

Judicial analysis of witness protection scheme, 2018

Ishika Shrivastava

Department of Criminology, Dharmashastra National Law University, Jabalpur, Madhya Pradesh, India

Abstract

Witness protection stands as a crucial pillar in ensuring the efficacy and integrity of the criminal justice system. In the Indian context, the efficacy of witness protection laws has long been a subject of scrutiny and debate. With the enactment of the New Criminal Law Amendment and The Witness Protection Scheme, 2018, there have been notable shifts in the legal framework governing witness protection. This paper delves into the intricacies of the legal framework concerning witness protection in India, with a special focus on the provisions introduced by the New Criminal Law Amendment.

Keywords: Witness, hostile, scheme, fair trial, amendments, protection, evidence

Introduction

The fundamental principle of criminal jurisprudence and a crucial element of democratic governance is the right to a fair trial. The Hon'ble Supreme Court has declared that "denial of a 'fair trial' is the crucifixion of human rights ^[1]."

One of the fundamental rights derived from Article 21 of the Indian Constitution is the recognition of a fair trial. A criminal trial requires witnesses because it is through their testimonies that the guilt of the accused is established. Thus, the independence and freedom of the witnesses who testify in front of the court are essential components of a fair trial.

The Hon'ble Supreme Court made a clear observation in *Zahira Habibullah Sheikh & Anr. v. State of Gujarat & Ors* ^[2], if witnesses are intimidated or coerced into providing false evidence, a fair trial is unlikely to take place.

A witness is someone who was present at the scene of the crime and witnessed it being committed right in front of his eyes.

The only person who can best assist in identifying and substantiating the significant details of the event is a qualified witness.

According to Black's Law Dictionary ^[3], the term "witness" means-

1. Someone who sees, knows, or vouches for something.
2. Someone who gives testimony under oath or affirmation

(1) in person, (2) by oral or written deposition, or (3) by affidavit.

It is not unusual for witnesses to become hostile during a trial ^[4]. According to the Hon'ble Supreme Court, several factors, including the use of force and money, threats or intimidation, inducements through different channels, and an extensive review of multiple rulings, can cause witnesses to recant from their testimony in court and become hostile.

The Hon'ble Court noted expressly in *Mahender Chawla and Ors. v. Union of India (UOI) and Ors* ^[5], that the lack of proper protection provided by the State is one of the primary causes of the witnesses becoming hostile. Thus, the Supreme Court of India in this case approved the First Witness Protection Scheme drafted by the Union Government until Parliamentary Law is legislated and asked the Centre, States and Union Territories to enforce it in LETTER & SPIRIT.

The Scheme was drawn up by the Centre in 2018 with inputs from States and Union Territories, National Legal Service Authority, Civil Society, High Courts, and Police Personals.

The Aim and Objective of the Scheme is to ensure that the Investigation, Prosecution, and Trial of criminal offences are not prejudiced because witnesses are intimidated or frightened to give evidence without protection from violent or other criminal recrimination. It has been frequently acknowledged by Indian courts that "the edifice of administration of justice is based upon witness coming forward and deposing without fear or favor, without intimidation or allurement in Courts of Law."

Thus, it is inadequate to simply state that there is an efficient and stringent Witness Protection Program in India. The State needs to provide comprehensive legislation in this direction and assume its role of *parens patriae*. Only then would the justice stream be able to run autonomously and freely.

However, Indian laws are inadequate in dealing with the matter of Witness Protection. And because of the complexities involved, this hypothesis rests on a presumption that if a situation regarding the protection of a witness in criminal cases remained unchanged, the repercussions of this problem could be annihilating in the delivery of justice by a judicial system with criminals going scot-free and reliable witnesses difficult to be traced. For that matter a comprehensive study that deals with the subject of 'Witness Protection' needs to be done.

Research objective

- To evaluate the adequacy and consistency of existing policies in addressing the diverse needs of witnesses.
- To explore the legal and policy frameworks governing witness protection in India with special reference to new criminal laws (2023)

Research scope

While the critical analysis of the witness protection scheme in India provides valuable insights, it is important to acknowledge certain limitations and identify areas for further research. One significant limitation of the existing research is the scarcity of empirical data on the effectiveness of witness protection measures implemented in different states and union territories.

Another research gap pertains to the interplay between legal frameworks and operational realities. While the legal provisions for witness protection may exist, the actual implementation and enforcement of these measures vary across jurisdictions.

