

# INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi-Disciplinary  
Peer Reviewed

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ISSN

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# **CASE COMMENTARY ON MAHENDRA CHAWLA AND ORS. v. UNION OF INDIA AND ORS.**

AUTHORED BY - AMSHUMAN SANKAR R

## **ABSTRACT**

The witnesses have been subjected to harsh realities, sometimes succumbed to fatalities caused by the inherent fears and threats which persists in the minds of perpetrators of several offences, across the country. This particular method of intimidating the innocent witnesses has only paved way to question the credibility of the contemporary criminal justice system's commitment to protecting the witnesses, and whether the requirement of protecting witnesses are mere words expressed in the law, which is being parroted by the law enforcing agencies or are these words are realised through the implementation of policies which aim at protecting witnesses. This case is a landmark precedent in the judicial literature of the apex court, which addresses the issue of witness protection by deliberating upon the enforcement of draft scheme on witness protection prepared by the Government of India, which has been corroborated by the contributions provided by various stakeholders such as state governments, civil societies, contemporary and retired officials in law enforcing agencies etc. The effect of this judgement is visible through the introduction of section 398 of the Bharatiya Nagarik Suraksha Sanhitha 2023(BNSS), which gives statutory protection to the enforcement of witness protection schemes. This work would affirmatively study the requirement of this judgement, especially at a time when technological advancements are plausible modes of threatening lay individuals, which leave the witness unable to aid in the pursuit of justice.

**Keywords- Witness, Witness Protection Scheme, Threats Analysis Report, Vulnerable Witness Deposition Complex, Witness Protection Order.**

## **1. INTRODUCTION**

“The witnesses are the eyes and ears of justice”, postulated **Jeremy Bentham**. The Country was a witness to some of the most gruesome of offences which were hurled upon those who braved in deposing as witnesses for one of the most heinous offences that the country could ever withstand. This paved the way for deliberations upon the status of witness protection that persists, the reformation required to modify the criminal justice systems approach to witnesses

and many other equivalent arenas.

In *Mahendra Chawla and Ors. v. The Union of India and Ors.*<sup>1</sup>, a two-judge bench composed of Justice A.K. Sikri and Justice S. Abdul Nazeer of the Hon'ble Supreme Court had determined the matter, which had endorsed the viewpoint which equated the witness role equivalent to the sun who eliminates darkness of ignorance and illuminates the face of justice.<sup>2</sup>

## 2. MATERIAL FACTS OF THE CASE<sup>3</sup>

### A. Accused

Mr. Asaram Babu (the prime accused) was charged with committing the offence of rape in multiple cases. Asaram thereby used to intimidate witnesses to offence, such that ten witnesses were attacked, three witnesses were killed and other witnesses were subsisting in a daunting environment, fearing for their lives.

### B. Petitioners

There were 4 petitioners who approached the Hon'ble Supreme Court, seeking relief for the grave injustice and oppression they were subjected to by the accused and his accomplices.

**Petitioner No. 1 (P1)** is a witness to the rape committed along the performance of tantrik practices over the mortal remains of child rape victim by Accused No. 2 (A2). P1 survived an attack which intimidated his existence and survived by fragility.

**Petitioner No. 2** is the father of a witness, who succumbed to the attack by the accused.

**Petitioner No. 3** is the father of a rape survivor and a minor boy, who was threatened by the accused. The Family of the Petitioner No. 3 was given only half security by the police officials.

**Petitioner No. 4** is a journalist, who wrote many articles on the accused's by conducting multiple ground studies about the accused and their antecedents, surviving murder attempts caused by the accused's.

The common plea of all petitioners before the Hon'ble Apex Court is to conduct a probe through a Special Investigation Team (SIT) or Central Bureau of Investigation (CBI) over the actions of the accused against the witnesses. The court had thereby sought the petitioners to implead all state Governments and union territories as parties to the suit, wherein the court held that all stakeholders must be involved in the process of witness protection. Thereby the Central

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<sup>1</sup> *Mahendra Chawla v. Union of India*, , 2019 (14) SCC 615, AIR 2018 SC (SUPP) 2561

<sup>2</sup> *Id.* at Para 3

<sup>3</sup> *Id.* at Para.14 to 24.

Government submitted its draft “Witness Protection Scheme, 2018” before the Hon’ble Supreme Court, which was subjected to the reference of the Hon’ble Bench.

