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Subject: **Law**

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Paper : **Criminal Justice Administration**

Module : **Witness Protection**



ज्ञान-विज्ञान-विमुक्तये



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DESCRIPTION OF MODULE

Items	Description of Module
Subject Name	Law
Paper Name	Criminal Justice Administration
Module Name	Witness Protection
Module Id	LAW/CJA/XVI
Objectives	<ul style="list-style-type: none">• The main objective of the module is to provide introductory knowledge of criminal justice system vis-à-vis witness protection.• To make the students aware about legal and regulatory framework under which the witness operate within the CJS and are extended protection.• To make the students understand the present status of witness, causes of hostility and implementations of recommendations of Law Commission of India for protection of witnesses.
Prerequisites	Basic knowledge of legal provisions relating to witness under the Code of Criminal Procedure, 1973 and Indian Evidence Act, 1872 is required.
Key words	Criminal justice, witness, witness protection programme, hostility, false evidence, whistle blowers, perjury.



1. Introduction:

Witness plays a vital role in adversarial system of criminal justice which is prevalent in India. It is cardinal principle of criminal law that the burden of proof always lies on the prosecution. A criminal case is to be proved beyond the reasonable doubt. In this context, protection of witness becomes very important to explore the truth. The statement of witness is the determining factor for the conviction or acquittal of the accused. The speedy justice or delay in justice delivery also depends, to great extent, on the quality of statement given by the witness during trial. The *Jessica Lal case* and *Nirbhaya Case* have raised many important debates on the working of our Criminal Justice System. It becomes imperative for a student of criminal law to understand firstly, how criminal justice is regulated in the country and secondly, what are the legal provisions prescribed for protection of witness. This module, therefore, will provide a brief insight on provisions of law for witness protection in force in India. The module will also help students to understand case laws, recommendations of Law Commissions of India and various Committees for reforming criminal justice administration system and recommendations for providing protection to witnesses.

The testimony of a witness is very vital in a criminal trial. The significant role played by the witness is *sine qua non* for dispensing justice. It is believed that witnesses are just like the eyes and ears of the court whose sole testimony sometimes leads to conviction or acquittal in a criminal case. Each and every statement of witness is relevant to decide a case by the court of law as witness has the power to change the course of the whole case.

2. Types of Witnesses and Witness Identity Protection:

Since witness is a party that brings relevant facts before the court either through oral evidence or through documentary evidence, the criminal procedure law would permit the possibilities of, at least, three categories of witnesses, namely i) victim witness, ii)



accused witness¹ and iii) independent witness.² The issue of witness protection becomes relevant only in cases of victim witness or independent witnesses, who face the threat of violence and harassment at the hands of the powerful and scheming accused. The problem of hostile witnesses can be said to be a direct fall out of the growing menace of protection-less victim/witness.

Witness protection is not defined anywhere under the Indian criminal law. Different provisions under the Indian Evidence Act and Code of Criminal procedure only seek to deal with hostile witness. In common parlance, it means protection to a witness from physical harm, discomfort and inconveniences. It also implies legal analysis of the commission of a crime to testify before a court or quasi-judicial body or before an investigating authority by protecting him from reprisals and from economic dislocation providing all necessary security and reposing in him the confidence that he is discharging a very important duty to society for which he is expected to discharge the onus of testifying his statement without any bias.

The identity of witnesses requires protection during investigation, inquiry and trial. It is not confined to cases of terrorism or sexual offences only but it extends to all serious offences where danger is imminent to the life and property of the witness. The Law Commission in its 198th Report dwelled upon this issue and stressed upon streamlining Witness Identity Protection and Witness Protection Programmes in India. It has been

¹ An accused witness may be required to come for testifying before the court under section 313 and may be either summoned to appear before the court under section 204(1)(a) or required to appear under warrant under section 204(1)(b). Similarly an accused who is already remanded to prison may be required to attend the court under section 267. In case of other witnesses, such as victim witness or independent prosecution witness the court is given power to call the witness under section 311 of the Code.

² Law Commission of India in its 198th Report on “Witness Identity Protection and Witness Protection Programmes” (2006) divides witnesses in to three categories, namely (i) victim-witnesses who are known to the accused; (ii) victims-witnesses not known to the accused (e.g. as in a case of indiscriminate firing by the accused) and (iii) witnesses whose identity is not known to the accused. It further states that the category (i) witnesses require protection from trauma and categories (ii) and (iii) witnesses require protection against disclosure of identity.

Report available at <http://lawcommissionofindia.nic.in/reports/rep198.pdf>



stated in the said Report that Witness Identity Protection may require during investigation, inquiry and trial while Witness Protection Programmes apply to the physical protection of the witness outside the Court. In this regard the said Report provides that on the basis of the direction given by public prosecutor, the Magistrate in cases of likelihood of danger to life or property of the witness or any of his relative can give the witness a new identity, only known to him. Entire case record must use the same identity. Such order granting anonymity may be passed during the course of trial as well.

