

HOSTILITY OF WITNESSES IN CRIMINAL TRIALS: EMERGING ISSUES AND CHALLENGES

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Abstract

The court system's role in ensuring justice for victims and punishing offenders is a key indicator of its effectiveness. To determine guilt, courts examine all the evidence presented by the parties, whether oral or written. Witness testimonies are used to support the oral evidence. Witnesses are an important source of information for the courts, as they can provide details about the accused person's actions and motives. The witness accounts help the courts to make a fair judgement. Therefore, witnesses are essential for the administration of the criminal justice system. Whittaker Chambers said that "in search of truth, he plays that sacred duty of the sun, eliminating the darkness of ignorance and illuminating the face of justice, surrounded by devils of humanity and compassion." However, witnesses face many challenges and risks in India. They often receive reports of inducement, intimidation, harassment, and threats from various parties. These incidents create fear and hesitation among witnesses, who may not want to testify or cooperate with the legal process. They may also become hostile or biased against the accused person. Moreover, there is no witness protection system in India that can guarantee the security and safety of witnesses. The Law Commission of India has recommended several measures to address this issue in its report on witness protection. The purpose of this research paper is to explore this problem and its implications for the criminal court system in India. It will also examine how CrPC can protect witnesses from harm and danger. In this essay, it will discuss both the advantages and disadvantages of witness protection programs in India. It will also review the Law Commission's recommendations and suggest a comprehensive strategy for witness protection in India. The main focus of this paper is on ensuring a fair trial for all parties involved in a criminal case.

Keywords: Witnesses, Law Commission of India, Criminal Justice Administration, Oral Evidence, CrPC

1.0 Introduction

Bentham reportedly claimed that witnesses serve as the legal system's "eyes and ears." The trial becomes rotten and paralysed and can no longer be regarded as a fair trial if the witness is unable to serve as the eyes and ears of justice. When there are no other relevant witnesses available, eye witnesses are crucial to many convictions. However, when called as a witness in court during a trial, the witness typically denies knowing about the commission of a crime but admits it when speaking to the police. The word "hostile witness" refers to a witness who has an impact on the case's outcome. According to the Supreme Court's ruling in *Himanshu Singh Sabharwal v. State of M.P. and others* (2008) 4 SCR 783, "free and fair trial is sine qua none of Article 21 of Indian Constitution. Justice should not only be done, but also be shown to have been done, according to established legal principles. If the criminal trial is not free, fair, and without prejudice, judicial fairness and the criminal justice system could be in jeopardy, eroding the public's confidence in the system and would be the rule of law".

Eye witnesses frequently become hostile during a case's trial, whether it be in the Best Bakery case, the Jessica Lal case, or the Phoolan Devi case, or even in less-notable situations. This violates the victim's right to justice in addition to weakening the prosecution's case. In a country like India where there is neither a law nor a plan for the protection of witnesses, the judiciary has turned into a puppet for the wealthy. This is not a requirement, despite the fact that Section 161 of the Criminal Procedure Code mandates that the investigating officer record statements made by witnesses under oath and in writing. And as a result, the witness turns hostile throughout the trial after making a statement under Section 161 Crpc, which has an additional impact on the prosecution's case due to Section 193 of the IPC. The consequences for providing false testimony in violation of section 1913 of the Code and producing false testimony in violation of section 192 of the Code are described in this section. According to the section, anyone who intentionally provides false testimony during any stage of a legal proceeding or fabricates false testimony with the intent to use it at any stage of a legal proceeding will face fines and simple or strict prison time that could last up to seven years. Anyone who intentionally provides or fabricates false testimony in any other situation not covered by the previous sentence will face a punishment of either one of the two. According to Section 191 of the Indian Penal Code, "Whoever, being legally obligated by an oath or by an express provision of law to state the truth, or being

obligated by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, is said to give false evidence.” In light of this, Section 193 only punishes those who provide false evidence to a judge after swearing under oath. As a result, the witness who made a statement to the police before becoming hostile in court is not punished. The investigation officer made every effort to gather evidence against the accused, but due to oversights and a lack of provisions for the protection of the Witness, the accused take advantage of it and mock both the executive (Police department) and the judiciary, which not only has a negative effect but also discourages people from coming forward to provide statements in cases due to the risk to their lives and harassment they may experience. It's time to update the Criminal Procedure Code and implement safeguards for witnesses.