Furthermore, the existing research predominantly concentrates on the criminal justice system's perspective, with limited attention to the societal and psychological aspects of witness protection. Understanding the broader societal impact, such as the community's perception of witnesses under protection, can contribute to a more comprehensive evaluation of the scheme's overall effectiveness.

Research methodology

The research methodology employed in the critical analysis of the Witness Protection Scheme in India involves a comprehensive approach rooted in the doctrinal method. Through this method, an analytical lens will be applied to examine the scheme.

The primary data for this study will be sourced from statutes and case laws, providing a legal foundation for the analysis. Additionally, an array of secondary sources, including books, historical materials, Law Commission Reports, academic writings, leading journals, newspapers, magazines, and online resources, will be consulted to offer a nuanced understanding of the subject.

Statement of problem

The role played by witnesses in the trial process is of immense significance. Yet the journey of a witness is fraught with considerable pain and distress throughout the investigation and trial phases.

While the Indian criminal justice system rightfully expresses concern about witness hostility during trials, it has, unfortunately, overlooked delving into the root causes of such hostility. Numerous instances have surfaced, shedding light on the dire situations witnesses face.

For example, gangster Vikas Dubey, who was recently confronted by the police, murdered a state minister at a police station.

Nevertheless, he was acquitted by the trial court, as all 25 witnesses, including policemen, chose to become uncooperative and turn hostile^[6].

In the Best Bakery case, nearly half of the witnesses, comprising 37 out of 73, including the sole eyewitness, recanted their testimony under the influence of threats and inducements.

Similarly, in Jessica Lal's murder case, 19 witnesses initially testified but later retracted their statements, leading to charges of perjury^[7]. In the VYPAM case, over 32 individuals lost their lives in suspicious circumstances, among them was the son of the former Governor of the State, a television news journalist, and various whistle-blowers^[8]. It can be stated that the Criminal Justice System revolves primarily around the Court, police, accused, victim, and witnesses. Within this framework, it is assumed that Courts and police officials have inherent protection, the accused are granted protection by the State, and in contemporary times, even victims receive protection. However, witnesses, who play a pivotal role during trial, do not enjoy adequate protection. Despite the National Crime Records Bureau (NCRB) being an agency formed by the government to document crime statistics under the IPC and

other Special Acts, it neglects to collect data on offenses against witnesses. Conversely, the accused is afforded safeguards under various provisions of the Constitution of India, including Article 20, Article 21, and Article 22. Furthermore, the Code of Criminal Procedure, 1973, encompasses various provisions concerning the protection of the accused.

The plight of witnesses is distressing, resembling a situation akin to being caught between the devil and the deep sea. On one hand, they lack sufficient protection, and on the other hand, they face punishment for the offense of perjury under Section 195 of the IPC, which prescribes penalties for individuals providing false testimony in a court of law. Despite this, there is a notable absence of explicit provisions for witness protection.

Consequently, it can be argued that the current legal system has neglected the rights of witnesses. In addition to these serious issues, witnesses often experience other difficulties when they appear before the court.

In a recent judgment, *Mahender Chawla v/s Union of India*^[9], the Apex Court endorsed the Witness Protection Scheme, 2018, considering it a 'Law' under Article 141/142 of the Constitution until the Parliament and/or State legislature enacts a law on the subject. Despite being prepared by the National Legal Services Authority with the aim of instilling a sense of security in the minds of witnesses, the Scheme is marred by several lacunas, casting doubt on its effective implementation. Notably, the Scheme lacks clarity regarding the duration of protection, merely stating that it will last for three months at a time, leaving witnesses vulnerable to the accused after this period. Additionally, the categorization of witnesses based on threat perception, while a component of the Scheme, may not effectively fulfill its intended purpose. The involvement of the district Head of the police in preparing the Threat Analysis Report under the Scheme raises concerns about potential political interference in high-profile cases.

While the Scheme is a noteworthy initiative in providing protection and safeguarding witnesses, its limitations hinder the achievement of its objectives.

Hypothesis

The witness suffers various hardships during the course of the trial, and the instance of the witness turning hostile has substantially enhanced due to a lack of adequate legal protection to the witnesses. The effectiveness of the Witness Protection Scheme in India is compromised due to systemic loopholes and inadequate implementation strategies.

Legal ambiguities and inconsistencies in the framework of the Witness Protection Scheme contribute to its inefficacy in ensuring witness safety and cooperation.

