

A CRITICAL STUDY ON HOSTILE WITNESSES: PROBLEM AND SOLUTIONS

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1. INTRODUCTION

"Witness as Bentham said: are the eyes and ears of justice. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralyzed, and it no longer can constitute a fair trial"¹. Eye witnesses are critical to many convictions where no other material witness is available. However, on many occasions, the witness gives a certain statement on his knowledge about commission of a crime before the police but refutes it when called as witness before the court during trial. Such a witness is termed hostile because it affects the direction of the case.

In Himanshu Singh Sabharwal -vs- State of M.P and others (2008) 4 SCR 783 Supreme Court held that "free and fair trial is sine qua none of Article 21 of Indian Constitution. It is trite law that justice should not only be done but it should be seen to have been done. If the criminal trial is not free and fair and not free from bias, judicial fairness and the criminal justice system would be able at stake shaking the confidence of the public in the system and wow would be the rule of the law"².

Whether it's a case of Best Bakery case, Jessica Lal or Phoolan Devi Case it has been found in most of the high profile and even in normal cases also, eye witness of the Case become hostile during trial of the case which not only make the prosecution case weak but grave in justice to the victim also. In a country like India, where there is no law and scheme for the protection of witnesses, in such situation judiciary has become puppet for the rich people. Even there is no provision of recording statement in oath and signed by the witness during investigation under Section 161 of Criminal Procedure Code by the investigating officer. And that is why witness after recording statement under section 161 Crpc, become hostile during trial which is another impact in the process of prosecution because as per Section 193 of IPC "This section provides punishment for the offences of giving false evidence as defined under section 191³ and fabricating false evidence as defined under section 192 of the Code. The section states that whoever gives false evidence in any stage of a judicial proceeding intentionally, or fabricates false evidence intentionally for the purpose of the same being used in any stage of a judicial proceeding, shall be punished with simple or rigorous imprisonment for a term extending up to seven years, and shall also be liable to fine; and whoever gives or fabricates false evidence intentionally in any other case not stated above shall be punished with simple or rigorous imprisonment for a term extending up to three years, and shall also be liable to fine."⁴ As per Section 191 IPC "Whoever, being legally bound by an oath or by an express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, is said to give false evidence". So, as per Section 193 only those person will get punished who after taking oath give false evidence before court. Thus, witness who gave statement before Police and then turned hostile in court does not get any punishment. Many times it has been found that, the investigation officer did their best to collect evidence against the accused but due to some lapses and lack of provision for the protection of the Witness, the accused get benefit from it and make fun of the judiciary as well as the executive (Police department) which not only create a negative impact in the society

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¹ Hostile Witnesses – A Treatment, LAWYERSCLUBINDIA

<http://www.lawyersclubindia.com/articles/Hostile-Witnesses-A-Treatment--3984.asp>

² Ibid.

³ Section 191 in The Indian Penal Code,

<https://indiankanoon.org/doc/677888/>

⁴ Pinki Sarkar, Section 193 of Indian Penal Code, 1860 – Explained!,

<http://www.shareyouressays.com/knowledge/section-193-of-indian-penal-code-1860-explained/118402>

but also people don't want to come forward to give statement in cases due to their life risk and harassment faced by themselves by the investigation and prosecution agencies. It is high time to bring law for the protection of the witness as well as amendment should be done in CrPC.

2. LEGAL POSITION

2.1.A. HOSTILE WITNESS

Indian law does not define a "Hostile witness". Hostile witness means a when a witness give statement before police officer regarding an offence and then refutes from his statement before court. Indian law fails to define Hostile witness in any of its law whether its CrpC or Evidence Act.

According to Law Dictionary, Hostile Witness means "A party that the court feels is hostile against the party they are supposed to testify for. They can be cross examined if they are called. They can be impeached by their own credibility. Refer to adverse witness."⁵ In the case of Sat Paul -vs- Delhi Administration (AIR 1976 SC 294) Supreme Court held that "To steer clear of the controversy over the meaning of the terms 'hostile' witness, 'adverse' witness, 'unfavourable' witness which had given rise to considerable difficulty and conflict of opinion in England, the authors of the Indian Evidence Act, 1872 seem to have advisedly avoided the use of any of those terms so that, in India, the grant of permission to cross-examine his own witness by a party is not conditional on the witness being declared 'adverse' or 'hostile'⁶. Hostile witness under common law is a person who is not desirous of telling the truth at the instance of the party calling him and a unfavourable witness is one called by a party to prove a particular fact in issue or relevant to the issue who fails to prove such fact, or proves the opposite test. Now witness will not be called as hostile if he failed to prove his statement before court. Hostile is when he gave any statement which is destructive for the party who call him for his favour or who simply goes against his previous statement.