3. Legislative Measures for Witness Protection:

3.1 Procedural Safeguards to Victim/Witness:

Right to an open trial or public hearing and examination of witnesses in the presence of the accused are among those cardinal principles of fair trial which are found in the criminal procedure of almost all countries governed by rule of law. Similarly in our case sections 273 and 327 ensure that all evidence should be taken in the presence of the accused and requires all trials to be in open court. These rights of the accused are not absolute. The law needs to make balance between these rights of the accused as against the need for protection of victims and witnesses from fear or danger to their lives and property so that they may depose in court freely. However, the recent laws have created exceptions to these provisions.

3.1.1 Evidence to be taken in presence of the accused

The opening sentence of section 273 is indicative of the fact that in given cases the requirement of taking evidence in the presence of the accused can be dispensed with in the interest of justice.³

³ Section 273- Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused or, when his personal attendance is dispensed with, in the presence of his pleader.



A proviso to section 273 is inserted in the year 2013 which allows court to take necessary steps in recording of evidence in cases where a woman below the age of eighteen years is subjected to rape or any other sexual offence. Such measures are necessary to ensure that such woman is not confronted by the accused while cross-examination.⁴

3.1.2 Open Hearing or a Public Trial

The general rule is that the accused must be afforded a public trial. This rule is embodied in section 327 of the Code. Though section 327 also creates an exception to this general rule and the Magistrate, if circumstance demands, may reserve the access of public or any person in any inquiry or trial of a particular case.

The section further provides that where such an inquiry or trial of cases pertains to sexual offences then it must be conducted in camera. It prohibits publication of any matter relating to such proceeding except with the prior permission of the court. Section 228A of the Indian Penal Code, 1860 prescribes punishment if the identity of the victim of rape is published.

The objective of trial in camera trial is that it would help the victim/witness to give her testimony without fear. The presence of the accused or public creates a sense of pressure and hesitation in the mind of the victim/witness which may cause discomfort for her to depose voluntarily.

The Supreme Court in case of **State of Punjab v. Gurmit Singh**⁵ gave emphasis on in camera trial and held that it would not only help in keeping the self-respect of the witness /victim of the crime but also would improve the quality of evidence of the rape victim because she would not feel shyness or hesitant to depose freely. The evidence deposed by her will have quality and its evidence would help the court in ascertaining the truth.

⁴ It is pertinent to note here that the Law Commission in its 172nd Report (2000) has also recommended for insertion of such proviso which took its final shape in the Justice Verma Committee Report on Amendments to Criminal Law in the year 2013.

⁵ 1996 (2) SCC 384



In **Sakshi v. Union of India**⁶ the Apex Court stressed on the use of a screen or some other similar arrangement to prevent victim/witness face to face encounter with the accused person. The face or visibility of the accused to the victim or witness may create a fear in the mind of victim or the witness as a result of which he/she may adduce evidence involuntarily. The Court further stated that recording through video conferencing can be followed by which victim/witness can avoid direct confrontation with the accused at the time of giving testimony.

Question as to the admissibility of evidence recorded through video conferencing was answered in affirmative in the case of **State of Maharashtra v. Dr. Praful B. Desai**⁷. Upholding the validity and legality of video conferencing, the Supreme Court held that recording of evidence through video conferencing is permissible under law.

3.1.3 Recording of evidence in absence of the accused

Section 299 is an exception to the general rule that evidence to be taken in presence of the accused. In cases where the accused has absconded or where there is no immediate prospect of arresting him the Court may, in his absence, examine the witnesses produced on behalf of the prosecution, and record their depositions.

Section 299 deals with the right of the accused to cross-examine the prosecution witnesses. The object of this provision is to guarantee an open public trial which gives a right to the accused to know the evidence gathered by the prosecution and also a right to cross-examination to safeguard the interest of the accused. It is based on the cardinal principle that the accused is presumed to be innocent unless proved guilty beyond reasonable doubt.

3.1.4 Complainant and witnesses not to be required to accompany police officer and not to be subject to restraint

⁶ 2004(6) SCALE 15

⁷ 2003 (4) SCC 601



Section 171 of the Code provides that the complainant or witness is not required to accompany police officer on their way to any Court. At the same time they shall not be subjected to unnecessary restraint or inconvenience, or required to give any security for their appearance other than their own bond. In case any complainant or witness refuses to attend or to execute a bond the officer in charge of the police station may forward him in custody to the Magistrate, who may detain him in custody until he executes such bond, or until the hearing of the case is completed.