Research question

1. What are the key objectives of witness protection schemes, and how effectively do they achieve these goals?
2. What are the challenges and limitations of witness protection schemes, and how can these be addressed to improve their effectiveness?

Analysis of Witness Protection Scheme, 2018

As India has adopted the adversarial system of law which based on the two principles i.e. the prosecution side have the burden to prove that the accused is guilty and second, no

person shall be guilty until the contrary is proved. This provision provides an opportunity to the accused to play with enormously power of state and its machinery. In cases related to the criminal offences both the parties have to prepare their respective cases and the prosecution firstly have to give their evidence and defence have to cross-examine the witness of the prosecution to find out the truthfulness of his testimony.

In India, the situation of witness protection is woeful. A smaller number of witnesses have the courage to come before the court and stand in favour of aggrieved person. This all happens because of lack of protection provided to witness. Indian parliament should implement the law relating to the protection of witness and establish witness protection programme under the legislation.

Witness Protection Act is the need of the hour. The non-existence of any specific legislation for the protection of witness, possess inconvenience to Indian Criminal Justice System and affect the administration of justice. By the evolution of laws and criminal jurisprudence from time to time the concept of fair trial, compensation to victims, speedy trial has been evolved but even no laws have been formulated for the protection of witness. As Rosalind Sipos says "The provision of Witness and victim protection is fundamental to the credibility of any justice system and to the battle against impunity.

Asking witness and victim without giving provision of protection may indeed be irresponsible in cases where they face the possibility of re-victimized or becoming victim on their own right by reason of living up to their duty to provide their evidence".

There are many cases of intimidation of witnesses even though there is no proper law in India for protection of witness. In Jessica Lal case many witnesses turned hostile because of the intimidation and many witnesses were died in high profile cases such Vyapam and Asharam Bapu case. In case where Jail Superintendent was allegedly killed by the Mukhtar Ansari a politician of Samajwadi Party was acquitted because 36 witnesses of the case were turned hostile before the court^[10].

Asaram bapu case

A 16-year-old girl from Shahjahanpur, Uttar Pradesh, had accused Asaram of sexually assaulting her at his ashram in Manai village, close to Jodhpur, on the evening of August 15, 2013. In the same month, he was brought to Jodhpur Central Jail and lodged several bail petitions from there^[11].

Blackmail in exchange for sexual favours was mentioned in the charge sheet that was submitted in November against Asaram and four other defendants in the case. Asaram was charged under Section 8 of the Protection of Children from Sexual Offences Act (POCSO) as well as Sections 342 (wrongful confinement), 376 (rape), 506 (criminal intimidation), and 509 (insult the modesty of any woman) of the Indian Penal Code^[12].

Many of the important witnesses in the case were attacked or vanished while Asaram was incarcerated. In June 2014, Amrut Prajapat, the doctor of Asaram, was shot in Rajkot, Gujarat. In 2015, in Uttar Pradesh, his cook Akhil Gupta and another important witness, Kripal Singh, were shot and killed. In 2015, two additional witnesses, Mahendra Chawla and Rahul Sachan, were attacked on the Jodhpur court premises^[13]. After surviving, they proceeded to overthrow Asaram.

In October 2013, while Asaram was still incarcerated, a woman from Surat filed a case alleging rape and illegal confinement against him and seven other people, including his wife and daughter and son Narayan Sai. When she was residing at Asaram's ashram in Surat, the woman had accused Sai of repeatedly assaulting her sexually^[14].

The complaint, filed at Ahmedabad's Chandkheda police station, stated that Asaram allegedly sexually assaulted the woman multiple times between 2001 and 2006 while she was residing at his ashram outside of the city. Asaram was given a life sentence in prison in April 2018 for the rape of the 16-year-old Uttar Pradesh girl. He received a life sentence in prison in addition to an additional 20 years in prison for charges under two other laws. Before the ruling was announced, security measures were stepped up in Gujarat, Rajasthan, and Haryana. The case's verdict was delivered inside the Jodhpur Central Jail due to concerns about potential intercommunal violence. Following her father's allegations that the self-styled "godman's" supporters were threatening his life and the lives of his family members, Uttar Pradesh police increased security for the victim's family last year.

