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THE NEED FOR WITNESS PROTECTION IN CRIMINAL TRIALS: AN INDIAN PERSPECTIVE

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Abstract:

Under the Black's Law Dictionary, "in the primary sense of a word, a witness is a person *who has the knowledge of an event*. As we know that the most direct mode of acquiring knowledge of an event is by seeing it, a witness has acquired the sense of a person who is present at and observes the transaction". One of the most essential features of a democracy is the Right to Fair Trial. It is the primary duty of the Court to arrive at a fair and just result and to ensure this, the role of a witness is very crucial which makes it a very dependable one. They hold an immense amount of power during the proceedings of a trial. In many trials, it is the testimony of the witness that determines the conviction or acquittal of an accused, determining justice to be served in its true sense.

Due to their importance and reliability in a criminal trial, parties often intimidate the witnesses, forcing them to turn hostile and creating barriers in the quest for truth. In many instances witnesses have been subjected to threats and fear of being murdered, due to which they have refused to give their testimony where there could be an actualization of the impending threat on their life and property, thus interfering with the justice delivery system. Therefore, it becomes vital to protect the witnesses so that their testimony can be given in a proper and definite way. This calls for adequate measures to be taken to protect the witnesses in the country, to ensure a fair and just trial. The main intention of this research paper is to study the importance of a witness in a criminal trial and the need to protect them. The inadequacy of Witness Protection Laws in India highlights the imperative need for a proper independent legislative framework to protect the witnesses. The paper will dwell into the concept of Witness Protection Laws and the various Witness Protection Schemes Prevalent in India. It will lay emphasis on the various challenges faced to witness protection and suggestions to overcome it. Towards the end, a

conclusion shall be drawn on the comparative study between India and other countries in relation to the concept of Witness Protection Programs and associated schemes implemented to uphold the concept of a fair trial.

KEYWORDS:

India, fair, program, protection, trial, witness

Introduction:

A witness holds a significant role in the criminal justice system. The fundamental duty of the Court is to arrive at a fair and just result and to ensure this, the role of a witness is very crucial which makes it a very dependable one. They hold an immense amount of power during the proceedings of a trial. In many trials, it is the testimony of the witness that determines the conviction or acquittal of an accused, determining justice to be served in its true sense. They can be considered as the eyes and ears of the justice system. Witnesses have been subjected to threat to life and property, injury and intimidation, only because of their deposition. Many have been murdered in order to prevent them from giving their deposition in the court of law. Since the primary object of the judiciary is to arrive at the truth and witnesses are the medium through which this can be achieved it becomes extremely necessary and important to protect them. In India, it is often noticed that witnesses hesitate to provide their deposition in fear of threat to life and property. There have been many instances where witnesses have been manipulated, intimidated, threatened, murdered, etc, due to which they have either turned hostile or tuned away from providing their testimony.

To prevent this and ensure that the democratic principles of a fair and just trial are upheld, adequate measures and infrastructure must be in place to protect the witnesses. Confidence must be instilled in the witnesses that they would be protected. This can be implemented in the form of Witness Protection Programs and supporting statutory legislations that would protect the witnesses and in case of breach of security, then there are strict penal implications for the same. Through these witness protection programs, the witnesses will not only be able to testify without fearing for their life but also uphold the spirit of a fair trial. With the present scenario in our country, the inadequacy of Witness Protection Schemes highlights the imperative need for a statutory legislation to protect the witnesses.

The Apex Court in the case of *Zahira Habibullah Sheikh v. State of Gujarat*¹, observed that to uphold the spirit of a fair trial, a witness is of utmost importance and to ensure this it emphasised on the urgent need for “Witness Identity and Witness Protection Programs” in India.

