PROTECTION OF WITNESS UNDER LAW OF EVIDENCE
- A COMPARATIVE STUDY

SUMMARY OF THESIS

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SUMMARY

INTRODUCTION

A ‘witness’ is an indispensable aid in the justice dispensation system. A witness performs an important duty of assisting the court in deciding the guilt or otherwise of the accused person. Witnesses play a critical role in all stages of criminal proceeding, from initial reporting of crime right through to the trial. The evidence they produce is often crucial to the conviction of offenders. In this context, it is no surprise that individuals facing investigation and criminal prosecution may attempt to frustrate the administration of justice by intimidating witnesses and/or their families. Experts believe that, if there were no measures to protect witnesses and their families against intimidation, many people would be reluctant to cooperate with the authorities, and the state of affairs could cause the justice system to become paralyzed in some cases.¹ What is witness protection? What are its main elements? How is it used to strengthen criminal investigations and prosecutions? Are there any universally applicable lessons that are the secret to successful witness protection programmes? Can countries with limited human and financial resources afford programmes like the ones operated and prized by well-funded and well-resourced legal systems? These are some of the questions that the present research seeks to answer.

NEED OF THE STUDY

Witnesses are the foundation of well-functioning criminal justice systems as their cooperation with law enforcement and judicial authorities is essential to prosecute crimes successfully. Protecting witnesses from intimidation or physical threats from crime suspects is therefore a requirement to uphold the rule of law.

¹Gregory Lacko, The Protection of Witnesses, International Cooperation Group, Department of Justice Canada, 2004
The Supreme Court in the case of *Krishna Mochi v. State of Bihar*\(^2\) observed that society suffers by wrong convictions and it equally suffers by wrong acquittals\(^3\). The main crisis being faced by criminal Justice System relates to intimidation or allurement of victims or witnesses leading to inevitable consequences of collapse of trial. In *Krishna Mochi* Case\(^4\) the Supreme Court pointed out various reasons why the witnesses are not deposing in the court or why their deposition is not found credible. It was observed that one of the reasons may be that they do not have courage to depose against an accused because of threats to their life, more so when the offenders are habitual criminals or high ups in the Government or close to power which may be political, economical or other powers including muscle power\(^5\). Keeping this view in mind the present study has been undertaken to identify the gaps in the protection of witnesses under domestic law. Need of the study arises when we see that despite the high rate of crime and low rate of conviction, there is no rudimentary framework in India to protect witnesses in crucial cases. Absence of these laws has helped in further strengthening the criminals and offenders. In the absence of adequate protection the witnesses are turning hostile. This hostility of witnesses has further complicated the problem. Absence of witness protection and absence of fair trial is one and the same thing. Therefore enacting witness protection laws is need of the hour. By comparing and contrasting the protection of witnesses under domestic, European and International Law this study helps to find out the grey areas in the domestic law. Looking at the role played by witnesses in bringing offenders to justice, the need of the present study arises to answer the question as to why witnesses are not feeling secure to depose before the court.

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\(^2\) AIR 2003 SC 886  
\(^3\) Id. at 2664  
\(^4\) Id.  
\(^5\) Id.
STATEMENT OF PROBLEM

The present study intends to focus upon the issues and problems associated with the administration of justice delivery system due to lack of adequate legal mechanism to protect witnesses in the country. With the help of doctrinal and case-study method, attempts have been made to know as to why and in what circumstances the witnesses turn hostile. What are the specific factors, which induce hostility of witnesses? Are the existing legal safeguards adequate to protect the witnesses? Is there any need for establishing a comprehensive witness protection programme in the country? A systematic probe into some of these questions has been made in the study. For the formulation of our own programme a comparative study of Witness Protection Programmes of various countries has been made.

OBJECTIVES OF THE STUDY

The conviction rate in India is very low and acquittal rate is high due to inefficiency of system, to protect the witnesses. It is against the interest of the society. In order to find out the solution to this problem, the present study has been undertaken to achieve the following objectives:-

1. To understand the meaning and nature of the term ‘witness protection’ and achieving new insights into it.
2. To understand the historical perspectives pertaining to ‘witness’ at national level.
3. To highlight the need and significance of witness protection in India.
4. To critically analyse the exposition of law from the legislative and judicial trends.
5. To make an analytical study of the concept of “Hostile Witness” and emerging challenges and issues concerning the same.
6. To study the problem from International perspectives and analyse the possibility of incorporation of any international provision into Indian law.
7. To find out and analyze the difficulties in adapting the witness protection programme in Indian Legal system, to assess how it acts as a hurdle and remedies which can be suggested to remove these hurdles.

