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Critical Analysis of Legal Framework Laid Down for Identifying Vulnerable Witnesses and Ensuring Their Protection in the Light of Smruti Tukaram Badade v State of Maharashtra

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This Article deals with the Protection of Witnesses as well as safeguarding the rights of a vulnerable witness specifically; Introducing rules and regulations to create a conducive environment for potentially vulnerable witnesses in the country. It cites various apex court Judgements which have aimed at gradually doing the same. This coupled with executive functions is meant to facilitate the protection of vulnerable witnesses. Also, the insensitive behaviour of all stakeholders towards the victims and vulnerable witnesses in due course of a criminal trial is something that is frowned upon and adequate measures for the same directed by the Apex court are to be adopted. This Article acknowledges how an accused of a powerful background having abundant resources at hand can threaten the witness and derail the integrity of a case trial and in turn, taint the trust in the objectivity of the judicial system. This Article draws up a simple timeline on how as time progressed the need for protection of witnesses has proliferated.

Keywords: *vulnerable witnesses, evidence, protection scheme.*

INTRODUCTION

As Jeremy Bentham said ‘Witnesses are eyes and ears of the Court’¹. This quote recognises the pivotal role played by witnesses in establishing the role of an accused in the commission of the offence. A Witness can be defined as a person who can attest to the happening of an event or a fact pertaining to such event. Section 118 of the Indian Evidence Act 1872 narrows down this definition to a person who is competent enough to understand the questions asked by the court². Delving further into this concept, a hostile witness can be spelled out as a witness who initially agrees or volunteers to be a witness for a case but later reneges on their decision. This is done for a variety of reasons including but not limited to acts of coercion by the accused on the potential witness or their family. Witnesses increasingly turning hostile is deduced to be the direct consequence of having an insufficient and incompetent witness protection system in the country. The existence of hostile witnesses exposes the often ignored politically or financially powerful accused and a growing need for laying down a proper standard operating procedure to allow the facilitation of adequate protection of witnesses. The 4th National Police Commission Report 1980, explicates how genuine witnesses are manipulated and intimidated into turning hostile during the court proceedings by the accused.³

The concept of a vulnerable witness has evolved over the years, receiving the most traction through its mention in the Delhi High Court guidelines for recording evidence of vulnerable witnesses in criminal matters.⁴ These guidelines delineate vulnerable witnesses as child witness who has not completed 18 years of age. The right to testify in a free and fair manner has been held to be a Fundamental right under Article 21 of the Constitution of India by the *Mahendra Chawla v Union of India*.⁵

¹ Witness Protection Scheme 2018

² Indian Evidence Act 1872, s 118

³ National Police Commission, *Fourth Report of National Police Commission* (1980)

⁴ Guidelines for recording of evidence of vulnerable witnesses in criminal matters

⁵ *Mahender Chawla v Union of India & Ors* Crim WP No 156/2016

WITNESS PROTECTION SCHEME 2018

The Asaram Bapu case intensified the need for a codified form of Protection measures for the witnesses in the case who were coerced and later killed for exhibiting the courage to testify against the accused who had allegedly raped a minor. One of the initial and functional steps taken towards the same would be the Witness Protection Scheme 2018.⁶ The Supreme Court understood the need for a Witness Protection Scheme and observed the legislature shelving the approval for the same. Hence, it approved and ordered the implementation of the Witness Protection Scheme on an immediate basis exercising its right under articles 141 and 142 of the Indian Constitution. The bench has also asked all States and UTs to set up vulnerable witness deposition complexes.

The Witness Protection Scheme of 2018 was formulated in consultation with the National Legal Services Authority (NALSA) and the Bureau of Police Research and Development (BPRD).

The scheme identifies three categories of witnesses as per threat perception:

Category A: Those cases where threat extends to the life of witness or family members during the investigation, trial or even thereafter.

Category B: Those cases where the threat extends to the safety, reputation or property of the witness or family members during the investigation or trial.

Category C: Cases where the threat is moderate and extends to harassment or intimidation of the witness or his family members, reputation or property during the investigation, trial or thereafter.⁷

The Witness Protection Scheme of 2018 establishes a carefully articulated procedure to facilitate Witness Protection through proximate physical protection, anonymizing testimonies and concealment of witness identity, holding of in-camera trials and ensuring expeditious recording of deposition during trial on a day-to-day basis without adjournments. In many instances

⁶ Witness Protection Scheme 2018

⁷ *Ibid*

witness testimony is essential for the conviction of crime syndicates or criminal organisations and in such cases for protecting the witness grave measures such as relocation of a witness or changing the identity of the witness are resorted to. The scheme provides for the Witness Protection Fund and awarding from time-to-time periodical financial aids/ grants to the witness from the Witness Protection Fund for the purpose of re-location, sustenance or starting a new vocation/profession, if desired.

