

PAPER I

HOSTILE WITNESSES AND CRIMINAL LAW

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HOSTILE WITNESSES AND CRIMINAL LAW

1 INTRODUCTION

In today's scenario the problem of witnesses turning hostile is quite evident. The crucial part played by the witnesses in bringing offenders to justice is very important in any modern criminal justice system, since the successful conclusion of each stage in criminal proceedings from the initial reporting of the crime to the trial itself usually depends upon the cooperation of witnesses. Their role at the trial is particularly important in adversarial system where the prosecution must prove its case by leading evidence, often in the form of oral examination of witnesses, which can then be challenged by the defence at a public hearing.¹

By deposing in a case, they assist the court in discovering the truth. But the witnesses turning hostile is a common thing happening in the criminal justice system. The whole case of the prosecution can fall only on a false statement of the witness. The result is that more and more citizens are losing faith in the effectiveness of the system in providing justice to the victims. As long as the witnesses continue to go hostile and do not make truthful depositions in court, justice will always suffer and people's faith in efficacy and credibility of judicial process will continue to be eroded and shattered.²

¹ Mackarel Mark, Raitt Fiona and Moody Susan, "**Briefing Paper on Legal Issues and Witness Protection in Criminal Cases**" Scottish Executive, Central Research Unit, 2001

² Mukherjee Subhrarag and Arya Vatsal, "**Independent Witnesses: a Legal Crisis in India**", 2004, Cri. L. J. 186 (S.C.)

2HOSTILE WITNESS : MEANING AND NATURE

Generally a witness is labeled as hostile, when he furnishes a certain statement on his knowledge about commission of a crime before the police but refutes it when called as witness before the court during the trial.

The term 'hostile witness' does not find any explicit or implicit mention in any Indian laws, be it Indian Evidence Act or the Code of Criminal Procedure or any other law. Historically, the term Hostile Witness seems to have its origin in Common Law.

The term '*hostile witness*' was first introduced in the common law to provide adequate safeguard against the "*contrivance of an artful witness*" who willfully by hostile evidence "*ruin the cause*" of the party calling such a witness. Such actions hamper not only the interest of the litigating parties but also the quest of the courts to meet the ends of justice. The "safeguard" as envisaged under the common law, consisted of contradicting witness with their previous statements or impeaching their credit (which normally as a rule was not allowed) by the party calling such witnesses. To initiate the "safeguard", it was imperative to declare such a witness "hostile". For this purpose, common law, laid down certain peculiarities of a 'hostile' witness, such as, "not desirous of telling the truth at the instance of the party calling him" or "the existence of a 'hostile animus' to the party calling such a witness."³

³ Bose Suprio, "**Hostile Witness: A Critical Analysis of Key Aspects Hitherto Ignored in Indian Law**"www.Legalserviceindia.com/article/host.htm

The Wikipedia Encyclopedia defines 'hostile witnesses as a witness in a trial who testifies for the opposing party or a witness who offers adverse testimony to the calling party during direct examination. A witness called by the opposing party is presumed hostile. A witness called by the direct examiner can be declared hostile by a judge, at the request of the examiner, when the witness' testimony is openly antagonistic or clearly prejudiced to the Opposing party.⁴

The Law.Com Dictionary defines hostile witness technically an "adverse witness" in a trial who is found by the judge to be hostile (adverse) to the position of the party whose attorney is questioning the witness, even though the attorney called the witness to testify on behalf of his/her client. When the attorney calling the witness finds that the answers are contrary to the legal position of his/her client or the witness becomes openly antagonistic, the attorney may request the judge to declare the witness to be "hostile" or "adverse." If the judge declares the witness to be hostile (i.e. adverse), the attorney may ask "leading" questions which suggest answers or are challenging to the testimony just as on cross examination of a witness who has testified for the opposition.⁵

Atri Ajit⁶ defines hostile witness as 'an adverse witness in a trial who is found by the Judge to be hostile (adverse) to the position of the party whose attorney is questioning" the witness, even though the attorney called the witness to testify on behalf of his/her client. When the attorney calling the witness finds that the answers are contrary to the legal position of his/her client or the witness