8. To study the deciding factors in providing the protection to witnesses.

9. To give some practicable suggestions on the basis of findings for an effective implementation of Witness Protection Programme in India.

CHAPTER SCHEME:

In order to present the research study in systematic form, following chapter scheme has been adopted:

I. Introduction

II. Law relating to Witnesses: Historical Perspectives

III. Legal framework pertaining to Protection of Witnesses

IV. Witness protection: Legislative & Judicial Trends

V. Hostile Witness: Emerging Challenges & Issues

VI. Witness Protection at International Level: A Comparative Study

VII. Conclusions & Suggestions

HYPOTHESES

Corresponding to the objectives, following set of hypotheses was developed:

$H_{o1}$ The fundamental assumption of the study is that the existing safeguards are not adequate to provide effective protection to witnesses in India and a comprehensive witness protection programme is required.

$H_{o2}$ The witness turning hostile is the main cause for the high acquittal rate and low conviction rate in our criminal justice system. The absence of witness protection laws has helped in further strengthening the criminals and offenders.
An examination of Witness Protection Programme of other countries would give us valuable information for the formulation of our own programme.

Concept of witness protection is still in experimental stage and law is evolving. There would be novel and unexplored dimensions to witness protection in India. Innovative strategies have to be adopted and developed.

**MAJOR FINDINGS**

- Analysis of Indian Law, the European conventions and International law revealed that the term witness protection is not concretely defined so a working definition has been drawn on the basis of dictionary meaning. Witness protection means protecting someone whose life is in danger because they have helped a law enforcement body to do its job. It is seen that a witness is an indispensable aid in the justice dispensation system and their role cannot be underestimated particularly, in adversarial systems as we have in India.

- To trace the historical development of law relating to witness in India three different periods, namely witness in Ancient Hindu period, Muslim Rule and British Rule have been explored. The researcher has concluded after exploring three periods mentioned above that the absence of any established law relating to the witness led to the passing of Indian Evidence Act, 1872.

- It is seen that under Code of Criminal Procedure, 1973 and Indian Penal Code, 1860 there is no direct provision relating to witness protection except the recent amendment made by Code of Criminal Procedure (Amendment) Act, 2008 which inserted a new section 195A IPC which provides for a maximum punishment of seven years imprisonment for anyone trying to induce or influence a witness to give false evidence. Section 195A added in the Cr.P.C, 1973 by the same amendment will empower the witness or any
other person to file a complaint in response to the offence covered under IPC for threatening or inducing any person to give false evidence. In the Indian Evidence Act, 1872 section 149 to 152 together with section 148 were intended to protect a witness against improper cross-examination, a protection which is often very much required. It has however, been seen that the protection afforded is not very effectual. Nevertheless there are certain provisions to deal with witness protection under the special statutes also but it is found that these scattered provisions have failed to provide adequate protection. So, there is an emergent need to enact a separate law for witness protection.

- It is seen that though various studies are conducted by different Law Commissions and other organisations but none of the studies deal directly with the issue of witness protection (except 198\textsuperscript{th} report of Law Commission). A critical analysis of these studies gives a clear idea of what areas have been covered and what remains to be done to protect witnesses from harm and intimidation thereby paving a way for the implementation of National Witness Protection law in India.

- Analysis of various judgments like \textit{Naresh Shridhar Mirajkar, Gurbachan Singh V. State of Bombay, Kartar Singh V. State of Punjab, Delhi Domestic Working Women’s Forum V. Union of India, National Human Rights Commission V. State of Gujarat, Zahira Habibulla H. Sheikh and Another V. State of Gujarat and Others, Ms. Neelam Katara V. Union of India} shows that these are some preliminary steps taken by the judiciary. Though they provide guidance but are not sufficient and there is an urgent need to enact a comprehensive law on witness protection.

- A critical analysis of the concept of Hostile Witness revealed that absence of any law to protect witnesses is the main reason for the hostility of witnesses which led to the low conviction rate in India. It was found that witness may turn hostile for various reasons. Generally it is the
combination of money and muscle power, threat / intimidation, inducement by various means, allurement/seduction etc. but the major one being the absence of protection to the witnesses during and after the trial. Protection to witnesses, especially in sensitive cases would, to a great extent, be effective in preventing them from turning hostile therefore there is need for enactment of comprehensive witness protection legislation.