2.0 Hostiles Witness

A “Hostile witness” is not defined by Indian law. A witness is considered a hostile witness if he or she testifies about an offence to a police officer before denying it in court. No Indian law, including the Evidence Act or the CrpC, defines a hostile witness. A hostile witness is defined as “a party that the court perceives to be hostile against the party they are required to testify for” by the Law Dictionary. If called, they can undergo a cross-examination. By their own credibility, they are subject to impeachment cite the unfavorable witness. “To avoid the controversy over the meaning of the terms ‘hostile’ witness, ‘adverse’ witness, and ‘unfavorable’ witness which had given rise to considerable difficulty and conflict of opinion in England, the authors of the Indian Evidence” The authors of the Indian Evidence Act, 1872 seem to have wisely avoided using any of those terms so that, in India, the grant of permission to cross-examine his own. This was done to avoid the controversy over the meaning of the terms ‘hostile’ witness, ‘adverse’ witness, and ‘unfavorable’ witness which had given rise to considerable difficulty and conflict of opinion in England. A person who is called by a party to prove a specific fact in dispute or relevant to the subject but fails to do so or establishes the opposite is regarded under common law as an unfavorable witness. When questioned by the other side, a hostile witness will not tell the truth. Act, 1872 seem to have advisedly avoided using any of those terms so that, in India, the grant of permission to cross-examine his own. A person who is called by a party to prove a certain fact in dispute or pertinent to the matter but fails to prove such fact or proves the contrary test is considered an unfavorable witness under common law. A hostile witness is someone who refuses to be truthful when asked by the other side. A witness will no longer be seen as hostile if he fails to provide proof in court to back up his assertions. He is hostile when he says anything that is hurtful to the individual asking for his favor or when he simply contradicts something he has said in the past.

3.0 Methodology

This paper will investigate the Criminal Judiciary System and the Schemes for the Protection of Witnesses in India, using both primary and secondary sources. The primary sources are the statutes and the bare act of the CrPC, which are the main legal instruments for the system. The secondary sources are various websites, articles, journals, books, and blogs that provide useful information and analysis on the topic.

4.0 Problems Faced by Witness

The testimony of witnesses is crucial in criminal proceedings. They have the authority to change the trial’s path. The witness thus holds a significant position in the criminal justice system. However, in reality, they are in poor shape. They suffer a great deal during the trial. They waste their time and money by travelling a long way from home simply to assist with investigation and prosecution. The witness is not treated with the appropriate respect and care during the trial. They don’t have enough infrastructure in place. They occasionally have to wait until it’s their turn to testify outside the courtroom or on a balcony. They don’t even have access to clean, potable water or adequate restrooms in court (especially for those with impairments). In addition to these challenges, witnesses frequently face arbitrary postponements. Currently, the travel compensation, or Bhattas, offered to witnesses is incredibly meagre, if not nonexistent. In addition, witnesses are coerced into testifying against the accused and his family members by threats, harassment, and extortion. Deaths of witnesses or members of their families can occur as a result of torture occurrences. The issue becomes more serious when the witness is unable to identify any safety measure or defence against these occurrences. The witnesses get resentful as a result of all of these instances of poverty, making them reluctant to testify in front of the court during the trial. This is another justification for witness hatred.

5.0 A Need For Protection For Witnesses

One of the elements of a fair trial required by Article 21 of the Indian Constitution is witness protection. The witness’s circumstance is still getting worse under our administration of justice system, nonetheless. Witnesses who testify against the accused may face threats, intimidation, and persuasion. In addition, if witnesses testify against the

accused, they may potentially be killed. Due to the absence of an effective system for protecting witnesses in our nation, all of these cases of torture took place. Because of this, criminals are not afraid of the law and can intimidate witnesses. In the justice administration system, this has also led to a high rate of acquittal and a decrease in convictions.