⁴ en.wikipedia.org/wiki/Hostile_witness

⁵ <http://dictionary.law.com>

⁶ Atri Ajit, "**Hostile Witness: Not sufficient to earn acquittal**", 2008 Cri.L.J (Jour.) 191

becomes openly antagonistic, the attorney may request the Judge to declare the witness to be 'hostile' or 'adverse'. If the Judge declares the witness to be hostile the attorney may ask leading questions which suggest answers or are challenging to the testimony just as on cross-examination of a witness who has testified for the opposition. Hostile witness is a witness who testifies for the opposing party or a witness who offers adverse testimony to the calling party during direct examination.'

Thus, a hostile witness, is also called as adverse witness, who weakens the case of the side he or she is supposed to be supporting i.e. instead of supporting the prosecution who has presented him as a witness in the court of law, the witness either with his evidence or statement became antagonistic to the attorney and thus "ruin the case" of the party calling such witness. In such a case, moreover, it is the attorney who asks the judge to declare the witness a hostile witness. Thus, it is the court and no other than the court that has authority to declare a witness a hostile witness. It has to be remembered here that the court cannot by itself declare a witness a hostile witness but it can do so only on the request made by the prosecution attorney. If a witness has been declared a hostile witness, by the court of law, the attorney then has greater freedom in questioning the hostile witness. In other words, if a witness has been declared as hostile witness the prosecution may question the witness as if in cross-examination i.e. he or she may ask leading questions to the witness declared hostile and this is the basic difference between the status of a witness declared hostile and the witness who has not been declared hostile or who is a common or favorable witness.

The word “*hostile witness*” is not defined in the Indian Evidence Act, 1872. The draftsmen of the Indian Evidence Act, 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. The matter is left entirely to the discretion of the court. A witness is considered adverse when in the opinion of the judge, he bears a hostile animus to the party calling him and not merely when his testimony contradicts his proof.⁷

***In Sat Pal V. Delhi Administration*⁸**

the Hon’ble Supreme Court tried to define hostile witnesses and laid that to steer clear controversy over the meaning of hostile witness, adverse witnesses, unfavorable witness which had given rise to considerable difficulty and conflict of opinions, the authors of the Indian Evidence Act, 1872 seem to have advisedly avoided the use of any of those terms so that in India the grant of permission to cross-examine his own witness by party is not conditional on the witness being declared adverse or hostile.

***In Gura Singh V. State of Rajasthan*⁹**

The Supreme Court defined *hostile witness* as one “*who is not desirous of telling the truth at the instance of one party calling him*”.

⁷ Supra note 6

⁸ 1976 Cri.L.J. 295: A.I.R. 1976 S.C. 294

⁹ 2001 Cri.L.J. 487: A.I.R 2001 S.C. 330

In the *Indian context*, the principles dealing with the treatment of hostile witnesses are encompassed in Section 154 of the Indian Evidence Act, 1872¹⁰.

In **Panchanan Gogoi V. Emperor**¹¹

A hostile witness is one who from the manner in which he gives evidence shows that he is not desirous of telling the truth to the court. Within which is included the fact that he is willing to go back upon previous statements made by him .

In **R.K.Dey V. State of Orissa** ¹²

A witness is not necessarily hostile if he is speaking the truth and his testimony goes against the interest of the party calling him. A witness's primary allegiance is to the truth and not to the party calling him. Hence, unfavourable testimony does not declare a witness hostile. Hostility is when a statement is made in favour of the defence due to enmity with the prosecution.

In **G.S.Bakshi V. State** ¹³

The inference of the hostility is to be drawn from the answer given by the witness and to some extent from his demeanour .So, a witness can be considered as hostile when he is antagonistic in his attitude towards the party calling him or when he conceals his true sentiments and does not come out with truth and deliberately makes statements which are contrary to what he stated earlier or is expected to prove. 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.