The Need For Witness Protection:

The fundamental principle of a criminal justice system is that a particular crime must be proved beyond a reasonable doubt. The prosecution bears the burden of proof, to prove the crime supported by the testimonies of the witnesses in turn leading to establishing the guilt of the accused. With extensive developments in the criminal jurisprudence system, along the rights of the accused, the model of a fair trial and permissibility of evidence, the importance of a witness has been avoided. A fair trial is one which entails a triangulation of interests of the accused, the victim and the witness, but there exists a mismatch of rights between the accused and the witnesses². The accused have the right to a fair and public trial³, the freedom of expression and information⁴, to have evidence recorded in their presence⁵ but these rights are not absolute and maybe withdrawn in the interest of justice.⁶ Witness protection programs are necessary to strike a balance between the rights of the accused and the witnesses in a trial. Taking note of the fact that when a witness testifies in court, there are no personal benefits that the witness obtains. In spite of this, there seems to be no obligation on the State under any legal schemes to protect and secure these witnesses, making their rights as good as non-existent. There are no concrete provisions in the law to protect the witnesses from external threats, inducements or intimidation and also no clear-cut legislation to punish or deal with a hostile witness.⁷ Under monetary inducements or any kind of threats, it is often noticed that witnesses turn hostile. Further, due to the lack of protection of their rights and insufficient security, they refuse to provide for their testimonies and be involved in the long judicial process. This could hamper a fair trial, in order to avoid this there is a need to protect to the witnesses and implement various protection schemes to prevent hostility and ensure a fair justice delivery system. Since 1958, concrete deliberations on the need for witness protection programs in the county has been

¹ *Zahira Bibi Sheikh v. State of Gujarat*, CriLJ 771, 2004.

² *Zahira Bibi Sheikh v. State of Gujarat*, CriLJ 771, 2004.

³ International Covenant on Civil and Political Rights, art14.

⁴ The Constitution of India, art.19 (1)(a).

⁵ The Criminal Procedure Code 1973, s. 273

⁶ The Law Commission of India, *Witness Identity Protection and Witness Protection Programs* (Law Com No.198, p.85, 2006.

⁷ *Ramesh and Others v. State of Haryana*, 1 S.C.C. 529, 2017.

done. The 14th report of the Law Commission critically scrutinised the reasons responsible in preventing the witnesses to give their testimony. With this, the Apex Court along with the Law Commission and other committees have highlighted the necessity for “Witness Identity Protection and Witness Protection Programs”, and in various judicial pronouncements have elaborated on its necessity, the framework that is required and the urgent need for its application in India.

1. The Law Commission Reports:

One of the first developments in the need for “Witness Protection” was identified by the 14th Law Commission where they were recognized as legal entities who were entitled to be treated with dignity and protection. In the report submitted it was concluded that there were inadequate arrangements for witnesses in the Courthouses⁸. In a number of States in the country, there is no adequate facilities done to accommodate, protect or uphold their rights which may cause a hindrance to the spirit of justice. It was stated by the Commission that “due respect is rendered to the convenience and comfort of witnesses and must be provided with compensation for sparing their valuable time⁹”. Further, it was observed that if these requirements were not fulfilled, then there would be no incentive for the witnesses, making them indifferent in helping the Court in the administration of justice.

The 14th Law Commission Report elaborated upon the harassment and ill-treatment that witnesses face, while the 42nd Report focused on the problem of the growing frequency of threats that witnesses are subjected to in turn causing them to turn hostile and not appear in Court. The subject matter of the report, had the commission proposing an addition of three new section to the Indian Penal Code¹⁰, where one of the sections penalized any acts which interfered with the testimonies of witnesses.

The proposed Section 299-A stated that, “Whoever, by threats, bribes or other corrupt means, dissuades or attempts to dissuade any person from giving evidence before a public servant, legally competent to examine him as a witness, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both¹¹”. Further, it was highlighted that mere punishment of the offender was not sufficient and for the eradication

⁸ The Law Commission of India, Reforms in Judicial Administration, Law Com No, 14, p.687-689, 1958.

⁹ The Law Commission of India, Reforms in Judicial Administration, Law Com No, 14, p.670, 1958.

¹⁰ The Law Commission of India, “Indian Penal Code, 1971, Law Com No. 42, pp. 206-207.

¹¹ Ibid, p.207.

of the problem of hostile witnesses, then their rights must be protected and they must be given security. The 154th Law Commission taking reference from the 14th Law Commission Report opined that “plenty of justification for the reluctance of witnesses to come forward to attend Court promptly in obedience to the summonses, the Law Commission was of the view that inconveniences meted out to the witnesses coming to courts, lack of facilities to the witnesses, frequent adjournments and inadequate allowances are the reasons behind the reluctance of the witnesses to cooperate with the law enforcement agencies¹². Based on these, recommendations and suggestions were given for the protection and preservation of the rights of witnesses. Though these were given by the Commission, it failed to present an elaborate framework to elaborate on the criteria and guidelines to do so.