When the Witness applies for protection, the competent authority shall pass an order directing the Commissioner or the Senior Superintendent of Police to draw up a Threat Analysis Report assessing the category of risk the witness falls under and the subsequent measures to ensure Witness Protection. The Competent Authority under the scheme has been defined to mean the Secretary, District Legal Services Authority (DLSA) and the order of this Authority is implemented by the Witness Protection Cell of the specific State/UT. These provisions introduced to be liberally construed are aimed at achieving a strong criminal justice system and instill a sense of trust and security amongst the citizens of the country who are potential witnesses to any crimes that have been committed or will be committed in the future.⁸

JUDICIAL PRECEDENTS

State of Punjab v Gurmit Singh:⁹ This judgement upholds and brings to light the importance and vitality of adhering to Section 327¹⁰ and notes how it is obliged to act on the intention of legislature and duty to invariable conduct in-camera trials.

It notes how a court must function consciously to make the victim feel comfortable. It hoped that adopting certain measures such as holding in-camera trials in cases of sexual assault, issuing a gag order against the discussion and publication of the victim's identity or presumably establishing the character of the victim, sexual assault cases being presided over by female

⁸ *Ibid*

⁹ *State of Punjab v Gurmit Singh* (1996) SCC 2 384

¹⁰ Code of Criminal Procedure 1973, s 327

judges would make the victim feel comfortable. This would improve the quality of evidence and help establish the truth in the court of law.

In *Sakshi v UOI*,¹¹ the apex court had issued a set of directions that have to be adhered to while dealing with certain offence

“(1) The provisions of sub-section (2) of section 327 Cr.P.C. shall in addition to the offences mentioned in the sub-section would also apply in inquiry or trial offences under sections 354 and 377 IPC.

Here, the offences wherein an in-camera trial or inquiry into offences under Section 376, 376A, 376B, 376C, 376D or 376E and Section 354, which essentially deals with assault or use of criminal force with the intent to outrage the modesty of a woman. However, the offence of unnatural carnal intercourse under Section 377¹² which was then valid has now been decriminalised in 2018.

(2) In holding trial of child sex abuse or rape:

(i) A screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;

(ii) the questions put in cross-examination on behalf of the accused, in so far as they relate directly to the incident, should be given in writing to the President Officer of the Court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;

(iii) the victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.”

In State of Maharashtra v Bandu @ Daulat:¹³ This judgement ordered the setting up of a minimum of two Vulnerable witness centres under the jurisdiction of each High Court within

¹¹*Sakshi v Union of India* Crim WP No 33/1997

¹² Indian Penal Code 1860, s 377

¹³ *State of Maharashtra v Bandu Daulat* Crim SLP No 2172/2014

three months of this order and adopted a set of guidelines to regulate the same. This order aims to create a conducive environment for the witnesses in criminal cases, with proper safeguards.

Smruti Tukaram Badade v State of Maharashtra and Anr:¹⁴ This Judgement delineated the need for establishing separate centres for witness examination to respect privacy and developing consciousness of the vulnerability of witnesses. The importance of paying heed to the needs of vulnerable witnesses was underscored by the Supreme Court through a number of its earlier decisions and directions which have been discussed previously. This judgement specifically expanded on the definition of a Vulnerable Witness.

DECISION OF THE COURT

The court reiterated that the Right to dignity is an intrinsic part of Article 21 of the Indian Constitution. The court emphasised how essential removing physical as well as emotional barriers is and how it would improve the quality of evidence provided by vulnerable witnesses. This could be achieved by not just building a special infrastructure but also through the conscious behaviour of the stakeholders and institutions involved in the deposition of vulnerable witnesses in the pursuit of substantive justice.