¹⁰ Gopinath Pallavi, "**Hostile Witness: A Critical Study of the Concept under Section 154 of the Indian**

¹¹ A.I.R. 1930 Cal. 276 (278)

¹² A.I.R. 1977 S.C. 170

¹³ A.I.R. 1979 S.C. 569

3. CONCEPT OF HOSTILE WITNESS UNDER INDIAN LAW

Though there are not enough provisions under domestic law dealing directly with the issue but there are certain provisions under the Indian Evidence Act, 1872 and the Code of Criminal Procedure, 1973 which are helpful in explaining the concept to some extent.

3.1. Code of Criminal Procedure, 1973

Section 160 of the Code of Criminal Procedure, 1973¹⁴ empowers the Police Officer 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 under investigation. This provision is to be read in conjunction with Section 161 as per which the Police Officer making the investigation can examine orally any person supposed to be acquainted with the facts and circumstances of the case. Section 161(3) also permits the Police Officer to reduce into writing any statement made to him in the course of an examination under this section. However, once this is done, Section 162 of the Code comes into play. Section 162(1) consists of two main parts. The first part 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. The second part of this provision creates a bar on the admissibility of statements made by any person to a police officer in the course of an investigation.

¹⁴ Section 160 of the Code of Criminal Procedure, 1973

In *Tahsildar Singh V. State of U.P* ¹⁵

The Supreme Court examined in detail the purpose and object of this provision. 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.

At the same time, 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. ¹⁶It 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 Section 164 of the Code.

In *State of U.P. V. Singhara Singh* ¹⁷

The Supreme Court also observed that Section 164 would be rendered wholly nugatory if the procedure prescribed by that provision was not held to be mandatory. 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

¹⁵ A.I.R. 1959 S.C. 1012

¹⁶ Ram Charan v. State of U.P., A.I.R. 1968 S.C. 1270.

¹⁷ A.I.R. 1964 S.C. 358

compliance with the prescribed procedure. As rightly observed by a Full Bench of the Madras High

The Evidential Value of Statements Recorded Under Section 164

Any statement made before a Magistrate and duly recorded under Section 164 is considered a public document under Section 74 of the Indian Evidence Act, 1872. Written documents containing such statements are also presumed to be genuine as well as duly recorded, under Section 80 of this Act. The effect of this provision is to dispense with the examination of the Magistrate who recorded the statement under Section 164. Section 164 can be used as evidence of the verbal statement made by the witness before the Magistrate.

3.2. Indian Evidence Act, 1872

Certain other provisions of the Indian Evidence Act, 1872, govern the use of such statements in a criminal trial, and thereby merit our attention. Section 141 of the Indian Evidence Act, 1872 defines leading questions, whereas Section 142 requires that leading questions must not be put to witness in an examination-in chief, or in a re-examination, except with the permission of the Court. The court can however permit leading questions as to the matters which are introductory or undisputed or which in its opinion have already been sufficiently proved. Section 154 authorizes the court in the discretion to permit the persons who call a witness to put any quest to him which might be put in cross examination by other party.

Such questions will include:-

- Leading questions (Section 143 of Evidence Act)

- Questions relating to his previous statements(Section 145 of Evidence Act)
- Questions, which tend to test his veracity to discover who he is and what his position in life or to shake his credit(Section 146 of Evidence Act)

The courts are under a legal obligation to exercise the discretion vested in them in a judicious manner by proper application of mind and keeping in view the attending circumstances. Furthermore the permission of cross-examination Under Section 154 of the Evidence Act cannot and should not be granted at mere asking of a party calling the witness.

Section 145 of this Act prescribes one of the most effective modes for impeaching the credit of a witness. This section allows for the cross-examination of any witness as to any previous statement made by him in writing. The previous statement made by the witness can be used for the purpose of contradiction of the witness, under this section, as long as his attention is taken to those parts of the writing that are to be relied on for such purpose. Section 145 statutorily incorporates one significant use of previous statements made by witnesses and assumes prominence especially in the context of the general principle that such statements cannot be used as substantive evidence. The other relevant provision is Section 157 of the Act, which states that any former statement made by a witness relating to the same fact, before any authority legally competent to investigate the fact, can be used to corroborate the oral testimony.