3.1.5 When attendance of witness may be dispensed with and commission issued

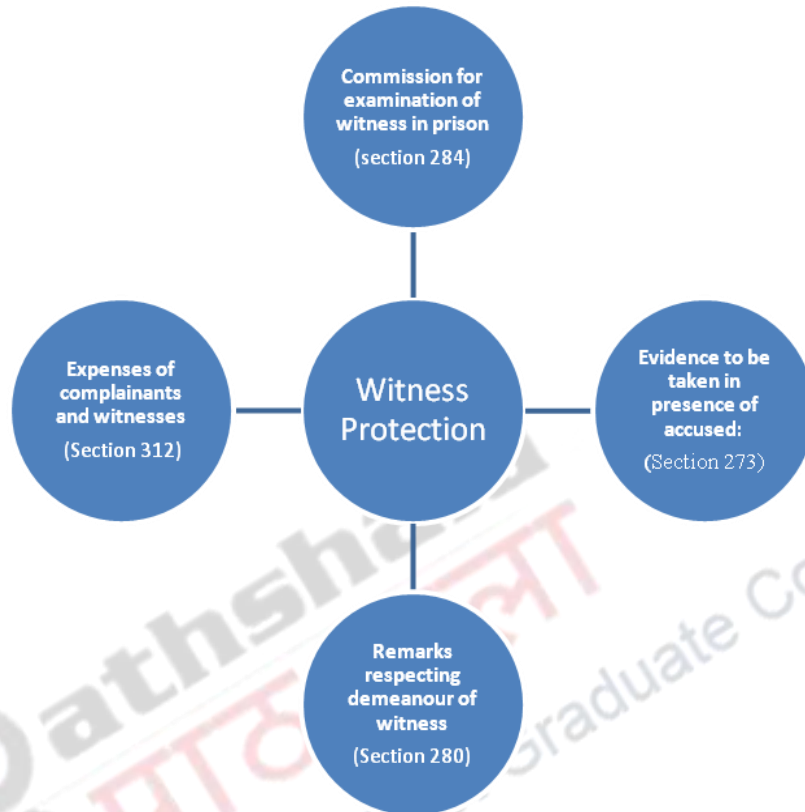
Section 284 provides for cases where attendance of witness may be dispensed with and commission may be issued for examination. If it appears to Magistrate that the examination of a witness is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, the Court or Magistrate may dispense with such attendance and may issue a commission for the examination of the witness.

3.1.6 Expenses of complainants and witnesses: Section 312 Cr. P.C

As per section 312, 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 purposes of any inquiry, trial or other proceeding before such Court.

It was held in the case of **Zahira Habibulla Sheikh v. State of Gujarat**⁸ that in cases where the venue of trial is shifted from one place to another to provide more conducive environment to witnesses or victims to depose freely, the courts are obliged to order payment of reasonable expenses incurred by the witness or complainant for attending the court as per section 312 of the Code.

⁸ (2004) 4 SCC158.



3.2 Penalizing Disclosure of Identity of victims of sexual offences and threatening witness:

3.2.1 Disclosure of identity of sexual victims to be an offence

Section 228A of the Indian Penal Code provides that the court shall impose a sentence of two years imprisonment and fine upon any person who prints or publishes the name which may identify the victim of such offence of rape. The object of extending this protection is to ensure that the rape victim's privacy can be maintained throughout the trial and even after trial is over.



3.2.2 Threatening any person to give evidence

Section 195-A was inserted in the Indian Penal Code by an amendment in the year 2005 which provides for punishment for threatening any person to give false evidence.

If any person threatens another with any injury to his person, reputation or property or to the person or reputation of any one in whom that person is interested, with intent to cause that person to give false evidence, he shall be punished with imprisonment for a term which may extend to seven years.

Where any innocent person is convicted and sentenced in consequence of such false evidence, with death or imprisonment for more than seven years, the person who threatens shall be punished with the same punishment and sentence in the same manner and to the same extent such innocent person is punished and sentenced.

3.3 Special Evidentiary Rules Relating to Witnesses:

3.3.1 Witness not excused from answering on ground that answer will criminate

Section 132 imposes a duty on a witness to answer questions put to him. He shall not be excused from answering any question in any proceeding on the ground that such answer will criminate witness or expose such witness to a penalty or forfeiture.

In case the witness is compelled to answer any such question, he shall not be subjected to any arrest or prosecution, or it will not be used against him in any criminal proceeding, though he may be prosecuted for giving false evidence by such answer.⁹

3.3.2 Court to decide when question shall be asked and when witness compelled to answer

⁹ In the case of **Elavarathi Peddatha Reddi v. Iyyala Varada Reddi**, [AIR 1929 Mad. 236] the Court observed that to avail the protection given under section 132 of Indian Evidence Act the witness should be compelled to answer the question. The compulsion provided in Section 132 may be expressed or implied.



Section 148 of the Indian Evidence Act provides that if any question relates to matter which is not relevant to the proceedings under hearing except it effects the credit of a witness by injuring his character, then it empowers the court to decide when such questions shall be asked and when such witness be compelled to answer it.

In exercising its discretion, the Court shall have regard to the following considerations:-

- (1) such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Courts as to the credibility of the witness or the matter to which testifies;
- (2) Such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies;
- (3) such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence;
- (4) the Court may, if it sees fit, draw, from the witness's refusal to answer, the inference that the answer if given would be unfavourable.

The onus is on the person asking such question to prove that he has reasonable grounds for thinking that the imputation which it conveys is well-founded. Section 149 of the Evidence Act lays down that a question which is likely to impeach the credit of a witness should not be asked.

