Witness protection Programme - Risk and Challenges Involved

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Abstract

In India there has been always feeling from the corners of court to police station as well as in mind-set of the common people that justice delivery system is harassing, lengthy, costly and drama of rich and mussel men. Perhaps judiciary is the last hope for the victim. It is settled fact that only that person goes to the door of court who is helpless from every side because power makes its own law or consist capacity to mold the things in his favour. In this process culprit does all those things whatever (s)he is capable to do to cheat, defraud and befool the justice. In the words of Frederic Pollock a great jurist "Justice is never given, it is a task to be achieved" and this task accused always creates troubles. Sometimes victims are being forced to take back their case, witnesses are forced to hostile and when they both are not breaking after overall facing these troubles then ultimate tool for culprit is to finish them either victim or witness whosoever is soft target for him because he wants to give certain message in society and both, victim and witness are essential for ends of justice. In the words of Bentham "Witnesses are eyes and ears of justice" but truly speaking in there is no special safeguard or protection to the witness or accused. In spite of Indian Penal Code 1860, Indian Evidence Act 1872, Criminal Procedure Code 1973 and latest proposed Whistle Blower Act are not suffice to provide security to witnesses and victim. Now it is the need and demand of the time that there should be a specific legislation on protection of witnesses.

Introduction

"The edifice of administration of justice is based upon witnesses coming forward and deposing without fear or favour, without intimidation or allurement in courts of law. If witnesses are deposing under fear or intimidation or for favour or allurement, the foundation of administration of justice not only gets weakened, but in cases it may even gets obliterated."
This landmark observation was made by the High Court of Delhi in the petition filed by Smt. Neelam Katara, mother of Nitish Katara, who was killed by certain influential persons in the night of 16-17 February, 2002. The mother, Smt Neelam Katara, had filed the petition in the High Court of Delhi, requesting the court to issue directions pertaining to witness protection.

Witness protection has been a much talked about matter in the last few months. The BMW case, Tandoor murder case, Best Bakery case, Muttoo murder case and lately the much talked about Jessica Lall case, Vyapam case and Asharam Bapu case have all highlighted the urgent need to address this vital area of our criminal justice system.

The Vohara Committee Report had critically talked about the growing nexus of politicians, bureaucrats and the criminals. It states that criminalization had struck at the very foundation of the Indian polity and there was an urgent need to deal with this matter in a surgical manner to prevent the morass from spreading further.²

The Malimath Committee Report also reiterated the common perception that the witness today has no stake in the decisions of the criminal courts as he is neither an accused nor a victim. The Report emphasized that he should be treated with great respect and considered a guest of honour if the law is to succeed.³

It is being increasingly felt that the legal system in India is biased against the weak, the poor and the helpless. It is the rich and those having the muscle who take advantage of the legal system by either delaying the entire process of police investigation and trial in the courts or buying justice in their favour. Protection of witnesses is past history.

It is interesting to note that as far back as 1932, Sec. 32 of Bengal Suppression of Terrorist Outrages Act, 1932 empowered the Special Magistrate to exclude persons or public from the premises of the court in order to protect the identity of certain witnesses. Similarly, Sec. 13 of Terrorism And Disruptive Activities (Prevention) Bill (TADA) 1985 and Sec. 16 of TADA 1987 provided for the protection of the identity and addresses of witnesses. Prevention Of Terrorism Act (POTA) 2002, which has, since been replaced, also had a similar provision to protect the identity of witness and help him to depose fearlessly and truthfully in the court to support the cause of justice.
Initiatives in recent past

The 14th Report of Law Commission of India (1958)\(^4\) did refer to witness protection but in a very limited sense relating to proper arrangements to be provided to the witness in the courts and the extent of travelling and daily allowance to be given to him. The 4th Report of National Police Commission (1980)\(^5\) also talked about the travails that the witnesses have to undertake while attending the proceeding, but nothing more. The 154\(^{th}\) Report of Law Commission (1996)\(^6\) had a chapter on the need for protection and facilities to witnesses. However this report did not recommend any measures for physical protection of witnesses.

