Witness Anonymity & Protection: Balancing under Criminal Law

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Abstract

This article is broadly divided in different sections, as concept of Hostile Witness, legal frame work of taking evidences and judicial pronouncement on witness anonymity and protection. Article highlights the problem faced by the witnesses during investigation and trial. It also discusses the problem faced by prosecution due to hostility of witnesses. Law commission recommendation through different reports is used by the author to balance the rights of witness against the right of accused to fair trial. Lastly, article led emphasis on the importance of witness anonymity & protection.

Introduction

As stated in Bhagwat Gita, a person who is not affected by adversity, attachment, fear and anger, is indeed the muni. Whether it is possible for a person who is termed as witness[1] in Criminal Jurisprudence to overcome fear, attachment etc? These qualities are less shown when evidence has to be given for a victim who is unknown.In the present times when a criminal trial is marked by hostile witnesses and protracted trials thereby defeating the ends of justice, it becomes necessary to reconsider the laws regarding witness protection in our country.[2] The witness in a criminal trial is intimidated by the criminals resulting in ever increasing trend of witnesses turning hostile. According to National Crime Records Bureau data, the rate of conviction in crimes committed under Indian Penal Code (IPC) has dropped miserably. Records show conviction rate in IPC crimes has dropped to 40.2% in 2013.[3] It has become more or less a fashion to have a criminal case adjournment again and again till the witness tires and he gives up. Not only the 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.[4]

The great thinker Bentham said that witnesses are the eyes and ears of justice.[5] It is for this reason that when a witness is called in for deposing before the court, it is expected that he/she would depose without any fear.

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1. Sec 3(ed) Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Amendment 2014) defined "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 under this Ordinance, 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.
2. Expressing concern over the decline in conviction rates in heinous crime cases due to absence of protection to witnesses, the Madras high court bench directed the home secretaries of the Centre, Tamil Nadu governments, Union law commission secretary and state DGP to explain measures available for protection of witnesses. "Why can't we make protection of witnesses statutory?" Justice Kirubakaran, who impleaded these government officials, asked during the hearing a petition. Petitioner husband was hacked to death by 14 people some years ago. The petitioner said the prime witness in the case, was threatened and forced to turn hostile on April 3rd when he was examined in the court. Witness had given a police complaint that he was kidnapped by three accused in the case, the petitioner submitted. The Times of India, Aug 25, 2014.
3. Crime in India, 2013, Statics, National Crime Bureau, Ministry Home Affairs. http://ncrb.gov.in/ visited on 23rd Oct, 2014.
4. Swaran Singh v. State of Punjab, AIR 2000 SC 2017.
5. Dhanaj Singh v. State of Punjab, AIR 2004 SC 1920.

However, in the present times of politicization of crime and frequent intimidation of the witnesses, the witnesses do not feel safe. It is for this reason that they would either turn hostile in the middle of a trial or may not even come forward to depose before the court.

This situation is alarming for the reason that it frustrates the very purpose of a criminal trial as a criminal trial is to find out whether the accusation imposed upon the accused by the prosecution is true or not, which in the absence of a true witness is compromised. In such a case the end result of the trial may be something which may not be considered just if proper facts would have been placed before the judge.

Witness anonymity & protection can be a solution to this situation as it will eliminate any chance of intimidation of the witness and the witness will depose without any fear. However, in our criminal system the accused has various rights which necessitate the disclosure of witness identity. Nevertheless in this article it is attempted to build a case for introduction of witness anonymity in Indian criminal system by relying on law commission reports, judicial pronouncements of courts and various provisions of Cr.P.C.

Revising the Concept of Hostile Witness

The word "hostile witness" is not defined in the Indian Evidence Act, 1872 (hereinafter Act of 1872). The draftsmen of Act of 1872 were not unanimous with regard to the meaning of the words "adverse", "unwilling", or "hostile", and therefore, in view of the conflict, refrained from using any of those words in the Act.[6] The apex court in Gura Singh v. State of Rajasthan [7] defined hostile witness as one "who is not desirous of telling the truth at the instance of one party calling him". It can be said that hostility is when a statement is made in favour of the defense due to enmity with the prosecution.[8] When a prosecution witness turns hostile by stating something which is destructive of the prosecution case, the prosecution is entitled to request the Court that such witness be treated as hostile.[9]

Hostile witness is that witness, which makes statement against the interest of the party who has called him.[10] Phipson defines a hostile witness as one who 'bears a hostile animus to the party calling him and so does not give his evidence fairly and with a desire to tell the truth to the court; he is not adverse in the statutory sense when his testimony merely contradicts his proof or because it is unfavourable to the party calling him.[11]

In Australia,[12] Canada,[13] England,[14] and Ireland,[15] courts have recognized the principle that a prior inconsistent statement or other extrinsic evidence is admissible to prove that the witness is adverse in the statutory sense. Some courts have gone further and held that a prior statement itself may be sufficient proof of adverseness.[16] Proof of a prior statement may satisfy, in whole or in part, the requirements which permit a judge to hold that a witness is 'adverse.'[17] Canadian Evidence Act, 1985 in Sec.9 inked the concept of Adverse witnesses, as a party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, the party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony, but before the last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement.