3.3 Indian Penal Code, 1860 & The Offence of Perjury

The Indian Penal Code, 1860 under Section 191 defines Perjury as “giving false evidence”. *Perjury* in general sense is considered as lying. Perjury in legal sense means lying or making verifiable false statements on a material matter under oath or affirmation in a court of law or in any of various sworn statements in writing. Perjury is a crime because the witness/ accused have sworn to tell the truth &, for the credibility of the court, witness testimony must be relied on as being truthful.¹⁸ Perjury is considered as a very serious crime as it could be used to usurp the authority of the courts, resulting in miscarriage of justice. A witness has to give all the information correctly otherwise he will have to face the trial under Section 191 of The Indian Penal Code & thereafter he may be penalized under Section 193-195 of the same for the aforesaid offence.

Section 191 is applicable only when a statement is made by a person bound by an oath or by an express provision of law to state the truth, or who is bound by law to state the truth, or who is bound by law to make declaration upon any subject. In other words it means that he is under legal obligation to speak truth in view of the oath administered to him or because of the express provision of law, which binds him to speak the truth.¹⁹

¹⁸ Bhat Sairam, “**Perjury: Under Estimated Reasons for Failure of the Justice Delivery System in India**”, Kare Law Journal, August 2006 pp. 73-78

¹⁹ Chaterjee Mamta, “**Problem of Hostile Witness**”, available at www.legalservicesindia.com

3.3.1.critical appraisal of perjury

There are some specific provisions dealing with the offence of perjury. The section 191 of IPC²⁰ defines perjury as "giving false evidence" and by interpretation it includes the statements retracted later as the person is presumed to have given a "false statement" earlier or later, when the statement is retracted. But hardly anyone, including the legal experts, could recall a single case in which a person was prosecuted for making a false statement before the court.

Any statement tendered under oath on an affidavit also constitutes perjury.

Under section 191 of IPC²¹, an affidavit is evidence and a person swearing to a false affidavit is guilty of perjury punishable under section 193 IPC that prescribes the period of punishment as seven years imprisonment.

Sec 195(1)(b) of the code of criminal procedure provides that no court shall take cognizance inter- alia of the offence of perjury under Section 193 to 195 except on the complaint in writing of that court or the court to which that court is subordinate. Section 340 of Criminal Procedure Code prescribes the procedure to be followed for making a complaint contemplated by Section 195. Section 344, Criminal Procedure Code however prescribes an alternative summary procedure. It provides that if the

²⁰ Indian Penal Code, 1860

²¹ *ibid*

Court of Sessions or Magistrate of first class if any time of delivery of judgment in the case expresses an opinion that the witness appearing in such proceeding had knowingly or willfully given false evidence or fabricated false evidence for use in the proceedings, the court may if satisfied that it is necessary and expedient in the interest of justice that the witness should be tried summarily, take cognizance after giving reasonable opportunity of showing cause, try such offence summarily and sentence him to imprisonment which may extend up to three months or to fine up to rupees five hundred or with both.

Certain legal provisions dealing with the offence of perjury are discussed as under:

3.3.2. Perjury: Judicial Approach

Punishment for false evidence²²

Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

²² Section 193 Indian Penal Code, 1860

Prosecution for Contempt of Lawful Authority of Public Servants, for Offences against Public Justice and for Offences relating to documents given in Evidence²³:

I of any offence punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code (45 of 1860), or

ii of any abetment of, attempt to commit, such offence, or

iii of any criminal conspiracy to commit, such offence,

Except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate;

i of any offence punishable under any of the following sections of the Indian Penal Code,(45 of 1860) namely, sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, or

ii of any offence described in section 463, or punishable under section 471, section 475 or section 476, of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court, or

iii of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in sub-clause (I) or sub-clause (ii),

except on the complaint in writing of that Court, or of some other Court to

²³ Section 195 Indian Penal Code, 1860

which that Court is subordinate

Procedure in the cases mentioned in section 195 Indian Penal Code, 1860²⁴

This section confers an inherent power on a Court to make a complaint in respect of an offence committed in or in relation to a proceeding in that Court, or as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, if that Court is of opinion that it is expedient in the interest of justice that an enquiry should be made into an offence referred to in clause (b) of sub-section (1) of Section 195 and authorizes such Court to hold preliminary enquiry as it thinks necessary and then make a complaint thereof in writing after recording a finding to that effect as contemplated under sub-section (1) of Section 340. The words "in or in relation to a proceeding in that Court" show that the Court which can take action under this section is only the Court operating within the definition of Section 195 (3) before which or in relation to whose proceeding the offence has been committed. There is a word of caution built in that provision itself that the action to be taken should be expedient in the interest of justice. Therefore, it is incumbent that the power given by this Section 340 of the Code should be used with utmost care and after due consideration.

Using Evidence known to be False³¹

Whoever corruptly uses or attempts to use as true or genuine evidence any evidence, which he knows to be false or fabricated, shall be punished in the same

²⁴ Section 340 Cr.P.C,1973

manner as if he gave or fabricated false evidence.

False Statement made in declaration, which is by Law receivable as Evidence²⁵

Whoever, in an declaration made or subscribed by him, which declaration any Court of Justice, or any public servant or other person, is bound or authorized by law to receive as evidence of any fact, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, touching any point material to the object for which the declaration is made or used, shall be punished in the same manner as if he gave false evidence. In context of cases under above sections section 195 of the Criminal Procedure Code is applicable. According to this section the Court shall take cognizance of such offence only on the complaint of such Court or any other Court to which such Court is subordinate.

3.3.3 Perjury: Judicial Approach

Narmada Shankar v DanPal Singh,²⁶

a case of malicious prosecution, where defendant-respondent was charged under Section 193 of the IPC for having arrested the Petitioner and subsequently lying under oath as to the presence of such orders, admitted during cross-examination that he had previously lied about the orders. It was held in this case that when a witness comes to Court prepared

²⁵ Section 199 Indian Penal Code, 1860

²⁶ AIR 2001 S.C. 2004

to make a false statement and makes it, but is cornered in cross examination and compelled to admit his false statements he cannot claim that the admission neutralizes the perjury committed by him. The real test in all such cases was held to be whether the witness voluntarily corrected himself due to realization of his error or genuine feeling of remorse before his perjury was exposed. In the given circumstances, though, the defendant was let off with a warning.

*In State of Gujrat v Hemang Prameshrai Desai*²⁷

In the same year in the Allahabad High Court in ,the Court stressed upon the need to corroborate the falsity of a statement with ample evidence. Mere police evidence was held insufficient to convict the accused. Also where the conviction of the accused was based on his voluntary admission of guilt, his statements were to be construed literally and strictly.

4 HOSTILE WITNESSES: Recent Judicial Pronouncements

Best Bakery case²⁸

Best Bakery trial is the glaring example of miscarriage of justice where the witnesses turned hostile due to external pressures by the rich and powerful accused. Before the newly instituted court, the witness refused to identify any of the accused and was contrary to her previous statement before the police and the National

²⁷ 1966 Cri. L. J. 474

²⁸ (2004) 4 SCC 158

Human Rights Commission. The court recorded a verdict that the prosecution had failed to prove the charges. Later Ms. Sheikh asserted that she had lied to the court under threat and fear for her life.

BMW Hit and Run case²⁹

On 10 January, 1999, a BMW driven by Sanjeev Nanda, grandson of the former Chief of Naval Staff and arms dealer admiral S.L. Nanda had allegedly run over sleeping pavement dwellers in Delhi. Three people died on the spot and other received serious injuries. As the trial progressed, a large number of witness turned hostile- Monoj Mallick, the lone survivor of hit-n- run, told the court that he was hit by a truck. Key witness, Hari Shankar, refused to identify the BMW and another witness absconded. In fact, none of the witness supported the prosecution. In the end, Sidharth and Manik were granted bail.