3.3.3 Witnesses not to be subjected to unreasonable questioning

The objective of section 150 of Evidence Act is to impose a restriction on the lawyers to ask any question without any reasonable ground. It empowers the court to report the



circumstances of the case either to High Court or to such Bar Council to which such barrister, pleader, vakil or attorney is subject in exercise of his profession.

3.3.4 Prohibition on indecent and scandalous questions

As per section 151 the Court may forbid any question or inquiry which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.¹⁰



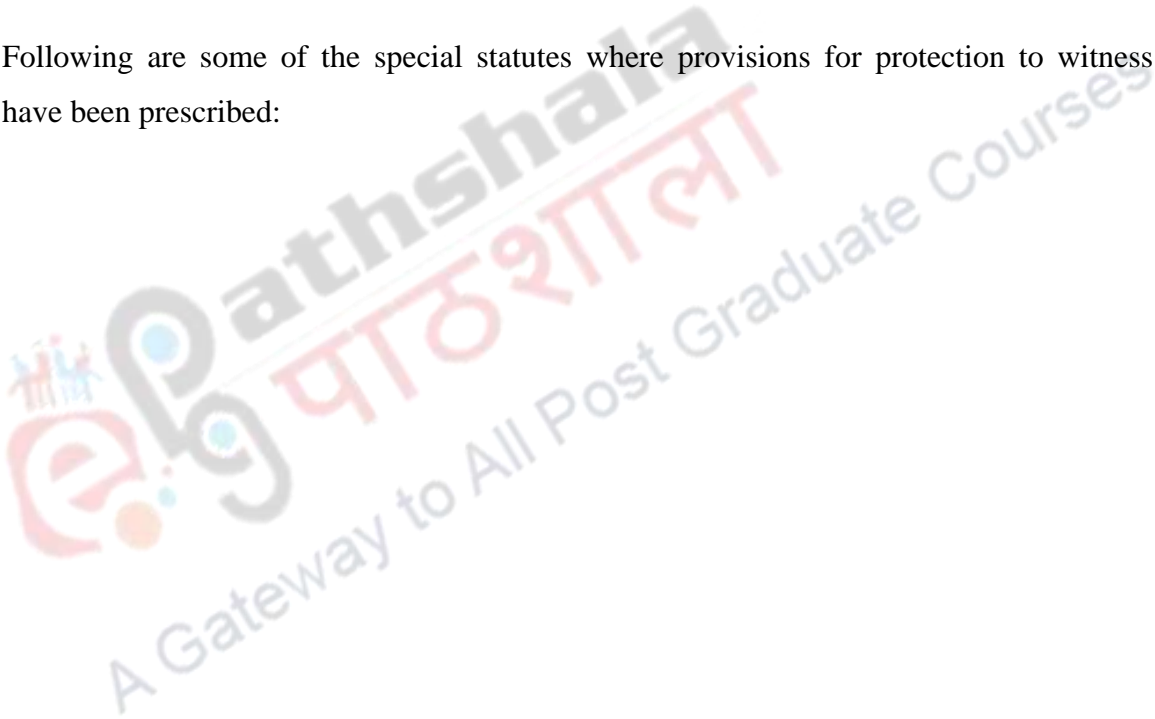
¹⁰ In **Babu Rao Patel v. Bal Thackeroy [1977 Cri.L.J. 1639]** the Court pointed out that if the court is satisfied that even an indecent and scandalous question is directly related to fact in issue that cannot be refused to be asked. But the questions which are not relevant and likely to harass or embarrass a witness are not allowed to be asked.