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[6]. Sat Paul V. Delhi Administration, AIR 1976 SC 294
[7]. AIR 2001 SC 330
[8]. R.K. Dey V. State of Orissa, AIR 1977 SC 170
[9]. G.S.Bakshi V. State, AIR 1979 SC 569
[10]. Avtar Singh, Principles of The Law of Evidence.
[11]. Phipson Evidence (12th ed 1976), Sweet & Maxwell (U.K.)
[12]. R. v Hunter [1956] V.R. 31;
[13]. Wawanesa Mutual Insurance Co. v Hanes [1961] O.R. 495.
[14]. (1956) 40 Cr. App. R. 16o
[15]. R. v Hannigan [1941] Ir. R. 252
[16]. Wawanesa Mutual Insurance Co. v Hanes, supra note 13.
[17]. R. v. Francis & Barber (1929) 51 c.c.c 343, 94.

Sub sec (2) of Sec.9 lays down that, where the party producing a witness alleges that the witness made at other times a statement in writing, reduced to writing, or recorded on audio tape or video tape or, otherwise, inconsistent with the witness' present testimony, the court may, without proof that the witness is adverse, grant leave to that party to cross-examine the witness as to the statement and the court may consider the cross-examination in determining whether in the opinion of the court the witness is adverse.

It is seldom that a crime has been committed in the presence of only one witness, leaving aside those cases which are not of uncommon occurrence where determination of guilt depends entirely on circumstantial evidence. If the Legislature were to insist upon plurality of witnesses, cases where the testimony of a single witness only could be available in proof of the crime would go unpunished. It is here that the discretion of the Presiding Judge comes into play. Situation may arise and do arise when only a single person is available to give evidence in support of a disputed fact. If the evidence of a single witness is free from all taints which tend to render oral testimony open to suspicion, it becomes Court's duty to act upon such testimony.[18]

If a witness, who is the only witness against the accused to prove a serious charge of murder, can modulate his evidence to suit a particular prosecution theory for the deliberate purpose of securing a conviction, such a witness cannot be considered as reliable person and so no conviction can be based on his sole testimony.[19]

In the Best Bakery Case[20], in the context of the collapse of the trial on account of witnesses turning hostile as a result of intimidation, the Supreme Court reiterated that "legislative measures to emphasize prohibition against tampering with witness, victim or informant, have become the imminent and inevitable need of the day. There are now more hostile witnesses than before and the witnesses are provided allurements or are tampered with or purchased and if they remain firm, they are pressurized or threatened or even eliminated.[21] This observation made way back in 1958 remains the same and the witnesses are still a fearful lot turning hostile during the trial.

Tests to Determine witness as Hostile Witness or Tests of Hostility

1. 'Hostile witness – demeanour' test was set out in Greenough v Eccles (1859).[22] The English Court of Common Pleas held that the term 'proves adverse' meant a witness who was proven to be hostile and that hostility was to be determined by the manner and appearance of the witness in the witness box.[23]

The discretion conferred by S.154[24] of Indian Evidence Act, 1872 (hereinafter Evidence Act, 1872) on the Court is unqualified and untrammelled, and is apart from any question of "hostility". It is to be liberally exercised whenever the Court from the witness's demeanour, temper, attitude, bearing, or the tenor and tendency of his answers, or from perusal of his previous inconsistent statement, or otherwise, thinks that the grant of such permission is expedient to extract the truth and to do justice. The grant of such permission does not amount to adjudication by the Court as to the veracity of the witness. Therefore, in the order granting such permission, it is preferable to avoid the use of such expression, such as "declared hostile", "declared unfavourable", the significance of which is still not free from the historical cobwebs which, in their wake bring a misleading legacy of confusion, and conflict that had for long vexed the English Courts.[25]

[18]. V. Thevar v. State of Madras AIR 1957 SC 614
[19]. Badri v. State of Rajasthan AIR 1976 SC 560
[20].(2004) 4 SCC 158
[21].14th Report of Law Commission (1958):'inadequate arrangements' for 'witnesses'.
[22]. Greenough v Eccles (1859)5 C.B. (N.s.) 786; 141 E.R. 315; R. v Duckworth (1916) 37 O.L.R. 197; Wawanesa Mutual Insurance Co. v Hanes [1961] O.R. 495; Robinson v Reynolds (1864) 23 U.C.Q.B. 560.
[23]. Ibid.
[24]. Sec.154 of Indian Evidence Act; Question by party of his own witness -(1)] The Court may, in its discretion, permit the person who calls a witness to put any question to him which might be put in cross-examination by the adverse party.(2) Nothing in this section shall disentitle the person so permitted under sub-section (1), to rely on any part of the evidence of such witness.
[25]. Sat Paul v. Delhi Administration, AIR 1976 SC 294. Supra note. 6

2. 'Hostile or unfavourable witness - extrinsic evidence' test was articulated by Chief Justice Porter in Wawanesa Mutual Insurance Co v Hanes. He distinguished between an unfavorable witness and a hostile witness[26] and reasoned that 'adverse [was] a more comprehensive expression than hostile.'[27] He held that 'adverse' included a witness who was 'opposed in interest or unfavorable in the sense of opposite in position.'