### 3. ISSUES

The issue which was deliberated by the Hon’ble court in this case was “Whether the Witness Protection Scheme prepared by the Central Government, along with the contribution of other stakeholders, can be enforced?”

### 4. DRAFT WITNESS PROTECTION SCHEME, 2018

#### A. Aim and Objective

The significant aim and objective of the Draft Witness Protection Scheme, 2018 (hereinafter referred to as the “**Scheme**”) is to ensure that witnesses and their family members are protected from intimidation and threats against their lives, reputation and property.<sup>4</sup>

#### B. Scope

The Scheme has outlined that its scope may range from preliminary police escorts or use of modern communication technology for recording testimony of witnesses, to ensuring anonymity of witnesses, temporary residence, relocation of witness at undisclosed place in complex cases. The Scheme outlines that the major scope is to provide witness protection on a case to case basis.

#### C. Major Provisions

**Clause 2** of the Scheme is the definitions clause, which defines the major terms which are used in the course of the Scheme. Some of the major terms defined in the Scheme are

1. “**Witness**” is any person who possesses any information or document on any offence.<sup>5</sup>
2. “**Concealment of Identity of Witness**” which is interpreted as any condition prohibiting publication or revealing of any particular(s) of a witness which may lead to their identification in the course of the investigation, trial and post-trial stages.<sup>6</sup>
3. “**Offences**” have been construed as those offences which are punishable for an imprisonment for a period of seven years or more.<sup>7</sup>
4. “**Threat Analysis Report**” is any detailed report on the nature, seriousness and credibility of the threat perception towards a witness or family members, prepared and

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<sup>4</sup>*Id.* at para.25

<sup>5</sup> The Witness Protection Scheme, 2018, s..2(k)

<sup>6</sup> *Id.* at s.2(b)

<sup>7</sup> *Id.* at s.2(i)

submitted by the Head of Police, who investigates the case. The Report must encapsulate the following

- a. Threats to family life property or reputation
  - b. Analyse the extent of the potential threat<sup>8</sup>
5. “**Competent Authority**” comprising a **Standing Committee** in each district, chaired by the **District and Sessions Judge**, along with **District Police Head** and **District Prosecution Head** as its **members**.<sup>9</sup>

Clause 3 enumerates on the **classification of witness**<sup>10</sup> or their family members as

1. Category A: threat towards life during investigation or post-trial
2. Category B: threat towards the safety, reputation, property
3. Category C: threat is moderate and in the nature of harassment or intimidation during the investigation or trial

Clause 4 enunciates on the “**State Witness Protection Fund**” which shall include the expenses incurred while enforcing Witness Protection Order passed by the Competent Authority.<sup>11</sup>

Clause 5 outlines on the filing of an **Application** before the Competent Authority, wherein the applicant must scrupulously comply with the prescribed form provided in the annexure of the Scheme.<sup>12</sup>

Clause 6<sup>13</sup> comprehensively explicates the **procedure to process an application** filed by a witness before the competent authorities. The procedure includes

1. Receipt of the Application by the Competent Authority, thereby passing an order seeking Threat Analysis Report from the relevant Assistant Commissioner of Police(ACP)/Deputy Superintendent of Police(DSP). (Interim Orders may also be passed by the Competent Authority based on the urgency of the matter)
2. Threat Analysis Report to be prepared and submitted by relevant ACP/DSP within 5 working days, maintaining complete confidentiality.
3. Threat Analysis Report shall classify the threat perception, mentioning the adequate protection measures.

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<sup>8</sup> *Id.* at s.2(j)

<sup>9</sup> *Id.* at s.2(c)

<sup>10</sup> *Id.* at s.3

<sup>11</sup> *Id.* at s.4

<sup>12</sup> *Id.* at s.5

<sup>13</sup> *Id.* at s.6

4. Competent Authority shall interact with the witness and/or their family members, either in person (preferred) or through electronic mode.
5. Hearings of the applications to held in-camera before the Competent Authority
6. Application should be disposed of by the Competent Authority within 5 working days.
7. Witness Protection Order to be implemented by witness protection cell, and in case of change in identity and/or relocation, it must be implemented by the concerned State/Union Territory government's Home Department.
8. Witness protection cell must file a monthly follow up report to the Competent Authority.
9. The Competent Authority can revise its order and seek a fresh Treat Analysis Report by the concerned ACP/DSP.