The 172nd Law Commission Report further discussed the concept of Witness Protection but rather narrowly, which was originally the result of writ petition¹³ being filed that demanded for various amendments to be made to the Indian Evidence Act, the Code of Criminal Procedure and the Indian Penal Code. The Apex Court requested the Law Commission to examine the issues submitted in the petition. The petitioners contended for various amendments with respect to the definition of “sexual intercourse”, minor witnesses and oral testimony.

The Law Commission with its report recommended the addition of a provision to Section 273. The report mainly dealt with the reasons for the hostility of witnesses. To this, they elaborated on various recommendations that needed to be adopted in order to prevent witnesses from turning hostile. The Commission was successful in identifying the existence of a problem, but with respect to the question of actual physical protection and maintain anonymity of the witnesses, no such methods were thrown light upon.

Conceivably, the most inclusive and complete law commission report with respect to the Protection of Witnesses is the 198th Law Commission Report. The entire report dealt with “Witness Identity Protection and Witness Protection Programs”. The Witness Identity Protection implicates the necessary steps that need to be taken in order to maintain the anonymity, concealment and protection of witness identities. In order to do so, screen techniques are used where their name is hidden and does not appear in court documents. The Law Commission opined that, different witnesses needed different levels of protection and to this they categorized

¹² The Law Commission of India, “The Code of Criminal Procedure”, Law Com No. 154, p.62, 1962.

¹³ Sakshi v. Union of India, SCALE 15, 2004.

the witnesses into three types – “Victim-witnesses who are known to the accused, Victims-witnesses not recognized to the accused and witnesses whose identity is not revealed to the accused¹⁴. Protection to witnesses must be provided during all three stages of a criminal trial – before a trial, during a trial and after a trial. Recommendations with respect to adoption of in-camera sessions, anonymity, concealment and protection of witness identities and for protection of witnesses post the trial creation of various “Witness Protection Programs”. The main aim of such programs would be to make the witness disappear and untraceable. Through these programs, the witnesses testifying who are subjected to constant threats and fear, can be relocated to a different city or State where they can be given a new name and identity, to ensure that they are safe and secure. There was a model suggested for the Witness Protection Program by the commission which later went onto form the basis of the Witness Protection Scheme of 2018.

2. Judicial Trends:

The need for Witness Protection and its associated programs which is required in order to ensure a fair trial has been emphasized by the Apex Court and the High Courts, through the various judgements given by them. The main objective is to be deliver justice in its true sense and when witnesses are subjected to threats and intimidation affecting their testimony, this objective remains unfulfilled. The Apex Court, in the landmark case of Neelam Katara v. Union of India¹⁵, elaborated on the need of a judicial calm environment and held that if witnesses were testifying under fear or any sort of intimidation then the administration of justice is weekended and obliterated. In the same case guidelines for witness protection were laid down. In the case of Swaran Singh v. State of Punjab - it was held, “when a witness is threatened, maimed, done away with or even bribed and there is no protection for him, the purpose of a criminal jurisprudence is defeated¹⁶”

The need for witness protection programs in order to ensure a fair trial was emphasized by the Apex Court in the case of Zahira Bibi Sheikh v. State of Gujrat¹⁷. It was noted that if witnesses

¹⁴ Law Commission of India, Witness Identity Protection and Witness Protection Programs(Law Com No. 198, 2006.

¹⁵ Neelam Katara v. Union of India, ILR II Del. 377, 2003.

¹⁶ Swaran Singh v. State of Punjab, AIR 637, 1957.

¹⁷ Zahira Bibi Sheikh v. State of Gujrat, CriLJ 771, 2004.

are forced or threatened to give false testimonies then also this would not result in a fair trial and the Court elaborated on the role of the State to protect its witnesses, where it held that this was a constitutional obligation to protect the life and liberty of the witnesses and they were entitled to this¹⁸. The need for witness protection programs taking into consideration the present circumstances and hostility of witnesses was the call of the hour. In the case of Hira Nath Mishra v. Principal Rajendra Medical College - the Court held that cases in which the accused is a hardened criminal then care must be taken to protect the identity of the witness¹⁹.