A witness should be regarded as adverse and liable to be cross-examined by the party calling him only when the Court is satisfied that the witness bears hostile animus against the party for whom he is deposing or that he does not appear to be willing to tell the truth. In order to ascertain the intention of the witness or his conduct, the Judge concerned may look into the statements made by the witness before the Investigating Officer or the previous authorities to find out as to whether or not there is any indication of the witness making a statement inconsistent on a most material point with the one which he gave before the previous authorities.[28]

The Court must however, distinguish between a statement made by the witness by way of an unfriendly act and one which lets out the truth without any hostile intention. Discretion is left to the Court to allow or not to allow a person to cross-examine his own witness as hostile.[29]

In R. v Fraser & Warren.[30] English Court of Criminal Appeal held that, a witness whose evidence was in flat contradiction to his previous statement[31] ('it appeared to be a pack of lies')[32]? was hostile. In R. v Thompson,[33] a witness who 'stood mute of malice' was characterized as a 'recalcitrant witness' and therefore held to be hostile.

3. 'Unfavourable witness - adverse testimony' test was set out in Wawanesa Mutual Insurance Co. v Hanes by MacKay JA: '[T]he words "proves adverse" ... should be given their ordinary meaning, that is that the evidence of the witness is adverse or against the interest of the party calling him, and not construed as meaning hostile.'[34] Adverse must mean unwilling, if called by a party who cannot ask him leading question-to tell the truth for the advancement of justice.[35]

Hostile Witnesses and Indian Criminal Regulatory Framework

Though there are not enough provisions under domestic law dealing directly with the issue but there are certain provisions under the Evidence Act, 1872 and the Code of Criminal Procedure, 1973 (hereinafter Cr.P.C) which are helpful in explaining the concept to some extent. Cr.P.C empowers the Police Officer under Sec.160 making an investigation, to require the compulsory attendance before himself, of any person who appears to be acquainted with the facts and circumstances of the case, and where such notice is given by investigating Officer, the person on whom the notice is served is bound to attend.[36] This provision is to be read in conjunction with Sec. 161 of Cr.P.C[37].

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[26]. (1961) O.R 495. P.499
[27]. Ibid
[28]. Rabindra Kumar Dey v. State of Orissa, (1976) 4 SCC 233: Dahyabhai Chhaganbhai Thakkar v. State of Gujarat, AIR 1964 SC 1563.
[29]. Rabindra Kumar Dey v. State of Orissa, (1976) 4 SCC 233.
[30]. (1956) 40 Cr. App. R. 16o
[31]. Ibid
[32]. Ibid
[33]. (1977), 64 Cr. App. R. 96
[34]. Wawanesa Mutual Insurance Co. v Hanes [1961] O.R. 495. Supra note 22.
[35]. Sheikh Zakir v. State of Bihar, AIR 1982 SC 829.
[36]. Sec. 160 of the Cr.P.C.
[37]. Emphasis added: The Law Commission in its 154th Report made the observation that, Section 161 & 162 deals with oral examination of witnesses by the Police, the record to be made of their statements and the use to which it may put subsequently have been the subject matter of many court decisions, discussions and consideration by various Commission including the National Police Commission and they have attracted a variety of comments and suggestions. The 14th Report of the Law Commission is the earliest one to consider the issue involved. The Commission expressed the view that the discretion allowed to the Police Officer to record or not to record the statement of witnesses orally examined by him is in such restricted terms that the whole purpose of Section 173 Cr.P.C would be defeated by a negligent or dishonest Police Officer and the Commission, therefore, recommended that the Police Officer should be obliged by law to reduce in writing to record the statement of every witness whom the prosecution proposed to examine at the trail. This view was accepted in the 37th Report of the Law Commission. But the recommendation went further to suggest that statement of every witness questioned by the police under Section 161 must be recorded thereby suggesting that the recording of statement of witness should not be limited only to those proposed to be examined at the trail. The Law Commission again in its 41st Report considered these recommendations and suggested that there is no need to place any fetter on the discretion of the Police Officer at the stage of investigation and better to leave on him to record only what in his judgment is worth recording and leave the rest to the departmental instruction and supervision.

It is only under Sec.161 that the Police Officer making the investigation can examine orally any person supposed to be acquainted with the facts and circumstances of the case. Statement taken under Sec.161 can be reduced in writing, if the investigating Officer wishes to do so, however the statement should not be on oath or affirmation.[38] Statement made under sub-sec. 161(3) may also be recorded by audio-video electronic means.[39] There should not be a long delay on the part of investigating agency in recording statement. Unexplained delays throw doubt on the veracity of the prosecution story.[40] However when the delay is properly explained, it may not have adverse impact upon the probative value of a particular witnesses.[41]

However, law clearly mandates that any statement made to the Police Officer and reduced into writing by him, would not be signed by the maker of such statement. Law creates a bar on the admissibility of statements made by any person to a police officer in the course of an investigation.[42] Even no such statement or any record of such a statement, whether in a police diary or otherwise or any part of such statement or record shall be used for any purpose other than those stated in the section.[43] But, when a witness is called for the prosecution, any part of the statement if duly proved may be used by the accused and with the permission of the Court by the prosecution to contradict such witness in the manner provided by Sec. 145 of Evidence Act 1872.[44] But, there had been many complaints that the police record of a witness is often inaccurate and that a dishonest Police Officer can write anything he likes.