The court held in *Zahaira Habibulla H. Sheikh & anor v. State of Gujarat and Others*, 2004 that the state has a duty to safeguard witnesses, especially in sensitive cases involving powerful people who can influence the outcome of the trial and intimidate the witnesses. The state must ensure that the witnesses can speak the truth in court without fear of retaliation from those they have accused. Every state has a responsibility to protect the lives and rights of its citizens. This is essential for upholding the rule of law. No external factors, such as caste, faith, religion, political affiliation, or philosophical views, should be allowed to violate this principle. There is no justification for punishment because all states should know these basic principles.

Given these worries, it is emphasised that witnesses should be shielded from such sufferings and that the state has a duty to protect witnesses' rights in such sensitive situations.

6.0 Provision Concerning Witness in CRPC

According to Section 160 of the Criminal Procedure Code, any police officer conducting an investigation under this Chapter may, by written order, demand the presence before him of anyone who is within the station's boundaries or those of any nearby stations and who, based on the information provided or otherwise, appears to be familiar with the facts and circumstances of the case.

With the caveat that no man "under the age of fifteen years or above the age of sixty-five years, or a woman, or a person who is mentally or physically impaired" shall be obliged to attend at any location other than the residence of such man or woman.

(2) The State Government may establish guidelines in this regard that would allow the police officer to cover the reasonable costs of any individual required to attend under subsection (1) at a location other than his place of abode. Additionally, Section 161 of the Criminal Procedure Code allows a police officer to interview anyone who is ostensibly familiar with the case's facts or circumstances or to reduce a statement made to him or her into writing. If the police officer chooses to do this, he or she must make a separate and accurate record of each such person's statement that he or she records. Afterwards, section 162 of the Criminal Procedure Code takes effect, which states that "No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; and no such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, shall be used for any purpose, save as hereinafter." In *Emperor v. Aftab Mohd. Khan*, Justice Braund discusses the rationale for Section 162 of the CrPC. "As it seems to us, it is to protect accused persons from being prejudiced by statements made to police officers who, because an investigation is known to be underway at the time the statement is made, may be in a position to influence the maker of it, and, on the other hand, to protect accused persons from the prejudice at the hands of persons who, in the knowledge that an investigation has already started, are prepared to tell untruths," states AIR 1940 All 291. In *Baliram Tikaram Marathe v. Emperor*, a division bench of the Nagpur High Court stated a similar viewpoint regarding the purpose of the section as follows: "The purpose of the section is to protect the accused both against overzealous police officers and untruthful witnesses". Section 162 is therefore for the protection of the accused from any prejudice. However, Section 164 of the CrPC, which states that

Any Metropolitan Magistrate or Judicial Magistrate may record any confession or statement made to him during the course of an investigation under this Chapter or under any other law currently in effect, or at any time afterwards prior to the start of the investigation or trial, whether or not he has jurisdiction in the

Taking into account the possibility of audio-visual technological devices being used to record any confession or statement made in line with this subsection while the defendant's defence attorney is present.

Furthermore, no police officer who has received a magistrate's authority under any currently in force statute may record any confession.

1. Unless the magistrate has cause to assume that the confession is being made voluntarily after questioning the speaker, he or she shall not record any such confession.
2. The Magistrate must inform the individual confessing that he is under no need to do so and that, if he does, his confession could be used against him in court.
3. The magistrate shall not detain a person who is reluctant to confess before recording the confession.

The person must be recorded in the manner prescribed in section 281 for recording the examination of an accused person and must sign the confession. The magistrate must also write a memorandum at the end of the record stating

this. I think this confession was voluntarily made after telling (name) he was not forced to confess and that, if he did, any confession he might make could be used against him. It was taken in my presence and heard by me; it was read to the maker, who confirmed its accuracy. It provides a thorough and accurate account of his statement.

4. A.B. Magistrate (Signed). Any statement (other than a confession) made under Sub-Section (1) must be recorded in the manner that, in the Magistrate's view, is best suited to the facts of the case. The Magistrate has the authority to administer an oath to the person whose statement is thus recorded.