The specific directions enumerated by the Supreme Court of India in this case include

(i) The definition of 'vulnerable witness' contained in Clause 3(a) of the 'Guidelines for recording evidence of vulnerable witnesses in criminal matters' of the High Court of Delhi shall not be limited only to child witnesses who have attained the age of 18 years and should be expanded to include, inter alia, the following categories of vulnerable witnesses:

(a) Age-neutral victims of sexual assault read with Sections 273 and 327 of the Code of Criminal Procedure 1973 and Section 354 of the Indian Penal Code 1860;

(b) Gender-neutral victims of sexual assault read with Section 2(d) of the Protection of Children from Sexual Offences Act 2012;

¹⁴ *Smruti Tukaram Badade v State of Maharashtra* Crim App No 1101/2019

(c) Age and gender-neutral victims of sexual assault under Section 377 of the Indian Penal Code 1860 read with paragraph 34(1) of the decision in Sakshi;

(d) Witnesses suffering from 'mental illness' as defined under Section 2(s) of the Mental Healthcare Act 2017 read with Section 118 of the Indian Evidence Act 1872;

(e) Any witness deemed to have a threat perception under the Witness Protection Scheme 2018 of the Union Government as approved by this Court in Mahender Chawla v Union of India;

(f) Any speech or hearing impaired individual or a person suffering from any other disability who is considered to be a vulnerable witness by the competent court; and

Any other witness deemed to be vulnerable by the concerned court."¹⁵

(ii) Directions to all High Courts to formulate, adopt and notify a Vulnerable Witness Deposition Scheme, with the aim to regulate all aspects concerning the deposition of Vulnerable Witnesses.

(iii) Directions to set up an in-house permanent Vulnerable Witness Deposition Centre Committee vested with the responsibility to implement the present directions, understanding the number of centers required to cater to the needs of each district and conducting of Periodic training programs.

(iv) Periodic Training programs are to be conducted with the aim to sensitize stakeholders including but not limited to judicial officers, members of the Bar and the staff of the court establishment. A committee shall devise and implement the All India VWDC Training Programme and monitor the building of infrastructure.

(iv) Expenditure estimates by the Vulnerable Witness Deposition Centre Committee for setting up of Vulnerable Witness Deposition Centre and the manpower, and infrastructure required for the same. Each State government shall disburse funds within three months of receiving the

¹⁵ *Ibid*

committee estimate and appoint a nodal officer from the finance department to coordinate and facilitate the implementation of the scheme.

(vi) A nodal officer is to be assigned by the Ministry of Women and Child Development to coordinate and facilitate logistical support required by Gita Mittal for the performance of her duties and responsibilities as the chairperson of the committee. Setting up of at least one permanent VWDC is mandated which should be established by the High Court. In some states, Alternative Dispute Resolution (ADR) centres have been established near the court premises. In such cases, the High Court has the authority to ensure that a VWDC is conveniently located within the ADR center's premises.

“(vii) The National Legal Services Authority, as well as the State Legal Services Authorities, have a vital stake and role, particularly in devising and implementing sensitization and training programs. The Chairperson of the Committee appointed by this Court is requested to engage with NALSA and SLSAs (subject to the directions which may be issued by the Hon’ble Executive Chairperson of NALSA) so as to provide an effective interface for implementing the scheme for training.

(viii) The Ministry of Women and Child Development of the Union Government shall designate a nodal officer for coordinating the implementation of these directions and for providing all logistical support to Justice Ms Gita Mittal, the Chairperson of the Committee appointed by this Court.”¹⁶

ANALYSIS

The blithe disregard towards the vulnerability of the witnesses by the stakeholders, putting them under further duress, has brought to light the need for having a proper monitoring system for the victims and vulnerable witnesses in general.

In the State of Punjab v Gurmit Singh, Sakshi v State of Maharashtra v Bandu @ Daulat cases the importance of adhering to section 327 of the CrPC was highlighted and several directions were issued to protect the dignity of victims of sexual assault. The plight of the victims in the above cases was initially blatantly overlooked. Their dignity and sensitivity were trampled on by the

¹⁶ *Ibid*

negligence and indifference of the stakeholders during the trial and inquiry of these cases. The Supreme Court of India observed in each of these cases, the lack of uniform and proper directives to regulate how victims and witnesses are treated.

Smruti Tukaram Badade v State of Maharashtra directs all High Courts to take appropriate actions in favour of vulnerable witnesses. This judgement directs for the establishment of a proper system to uphold the dignity of vulnerable witnesses.

CONCLUSION

The protection and better treatment of Witnesses is imperative. Witness Protection Scheme of 2018 and the aforementioned judicial directions if implemented sincerely without any bureaucratic stalling or impediments would help establish a strong criminal justice system in India and augment the confidence of the people in our judiciary. Protection of the witness and their dignity would help bolster a sense of security and improving the quality of evidence are direct consequence of proper implementation of these regulations.