Clause 7 holistically delineates the types of protection measure may be provided by the Competent Authority, which mandates that the same has to be proportionate to the threat, within a limit of 3 months at a month.<sup>14</sup>

Clause 8 demarcates the monitoring and review the enforcement of the Orders passed by the Competent Authority, on a quarterly-basis corroborated by follow-up reports provided by the witness protection cell.<sup>15</sup>

The remaining provisions deal with protection of identity<sup>16</sup>, change of identity<sup>17</sup>, relocation of witness<sup>18</sup>, appraisal of witnesses of the Scheme<sup>19</sup>, Confidentiality and Preservation of records<sup>20</sup>, recovery of expenses<sup>21</sup> and review<sup>22</sup>. The review sought by the police authorities must be filed within 15 days of passing of the order.<sup>23</sup>

It is pertinent to note that the Witness would submit an undertaking before the competent authority in the lines of a deposition given in an affidavit.<sup>24</sup> The technical advancements in

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<sup>14</sup> *Id.* at s.7

<sup>15</sup> *Id.* at s.8

<sup>16</sup> *Id.* at s.9

<sup>17</sup> *Id.* at s.10

<sup>18</sup> *Id.* at s.11

<sup>19</sup> *Id.* at s.12

<sup>20</sup> *Id.* at s.13

<sup>21</sup> *Id.* at s.14

<sup>22</sup> *Id.* at s.15

<sup>23</sup> *Id.* at s.15

<sup>24</sup> *Id.* at s.15

protecting witnesses to avoid the identification of the witness are outlined in Part II(7)(1).<sup>25</sup>

## 5. PRECEDENTS RELIED UPON

In *Krishna Mochi v. State of Bihar*<sup>26</sup> The Supreme Court considered that one of the reasons why witnesses' depositions were not credible was that they lacked the courage to depose against the accused, which was caused by the threats created by the offenders, who would be habitual criminals or high ups with political or economic power.<sup>27</sup>

In *Swaran Singh v. State of Punjab*<sup>28</sup> The Supreme Court expressed conditions on witnesses, which includes the harassment undergone, the endless adjournments, prolonged stretches of examination, thus deterring the witness to appear before the courts.<sup>29</sup>

In *Ramesh and Ors. vs. State of Haryana*<sup>30</sup>, this Court had analysed the reasons which make witnesses turn hostile, which are

- (i) Threat/Intimidation.
- (ii) Inducement by various means.
- (iii) Use of muscle and money power by the accused.
- (iv) Use of stock witnesses.
- (v) Protracted trials.
- (vi) Hassles faced by the witnesses during investigation and trial.
- (vii) Non-existence of any clear-cut legislation to check hostility of witness.<sup>31</sup>

In *Zahira Habibullah Sheikh v. State of Gujarat*<sup>32</sup>, the Apex Court held "If ultimately truth is to be arrived at, the eyes and ears of justice have to be protected so that the interests of justice do not get incapacitated in the sense of making the proceedings before the courts mere mock trials as are usually seen in movies"<sup>33</sup>.

In *Sakshi v. Union of India*<sup>34</sup> The Apex Court emphasised on the dire need of legislation protecting witnesses. The Court also had issued certain guidelines on the procedure of taking evidence from a child witness<sup>35</sup>. The Court further pointed out the need for special protection to a victim of sexual abuse at the time of recording her statement in court.

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<sup>25</sup> *Supra* note 1, Para.30.

<sup>26</sup> (2002) 6 SCC 81

<sup>27</sup> *Id.* at Para.31.

<sup>28</sup> *Swaran Singh v. State of Punjab*, (2000) 5 SCC 68.

<sup>29</sup> *Supra* note 1, Para.4.

<sup>30</sup> *Ramesh v. State of Haryana*, (2017) 1 SCC 529 at para.44.

<sup>31</sup> *Ibid.* at Para. 45.

<sup>32</sup> *Zahira Habibullah Sheikh v. State of Gujarat*, (2006) 3 SCC 374, (2006) 2 SCC (Cri) 8

<sup>33</sup> *Id.* at Para.41.

<sup>34</sup> *Sakshi v. Union of India*, (2004) 5 SCC 518

<sup>35</sup> *Supra* note 1, Para.11.

