within the purview of legislation and made a duty of the state authorities to provide safeguard to the witness during the course of the trial. Before this landmark judgement, there was no comprehensive policy on witness protection in India. The Law Commission of India in various of its reports and Hon'ble Supreme Court of India in its previous decisions highlighted the urgent demand of witness protection programme in our country but the same was ignored. Therefore, Hon'ble Supreme Court approved a Scheme called **Witness Protection Scheme, 2018**. As per the verdict, the Scheme shall be deemed as Law within the ambit of Article 141 and 142 of the Constitution of India till any suitable law is incorporated by the Parliament.

## 6. THE WITNESS PROTECTION SCHEME, 2018

To ensure fair trial of criminal offence it is quintessential to protect the witnesses from intimidation or threat of life. For that reason, the Central Government came up with a National Scheme that is the Witnesses Protection Scheme in

2018. This Scheme has been drafted with inputs from National legal Service Authority, police, Civil society, Judiciary, State and Union Territories. Though it is the 14<sup>th</sup> Law Commission report of 1958 who initially recommended such scheme for witness Protection. Thereafter with view of all the Law Commissions reports with respect to Witness Protection and also the Malimath Committee have strongly recommended Witnesses Protection mechanism and also suggested that court should step in incases where witnesses are harassed during the cross examinations.

In severe cases, the Witness Protection Scheme, 2018 envisions means for ensuring witness life/safety in events ranging from [14]; having a police escort to the courtroom or using audio video means for recording testimony of such witness to measures ensuring privacy, temporary residence in a safe house, providing new identification, relocation of witnesses, and so on.

The Scheme, among other things, provides for the classification of witnesses into three categories, namely **Category A, Category B, and Category C**, based on threat perception, as well as the establishment of a State Witness Protection Fund, which will be run by the Department/ Home ministry under the State/ Union Territory Government, to cover the costs of implementing the Witness Protection Order [15]. As per the Scheme, the genesis of Witness Protection Order is the filing of an application in the prescribed form [16] before the Competent Authority of the concerned District, through its Member Secretary. Clause 6 of the Scheme outlines the procedure for processing such applications, which is based on the Threat Analysis Report (TAR) prepared by the Additional Commissioner of Police/Deputy Commissioner of Police in charge of the concerned Police Station, and its disposition within five working days of receipt of said Report. The Competent Authority is also empowered to issue interim protection orders before a verdict is reached on the witness' application, as well as to monitor and review the final order of protection on a monthly basis. Monitoring of mails/telephone calls; ensuring witness and accused do not come face to face during investigation/ trial; concealing identity; conducting in-camera trial; regular patrols around witness' home, etc. are all examples Of Witness Protection Orders that could be issued, each proportionate to the threat and for a particular period and subject to monitoring/review. The Scheme also includes provisions for witness confidentiality protection (Clause 9), identity- modification (Clause 10), witness relocation (Clause 11), confidentiality and record preservation (Clause 13), and more. Furthermore, under Clause 12 of the Scheme, every state is required to publicize the scheme widely, and the Investigation Officer and Court are required to warn witnesses of the Scheme's presence and key features.

## **7. DRAWBACKS OF THE WITNESS PROTECTION SCHEME, 2018 AND A NEED FOR COMPREHENSIVE WITNESS PROTECTION LAWS**

The Witness Protection Scheme, 2018, is a welcome move in the right direction in terms of witness protection, but it does have some flaws. To begin with, the security provided therein is only for a period of three months at a time. Second, the recommendations/ advice made in TAR(s) by concerned police officers, who are frequently vulnerable to corruption, political pressures, and other factors, seem to be the foundation of orders that may be passed under the Scheme. Moreover, although the Scheme provides for confidentiality and the protection of documents, it does not provide any penal actions against such violations.

The Scheme also does not make any provision for occupation/ work/ education, in the interim, of the witnesses. The Witness Protection Bill, on the other hand, included strict provisions about the sanctions that could be imposed for violating the terms of the Bill; instructions for the protectee's safety and security from the beginning of the investigation until the stage after trial on terms that the Court deems appropriate based on the threat perception of the individual, and so on. In fact, the said Bill included explicit provisions relating to the protectee's right to engage in a different profession without jeopardizing the case's reputation or the juvenile protectee's education, which were absent from the Scheme. A similar bill was introduced in Parliament to secure the identity of witnesses [17]. Unfortunately, none of the above Bills were able to become law.

India has undoubtedly come a long way in terms of ensuring the protection and security of witnesses, who are an important part of the criminal justice system. However, due to the lack of a legislative framework with strict punitive consequences, which leaves the whole mechanism, which was adopted through the judicial process, in limbo. As the Indian Courts have often recognized, the edifice of administration of justice is based upon witness coming forward and deposing without fear or favor, without intimidation or allurement in Courts of Law [18]. Therefore, the existence of an effective and strict Witness Protection Scheme cannot be stated to be enough. Time has come for the **State** to

step into its role and provide comprehensive legislation in this direction. It is only then that the stream of justice will be able to flow freely and independently.

The Supreme Court acknowledged in the **Best Bakery case** [19] that political bribery and unethical practices play a role in witnesses being hostile. It is possible that the existing scheme would have addressed the problems embedded in it if the provisions were deliberated upon by the stakeholders.

## 8. CONCLUSION

Finally, for the first time in India nationally a scheme for protecting witness was enacted in 2018. This scheme will enhance rendering of justice for the victims by ensuring the safety of witnesses and keeping such information confidential. The witness protection scheme will go a long way in strengthening the criminal justice system in India. Now only three months is the period given for protection by way of threat analysis report submitted by the specific machinery head of the police who may be influenced by the politicians. The loopholes now appears that how long such a protection can be given till the disposal of the case or even after that not given whether it is possible to extend such protection. Since it is in the form of a scheme need to give a legislative effect. And special mention of child as a witness and their protection including in cyberspace and internet should be considered.

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