The Supreme Court in Tahsildar Singh V. State of U.P[45] examined in detail the purpose and object of Section 162 of Cr.P.C. According to the Apex Court, the legislative intent behind this provision was to protect the accused person from police officers who would be in a position to influence the makers of such statements, and from third persons who would be inclined to make false statements before the police. This is a highly laudable objective and is truly reflective of the attempt to ensure fairness in the process of criminal investigation. Voluminous case law has built up on these two sections over several years, the effect of which has been to underline the following legal requirements:(i) The statement of a witness, if the police officer decides to record it, shall be recorded in detail in the first person even as the witness goes on making his statement; (ii) The statement so recorded cannot be used for any purpose other than the sole purpose of contradicting the witness at some stage during trial, if his deposition in court happens to differ from that statement.[46]

Sub-Sec. (5) of S. 173, Cr.P.C. makes it obligatory upon the Police Officer to forward along with the report all documents or relevant extracts thereof on which the prosecution proposes to rely and the statements recorded under Sec. 161 of all persons whom the prosecution proposes to examine as witnesses at the trial. In fact, the report under Sec. 173(2) purports to be an opinion of the Investigating Officer that as far as he is concerned he has been able to procure sufficient evidence for the trial of the accused by the Court and when he states in the report not only the names of the accused, but names of the witnesses, the nature of the offence and a request that the case be tried, there is compliance with Sec. 173(2). The report as envisaged by Sec. 173(2) has to be accompanied as required by sub-sec. (5) by all the documents and statements of the witnesses therein mentioned. One cannot divorce the details which the report must contain as required by sub-sec. (2) from its accompaniments which are required to be submitted under sub-sec. (5). The whole of it is submitted as a report to the Court.

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[38]. Sec. 161(3) of Cr.P.C.
[39]. Proviso to sub-sec. 161(3) of Cr.P.C, inserted by The Code of Criminal Procedure (Amendment) Act 2009.
[40]. Ram singh v. State of M.P., 1989 Cr LJ NOC 206 (M.P); Brij Nandan Rai v. State of Bihar 1922 Cr LJ 942 (Pat).
[41]. Jodha Khoda Rabari v. State of Gujarat, 1992 Cr LJ 3298 (Guj).
[42]. Sec. 162 of the Cr.P.C. In the 14th Report, the Law Commission recommended that the literate witnesses should be required to sign the statements. In the 37th Report, the Commission, however, did not favour such a change. But, in the 41st Report, the Commission, however, recommended that where the person can read the statement so recorded, his signature can be obtained after he has read the statement.
[43]. Tellu v. State, 1988 Cr LJ 1063 (Del).
[44]. Hazari Lal v. State (Delhi Administration), AIR 1980 SC 873
[45]. AIR 1959 SC 1012
[46]. National Police Commission in its 4th Report.

The Police Officer investigating into a cognizable offence is under a statutory obligation to submit along with his report under Sec.173(2) documents purporting to furnish evidence collected in the course of the investigation and the statements of the witnesses and the Court before proceeding into the case is under a duty to enquire whether the accused has been furnished with copies of all relevant documents received under Sec. 173 by the Court, and the entire complexion of what should normally be styled as report submitted under Sec. 173(2) of the Cr.P.C. has undergone a change. The Court can look at the report in prescribed form along with its accompaniments for taking cognizance of the offence.[47]

Under the present provisions of Sec. 162, a police officer is precluded from obtaining the signature of a person on the statement recorded from him. 4th Report of National Police Commission, state that several police officer emphatically signified that this provision in law operates to their great disadvantage and induces a general feeling among witnesses that they are not in any way bound by the statement recorded by the police and that they could freely deviate from it at a subsequent stage without attracting any penal notice.[48]

In 41st Law Commission report, Shri R. L. Narasimam and Shri Balakrishnan, opinioned that, the fundamental anomaly in the existing provisions of Sec. 162 is that though the statute prohibits the use of the statements made to the police during investigation for the purpose of corroboration obviously on the assumption that the police record is not correct, yet permits their use for contradicting prosecution witnesses and that even for such contradicting obviously, the earlier statements should be presumed to have been correctly recorded and that the record cannot be at the same time to be correct and also incorrect.[49]

154th Law Commission report and The Law Reform (Miscellaneous Provisions Amendment) Bill, 2002, proposed for substitution of sub-sec. (1) of Sec. 162, that, if the statement made by any person to a police officer during investigation and the same is reduced in writing, than the person making the statement will put his signature, if the person is literate or thumb impression in case of illiterate, a true copy of the statement shall be provided to the person making the statement. Statement recorded shall consist of date, time and place where it was recorded, which should be forwarded to the Magistrate.[50]

The major difference between two reports can be underlined as, in the former one the copy of the statement duly authenticated by the police officer recording it shall be delivered under acknowledgement to the person on whose examination such statement was recorded, if so desired by that person, the later compels the police officer to furnish it to the person making the statement. According to 154th report the statement made under Sec. 162, cannot be used by the prosecution or the accused either for contradiction or for corroboration under Sec. 145 & 157 of Evidence Act, 1872 in contrary Law Reform Bill 2002 didn't suggest any change.