A Critique of Witness Protection Scheme, 2018

The Witness Protection Scheme was developed by the Home Ministry in 2018 after consulting with the State Governments, the Bureau of Police Research & Development, and the National Legal Service Authority. Witnesses are protected under the Witness Protection Scheme through the use of specially equipped courtrooms, witness identity changes, relocation, installation of security equipment at witnesses' residences, and other measures based on dangerousness assessments and protection techniques.

This Scheme aims to ensure that witnesses are not intimidated or afraid to testify in the absence of protection from violent or other criminal retaliation, thereby preventing any hindrance to the investigation, prosecution, and conviction of defendants. The Plan is a first step in protecting witnesses' rights and making sure that witness suppression doesn't impede the administration of justice.

After conducting a comprehensive analysis of the plan, it is evident that the plan has not fulfilled its obligation to provide clear, precise, and unambiguous provisions. Numerous questions remain unanswered, some of which are highlighted below.

1. Protection based on offence

Clause 2(i) of the Scheme defines a "offence" as any offence that carries a life sentence or the death penalty, or as offences pertaining to crimes against women (as defined by Sections 354, 354A, 354B, 354C, 354D, and Section 509 of the Indian Penal Code)^[15]. This restricts the level of protection provided to witnesses, thereby limiting their protection to only those who report horrific crimes or crimes against women.

The true purpose of the scheme is not much furthered by this definition of offences, under which protection is offered. Both of its points of weakness are present. By dividing witnesses into two groups according to the crime they witnessed, it first limits the scope of the protection provided by the Scheme. As a result, it assesses the applicability of protection by assigning a certain degree of threat perception to a crime rather than based on the actual

danger quotient of the offenders. Therefore, determining the level of threat to the witnesses cannot be done objectively.

Because there can be no empirical measure that can distinguish between an offender of a heinous crime and one that is not, based on the degree of their instinct of self-preservation, the principle assumes that offenders of heinous crimes are more likely to endanger the witnesses, which is a very constructive and myopic view of the societal realities.

Furthermore, it also, in a vicarious sense, compromises the feeling of security that comes with being a regular witness by giving criminals who commit crimes outside the purview of Clause 2 some latitude (i).

All classes of witnesses should have been protected, and those claims should have been segregated by a mechanism known in the Scheme as a "Competent Authority." That would have made the Scheme more appropriate.

The current provision lessens the scheme's impact by allowing a large number of witnesses to evade the safety net.

2. Classification of witnesses

The Scheme divides witnesses into three groups according to the level of danger they believe they are facing. Witnesses in Category A face an immediate threat to their lives or the lives of their family members; witnesses in Category B face a threat to their safety, reputation, or personal belongings; and witnesses in Category C, the lowest tier of the protection hierarchy, face a "moderate" threat that includes intimidation or harassment. This classification has a few significant flaws.

First of all, no objective standards are followed in the categorization process to determine a witness's threat-proneness. The Head of Police is mandated to submit a report following an investigation into the nature and seriousness of threats, as per Clause 2 (j) of the Threat Analysis Report [hereinafter TAR], which is defined as a report analysing the seriousness and credibility of the threat perception to the witness.

In this case, a TAR would consist of a thorough analysis of the Witness's situational rubric, culminating in a threat assessment. However, this becomes arbitrary based on how satisfied the investigating officer is. There is no metric in the Scheme to assess a witness's susceptibility to threats. As a result, a suitable metric that eliminates subjectivity in the procedure must be created.

The threat assessment might not accurately represent the witness's actual level of threat, which is another problem that comes up.

The Scheme must recognise that, frequently, the threat that witnesses perceive is far greater than the actual threat that they face, keeping in mind that the true goal of the Scheme is to allow the witnesses to testify in a fearless atmosphere. This issue results from the disparity in how a regular person with normal sensibilities and a trained police officer perceive threat. As a result, when determining the witness's perception of threat, it becomes crucial to consider their societal sensibilities.

3. Maintaining record confidentiality

According to the Scheme, all parties involved will make sure that no private information about the witness is disclosed both during and after the trial. However, the Scheme does not offer any means of guaranteeing the same. There isn't a specific enforcement mechanism in place to

handle any potential confidentiality violations. Considering the porous and prone to leak nature of the Indian legal system, this puts the witnesses' situation in a precarious position.

Furthermore, it is specified that while soft copies of the records must be kept, hard copies of the records "may" be destroyed after the trial is over. There are absolutely no guidelines available for this kind of procedure. The Indian judiciary's IT infrastructure is in a concerning state, and the absence of guidelines further complicates the enforcement of such a confidentiality provision.