The 172\(^{nd}\) Report of the Law Commission (2000)\(^7\) also talked about witness protection but in a very limited sense pertaining to the evidence of a minor in the case of a sexually abused child only.

The 178\(^{th}\) Report of the Law Commission (2001)\(^8\) again referred to the fact to witnesses turning hostile. The Malimath Committee on Reforms of Criminal Justice System made recommendations to prevent witnesses turning hostile. The Report recommended the insertion of a new Section 164-A in CrPC to provide for recording of statement of material witnesses in the presence of a magistrate where the offence was punishable with imprisonment of 10 years or more including an offence punishable with death. On the basis of this recommendation, the Criminal law (Amendment) Bill, 2003 was introduced in the Rajya Sabha. It has since been passed by both the houses of the Parliament but the due notification is still pending. The Malimath Committee in its Report (2003) mentioned about the serious concern being voiced by all about witnesses who came to the courts and gave false evidence with impunity.

The Law commission of India has lately released a consultation paper on the issue of witness protection. It has talked about two broad aspects relating to witness protection. Firstly, anonymity and physical protection. Secondly, relocating them at a different place as is provided in the witness protection programmes of a number of countries.\(^9\)

Witness protection in some of the countries\(^{10}\)

United states
The Witness Security Reform Act of 1984 sets up the platform for the relocation and protection of witness in proceedings related to organized criminal activity, drug trafficking or any other serious offence. This protection can also be extended to the immediate family or a person closely associated with such a witness if he felt endangered on account of his participation as a witness in judicial proceedings. The Attorney General of US is the final authority to decide whether a person is to be granted entry into the witness security programme.

The three main organizations which maintain the witness security programme in the US are: US Marshal Services, which provides security and safety of the witnesses; US Department of Justice, which authorizes the admission of witnesses into this programme and the Federal Bureau of Prisons, which maintains the custody of witness in prison.

**United Kingdom**

The Criminal Justice and Public Order Act (1994) provides for punishment of persons who intimidate witnesses. Sec. 51 of the Act protects person who are going to give evidence during trial and also those who help him in the investigation of crime. The Director of Prosecutions, created in 1999 and appointed by the Attorney General from amongst the Members of Bar administers the witness protection programme in U.K. He discharges all his functions under the superintendence of the Attorney General.

**Canada**

The Witness Protection Act (1996) lays down the parameters for deciding whether a witness needs to be admitted to protection programme. The Attorney General has to consider the nature of risk to the witness, the danger that the witness can pose to the community if he is admitted to this programme.

**Australia**

The Witness Protection Act (1994) established the National Witness Protection Programme of the country. The Commissioner of Australia Federal Police is the final authority to decide whether or not a witness is to be included in this programme.
Columbia

Columbia’s witness protection programme has its origin as the constitution of this country imposes obligation to the office of the Attorney General to provide protection for witnesses, victim and other parties to proceeding.

Germany

Germany started witness protection programme in mid of 1980. However, the Witness protection Act was promulgated in 1988. This Act mainly focus on (i) Application of video technology for examination of witness endanger. (ii) Keeping fully secure the personnel information of witness. (iii) Legal assistance to victim and witness.

Italy

In the age of 1930, the Italian Criminal Procedure Code was providing partial protection to the offender if they were co-operating with investigating agency in cases related to gang activities or political conspiracy. However at the same time this process was also under increasing criticism for incredibility of witness. Finally in 1991 a revision was taken place in the law which commence in to force in 2001 which provides (i) Persons eligible for protection. (ii) Type of protection. (iii) Justice collaborators. (iii) Decision on admission are taken place by central commission.