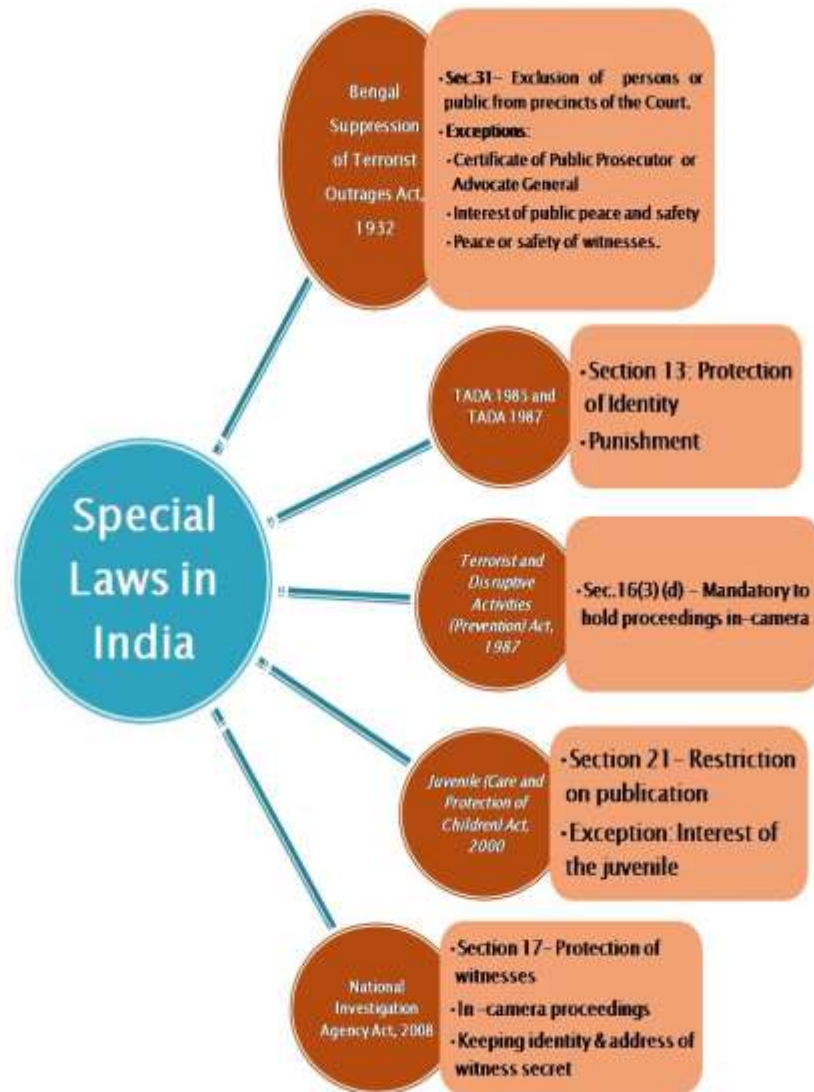


4. Special Witness Protection Laws:

The necessity for protection of witness in a criminal case has been universally recognized for better administration of criminal justice and to ensure that offences like terrorist acts or organized crime are properly prosecuted and punished to ensure that the hardened criminal is not escaped from the clutches of law. It is noteworthy to mention here that a witness who adduce evidence against an accused in a trial especially in a terrorist offence which would expose himself to life threatening which may cause death or severe bodily injury to him or to his kith and kin.

Following are some of the special statutes where provisions for protection to witness have been prescribed:





4.1 The West Bengal Act, 1932

Section 31 of the West Bengal Act conferred power on a court to reserve the access of public or any particular person in any given case. Even the Public Prosecutor or Advocate-General may certify in writing to the Magistrate that it is expedient in the interests of public, peace or safety, or of peace or safety of any of the witnesses in the trial that the public generally should not have access, the special Magistrate shall order accordingly.



Section 31 kept the safety of the witnesses at paramount importance and it is a ground for exclusion of public from a criminal trial.

4.2 Terrorists and Disruptive Activities Act, 1985

For the first time in 1985, the legislature introduced the principle of 'witness identity' protection in certain special statutes, and this started with the statutes to prevent terrorist activities. To prevent the rising incidence of terrorist activities in recent times, the Terrorist and Disruptive Activities (Prevention) Act, 1985 was enacted. It was felt that unless sufficient safeguards are not provided to victims/witnesses the idea to curb such a menace will remain a dream. To achieve this, the Act introduced witness anonymity for the first time.

Section 13 of the Act provides for in camera proceeding. Though the prosecutor may request to conduct any proceeding or part thereof in open court. Clause (2) provides for keeping the identity of the witness secret if an application is made by the witness in this behalf or by the public prosecutor in relation to a witness or even the Court on its own motion may take such measures as it deems fit for keeping the identity and address of the witness secret.

To protect the identity of the witness the Court may

- a) hold the proceedings at a protected place;
- (b) avoid mention of the names and address of witnesses in its orders or judgments or in any records of case accessible to public;
- (c) issue directions for security that the identity and addresses of the witnesses are not disclosed.



Clause (4) provides for criminal sanction for those who contravene any such direction issued under clause (3) prescribes for imprisonment for a term which may extend to one year and with fine which may extend to one thousand rupees.

The 1985 Act was replaced by the 1987 Act with some changes. Under section 16 of the new Act, it is not mandatory in all cases of trials in relation to terrorist activities to conduct the proceedings in camera and the Court is given discretion to decide the same based on facts and circumstances of the case. Section 16 prohibited publication of information in regard to all or any of the proceedings pending before the Court in any manner.

4.3 Prevention of Terrorism Act, 2002 (Repealed w.e.f. 21.9.2004)

The TADA Act 1987 was repealed by POTA Act 2002. Section 30 of the POTA, was similar to section 16 of the TADA, 1987 and section 13 of the TADA, 1985. The only changes brought into POTA, 2002 were

- (i) that the Court has to record reasons for holding the proceedings in camera and also for coming to the conclusion that the 'life of such witness is in danger', and
- (ii) that publication of court proceedings may be prohibited in 'public interest' too.

4.4 Unlawful Activities (Prevention) Act, 1967

The Act applies to 'unlawful activities' and also to 'terrorist acts'. Section 44 (1) to (4) of the Act bears the heading 'Protection of Witness' and is in identical term as section 30(1) to (4) of the POTA, 2002.