In *State of Madhya Pradesh v. Bandu Daulat*<sup>36</sup>The Apex Court held that there is a need for special centres aimed at examining vulnerable witnesses in criminal cases in the interest of a conducive environment in Court so as to encourage a vulnerable victim to make a statement. Such centres ought to be set up with all necessary safeguards.

## 6. FINDINGS

The Hon'ble Court made the following findings on the issue at hand,

1. The weak protection of witnesses has led to low convictions, which have serious repercussion on the criminal justice system<sup>37</sup>
2. Right to life<sup>38</sup> includes the right to live in a society which is free from crime and fear and the right of witnesses to testify in courts without fear or pressure.<sup>39</sup>
3. The principle of witness to be examined in the presence of accused cannot be breached during trials, examination of witnesses through video conferencing is the solution, which ensure the balance of accused and vulnerable witness's interest<sup>40</sup>
4. The reason behind the establishment of Vulnerable Witness Deposition Complexes in the National Capital Territory was due to a large number of criminal cases, wherein the witness would turn hostile by providing false testimonies which were caused by lack of protection from them and their families.<sup>41</sup>
5. Paramount requirement of a statutory witness protection regime, conceded by all stakeholders in the criminal justice system.<sup>42</sup>

## 7. JUDGEMENT

The Hon'ble Supreme Court held<sup>43</sup>

1. The Scheme prepared has been officially approved, with immediate effect.
2. Enforcement of the Scheme in letter and spirit by Union Government, State Government and Union Territories.

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<sup>36</sup> *Supra* note 1, Para. 11.

<sup>37</sup> *Supra* note 1, Para. 8.

<sup>38</sup> The Constitution of India, art. 21.

<sup>39</sup> *Supra* note 1, Para. 16.

<sup>40</sup> *Supra* note 1, Para. 29.

<sup>41</sup> *Supra* note 1, Para.32

<sup>42</sup> *Supra* note 1, Para.34.

<sup>43</sup> *Supra* note 1, Para.35.

3. Scheme is law under Article 141<sup>44</sup> and 142<sup>45</sup> of the Constitution, until any legislative enactment is in force.
4. Ensure the establishment of vulnerable witness deposition complexes in every district court by 2019, which shall be funded by the Central government to support this endeavour.

## 8. ANALYSIS

The recently enacted **Bhartiya Nagarik Suraksha Sanhitha 2023(BNSS)**<sup>46</sup> has incorporated S. 398<sup>47</sup>, which mandates the state governments to prepare a Witness Protection Scheme, which aims at protecting witnesses. Since this statutory enactment only grants power to the State Government to ensure the enforcement of the witness protection scheme, the State Government is at the liberty to implement the draft scheme which has been deliberated in the course of this case, and it is interpreted that, in the absence of any explicit enforcement of a scheme by the state government, the draft scheme deliberated upon in this case would prevail.

This judgement has the effect of a landmark precedent in the realm of criminal jurisprudence, as this judgment has encapsulated on the various apprisers which are required for the implementation of a scheme that aims to foster the interest of the witness.

The judgement should be viewed as the seed which would grow into a humongous tree, providing the fruits of justice in the realm of witness protection, ensuring that witnesses do not act as passive eyes and ears of justice, but conduct themselves as proactive eyes and ears of justice. This case also acts as the stepping stone to bridge the lacunae between the textual interpretation of the judicial literature and practical enforcement of the law.

## 10. CONCLUSION

This judgment affirmatively provides impetus to the law enforcing agencies and the governments, to protect witnesses in the form of accepting a scheme. This verdict also paved the way for all state governments, who had no relation to the facts of this case, to become part of the process of contemplating perspectives to the witness protection scheme. Despite many

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<sup>44</sup> *Supra* note 38, art. 141.

<sup>45</sup> *Supra* note 38, art. 142.

<sup>46</sup> The Bharatiya Nagarik Suraksha Sanhita, 2023 (Act No. 46 of 2023).

<sup>47</sup> *Id.*, s. 398

precedents which were previously pronounced in the realm of witness protection in criminal jurisprudence, this verdict is most effective due to the judicial wisdom utilised to pragmatic situations, thus ensuring utmost justice to the petitioners who have approached this Hon'ble Court.