- A comparative analysis of the features of witness protection programs in selected countries (with special emphasis on Australia, United States of America, and Canada), has shown that effective and reliable witness protection programs have proven their value as essential tools in the fight against serious crime. The witness protection measures provided by international organisations like ICC (International Criminal Court), ICTY (International Criminal Tribunal for the Former Yugoslavia), ICTR (International Criminal Tribunal for Rwanda), UNCTOC (United Nations Convention against Transnational Organized Crime) (or Palermo convention), The United Nations Convention Against Corruption and the UNODC "Good Practices in the Protection of Witnesses in Criminal Proceedings Involving Organized Crime" revealed that there are no internationally accepted formal standards for witness protection. However, this comparative analysis will prove helpful in framing law for India. The important features of the laws of these countries can be taken into consideration while enacting a law for India.

POSITION OF HYPOTHESES

Following is the summarised position of hypotheses:

- The Hypothesis $H_01$ stands accepted and it was established that nevertheless there are certain provisions to deal with witness protection under the special statutes also but these scattered provisions have failed to
provide adequate protection. So, there is an emergent need to enact a separate law for witness protection.

- The Hypothesis $H_{02}$ stands accepted and it was established that absence of any law to protect witnesses is the main reason for the hostility of witnesses which led to the low conviction rate in India.
- The Hypotheses $H_{03}$ and $H_{04}$ stands accepted and it was established after making a comparative analysis of witness protection programmes in various countries that effective and reliable witness protection programs have proven their value as essential tools in the fight against serious crime. This comparative analysis will prove helpful in framing law for India. The important features of the laws of these countries can be taken into consideration while enacting a law for India.

**CHALLENGES TOWARDS WITNESS PROTECTION**

The following key gaps and hindrances to the practical efficacy of the witness protection programme in India have been identified by the researcher:

a) The first and most important problem is with regard to anonymity of witnesses and the balancing of interests of the prosecution in protecting the witness and the rights of the accused.

b) There are many practical problems when talking about such an extensive programme. The most obvious is that of the costs of implementation and infrastructure. When talking about providing bodyguards, security, relocation to another area etc., the costs that are involved are bound to be enormous. With inadequate funds, it may be difficult to devise a witness protection programme, or even to implement it.

c) No express duty on any agency to consider the needs of witnesses for protective measures under the law.
d) The protection that is currently offered is discretionary and may therefore appear arbitrary and unpredictable.

e) It is difficult to define the scope of witness protection. Should the protection be limited to the witness, or should it include his family, and if so, to what degree?

f) Should the witness and/or his family receive protection or assistance only during the time of trial, or should it continue indefinitely as long as the threat exists?

g) The most important problem is that of corruption in the administration and judiciary. No witness protection programme can function with a corrupt administration. If one is provided with false identities and relocated and the approved authority is bribed and sells the information, the whole system is undermined. Thus, corruption and political pressure remains the main problem when addressing the hostile witness situation.

SUGGESTIONS

Following suggestions have been made to overcome the abovementioned difficulties:

1. The researcher suggests that there is need to evolve the comprehensive policy and legislation for witness protection.

2. The first step in developing a witness protection law is to acknowledge that witness protection is not a favour to witnesses, but rather a duty for States.

3. The Witness Protection legislation is a crucial part of the strategy of crime prevention and without an effective legislation, key witnesses are unlikely to co-operate in giving vital evidence. However, for any witness protection law to be effective, it is essential that it be seen as credible in the eyes of the general public.
4. In order to get the cooperation of people in the fight against crime, they must be assured that in doing so, their life or property, or that of their families, would be safe. Depending on the degree of cooperation and the type of witness, this protection may be given before, during and/or after the judicial proceeding. Even as the inquiry is done before the police, the public prosecutor, or the court, protection must be considered as long as there is a possibility that the suspect/accused or other individual aims to prevent the witness from testifying against said suspect/accused or to force such witness to make a false testimony, by threatening or actually hurting the witness or any member of his/her family.

5. Effective witness protection legislation, should involve all the three concerned agencies – police, government and judiciary.