4.5 Juvenile (Care and Protection of Children) Act, 2000

Section 21 of the Juvenile Justice (Care and Protection of Children) Act, 2000 provides for 'prohibition of publication of name, etc. of juvenile involved in any proceeding



except in situations where such disclosure is in the interest of the juvenile and prior permission of the authority is taken.

4.6 National Investigation Agency Act, 2008

Section 17 of the Act provides for protection of witnesses in the similar terms as given under section 13 of TADA, 1985 and section 30 of POTA, 2004. The only improvement was made by prescribing enhanced punishment for breaching any of the directions issued under that section. The term of imprisonment was enhanced from one year to three years.

4.7 Whistle Blowers Protection Act, 2011

This Act is meant to establish a mechanism to receive complaints relating to disclosure on any allegation of corruption or willful misuse of power or willful misuse of discretion against any public servant and to inquire or cause an inquiry into such disclosure and to provide adequate safeguards against victimization of the person making such complaint. Some notable provisions in this regard are mentioned below:

- The Act casts a duty on the Central Government to protect any person or public servant from any kind of proceedings initiated merely on the ground that such person or a public servant had made a disclosure or rendered assistance in inquiry under this Act.¹¹
- If the Competent Authority either on the application of the complainant, or witnesses, or on the basis of information gathered, is of the opinion that such person rendering assistance for inquiry under this Act need protection, the Competent Authority shall issue appropriate directions to the concerned Government authorities (including police) which shall take necessary steps,

¹¹ Section 11, Whistle Blowers Protection Act, 2011



through its agencies, to protect such complainant or public servant or persons concerned.¹²

- The Act empowers the Competent Authority to conceal the identity of the complainant and the documents or information furnished by him.¹³

4.8 Protection of Children from Sexual offences Act, 2012

This Act is enacted with an object to protect children from offences of sexual nature and pornography. The Act also aims to establish special courts to try cases involving such offences. Some of the provisions dealing with protection of witness/victim are given hereinafter:

- The Act prohibits media and other agencies to make any report or comments on any child in any manner which may have the effect of lowering the reputation or infringing upon the privacy of the child. These agencies are also restricted from showing any information which may disclose the identity of the child including his name, address, photograph, family details etc. Such disclosure may be permitted in the interest of the child and only with the permission of the Court. Any failure to follow these directions will lead to punishment which may vary from six months to one year imprisonment.¹⁴
- The Act protects the child from direct face-off with the prosecution or defense counsel. It provides that the questions to be put during recording the examination in chief cross examination or re-examination of the child must be communicated to the court which shall put those questions to the child. The Court shall ensure that the dignity of the child is maintained during trial and he is not exposed to

¹² Section 12, Whistle Blowers Protection Act, 2011

¹³ Section 13, Whistle Blowers Protection Act, 2011

¹⁴ Section 23, POCSO Act, 2012



aggressive questioning or character assassination. The identity of the child shall remain confidential throughout the investigation and trial.¹⁵

- The Court must ensure that the child is not exposed in any way to the accused while testifying against him. To avoid such situation the Court may record the statement of the child through video conferencing or by using single visibility mirrors or curtains or any other device.¹⁶
- The trial should take place in camera in the presence of the parents of the child or any other person in whom the child has trust and confidence.¹⁷

So far the abovementioned provisions of law are concerned both in general and special law, which clearly reveals that there is no general law on protection of identity of witnesses in criminal cases except some of the provisions for protection of witnesses in the special statutes related to terrorist-crimes or sexual offences. But in recent times, the cases where witnesses are turning hostile at trial due to threats are not confined to such category of cases. Witness turning hostile of witness has reached to alarming proportion in the recent times. So, it is the crying need of the hour to protect the witness from intimidation, muscle power, political power, money power or other methods employed by the accused especially in sensational cases against witnesses and victims so that witnesses could adduce evidence freely in the court as a result of which the real culprit will be punished and it will also enhance the conviction rate and make strengthen our criminal justice administration system.

5. The Delhi Witness Protection Scheme, 2015:

Very recently the Delhi Government has notified 'Delhi Witness Protection Scheme, 2015' which is country's first such scheme dealing with witness protection. The Scheme

¹⁵ Section 33, POCSO Act, 2012

¹⁶ Section 36, POCSO Act, 2012

¹⁷ Section 37, POCSO Act, 2012



makes it mandatory for the investigating agency and courts to inform the witness about this Scheme and also the protections provided therein. The Scheme aimed to identify series of measures that may be adopted to safeguard witnesses and their family members from intimidation and threats against their lives, reputation and property.¹⁸ The Scheme provides for creation of Witness Protection Fund which will be utilised to meet the expenses incurred during the implementation of Witness Protection Order passed by the Competent Authority.

The Scheme divides witnesses in three categories depending on threat perception. These are

Category 'A': Where the threat extends to life of witness or his family members and their normal way of living is affected for a substantial period, during investigation/trial or even thereafter.

Category 'B': Where the threat extends to safety, reputation or property of the witness or his family members, only during the investigation process or trial.