However these recommendations never reached its destination. It was imperative that there be some mechanism for recording confessions and other statements in a fair and foolproof manner, especially in situations where the police thought the witnesses were unlikely to stick to the statements made by them under Section 161 of Cr.P.C.[51]

Statements recorded by the Police under Sec. 161, Cr.P.C. cannot be used as evidence. Conviction cannot rest on such statements. A statement recorded by the Police Officer during investigation is inadmissible in evidence and the proper procedure is to confront the witness with the contradictions when they are examined and then ask the Investigating Officer regarding the contradictions. It cannot be used for the purpose of cross-examination. Courts are to confine themselves only to those portions for contradiction, if attention had been bestowed at the appropriate stage.[52]It was precisely this objective that resulted in vesting of authority in the Judicial Magistrate to record statements by witnesses as well as confessions by accused persons, under Sec. 164 of the Cr.P.C.

The Supreme Court also observed in Stateof U.P. V. Singhara Singh [53]that Section 164 of Cr.P.C would be rendered wholly nugatory if the procedure prescribed by that provision was not held to be mandatory.

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[47]. Satya Narain Musadi v. State of Bihar AIR 1980 SC 506
[48]. National Police Commission in its 4thReport . Supra note. 4.
[49]. 154th Law Commission Report, 1996. Supra note 37.
[50]. Ibid, 178th report contains the Reform(Misc. Provisions Amendment) Bill 2002.
[51]. Ram Charan v. State of U.P., AIR. 1968 S.C. 1270.
[52]. State(Delhi Administration) v Laxman Kumar, AIR 1986 SC 250
[53]. AIR 1964 SC 358

Section 164 strikes a fine balance between the interests of the investigating agency and the accused person, and this is the primary reason for judicial insistence on strict compliance with the prescribed procedure.

As rightly observed by a Full Bench of the Madras High Court in State of Madras V. G. Krishnan[54], the object of recording a statement under Sec. 164 of Cr.P.C is to deter a witness from changing his version later by succumbing to temptations, influences, or blandishments. Also any statement made before a Magistrate and duly recorded under Sec. 164 of Cr.P.C is considered a public document under Sec. 74 Evidence Act, 1872.[55] So, it can be said that the provisions of the Cr.P.C and Evidence act provides for measures to deal with the problem of witnesses turning hostile and that the statement of the witnesses should be recorded by the investigation agency before a Magistrate under Sec. 164 of Cr.P.C.

The 41st Report of the Law Commission having considered the various views also observed that the statement under Sec. 164 would not be a good substitute for the statement before the police. The Commission ultimately, however, did not recommend any change.[56]

154th Report suggested insertion of Section (1A) in Section 164 of the Cr.P.C that, every Investigating Officer shall send to the nearest Magistrate all the statements of material witnesses recorded by him, if such Magistrate is empowered to take cognizance of the case on police report, he shall keep such statements along with the FIR received by him and await the further police report under Section 173 of Cr.P.C. If he is not empowered to take such cognizance, he shall send the statements thus recorded on oath to the Magistrate empowered to take cognizance of the case.[57] 178th Report narrow down the scope of 154th report recommendation, it suggest the insertion of new section 164A after Section 164, making the above requirement necessary only for the offences punishable with imprisonment for a period of ten years or more (with or without fine) including an offence which is punishable with death,[58] copies of such statements shall be furnished to the investigating officer.[59] The statement of any person duly recorded as a witness may, if such witness is produced and examined, in the discretion of the court and subject to the provisions of the Indian Evidence Act, 1872, be treated as evidence.[60]
154th Report discussed in its Chapter X 'Protection and Facilities to Witnesses, which is discussed in later part of this article. However, it is to be noted that the 178th Law Commission report, did not suggest any measures for the physical protection of witnesses from the 'wrath of the accused' nor deal with the question whether the identity of witnesses can be kept secret and if so, in what manner the Court could keep the identity secret and yet comply with the requirements of enabling the accused or his counsel to effectively cross examine the witness so that the fairness of the judicial procedure is not sacrificed.[61]

Thus, the above analysis of the various recommendations of the Law Commission made from time to time, including the 178th Report shows that they do not address the issue of 'protection' and 'anonymity' of witnesses or to the procedure that has to be followed for balancing the rights of the witness on the one hand and the rights of the accused to a fair trial. In the absence of such a procedural law, the Supreme Court has had to step in on the judicial side in recent cases to give various directions.