Prof Sabharwal's case³⁰

Late Prof. H.S. Sabharwal was a professor in Government College, Ujjain, M.P was brutally beaten up by certain persons, for taking a rigid stand in the college union elections. Though the assaults were made in the presence of several police officials, media persons and members of public, attempt has been made to project as if his death was as a result of an accident. Initially, First Information Report was lodged and after investigation charge sheet was filed and charges have

²⁹ (2003) 10 S.C.C. 670

³⁰ Himanshu Singh Sabharwal V. State of M.P. and Ors

been framed against several persons. The Supreme Court came heavily upon the state Government of M.P. by issuing a contempt notice and asked its explanation about the action taken against the police officials who turned hostile before the session court.

During examination of several witnesses who were stated to be eye-witnesses, such witnesses including three police witnesses who resiled from the statements made during investigation.

The Case of Jessica Lal³¹

On April 29, 1999, a girl named Jessica Lal was shot dead by Manu Sharma .During the trial Four of the witnesses who had initially said they had seen the murder happen eventually turned hostile This led to a further weakening of the prosecution's case.

After extensive hearings with nearly a hundred witnesses, a Delhi trial court acquitted the accused and his friends. After an immense uproar, hundreds of thousands e-mailed and sms their outraged on petitions forwarded by media channels and newspapers to the president and other seeking remedies for the alleged miscarriage of justice. On 25 the Delhi High Court admitted an appeal by the police against the Jessica Lal murder acquittals, issuing non-bailable warrants against prime accused Manu Sharma and eight others and restraining them from leaving the country. This was not a re-trial, but an appeal based on evidence already marshalled in the lower court.

³¹ 2001 Cri.L.J. 2404

5.1FACTORS RESPONSIBLE FOR WITNESSES TURNING HOSTILE

A witness may turn hostile for various reasons. Generally it is the combination of money and muscle power, threat / intimidation, inducement by various means, allurementseduction etc. but the major one being **the absence of protection to the witnesses during and after the trial**. The witness is afraid of facing the wrath of the convicts who may be well connected. Witnesses are extremely vulnerable to intimidation in the form of threats by the accused available.

Common causes for hostility can be summed up as follows:-

1. Absence of Witness Protection Programs

The need for comprehensive witness protection legislation has been long felt in India. In most cases, witnesses are threatened or injured-sometimes even murdered-before giving testimony in Court.

In **Swaran Singh Vs. State of Punjab** ³²

the Apex court also observed, “not only that a witness is threatened; he is maimed; he is done away with; or even bribed. There is no protection for him”.

The threat to the lives of witnesses is one of the primary reasons for them to retract their earlier statements during the trial. Section 151 and 152 of the Indian Evidence Act, 1872protect the victims from being asked indecent, scandalous, offensive

³² 2000 Cr.L.J 2780 (S.C.)

questions, and questions likely to insult or annoy them. Apart from these provisions, there is nothing in the law to protect witnesses from external threats, inducement or intimidation.

2. Protracted Trials

Apart from the absence of witness protection programme another major reason of this growing menace is protracted trials. The working of judicial process is very slow. Several dates are fixed for cross- examination of the witnesses, who becomes frustrated over because of being summoned again and again only to find that the date is adjourned. The frustration takes its toll, & the witness decides to turn hostile to get rid of the harassment

3 Easy Availability of Bail to the Accused

In many cases involving high profile personalities or heinous crime, the courts easily grant bail to the accused thereby making the witness vulnerable to threats and intimidation by the accused. No doubt Section 439(2) of the Code of Criminal Procedure provides for the arrest of a person who has been released on ball, it is seldom used by the State in cases where there exists a reasonable apprehension that the accused might try to influence the witness

4. Defaults in Payments of Allowances

observed that the allowances paid to witness for appearing in Court are inadequate, and called for a prompt payment, no matter whether they are examined or not. Section

312 of the Cr.P.C. says that“ 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 purpose of any inquiry, trial or other proceeding before such Court under this Code”. However, in most cases proper diet money is not paid to the witnesses.