Category 'C': Where the threat is moderate and extends to harassment and intimidation of the witness or his family member's, reputation or property, during the investigation process.

The Scheme also provides for nature of protection which may be afforded to witnesses depending on the threat posed to such witness. These protections cover among others the measures to ensure that witness and accused do not come face to face during investigation or trial; concealment of identity of the witness by giving a changed name or alphabet, close protection, regular patrolling around the witness's house, escort to and from the court and provision of Government vehicle or a State funded conveyance for the date of hearing, expeditious recording of deposition during trial on day to day basis without adjournments etc.

¹⁸ Aims and Objective, Delhi Witness Protection Scheme, 2015.



This Scheme being first of its kind in the country may have some shortfalls but it's a great initiative to prompt other State Governments and Centre Government to come up with a similar kind of scheme.

6. Judicial initiatives to protect witness identity

It was judiciary which marched ahead of legislature to extend protection to witness/victim. In many cases the Supreme Court has formulated procedures and rendered guidelines for the protection of witness/victim in trial of sexual offences which was later used by the legislature while enacting laws relating to sexual offences.

The case of **Zahira Habibulla Sheikh v. State of Gujarat**¹⁹ is a glaring example of witness intimidation. It was observed by the Court that the public prosecutor was not acting in a manner befitting the position held by him. He did not request the trial court for holding the trial in camera when a large number of witnesses were resiling from the statements made during investigation. The public prosecutor did not examine the injured witnesses. Even the trial court failed to exercise power under section 311 of the Code to recall and re-examine witnesses as their evidence was essential to arrive at the truth and a just decision in the case.²⁰

“The Court further stated that it is high time to address numerous experiences faced by courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations... The State has definite role to play in protecting the witnesses... As a protector of its citizens it has to ensure that during a trial in court the witness could safely depose truth without any fear of being haunted by those against whom he has deposed. If ultimately truth is to be arrived at, the eyes and ears of justice have to be protected so that the interests of justice do not get incapacitated in the

¹⁹ (2004)4SCC158

²⁰ *Id* at Paras 10 and 11.



sense of making the proceedings before Courts mere mock trials as are usually seen in movies.”²¹

“Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial. The Court ordered for re-trial.”²²

Such concern for witnesses was again highlighted by the Supreme Court in **National Human Rights Commission v. State of Gujarat**.²³ The Court observed that witnesses form the key ingredient in a criminal trial and it is the testimonies of these very witnesses, which establishes the guilt of the accused. It is, therefore, imperative that for justice to be done, the protection of witnesses and victims becomes essential.

The Supreme Court in **Sakshi v. Union of India**²⁴ accepted ‘video conferencing’ and ‘written questions’ in sexual and other trials. It was noted by the Court that mere sight of the accused may induce an element of extreme fear in the mind of the victim or the witnesses or can put them in a state of shock. In such a situation he or she may not be able to give full details of the incident which may result in miscarriage of justice. Therefore, a screen or some such arrangement can be made where the victim or witnesses do not have to undergo the trauma of seeing the body or the face of the accused. Questions in cross-examination can be put in writing through the presiding officer.²⁵

The Court gave specific directions in holding trial of child sex abuse or rape:

²¹ *Id* at Para 41.

²² *Id* at Para 36.

²³ (2009)6SCC342

²⁴ 2004(6) SCALE 15

²⁵ *Id* at Para 32.



- (i) a screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;
- (ii) the question put in cross-examination on behalf of the accused, in so far as they relate directly to the incident, should be given in writing to the presiding officer of the Court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;
- (iii) the victims of child abuse or rape, while giving testimony in Court, should be allowed sufficient breaks as and when required.

Similarly in **Swaran Singh v. State of Punjab**²⁶, the Supreme Court expressed deep concern about the trend of routine adjournments in criminal trials. It has been stated by the Court that a witness in a criminal trial may come from a far-off place to find the case adjourned. He has to come to the Court many times and at what cost to his own-self and his family is not difficult to fathom. It has become more or less a fashion to have a criminal case adjourned again and again till the witness tires and he gives up. It is the game of unscrupulous lawyers to get adjournments for one excuse or the other till a witness is won over or is tired. Not only that a witness is threatened; he is abducted; he is maimed; he is done away with; or even bribed. There is no protection for him. In adjourning the matter without any valid cause a Court unwittingly becomes party to miscarriage of justice.

Recently in case of **AG v. Shiv Kumar Yadav**²⁷ the Supreme Court has looked at the issue whether recall of witnesses may be allowed on the plea that defence counsel was not competent and therefore could not effectively cross-examine the witnesses. Answering the issue in negative the Court has stated that

²⁶ AIR 2000 SC2017

²⁷ Criminal Appeal 1187-1188/2015 dated September 10, 2015



“It has normally to be presumed that the counsel conducting a case is competent particularly when a counsel is appointed by choice of a litigant. Taken to its logical end, the principle that a retrial must follow on every change of a counsel, can have serious consequences on conduct of trials and the criminal justice system. Witnesses cannot be expected to face the hardship of appearing in court repeatedly, particularly in sensitive cases. It can result in undue hardship for victims, especially so, of heinous crimes, if they are required to repeatedly appear in court to face cross-examination.”