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54. AIR 1961 Mad 92
55. Ibid
56. 154th Law Commission Report, 1996.Supra note 37.
57. 154th Report recommended for introduction of new sub-section (1A) in Sec.164. Also see 178th Report sub –section 4 in Sec. 164.
58. 178th Report recommended a new sub-section 1 in Sec.164. Supra note 50.
59. Ibid, sub-section 3 in Sec. 164
60. Ibid, sub-section 5 in Sec. 164.
61. 198th Report of the Law Commission (2006): Witness Identity Protection and Witness Protection Programmes, p 256

Witness Anonymity & Protection; Judicial Pronouncement

Law Commission in its 154th Report draws the attention regarding protection and facilities to witnesses. The normal mode of giving evidence is by examining the witness in Court.[62] Report highlighted the problems faced by the witnesses, such as, adjourning the case at the fag end of the day after keeping the witnesses waiting for the whole day, while fixing the next date, witnesses' convenience is not at all kept in view and if he fails to turn up next date, harsh steps are taken against him. Even if a witness appears on the adjourned date, the chances are that the case would be adjourned again.

After suffering all these inconvenience even if he appears and evidence is recorded, he is brow beaten by overzealous defense counsel or declared hostile or unreliable by the prosecutor. They have to incur the wrath of the accused, particularly hardened criminals which results in their life being at great peril.[63] Should a person be troubled by compelling him to go the Court and depose if the evidence which he is to give is purely of a formal nature? Sec. 296, provides that if evidence of any person whose evidence is of a formal character may be given by affidavit and may, subject to all just exceptions, be read in evidence in any inquiry, trial or other proceeding under this Code.[64] The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any such person as to the facts contained in his affidavit.[65] This is, thus, a departure from the usual mode of giving evidence. The object of providing such an exception is to help the Court to gain the time and cost, besides relieving the witness of his troubles, when all that the said witness has to say in Court relates only to some formal part.[66]

Subject to any rules made by the State Government, any Criminal Court may, if it thinks fit, order payment, on the part of Government, of the reasonable expenses of any complainant or witness attending for the purposes of any inquiry, trial or other proceeding before such Court.[67] The Court has discretion to order payment of expenses to the witnesses either by the party concerned or by the State.[68] However the allowances paid to the witnesses are very meager because the rates of allowances are totally inadequate.[69] These factors make witnesses reluctant to attend courts promptly in obedience to the summons.[70]

At present there is an Ordinance called as Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Amendment 2014 on March 4th 2014, which provides witness and victim protection & anonymity, however only for the offences committed under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities), 1989. Although in general this issue has been raised by 198th Law Commission Report, 2006 and has also been deliberated by various judgments of the Supreme Court, the legislature has overlooked this matter till now. Law providing for witness anonymity & protection is the need of the hour as the witnesses are turning hostile at an ever increasing rate.

It is in this regard that the Supreme Court has said that: "No law has yet been enacted, not even a scheme has been framed by the Union of India or by the State Government for giving protection to the witnesses. For successful prosecution of the criminal cases, protection to witnesses is necessary as the criminals have often access to the police and the influential people."[71]

Not only has the Supreme Court recognized the need for a new law regarding witness anonymity but it has also deliberated upon the issue of witness protection & anonymity in various judgments. In case of Kartar Singh vs. State of Punjab[72],Supreme Court while upholding the court's discretion under section 16(2) and (3) of the

[62]. State of Punjab v. Naid Din, AIR 2001 SC 3955.
[63] . 154th Law Commission Report, 1996. Supra note 37.
[64]. Sub-sec.296 (1) of Cr.P.C.
[65]. Sub-sec.296 (2) of Cr.P.C.
[66]. State of Punjab v. Naid Din, AIR 2001 SC 3955. Supra note 62
[67]. Section 313 of Cr.P.C.
[68]. K.V. Baby v. Food Inspector, 1994 CrLJ 3421 (Ker).
[69]. 154thLaw Commission Report , 1996. Supra note 37.
[70]. Emphasis added; Despite Sec. 174 IPC & Sec. 350 Cr.P.C provide for punishment for non-attendance by witnesses in obedience to the summons issued by the court.
[71]. National Human Rights Commission v. State of Gujarat, 2003(9) SCALE 329
[72]. 1994(3) SCC 569.

Terrorist and Disruptive Activities (Prevention) Act, 1987[73] has held:[74] "Generally speaking, when the accused persons are of bad character, the witnesses are unwilling to come forward to depose against such persons fearing harassment at the hands of those accused. The persons who are put for trial under this Act are terrorists and disruptionists.

Therefore, the witnesses will all the more be reluctant and unwilling to depose at the risk of their life. The Parliament, having regard to such extraordinary circumstances has thought it fit that the identity and addresses of the witnesses be not disclosed in any one of the above contingencies."

The court went further and declared:[75]**"**Therefore, in order to ensure the purpose and object of the cross-examination, we feel that, as suggested by the Full Bench of the Punjab and Haryana High Court in Bimal Kaur[76] the identity, names and addresses of the witnesses may be disclosed before the trial commences; but we would like to qualify it by observing that it should be subject to an exception that the Court for weighty reasons in its wisdom may decide not to disclose the identity and addresses of the witnesses especially if the potential witnesses whose life may be in danger."