5. Lack of Adequate Facilities in Courts

Despite the crucial role of witnesses in criminal trials, the facilities provided to them are minimal and insufficient. The 14th Law Commission Report³³ highlighted that in several States, the witnesses are made to wait under trees in Court campuses, or in the verandahs of court houses. They are not protected from the vagaries of the weather. Even the sheds in some courts are dilapidated and utilized for other court purposes. Apart from suffering such indignities and inconvenience, they have to spend time and money to come to courts from far distances.⁷⁰³⁴

6. Use of Stock Witness

‘Stock witnesses’ refer to certain persons of doubtful credentials who are available to serve the police as ‘witnesses’ where real witnesses are not forthcoming.

Planting such pliable witnesses as prosecution witnesses quite invariably leads to such witnesses turning hostile as they can be bought for a small price. The result is failure of case ending in acquittal of all the accused, there being no evidence or

³³ Law Commission of India ,**Reform of Judicial Administration**,14th Report , First Law Commission under the Chairmanship of Mr. M.C.Setalvad 1955-1958, in 1958

³⁴ Supra note33

reliable evidence on record.

7. Use of Money Power by the Accused

In many cases the witnesses are bought off or “purchased” with the use of money.

In such cases the victims/witnesses are mostly poor who are badly in need of money. The procedure is simple. The prime witnesses in a case are contacted either directly by the party or through the lawyers litigating that case and then offered a sum of money for not cooperating in the investigation and/or are told to take a pre decided stand at the trial. If, however, the trial has already started then he is told to turn away from what he had said earlier or to contradict his own statement.

8. Threat / Intimidation

The Delhi High court observed³⁵ that witnesses in a large number of cases were turning hostile due to “intimidation and threat”. The Home Ministry in its affidavit admitted that in all important case witnesses were under constant threat from criminals. The affidavit said, “There is need to take steps to stop harassment of witnesses so that he does not feel frustrated. There is also urgent need to provide adequate protection to the witnesses from intimidation by criminals”.

5.20ther factors

Political pressure, self-generated fear of police and the legal system, absence of fear of the law of perjury, an unsympathetic law enforcement machinery and corruption are some of the other reasons for witnesses turning hostile in the course

³⁵ Neelam Katara V. Union of India ILR (2003) II Del 377 260

of trial.

6 EVIDENTIARY VALUE OF STATEMENTS GIVEN BY A HOSTILE WITNESS

The law is now well settled that merely because the witness is declared as hostile witness, whole of his evidence is not liable to be thrown away.^{36,}

In State of U.P. V.Ramesh Prasad Mishra and anr.³⁷

“it is equally settled law that the evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused, but it can subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted”.

In Amrik Singh V. State of Haryana³⁸

“It is trite law that evidence of a hostile witness also can be relied upon to the extent to which it supports the prosecution version. Evidence of such a witness cannot be treated as washed off the record. It remains admissible”.

97 2009 (3) RCR (Criminal) 308 (P&H)(DB)

³⁶ Syed Akbar V. State of Karnataka 1980 (1) S.C.C. 30, Rabindra Kumar Dey V. State Of 1976(4)S.C.C.

³⁷ (1996) 10 S.C.C. 360

³⁸ 2009 (3) RCR (Criminal) 308 (P&H)(DB)

7 Amendment in the Existing Laws

The following steps will protect witnesses from external influences and will adequately control the malady of hostile witnesses:-

7.1. Amendment to Section 161 and Section 162 Cr.P.C.

Statements of witnesses by police under section 161, Cr. P. C. should be signed by the witnesses and used during trial of the case for corroboration and contradiction of their testimony. The existing law under Section 162, Cr. P. C. says that the person making it shall not sign the statement of witnesses under Section 161. An amendment in the Cr. P. C. would to a small extent apply moral pressure on the witness against changing his course in the court subsequently.