The immediate need for legislations and the introduction of witness protection programs in the country to uphold the spirit of justice was highlighted in the case of National Human Rights Commission v. State of Gujarat²⁰. In the case of Neelam Katara v. Union of India²¹, guidelines with respect to witness protection were laid down, 15 years after this the Witness Protection Scheme, 2018 was finally passed by the legislative body which was boosted by the case of Prem Chand v. State of NCT Delhi²².

Witness Protection Scheme, 2018 - Current Scenario:

The witnesses testifying in the Court of law must be instilled confidence in the fact that they would be protected if they testified and helped the judicial authorities in their enforcement process. The prime objective of the Witness Protection Scheme is to protect the witnesses from being intimidated or threatened in order to give any sort of testimony without any protection and to guarantee that the investigation, prosecution and the trial carried out are not intolerant. The scheme intends to uphold the law enforcement procedure and help in protecting the testifying witnesses who are directly or indirectly involved in this. It lays down the framework and guidelines that is required for the protection of the witnesses and their family members and see to that that they are not intimidated or threatened in any way. Under this particular scheme, witnesses are categorized on the footing on the potential threat they are faced by. They are grouped under Category A, B and C.

¹⁸ Ibid,17.

¹⁹ Hira Nath Mishra v. Principal Rajendra Medical College, SC 1260, AIR 1973.

²⁰ National Human Rights Commission v. State of Gujarat, Writ Petition(s)(Criminal)No(s).109, 2003.

²¹ Neelam Katara v. Union of India, ILR II Del. 377, 2003.

²² Prem Chand v. State of NCT Delhi, SLP (Cr) No. 647, 2017.

The Witness Protection Scheme elaborates on the categories of witnesses based on the potential threat that they would receive, with respect to this there is also a procedural framework that has been laid down. This framework guides the steps that are mandated and which need to be fulfilled in order to see witness protection. This includes a threat analysis report.

Lastly, on the basis of threat perception, the scheme throws light upon the different kinds of protection measures that are functional. The time period of these protection measures is considered to be specific and would automatically cease to function when the protection measures are lifted.

Witness Protection Programs Worldwide: Comparative Analysis

The Witness Protection Scheme, 2018 was one of the first steps taken to protect witnesses and considered to be a legitimately fresh addition to the Indian Criminal Jurisprudence.

In most countries across the globe, one can see that these witness protection programs are an inherent part of their justice systems. Drawing inspiration from countries such as the United Kingdom, the United States of America, Australia and New Zealand, the Witness Protection Scheme, 2018 has been laid down.

United Kingdom:

Protection measures are provided to witnesses and other individuals under Section 82 of the Serious and Organized Crime Police Act, 2005(SOCPA), who meet the eligibility criteria mentioned under the Standard Operating Procedure (SOP). These measures are applicable to all police officers, police staff and their respective families and other officers who work for the department on contractual basis. Protection is given to individuals who are involved in judicial proceedings such as law enforcement officers, witnesses, informants and their family members, this is provided for under Schedule 5²³ of Section 82 of the SOCPA. Unlike the Indian Witness Protection Scheme that only extends to witnesses,

²³ "The Witness Protection Program in Selected Countries", Public Safety Canada, 10 July 2014,

<https://www.publicsafety.gc.ca/cnt/rsracs/pblctns/rgnzd-crm-brf-43/index-en.aspx%3e>

the U.K witness protection scheme extends to police officers, witnesses, police staff and informants too covering a wider scope. But this is applicable only if certain criteria are met as per provisions laid down in the Act. Further, to determine the level of protection that needs to be provided, the Criminal Justice Protection Unit is committed to conduct a Threat Assessment to assess whether they should be included in the protection scheme. The protection scheme primarily focusses on identity-change and relocation of the witnesses and their family members to keep them off the radar.

United States of America:

The first witness protection program that has served as a model for many other countries is the US Federal Witness Security Program (WITSEC). For over four decades now, the WITSEC is being operated by the US Marshall services. Its core feature is the secret and permanent relocation, often coupled with an identity change, offered to witnesses and their immediate families²⁴. When a witness is testifying in the court of law and this act puts his/her life in grave threat then protection is to be provided for him under the WITSEC program. Further, the decision to decide whether a witness requires protection lies with the Office of the Attorney General along with the US Department of Justice, where the authorizing power is with the Office of Enforcement Operations. The scheme provides for protective services to those individuals who have testified in organized crimes, state/federal felonies or drug trafficking, etc. The protection services mainly focus on relocation and change of identity of the witnesses and their families.