In Javed Alam v. State of Chhattisgarh,[77] deceased girl a student of B.A. in Govt. Girls College was run over by jeep driven by accused along with other accused who were accompanying the accused onboard. The incident took place in broad daylight at the college campus witnessed by other students. The Apex Court while allowing the criminal appeal filed by other accused, except the main accused, on the ground that, "there is no evidence, much less credible, which has been salvaged from the onslaught on the witnesses which suggests that there was any meeting of minds, because everything appears to have happened suddenly."[78]

Court further viewed that this case is a classic case of deficiency in the criminal justice system to protect the witnesses from being threatened by accused. Court observed that witnesses backed out from what was stated during investigation. The statement made before the police during investigation is no evidence. Unfortunately, in cases involving influential people the common experience is that witnesses do not come forward because of fear and pressure. The plight of the girls who were under pressure depicts the tremendous need for witness protection in our country if criminal justice administration has to be a reality.[79]

In Delhi Domestic Working Women's Forum vs. Union of India[80] Supreme Court, while indicating the broad parameters that can assist the victims of rape, emphasized that in all rape trials "anonymity" of the victims must be maintained as far as necessary so that the name is shielded from the media and public. The Court also observed that the victims invariably found the trial of an offence of rape trial a traumatic experience. The experience of giving evidence in court has been negative and destructive and the victims have often expressed that they considered the ordeal of facing cross-examination in the criminal trial to be even worse than the rape itself.

Supreme Court accepted the plight of the witnesses in the country in Swaran Singh vs. State of Punjab. The judgment focused upon some important issues such as that of payment of allowances to the witness and stressed the need of a dedicated funding for it. The court observed that the witnesses are a suffered lot it went on to say: "Not only that a witness is threatened; he is maimed; he is done away with; or even bribed. There is no protection for him."[81]

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[73]. Sec. 16(2) gives discretion to the Designated Court to keep the identity and address of any witness secret on the following three contingencies: (1) On an application made by a witness in any proceedings before it; or (2)On an application made by the Public Prosecutor in relation to such witness; or (3) On its own motion.
Section 16(3) refers to the measures to be taken by the Designated Court while exercising its discretion under subsection (2).
[74]. 1994(3) SCC 569. Supra note 72
[75]. Ibid.
[76]. AIR 1988 P&H 95
[77]. SCC-2009-6-450/AIR (SCW)-2009-0-3918/JT-2009-8-4.
[78]. Ibid.
[79]. Ibid.
[80]. (1995) 1 SCC 14
[81]. AIR 2000 SC 2017. Supra note 4.

In PUCL vs. Union of India[82] the validity of several provisions of the Prevention of Terrorism Act, 2002 (POTA), came up for consideration, the Supreme Court considered the validity of Sec. 30 of the Act which deals with 'protection of witnesses'.[83]

The provisions of Sec. 30 are similar to those in section 16 of the TADA, 1987, which were upheld in Kartar Singh's case already referred to above. In PUCL, the Court referred to Gurubachan Singh vs. State of Bombay[84] and other cases, and observed that one cannot shy away from the reality that several witnesses do not come to depose or become hostile before the Court in serious cases due to fear of their life. Under Sec. 30 a fair balance between the rights and interests of witnesses, the rights of the accused and larger public interest has, it was held, been maintained. It was held that Sec. 30 was also aimed to assist the State in the administration of justice and to encourage others to do the same under given circumstances. Anonymity of witnesses is to be provided only in exceptional circumstances when the Special Court is satisfied that the life of witnesses is in jeopardy.

It was stated in PUCL that the effort of the Court is to strike a balance between the right of the witness as to his life and liberty and the right of the community in the effective prosecution of persons guilty of heinous criminal offences on the one hand and the right of the accused to a fair trial, on the other.

While dealing with the case of child sexual abuse Sakshi vs. Union of India[85]the Supreme Court held: "The whole inquiry before a Court being to elicit the truth, it is absolutely necessary that the victim or the witnesses are able to depose about the entire incident in a free atmosphere without any embarrassment. Sec. 273 Cr.P.C. merely requires the evidence to be taken in the presence of the accused. The Section, however, does not say that the evidence should be recorded in such a manner that the accused have full view of the victim or the witnesses. Recording of evidence by way of video conferencing vis-à-vis Sec. 272 Cr.P.C. There is a major difference between substantive provisions defining crimes and providing punishment for the same and procedural enactment laying down the procedure of trial of such offences. Rules of procedure are hand-maiden of justice and are meant to advance and not to obstruct the cause of justice. It is, therefore, permissible for the Court to expand or enlarge the meaning of such provisions in order to elicit the truth and do justice with the parties."

In National Human Rights Commission v. State of Gujarat[86], Supreme Court while constituting Special Investigation Team (SIT) for investigation in cases related to Gujarat riots 2002 observed that, a few important aspects concerning the cases need to be noted; (1) Fair trial (2) Modalities to ensure that the witnesses depose freely and in that context the need to protect the witnesses from interference by persons connected with it is the protection of victims who in most cases are witnesses. (3) Able assistance to court by competent public prosecutors.[87]

This judgment exemplifies the courts power to protect the anonymity of the witnesses in order to elicit the truth or to meet the ends of justice. In recent judgment pronounced by Supreme Court in Anjanappa v. State of Karnataka[88] observed that the serious question of witness protection which is not addressed as yet.