Following findings of the Court are relevant as far as this discussion is concerned:

- The Court has to keep in mind not only the need for giving fair opportunity to the accused but also the need for ensuring that the victim of the crime is not unduly harassed;
- Mere fact that the accused was in custody and that he will suffer by the delay could be no consideration for allowing recall of witnesses, particularly at the fag end of the trial;
- Mere change of counsel cannot be ground to recall the witnesses;²⁸

7. Recommendations of Law Commission

The Law Commission in its various reports dwell upon the issue of witness identity protection and witness protection programmes. As early as in 1958 in its 14th Report, the Law Commission referred to witness protection but in limited sense which was related to providing adequate facilities to witnesses attending courts, payment of traveling allowance to the witnesses to attend the court, proper sitting and waiting facilities within court premises.²⁹ Later in the year 1996, the 154th Report contained a Chapter on

²⁸ *Id* at Para 29.

²⁹ 14th Report, Law Commission of India, available at <http://lawcommissionofindia.nic.in/1-50/Report14Vol1.pdf>



Protection and facilities to Witnesses. The recommendations were mostly related to allowances and facilities to be made available for the witnesses:

- The allowances payable to the witnesses for attending court should be fixed and payment should be made by adopting simple procedure to avoid the delay and inconvenience to the witness.
- Adequate facilities should be provided to them in the court premises for their stay.
- **They should be protected from the wrath of the hardened criminal at any time.**
- Cases should be listed in such a manner that the witnesses can be examined in a regular basis and in this regard the frequent adjournments should be avoided and the trial should be continued in regular basis.³⁰

These reports were more focused on an overall reform of the Code of Criminal Procedure and incidentally discussed the need for victim/witness protection. In the year 2006, the Law Commission for the first time came out with a Report exclusively dealing with witness protection. The 198th Report was an outcome of several decisions of the Supreme Court in which the Court has shown concern for witness protection in our country. The Report also came up with a draft Witness (Identity) Protection Bill, but so far it has not been implemented. Some of the recommendations given by the Law Commission to strengthen the process of witness protection in our country are mentioned below:

- Witness Protection Programmes are necessary in our country and may be limited to cases of 'serious' offences and must apply to victims and prosecution witnesses alike.
- The concerned witness may be given a different identity. If any statement is recorded from the witness, the name and address should not be disclosed

³⁰ 154th Report, Law Commission of India, available at <http://lawcommissionofindia.nic.in/101-169/Report154Voll.pdf>



except to the investigation agency, and to the Magistrate who hears the application for grant of the protection under the programme.

- It may not be sufficient to grant protection only to the witness. There may be threats to other family members of the witness. Therefore, such protection must be extended to them as well.³¹

8. Malimath Committee Report on Reforms of Criminal Justice System:

The Committee was set up for giving a comprehensive scheme for revamping the entire Criminal Justice System. Among other recommendations, the Committee made following recommendations pertaining to witness protection:

- 3 The travelling allowance and other allowance should be fixed by the court which is to be paid to the witness to compensate him for the expenses which he has spent and proper procedures are to be adopted for the payment of such allowances.
- 4 The payment should also be given to the witness in case of any adjournment of the case and without examining the witness.
- 5 A comprehensive legislation should be enacted for the protection of the witness.
- 6 Court should prepare a list of cases where the witness is needed to attend the court and to adduce evidence. This will avoid him to attend the court again and again. The trial should be conducted in regular basis and in this context repeated adjournment should be avoided.³²

9. Summary:

To sum up the discussion, it can be stated that our procedural law has incorporated various facets of fair trial as far as the accused is concerned. He is afforded open trial and given opportunity to examine witnesses. Even evidence must be taken in his presence

³¹ 154th Report, Law Commission of India, available at <http://lawcommissionofindia.nic.in/reports/rep198.pdf>

³² Committee on Reforms of Criminal Justice System, Vol. 1 (2003) available at http://www.mha.nic.in/hindi/sites/upload_files/mhahindi/files/pdf/criminal_justice_system.pdf



(with some exceptions). As far as victim/witnesses are concerned, the Code of Criminal Procedure provides protection to the victims of sexual offences by concealing their identity. The Code prescribes for in camera proceedings in such cases. Even the judiciary through cases has laid down procedures to be followed during trial of sexual offences. Under the special laws relating to trial of terrorist cases provisions are found providing for keeping the identity of witnesses secret during inquiries as well as in trials. We have also seen that time and again the Law Commission in its various reports has emphasised for the need of witness identity protection and witness protection programmes.

But these initiatives or developments in limited cases are not enough to curb the menace of witness intimidation. The law from the point of view of witness protection is yet to cover other serious cases within its sweep where the witnesses are equally in danger. Such protection may be extended to all cases and may also cover various stages of criminal proceedings like investigation, inquiry and trial etc.