South Africa

Prior to 1996 before adoption of the National Crime Prevention Strategy, witness protection was governed by Section 185A of Criminal Procedure Act of 1977. However in year 2000, Witness Protection Act 112 of 1988 was promulgated which replaced the old system. The new law provides (i) Establishment of national office for witness protection under the authority of the Minister of Justice and Constitutional Development. The office shall be headed by Directorate at country level. (ii) Regulation of function of Director. (iii) Type of crimes. (iv) Penalties for disclosure of identities of witnesses entered in programme. (v) Suspension of civil proceeding against a protected witness. (vi) Minister of Justice and Constitutional Development
may enter in to agreement with other countries or international originations for regulation of condition and relocation of foreign witness.

Philippines

The Witness Protection Security and Benefit Act aims at protecting witnesses who are to depose in cases of grave offences, by granting them certain rights and benefits to ensure their appearance in courts. The witness, once under the aegis of this programme, is entitled to housing, means of livelihood, subsistence allowance, traveling expenses, free medical treatment and hospitalization and substantial monetary compensation to his relatives in case of his/her death.

International Criminal Court

The Rome Statute of the International Criminal Court is quite elaborate on witness protection. The victims and witnesses are both entitled to protection herein. The courts also have the authority to conceal the identity of witness, when they deem it appropriate. Similarly, International Criminal Tribunal for Rwanda (ICTR) also formulated a set of rules to provide for the protection of victims and witnesses, and also circulated a consultation paper to elicit more opinion in this regard.\textsuperscript{11}

United Nations

The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power has stated that judicial and administrative measures must be taken to minimize inconvenience, protect privacy and ensure safety of victims and witnesses. The above declarations was adopted by the UN General Assembly Resolution No. 40/34 of 29\textsuperscript{th} November, 1985 which states that individuals who have suffered harm, including physical or mental injury, economic loss etc. in violation of criminal laws operating in the country are the persons who need protection of the state.\textsuperscript{12}

A number of other countries like Italy, Germany, South Africa, Netherlands, and Ireland etc. also have similar witness protection programmes.
Need for a witness protection programme in India

The need for a witness protection programme in India has been felt for a long time. The Bengal Suppression of Terrorist Outrages Act (1932), Terrorism Activities Detention Act. (TADA) (1985), Prevention Of Terrorism Act. (POTA) (2002) etc did feel that the identity and other details of witnesses needed to be kept a secret where there was danger to life either of the witness, his relatives or to his property.

In India the crime rate is high and the rate of conviction is abysmally low. The police investigation and the court procedure take a long time to reach any conclusion and this is a significant reason why crucial witnesses lose vital interest in the cases.

Today, the transnational nature of organized crime is posing an ever increasing challenge to the law enforcement agencies all over the world. This is so because the real perpetrators of such organized crimes are difficult to identify, they do not directly involve themselves in the actual commission of crime and the evidence against them is difficult to build up.

In India, many recent cases like BMW case, Natish Katara murder case, Best Bakery case, Priyadarshini Matto case and the Jessica Lall case etc. indicate an increasing tendency of the witnesses to turn hostile because of various reasons. Similarly in spite of a large number of deaths, the record of conviction in the communal anti-Sikh Riots of 1984 and the Gujarat clashes of 2002 is shameful, to say the least.

Conclusion

A good witness protection programme is essential for witnesses whose evidence is crucial for the successful prosecution of criminal cases and wherein the life of witness and his family members is also at risk.

A number of agencies as judiciary, police, and prisons etc. should be involved in the witness protection programme. The data base managing, the identity of such protected witness must be scrupulously guarded, otherwise criminal elements will pose a threat to the life and liberty of the witness and his family members and thwart the ends of justice. If such elements find the true identity and the location of such protected witnesses they may either intimidate
them to change their evidence in the court or even eliminate them. Strict penal provisions must be made available to the officials who run the witness protection programme.

Indeed, we think that liability to pay damages to victims of perjury might well be provided as an additional deterrent. There should be provision for compensation to victims for harm suffered due to perjury.

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