Australia:

In 1998, a model and framework laid down by the Parliamentary Joint Committee on The National Crime Authority which investigated on the subject matter of witness protection, based on this the Witness Protection Act of 1994 was drafted²⁵. With the enactment of the Act, the National Witness Protection program (NWPP) was introduced and the maintenance of the same was given to the commissioner of the Australian Federal Police (AFP). Section 3 of the Act provides for the definition of a witness. Fulfilling this, a witness is eligible to apply for protection under the NWPP. Protection services namely relocation and identity changes are not only provided to Australian nationals but also to foreign nationals. But this can be only done on requests made by foreign law enforcement agencies or the International Criminal Courts. With witnesses relocating and identity changes they are fully given statutory rights for doing so along

²⁴ Witness Security Reform Act 1982 ,18 US Code, s. 3521

²⁵ Australian Federal Police, 'Witness Protection Act: Annual Report 2013-14', (Government of Australia, <https://www.afp.gov.au/sites/default/files/PDF/Reports%20%20witness-protection-annual-report-2011-12.pdf>)

with supporting legal documents recognized by the common law. A re-integration program that is included in the NWPP, thereby setting it aside from the WPP enacted by the USA. The NWPP not only provides for basic allowances and physical protection services to the witnesses and their families but also helps in integration these families into their newly relocated communities. They do this by the application of various operating methods in order to ensure safe integration.

DRAWBACKS OF THE SCHEME:

The Witness Protection Scheme, 2018 was one of the first legitimate attempts made in order to protect witnesses in criminal trials. To protect and secure the rights of a witness during the entire process of a trial, the scheme has been well-drafted with preeminent intentions. Despite this the scheme seems to have some inherent drawbacks and loopholes. The first one depending on the sincerity and objectivity of Police Officials. Provisions in the scheme state that to pass protection orders, the Threat Analysis Report must be done by the Head of the Police in that particular district. These police officers can be subjected to threats, inducement, political interference causing them to submit false reports. With such a system in place, it can always be influenced and this would hamper the justice system. Further, this would also lead to incorrect categorization of witnesses. The next drawback is with respect to the time-period of protection provided to the witnesses that is valid only for three months. After the said time period, the protection is lifted and the witness is again exposed to the threats. This provision makes it redundant as the witness is again on the radar of the accused and there is a high risk involved. The protection to the witnesses must be provided until there is no sign of imminent threat from the accused. Further, the scheme provides for no provisions that would penalize such threats. The lack of adequate infrastructure for the proper implementation of the scheme seems to be lacking. Inadequate State funds may hamper the implementation of the scheme and the overall functioning of the criminal justice system. In the system of lower courts, the mandate of the Witness Protection Scheme may not be satisfied due to the absence of suitable infrastructure.

Conclusion:

Witness Protection is an integral part of the criminal justice system. It is a necessity for every country to develop and implement Witness Protection Schemes and Programs to uphold the principles of a fair trial. Moreover, in a populated country like India where thousands of cases are being prosecuted on a daily basis, it becomes even more important to do so. In many cases, the witnesses are untraceable or turn hostile, only due to the fear of threats and intimidation. Even though India has implemented a Witness Protection Scheme which can be considered as one of the very first attempt towards witness protection, the scheme inherently seems to have lacunae and ignore fundamental ground realities. The Witness Protection Schemes need to be designed in such a way that the growing and developing conditions of the country are taken into consideration that influence the technicalities of the justice administration system. Further, since there is no legit statutory provision to support the same this may lead to citizens losing their faith in the justice disposing system. Therefore, as discussed through the course of this paper it an imperative call of the hour that there is a proper comprehensive legislative framework that needs to be laid down to protect witnesses in the country and any breach would result in penal consequences. In order to implement this, inspiration and guidance can be drawn from other countries who have already done this to protect their witnesses. Therefore, if witnesses are protected in the spirit of a criminal trial and this is implemented in a well-guided manner then justice could be delivered freely, independently and in its true sense.