The 178th Law Commission Report³⁹ commended that the statement of a witness under Section 161 shall be recorded in the language of the deponent, and shall be read over to him by the recording officer and the signature or thumb impression shall be obtained on the statement. The copies of the statement shall be sent to the Magistrate and the Superintendent of Police of the District, immediately. This would ensure that the discrepancies in investigation are eliminated.

7.2. Stringent Implementation of Section 311 of the Cr.P.C.

The first part of Section 311 of Cr.P.C. gives the Court the discretionary power to:

(i) Summon any one as a witness;

³⁹ Law Commission of India, **Recommendations for Amending Various Enactments, Both Civil and Criminal**, 178th Report, Sixteenth Law Commission under the chairmanship of Mr. Justice B. P. Jeevan Reddy 2000-2001 & Mr. Justice M. Jagannadha Rao 2002-2003 in 2001

(ii) Examine any person present in the Court.

(iii) Recall and re-examine any witness.

The second part of the section makes it mandatory on the court to take any of the above steps if the new evidence appears to be essential to the just decision of the case. The paramount consideration of this section is doing justice to the case and not filling up the gaps in the prosecution of defence evidence. In fact, both the prosecution and the defence may cross-examine a witness called under Section 311, and the court may decide which party will ask questions first, and to what extent.

7.3. Contradiction of the witness as envisaged in section 145 of

Evidence Act

In order to mitigate the harm done to the case of the prosecution, on account of a hostile witness, a request may be made to the court as laid down by the proviso to sub-section (1) of Section 162, Cr. P. C. to permit the prosecution to contradict the witness with his police statement, in the manner provided by Section 145, Evidence Act. It is desirable that the prosecution makes a proper request, and a proper note of it is made by the court rather than making a loose note about declaring the witness hostile.

7.4 Speedy Trials / No Frequent Adjournments

Section 309 of the Cr.P.C. was enacted with the objective of ensuring speedy and expeditious disposal cases and thus to prevent harassment of witnesses.⁴⁰

However, the spirit of this beneficial provision has been totally missed by the

⁴⁰ Section 309 (2) Second Proviso of the Cr.P.C states: *“Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them. Except for special reasons to be recorded*

judiciary and frequent adjournments are granted by courts. Prolonged trial and harassment is one of the main reasons for witnesses falling in side of the defence and retracting their statements. Trial should proceed with as little delay as possible so that there is less chance of the witness being approached and of him/her forgetting the facts. The Public Prosecutor must anticipate that the witness will turn hostile and have with him enough material and have prepared questions to effectively cross-examine such a witness.

7.5 Evidence Recorded U/Section 164(5), Cr.P.C Should Be Given

Substantive Value

The provisions in Section 164(5), Cr.P.C. although provide for recording the statements of any person including the witnesses by a Magistrate, the statement so recorded does not have a substantive value.⁴¹

Even if the witnesses turn hostile and retract from their statements made on oath before a Judicial Magistrate the said statements on oath should be permitted to be used as substantive evidence against the accused. However the probative value of the statements should be left to the discretion of the court for evaluation in the light of cross-examination and other materials adduced.

In order to overcome the problem of witness becoming hostile, it should be made mandatory that statement of all material witnesses should be made to be recorded by a Judicial Magistrate immediately during the course of investigation and the statements so recorded have to be given substantive value.

⁴¹ Ram Kishan V. Harmit Kaur A.I.R. 1972 S.C. 468

7.7 Reforming the process of investigation

The 14th Law Commission Report⁴² suggested that the investigation staff should be separated from the law and order police. This will pave the way for a stricter monitoring and control by the Examining Magistrate, and speedy investigations, since the investigating police may be relieved of their law and their duties.

⁴² Law Commission of India, **Recommendations for Amending Various Enactments, Both Civil and Criminal**, 178th Report , Sixteenth Law Commission under the chairman ship of Mr. Justice B. P. Jeevan Reddy 2000-2001& Mr. Justice M. Jagannadha Rao 2002-2003 in 2001

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