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[82]. 2003 (10) SCALE 967

[83]. POTA Sec. 30. Protection of witnesses.-(1) Notwithstanding anything contained in the Code, the proceedings under this Act may, for reasons to be recorded in writing, be held in camera if the Special Court so desires.(2) A Special Court, if on an application made by a witness in any proceeding before it or by the Public Prosecutor in relation to such witness or on its own motion, is satisfied 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.(3) In particular, and without prejudice to the generality of the provisions of sub-section (2), the measures which a Special Court may take under that sub-section may include—(a) the holding of the proceedings at a place to be decided by the Special Court;(b) the avoiding of the mention of the names and addresses of the witnesses in its orders or judgments or in any records of the case accessible to public;(c) the issuing of any directions for securing that the identity and address of the witnesses are not disclosed;(d) a decision that it is in the public interest to order that all or any of the proceedings pending before such a Court shall not be published in any manner.(4) Any person who contravenes any decision or direction issued under sub-section (3) shall be punishable with imprisonment for a term which may extend to one year and with fine which may extend to one thousand rupees.

[84] 1952 SCR 737

[85] 2004 (6) SCALE 15

[86] . AIR 2009 (SCW) 3049. Supra note. 71.

[87] . Ibid, para 3

[88]. (2014) 2 SCC 776.

Conclusion

As we are aware, investigation in a criminal trail assumes important role and it helps the court to determine the guilt or innocence of the accused. A fair and objective investigation can unearth the crime committed and as well collect the material which can prove the guilt or innocence of the accused. It is an established fact that witnesses form the key ingredient in a criminal trial and it is the testimonies of these very witnesses, which establish the guilt of the accused. Law regarding admissibility of hostile witness is established in large number of case, as evidence of witness does not become effaced from record merely because he turned hostile.[89] However, court has to be very careful, as prima facie, a witness who makes different statements at different times, has no regard for truth.[90]

Court must carefully analyze his evidence and see whether that part of evidence which is inconsistent with the prosecution case is acceptable or not.[91] It is, therefore, imperative that for justice to be done, the protection of witnesses and victims becomes essential, as it is reliance on their testimony and complaints that the actual perpetrators of heinous crimes can be brought to book.[92]

The Court in PUCL has pointed out that the need for existence and exercise of power to grant protection to a witness and preserve his or her identity in a criminal trial has been universally recognized. A provision of this nature should not be looked at merely from the angle of protection of the witness whose life may be in danger if his or her identity is disclosed but also in the interests of the community to ensure that heinous offences like terrorist acts are effectively prosecuted and persons found guilty are punished and to prevent reprisals.

President of India, in exercise of the power conferred by clause (1) of Art 123 of Constitution of India passed an Ordinance called as Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Amendment 2014 on March 4th 2014. This ordinance consists of a chapter IVA, which deals with "Rights of Victims and Witnesses". It imposes the duty and responsibility on the State to make arrangements for the protection of victims, their dependents and witnesses against any kind of intimidation or coercion or inducement or violence or threats of violence.[93] Ordinance ensures treatment of victim in dignified manner and a proper notice of any Court proceedings.[94] Ordinance under sub-sec. (6) of Sec. 15A empowers the Special Court established for the trial of offences under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 to provide victim, his dependent, informant or witnesses complete protection to secure the ends of justice, travelling and maintenance expenses during investigation, inquiry and trail.

Sub-sec (8) further, without prejudice to the generality of sub-sec. (6), Special Court on an application made by a victim or his dependent, informant or witness in any proceedings can take measures including; concealing the names and addresses of the witnesses in its order or in any records of the case accessible to the public; issuing the non-discloser of the identity and addresses of the witnesses; take immediate action in respect of any complaint relating to harassment of a victim, informant or witness and on the same day, if necessary, pass appropriate orders for protection.

The ordinance imposes the duty on the Investigating Officer and the Station House Officer to record the complaint of victim, informant or witnesses against any kind of intimidation, coercion or inducement or violence or threats of violence, whether given orally or in writing, and a photocopy of the FIR shall be immediately given to them at free of cost.

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[89]. Paramjeet Singh v. State of Uttarakhand, (2010) 10 SCC 439. PARA 15 TO 20; State of U.P v. Chet Ram, AIR 1989 SC 1543; Khujji alias SurendraTiwari v. State of M.P., AIR 1991 SC 1853.
[90]. Paramjeet Singh v. State of Uttarakhand, (2010) 10 SCC 439
[91]. State of Gujarat v. Anirudh Singh, (1997) 6 SCC 514.
[92] . National Human Rights Commission v. State of Gujarat AIR 2009 (SCW) 3049 para 4.
[93]. Sec 15A of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Amendment 2014
[94]. Ibid, Sub-sec. (2) & (3)

This ordinance has still not been passed from the Parliament,[95] though it is good step by the legislation to protect the victim and the witnesses. These kinds of law are urgently needed to establish faith in Criminal Justice system. Parliament should take up the recommendations given in 198th Law Commission report and should enact a Law, which would generally deal with the witnesses anonymity & protection.

[95]. This ordinance is a law, as till date this ordinance is neither revoked by the President nor Parliament has rejected it.