(5A)1 - a) In cases where the offender is subject to punishment under Section 354, Section 354A, Section 354B, Section 354C, Section 354D, Sub-section (1) or Sub-section (2) of Section 376, Section 376A, Section 376B, Section 376C, Section 376D, Section 376DA, Section 376DB, Section 376E, or Section 509 of the Indian Penal Code, the Judicial Magistrate shall record the offender'

With the proviso that if the witness is temporarily or permanently mentally or physically disabled, the Magistrate must enlist the assistance of an interpreter or a special educator in order to record the statement;

Furthermore, if the speaker is temporarily or permanently mentally or physically impaired, the statement must be videographed with the speaker's help from an interpreter or a special educator.

b) According to section 137 of the Indian Evidence Act, 1872, a statement made by a person who is temporarily or permanently mentally or physically disabled under clause (a) is treated as a statement in lieu of an examination-in-chief, allowing the person who made the statement to be cross-examined without the need to record it at the time of trial.

5. The magistrate who records a confession or statement under this section must send it to the magistrate who will be conducting the investigation or conducting the trial.

This component maintains balance between the Investigating agency and the Accused. In line with this provision, only a magistrate may administer an oath, and only after outlining the benefits and drawbacks to the speaker. A statement of a witness recorded in compliance with Section 164 of the Code is a public record that is not susceptible to formal proof, according to a 2003 Criminology Law Journal 3253 case involving Guruvind Palli Anna Rao of Andhra Pradesh. It is therefore unconstitutional for the Sessions Court to summon the Magistrate to demonstrate that the asserted statement's content. Section 80 covers any document that is presented to a court and claims to be a record or memorandum of the evidence, or any part of the evidence, given by a witness in a legal matter or before any officer authorized by law to take such evidence, or to be a statement or confession made by any prisoner or accused person and taken in accordance with the law.

These are the sections of the Criminal Procedure Code that govern the recording of police and magistrate testimony. However, these rules have a deficiency that might be the reason why most witnesses become hostile during court proceedings—the police's inability to record sworn remarks. The meaning of the oath will be covered later.

7.0 Conclusion and Suggestions

We must have a more powerful legal system that provides adequate witness protection. There is no legislation that safeguards witnesses in India, with the exception of a few provisions of the Indian Evidence Act, 1872. Sections 151 and 152 prohibit asking the witnesses questions that are immoral, scandalous, or offensive, as well as questions that are meant to annoy or offend them. There is no provision in India for witness protection except from these two. In the case of NHRC v. State of Gujarat, the Supreme Court acknowledged this fact by ruling that neither the Union of India nor the State Government had yet devised any legislation or a plan to offer witness protection. India needs to put in place a witness protection program now. In fact, the Law Commission released a consultation paper on witness protection on August 13, 2004, after realizing its importance.

With regard to a suggested amendment to Section 164 of the Criminal Procedure Code, the first aspect has received a lot of attention. The Law Commission recommended adding section 164A to the Criminal Procedure Code in its 178th Report (2001) in order to permit the recording of crucial witness testimony before magistrates under oath when the offenses carried a sentence of at least 10 years in prison. This recommendation led to the introduction of the Criminal Law (Amendment) Bill, 2003, which is still pending. For the protection of the witness, CrPC must therefore take action and impose practical sections. One of the main issues in a fair trial is the witness's physical and mental abuse, so the CrPC needs to add a section to protect them with enough protection from the police. In the criminal justice system, the witness plays an important part. In the courts, they cooperate by testifying. When witnesses provide testimony, it's sometimes thought of as fulfilling a holy duty. They should therefore be treated with respect as a result. But a few examples have come to light that show the predicament of witnesses. The accused additionally intimidates and tortures them throughout the trial in addition to mistreating and torturing them in the courtroom. The Law Commission of India has regularly highlighted the challenges the witness faced during the trial

in a number of reports. The Supreme Court has noted the difficulty witnesses face and the need to provide them with facilities in a number of statements. Since there was no centralized statute governing witness protection, the Supreme Court recently also authorized the Witness Protection Scheme, 2018. The decision states that the Scheme will be recognized as law up until the time that Parliament passes the necessary legislation. As witnesses are crucial as oral evidence in any fair trial, it is imperative to enact certain sections under the CrPC to protect them against mistreatment and police force. Instilling a sense of pleasure in the witness's thoughts and treating them with respect and protection at all stages of the investigation and trial are the only ways to lessen the anguish and suffering caused by the witness's participation in the legal process.

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