6. The witness protection cannot be viewed in isolation, but must rather be considered a crucial part of a comprehensive system designed to effectively investigate and prosecute perpetrators of crime. Protection measures will be ineffective if other parts of the criminal justice system do not function well. Every step of the process, from investigation to conviction and punishment, should be analysed to identify ways in which witnesses are placed at risk, and potential reforms designed to limit those risks.

7. The political will to initiate this program should be displayed by the government; the legal aspects can be looked into by the judiciary, and, the execution can be entrusted to the police.

8. Provision should be made to fast track cases where witnesses are under protection. Even if this is not always possible, Judges should be made aware of certain defence lawyers' efforts to needlessly drag cases involving witnesses under protection in the hope that these witnesses will succumb to stress and leave the protection. The spirit behind Section 309 of Cr.P.C must be realised in true sense by the court and adjournment should be exercised in exceptional situations only.
9. In order to avoid unnecessary adjournments the close monitoring of trial process is highly called for and it may be done through computer networking.

10. If the Court thinks it fit, then the identity of the witness should be changed. But this should not confine to merely change of name. If the situation demands, then his face should also be changed through plastic surgery.

11. If the court thinks that the place where the witness ordinarily resides is unsafe for the witness concerned, then he/she should be shifted to the place which is difficult for the injurer to reach or he should be kept in a place which is though the same locality, where he ordinarily resides but which is not known at least to the interested persons.

12. Witnesses who come to the court should be treated with dignity and shown due courtesy. Witness should be provided with an official for his assistance. Separate place should be provided with proper facilities such as seating, resting, toilet, drinking water etc. for the convenience in the court premises. The witnesses should be fully compensated for the day when he is in the court because he sacrifices his work to assist the court.

13. The judge should keep an eye on the defence in order to prevent the witnesses from harassment, annoyance or indignity during the time of cross-examination.

14. The witness should be brought to the court only at the sentencing stage. All his statements should be recorded in the isolation at the early stage.

15. Protection could be provided by adopting following measures:
   a. Keeping the identity of witnesses confidential throughout the trial.
   b. Arranging for a closed door trial or trial by video conferencing;
   c. Avoiding exposure of the witness to media;
   d. Ensuring physical safety of the witness and their close relatives by providing bodyguards;
e. Bringing them to court only at the sentencing stage; and resettling
them by providing a new identity and a safe haven

16. For a start this programme could be taken up for selected crimes only,
especially ones that have an impact on the safety and the security of the
Country, the economy of the Nation and those related to organized crime.

17. In case such a Witness Protection Programme is introduced, the extent of
anonymity to be provided to the witnesses, the security to be given to him
and his relatives and friends, relocating of the crucial witness elsewhere in
the country or abroad, providing him with suitable employment and
housing and taking necessary care of his medical, transportation and other
needs etc. can be extended in a phased manner taking into account the
extent of resources available with the State and the Country. However,
beginning needs to be made and even a small step would be a step in the
right direction.

18. The role of police should also be defined. The police can take a number of
basic measures to protect witnesses against intimidation. For example, they
can engage in surveillance activities at crucial times; escort the witness to
work, court, etc., lend a personal alarm device; assist with emergency
relocation; increase police patrols in the area where the witness lives; or
even offer 24-hour police protection. Whether or not to offer these services
is often a question of resources and costs. Moreover, police should be
provided with sufficient guidance on their responsibility with respect to
witness protection. There is a need for police reforms with special emphasis
on sensitization of the police in regard to witness protection.

19. Protective measures can also be taken at the level of the courts. Some
witnesses may be unable to testify freely if they are required to testify in
open court in the usual manner. Measures may be taken by the courts to
restrict public access to the witness’s identity or testimony through a
number of measures, including having a witness testify under a pseudonym;
expunging names and identifying information from the court's public records; or having all members of the public, including members of the media, excluded from the courtroom during the testimony of a witness. The use of screens, closed-circuit television and video links are the main methods by which a witness, while testifying, can be protected from the accused.

20. The use of practical measures such as videoconferencing, teleconferencing, voice and face distortion, and other similar techniques is also encouraged as well as allowing witnesses to conceal their address or occupation.

21. A number of agencies as Judiciary, Police, and Prisons etc. are involved in the Witness Protection Programme. The data base managing the identity of such protected witnesses must be scrupulously guarded, otherwise criminal elements will pose a threat to the life and liberty of the witnesses and his family members and thwart the ends of justices by finding out the true identity and the location of such protected witnesses and either intimidating them to change their evidence in the Court or eliminating them. Strict penal provisions must exist for violations observed on part of the officials who run the Witness Protection Programme.

