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## Adequacy of Witness Protection Scheme, 2018 in the Prevention of Elimination of witness

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*In the criminal justice system, the witness is regarded as a 'pivot' that balances the delivery of Justice between the parties involved in the case. It is the witness around which the whole Justice system revolves. But the importance of witness protection has been a neglected issue in the Indian criminal justice system. There have been rising cases of elimination of key witnesses by either killing them or making them hostile and current provisions for witness protection are failing to prevent these attempts, thus making witnesses vulnerable to innumerable threats for speaking the truth in the court of Justice. There is a lack of sensitization in Indian society to the plight of witnesses and the problems they face while discharging their duties as a witness, which results in poor or no legislation for witness protection. In light of these considerations, I will be discussing in my paper the utmost importance of witnesses in the criminal justice system to uphold the rule of law. I will also point out the lacunae in our existing rules and legislations which have almost taken for granted the duties of the witness and his safety and security.*

**Keywords:** *witness protection, elimination of witness, the criminal justice system, vulnerable, sensitization.*

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### INTRODUCTION

The criminal justice system in India is a triangulation. It comprises three limbs – accused, victim and witness. Since ancient times accused has been regarded as the 'centre of mass in the criminal justice system and given more attention than the other two limbs. We have been talking about

the rights of the accused, their living conditions in prison, and their innocence unless proven guilty. But focusing only on one limb will not going to improve our marred criminal justice system. Now it is time to focus on the other two. There is a need for a paradigm shift in our approach to the criminal justice system, the importance of victims and witnesses needs to be recognized and given equal importance as the accused. Proceeding further, this paper will specifically deal with the importance of witnesses and the problems they face in the criminal justice system.

### IMPORTANCE OF WITNESS

Now the question is who is a witness? English Philosopher Jeremy Bentham defined "Witnesses are the eyes and ears of Justice". I completely agree with Bentham's definition of a witness. It is through the witness that Judges can perceive and infer the happenings of incidents and crime scenes. Witnesses are the persons who are present at the place of criminal happenings and have seen and heard the criminal incident.<sup>1</sup> Witness bears the testimony of true incidence which no one except for another witness can endorse it. Had there been no witnesses in criminal cases, there would have been no convictions and no prisoners in jail. Apart from being called 'eyes and ears of Justice', I would say witnesses are the 'heart and soul' of the Judicial system in the dispensation of Justice.

Emphasizing the importance of witness, the Delhi High court in *Neelam Katara v Union of India, (2003)* observed, "*The edifice of administration of justice is based upon witness coming forward and deposing without fear or favour, without intimidation or allurements in Courts of Law. If witnesses are deposing under fear or intimidation or for favour or allurements, the foundation of the administration of justice not only gets weakened but in cases, it may even get obliterated.*"<sup>2</sup> Indian criminal Jurisprudence follows an adversarial system where Justice depends on evidence, witnesses are living proof, and form an essential part of the evidence. Provided that, so much faith has been entrusted to the witness for a Just delivery system, then why witnesses are becoming hostile and backtracking from their earlier instances? The reason may be many which comprise but are not

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<sup>1</sup> *Mahendra Chawla & Ors v Union of India & Ors* Writ Petition (Criminal) No. 156/2016

<sup>2</sup> *Mrs. Neelam Katara v Union of India* (2003) II Del 377

limited to threat, allurements, fear, intimidation, etc. It is because of these reasons designation of witness claim protection.<sup>3</sup>

## NEED FOR WITNESS PROTECTION

Witness forms the core of the Justice delivery system, for this reason, it becomes necessary to ensure that the witness delivers the statement independently without any fear, favour, affection, or ill will. He must speak only the truth without taking the side of either the accused or the victim, or else the purpose of justice would be defeated.<sup>4</sup> It is unfortunate to know that in India the condition of the witness is a 'sorry state of affairs'. It is a general perception that to become a witness in India is a misfortune. The above perception is true to some extent because a witness in India has to face life-threatening intimidation for himself and his family, he has to bear the burden to come to court on the summons, facing the traumatic court environment, had to wait for the whole day only to hear at the end of the day that the case is adjourned. This dragged litigation procedure is badly affecting the Criminal Justice System. Because of these dragged litigation procedures and delay in conviction, the accused got the chance to eliminate the key witnesses either by life-threatening intimidation or by inducement thus turning them hostile.<sup>5</sup>