Concerns about the provisions are further raised by the fact that the Competent Authority has been granted complete discretion over whether to delete records, giving the Authority an excessive amount of autonomy.

4. Drawbacks of the scheme

- Nothing is mentioned about designating an official to assist the witness, as suggested by the Malimath committee, and there is no provision to preserve the witness's dignity.
- The scheme makes no mention of providing adequate seating, relaxation areas, restrooms, drinking water, and other amenities to ensure the comfort of witnesses in the courtroom.
- There are no T.A. or DA. provisions in the scheme.
- The plan does not address the matter of case adjournment.
- There is no provision in the scheme to shield witnesses from harassment.
- The 198th Law Commission Report recommended that the costs of "Witness Protection Programmes" be shared equally by the Central and State governments. However, the Witness Protection Scheme of 2018 states that the State Government is responsible for paying for these programmes. In contrast to the 198th Law Commission's recommendations, protection is only granted for a period of three months.
- Provisions for categorising witnesses are in place, but they are for no purpose.
- According to the police's threat analysis report, there's a good chance they're working with powerful individuals.

Conclusion

Witnesses are essential in helping the pursuit of justice because they can testify about events that are true, but they frequently face obstacles and risks that prevent them from coming forward. The purpose of this study was to review the witness protection laws currently in place in India, assess their efficacy, and make suggestions for improving witness protection in the current environment.

The essential rights and protections for witnesses, such as the right to life, liberty, and a fair trial, have come to light during the examination of the Indian Constitution's provisions. Nevertheless, witnesses still have to deal with a number of difficulties, including coercion, threats, and intimidation, in spite of these constitutional protections. The current situation necessitates a thorough strategy to deal with these issues and safeguard the security and rights of witnesses.

The efficacy of India's current witness protection laws has been assessed, taking into consideration witness relocation, identification and testimonial anonymity, police and security protection, and support services. Although there has been

some protection offered by these measures, difficulties in implementing them, a lack of funding, and a lack of coordination among stakeholders have limited their overall effectiveness.

References

1. Rattiram v. State of M.P., (2012) 4 SCC 516
2. Zahira Habibullah Sheikh & Anr. v. State of Gujarat & Ors. (2006) 3 SCC 374
3. Black's Law Dictionary, 1919 (11th ed. 2019)
4. "Under the common law a hostile witness is described as one who is not desirous of telling the truth at the instance of the party calling him..." (Gura Singh v. The State of Rajasthan, AIR 2001 SC 330)
5. Mahender Chawla and Ors. v. Union of India (UOI) and Ors. (2019) 14 SCC 615
6. Encounters must be thoroughly investigated and perpetrators shamed, oHeraldo, <https://www.heraldgoa.in/Edit/Editorial/Encounters-must-be-thoroughly-investigated-and-perpetrators-shamed/162926> (last visited Feb 3, 2024).
7. Jessica Lall murder case: Chronology of events, The Hindu, Apr. 19, 2010, <https://www.thehindu.com/news/national/Jessica-Lall-murder-case-Chronology-of-events/article61758940.ece> (last visited Feb 3, 2024).
8. Mystery of Vyapam Scam: The death toll keeps increasing in India's killer scandal-India News, Firstpost, Firstpost (2017), <https://www.firstpost.com/india/mystery-of-vyapam-scam-the-death-toll-keeps-increasing-in-indias-killer-scandal-2316888.html> (last visited Feb 3, 2024).
9. Mahender Chawla v. Union of India Writ Petition (Criminal) No. 156 Of 2016
10. Mukhtar Ansari's tryst with crime began at the age of 15 | 10 facts, HINDUSTAN TIMES (2024), <https://www.hindustantimes.com/india-news/mukhtar-ansari-death-news-how-army-officers-grandson-became-a-dreaded-criminal-10-facts-101711673705962.html> (last visited Apr 25, 2024).
11. SC refuses to entertain Asaram Bapu's plea for suspension of sentence in rape case on health grounds, THE INDIAN EXPRESS (Mar. 1, 2024), <https://indianexpress.com/article/india/supreme-court-asaram-bapu-jail-sentence-suspension-rape-919746/> (last visited Apr 23, 2024).
12. Id.
13. Id.
14. Id.
15. The Indian Penal Code, 1860, § 354, 354A, 354B, 354C, 354D, 509, No. 45, Acts of Parliament, 1860 (India).