22. If violations are found to exist on part of witnesses enrolled in this programme they too should be penalized.

23. It is also suggested that the witness should be provided with certain rights to ensure him a fair deal in the criminal justice process and to protect him from any intimidation or undue pressure. The following may be some basic rights to be guaranteed under the proposed legislation for witness:

   a. To be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process.
b. To be informed, upon request, when the accused or convicted person is released from custody or has escaped.

c. To information of the status of the investigation and prosecution of crime.

d. To be present at and, upon request, to be informed of all criminal proceedings where the accused has the right to be present.

e. To be heard at the time of the granting of bail to the accused and sentencing.

f. To confer with the prosecution, after the crime against the victim has been charged, before a criminal court.

g. To give evidence anonymously

h. To information on medical facilities, social services, state crime compensation, and programmes which provide counseling, treatment and other support.

i. To seek guidance from police and prosecution in making the statement properly

j. To secure waiting place while at court proceedings.

k. To transportation and lodging arrangements.

24. Not only must they have rights, but it must be the duty of the magistrate and the public prosecutor to inform the witnesses about such rights.

25. A professional and accountable witness protection programme must balance the need of law enforcement with the needs of the witness and this will be more likely to occur in a system which:

   a. separates those responsible for the investigation from the management of the witness protection scheme;
b. has in place professional/informant management and investigation case management plans; and

c. has regard for the ongoing social and emotional needs of the witness.

26. The issue of hostility and subsequent protection are interrelated issues so they must be placed under single legislation.

27. Mere protection will not resolve all the issues relating to witnesses rather witness protection, hostile witness and general problems faced by the witness in criminal justice process should be kept in mind while framing the legislation.

28. All the witnesses cannot be provided protection cover due to practical limitations. The need therefore would be to identify and prioritize the case where the protection is quite essential. Thus by reviewing cases which may be high profile, communally charged, involving drugs or organised crime syndicates or cases involving grave offences where the authority observes a possible threat, protection could be provided. In all other cases assistance may be given to witnesses.

29. What is immediately possible is to ensure that the police, prosecution and judicial officers start showing little sensitivity in dealing with witnesses so that the attitudinal and harassment matters could be minimized and element of assistance to witness could be emphasized at all stages of trial.

RECOMMENDATION OF THE STUDY

In view of the above discussion on findings and suggestions the researcher subsequently recommends that there is an emergent need to enact a law on witness protection covering all the issues concerning witness. The issues of witness identity protection, witness protection, hostility, and witness assistance are part of larger problems that the criminal justice in India faces today. It is therefore recommended that all these matters should be dealt in single legislation.
While framing a Witness Protection Legislation certain prerequisites mentioned by the researcher can be taken into consideration by the Government of India. These requirements for Witness Protection Legislation can be adapted according to Indian conditions. In the context of the fight against crime it is clearly in the interest of the state to provide protection to witnesses. Without such protection the perpetrators of crime will not be brought to trial. It is in this sense that the provision of effective witness protection is of primary importance in the investigation and prosecution of criminal activity. Keeping in view that the resources of government to provide protection are not unlimited the decision to provide protection must be preceded by a rigorous assessment of the threat to the witness. Witnesses are reluctant and afraid to come to court because they are afraid of being victimized by the alleged criminals or because they have little confidence in the criminal justice system. We need to make sure our witnesses are safe at court proceedings, so that justice can be done swiftly. The criminal justice system is like a chain whose strength is only as good as its weakest link. Our lack of witness protection is often our weak link. This weak link can be transformed into our strength by taking a step in this direction and enacting a witness protection law.

SCOPE FOR FURTHER RESEARCH

Several areas have been identified throughout this research study which could benefit from additional empirical research. In particular, studies on witness intimidation and failed prosecutions as a result of intimidation or suppression of witnesses could be useful. This could be accomplished by gathering data from police or prosecutorial files, as well as through interviews with prosecutors (or another form of survey). Given the number of independent programs now in existence in the different countries, research could assist in understanding the relationship between these programs and help identify probable replications or cost ineffectiveness. The question of whether protected witnesses will really make
a difference in terms of the success of key investigations or prosecutions is certainly one which comes immediately to mind. An attempt should also be made, perhaps in collaboration with countries with similar witness protection programs, to develop some standard performance indicators for such programs.