The appearance of a hostile witness is a common phenomenon in high-profile cases where the accused either have some political affiliation or belongs to a group of gangsters. In *State v Sanjeev Nanda*, Supreme Court held, "*Witness turning hostile is a major disturbing factor faced by the criminal courts in India. Reasons are many for the witnesses turning hostile, but of late, we see, especially in high profile cases, there is a regularity in the witnesses turning hostile, either due to monetary consideration or other tempting offers which undermine the entire criminal justice system and people carry the impression that the mighty can always get away from the clutches of law, thereby eroding people's faith in the system.*"<sup>6</sup>

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<sup>3</sup> Mahendra Chawla (n 1)

<sup>4</sup> Law Commission, 'Witness identity protection and witness protection programs' (Law Com 198, 2006)

<sup>5</sup> Mahendra Chawla (n 1)

<sup>6</sup> *Ibid*

To take some examples – In 2017, *Asaram Bapu case*, three key witnesses were eliminated by killing them and the other ten key witnesses were attacked in an attempt to kill them also.<sup>7</sup> In 2018, Unnao minor rape case, where BJP MLA, Kuldeep Singh Sengar was accused of raping a minor, two key witnesses were eliminated by killing them including the victim's father, and the matter was hushed up without further inquiry as to the cause of their death. Other witnesses were turned hostile through inducement.<sup>8</sup> In India, abuse of Political and Money power by influential people is so high that it becomes very important to protect the witness from being eliminated by the criminal hands and thus to prevent recrimination.

### PROTECTION OF WITNESSES BEFORE 2018

Before 2018, there was no formal provision for witness protection, however, there exist some indirect provisions for the protection of witnesses. Section 436 and 437 of Crpc talk about granting bail in bailable and non-bailable offences on the condition of bail bond which necessarily includes non-threatening of witnesses by the accused<sup>9</sup>. There have been many previous Judgements that laid down consideration for granting bail, to quote some, in *State v Capitan Jagjit Singh* (1961), *Gurucharan Singh and Ors. v State (Delhi Admin)* (1977) and *Kalyan Chandra Sarkar v Rajesh Ranjan @ Pappu Yadav* (2004), etc, in all these Judgements one of the necessary conditions of bail bond was non-tampering with witnesses.<sup>10</sup>

Other provisions for the protection of witnesses include section 195 IPC, Juvenile Justice (Care and Protection of Children) Act 2015, Whistleblowers Protection Act 2011, Protection of Children from sexual offences (POSCO) ACT 2012, National Investigation Agency Act 2008 and Schedule caste and Tribes (Prevention of Atrocities) Act 1989, etc. The 14<sup>th</sup>, 15<sup>th</sup>, 178<sup>th</sup>, and 198<sup>th</sup> Law commission report also mentioned the protection of witnesses in high-profile cases.<sup>11</sup> All

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<sup>7</sup> Soibam Rocky Singh, 'India gets first witness protection scheme' (*The Hindu*, 5 December 2018) <<https://www.thehindu.com/news/national/sc-approves-centres-draft-witness-protection-scheme/article25669784.ece>> accessed 21 November 2022

<sup>8</sup> M. P. Nathanael, 'A law for those who testify' (*The Hindu*, 19 August 2019) <<https://www.thehindu.com/opinion/op-ed/a-law-for-those-who-testify/article29127685.ece>> accessed 21 November 2022

<sup>9</sup> Criminal Procedure Code 1973

<sup>10</sup> Dr. Krishna Murari Yadav, *The Code of Civil Procedure* (HP Hamilton Limited 2020)

<sup>11</sup> Mahendra Chawla (n 1)

these indirect provisions were not efficient in protecting witnesses from being eliminated. Instead, there had been a rising incidence of witnesses becoming hostile, thus increasing their elimination.

## PROTECTION OF WITNESS AFTER 2018

In the wake of rising cases of hostile witnesses and after the horrible incident against witnesses in the Asaram Bapu case, the pitch to introduce a witness protection scheme gained ground. Ministry of Home Affairs in consultation with other states and Government bodies, introduced Witness Protection Scheme, in 2018. The scheme was approved by the Supreme Court on 05/12/2018, by Justice A. K. Sikri in *Mahender Chawla & Ors. . Union of India and Ors.*,<sup>12</sup> Mahender Chawla was one of the witnesses who miraculously survived the attack in the self-styled godman Asaram Bapu Case. The court stated that the scheme shall be the law under articles 141 and 142 of the Constitution till parliament enacted new legislation on the subject. Thus, the witness Protection scheme 2018, became the first legal document for witness protection.<sup>13</sup>

The scheme provides protection based on threat perception and analysis reports prepared by the head of police in the District investigating the case. The scheme provides three categories of witnesses based on threat perception during the trial, investigation, and thereafter-

Category A: when threat extends to limb and life

Category B: when threat extends to safety, reputation, and property

Category C: when threat extends to intimidation and harassment <sup>14</sup>

The form of protection includes a change of Identity, relocation, installation of security devices in and around the witness's residence, specially designed courtroom having an audio-visual

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<sup>12</sup> *Ibid*

<sup>13</sup> 'Witness Protection Scheme' (PIB Delhi, 10 July 2019) <<https://pib.gov.in/PressReleaselframePage.aspx?PRID=1578108>> accessed 21 November 2022

<sup>14</sup> *Ibid*

arrangement to prevent face-to-face interaction of the accused and witness in high-profile cases. Provisions are made for funding the scheme, the sources of funding include:

- 1) Annual Budget allocation by State governments
- 2) Fines/costs imposed by courts and tribunals
- 3) Contributions by individuals, philanthropists, and trusts permitted by the government
- 4) Funds through corporate social responsibility <sup>15</sup>

### **PROBLEMS IN WITNESS PROTECTION SCHEME, 2018**

Witness Protection Scheme 2018, is a right step in the right direction, but still, we cannot conclude that it has served the purpose for which it is made. Even after the introduction of the scheme, there has been no stoppage in the chain of elimination of witnesses in high-profile cases for example in the high-profile cruise drug case in 2021, the PIL filed disclosed the attempt to bribe the witness. So, the question arises of the adequacy of the witness protection scheme 2018 in the prevention of the elimination of witnesses.

The problem lies in the scheme itself, firstly, it is just a scheme, and not legislation though it is binding on government bodies its violation will not call punishment. Secondly, there is no definite source of funding, the centre has no contribution to funding the scheme, and it is left at mercy of the state funds. Thirdly, the scarce resources of funding and manpower will make the implementation of the scheme difficult. Fourthly, the police personnel charged with the security of witnesses may themselves be corrupt and can pass the information of the whereabouts of witnesses. The head of police charged with the preparation of a threat perception report may under political pressure not performs his duty properly in high-profile cases. When all these problems are still lingering in the scheme, the elimination of witnesses will continue. These persistent problems show that the witness protection scheme 2018, is not adequate in the prevention of the elimination of witnesses.

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<sup>15</sup> *Ibid*

## SOLUTION

The best solution is to work on and improve the lacunae already pointed out in the witness protection scheme 2018 but what is more important is to work on the root causes of these problems. The issue of dragged litigation procedure and delay in conviction needs serious attention, this problem can be solved by solving the problem of infrastructure and staff crunch in the Indian judiciary and increasing the manpower by filling the vacancy of Judges. The use of technology like a scientific method of investigation using DNA and fingerprints etc could sufficiently address the problem of hostile witnesses<sup>16</sup>.

But the proper transition to a scientific investigation can be possible only by increasing specially trained manpower to investigate the case scientifically. These specially trained police officers must be different from 'beat constables'. Provided these solutions we must also keep in mind that technology cannot completely replace the witness and their importance in the criminal justice system. Technology can only help to reduce the dependence on witnesses, thus, witness protection rules must be strengthened.<sup>17</sup>

## CONCLUSION

Witness protection is the need of the hour. Lack of funds and human resources shall not be the excuse for its proper implementation. Now is the time for the parliament to become sensitized to the plight of the witness and bring in full-fledged legislation for the protection of the witness and punish those who act contrary to that legislation. Emphasizing the importance of witnesses in the Criminal Justice System, Justice Malimath Committee Report 2003 stated that the "Time has come for a comprehensive law being enacted for the protection of the witness and members of his family". This will boost the confidence of the witness to impartially depose the facts of the case without any fear or favour. <sup>18</sup>

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<sup>16</sup> *Ibid*

<sup>17</sup> *Ibid*

<sup>18</sup> Mahendra Chawla (n 1)