2.2. PROVISION RELATING TO WITNESS IN CRPC

According to section160 of CrPC- "(1) Any police officer making an investigation under this Chapter may, by order in writing, require the attendance before himself of any person being within the limits of his own or any adjoining station who, from the information given or otherwise, appears to be acquainted with the facts and circumstances of the case; and such person shall attend as so required:

Provided that no male person "under the age of fifteen years or above the age of sixty-five years or a woman or a mentally or physically disabled person" shall be required to attend at any place other than the place in which such male person or woman resides.

(2) The State Government may, by rules made in this behalf, provide for the payment by the police officer of the reasonable expenses of every person, attending under sub-section (1) at any place other than his residence"⁷.

Also Section 161 of CrPC empowers a Police Officer to examine orally any person supposed to be acquainted with the facts and circumstances of the case and the police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each

⁵ <https://thelawdictionary.org/hostile-witness/>

⁶ <https://indiankanoon.org/doc/928028/>

⁷ <https://www.kaanoon.com/34514/section-160-crpc>

such person whose statement he records. Now once a statement is recorded in writing under Section 161 of CrPC, section 162 comes into play which says that "No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter"⁸. Justice Braund explains the purpose of Section 162 of CrPC in Emperor v. Aftab Mohd. Khan AIR 1940 All 291 that "As it seems to us it is to protect accused persons from being prejudiced by statements made to police officers who by reason of the fact that an investigation is known to be on foot at the time the statement is made, may be in a position to influence the maker of it and, on the other hand, to protect accused persons from the prejudice at the hands of persons who in the knowledge that an investigation has already started, are prepared to tell untruths. " A division Bench of the Nagpur High Court in Baliram Tikaram Marathe -vs- Emperor expressed a similar idea in regard to the object underlying the section, at p. 5, thus: "The object of the section is to protect the accused both against over-zealous police officers and untruthful witnesses"⁹. Thus section 162 is for the protection of the accused from any prejudice. On the other hand section 164 of CrPC which says that

1. "Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial:

Provided that any confession or statement made under this sub-section may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of an offence;

Provided further that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.

1. The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.
2. If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorize the detention of such person in police custody.
3. Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect:-

"I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A.B.

Magistrate".

4. Any statement (other than a confession) made under Sub-Section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the

⁸ <https://indiankanoon.org/doc/523607/>

⁹ <https://indiankanoon.org/doc/56195/>

Magistrate shall have power to administer oath to the person whose statement is so recorded.

(5A)1 —

a) In cases punishable under section 354, section 354A, section 354B, section 354C, section 354D, sub-section (1) or sub-section (2) of section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB, section 376E or section 509 of the Indian Penal Code, the Judicial Magistrate shall record the statement of the person against whom such offence has been committed in the manner prescribed in sub-section (5), as soon as the commission of the offence is brought to the notice of the police;

Provided that if the person making the statement is temporarily or permanently mentally or physically disabled, the Magistrate shall take the assistance of an interpreter or a special educator in recording the statement;

Provided further that if the person making the statement is temporarily or permanently mentally or physically disabled, the statement made by the person, with the assistance of an interpreter or a special educator, shall be video graphed.

b) A statement recorded under clause (a) of a person, who is temporarily or permanently mentally or physically disabled, shall be considered a statement in lieu of examination-in-chief, as specified in section 137 of the Indian Evidence Act, 1872 such that the maker of the statement can be cross-examined on such statement, without the need for recording the same at the time of trial.

5. The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is to be inquired into or tried".¹⁰

This section maintains a balance between the Investigating agency and the accused person. Under this section only Magistrate can record a statement in oath by explaining the pros and cons to the person making it. In one of the case *Guruvind palli Anna Rao - of A.P., 2003 Cri. L.J. 3253*¹¹ it is said that "Statement of witness recorded under section 164 of the code is a public document which does not require any formal proof. Hence summoning of Magistrate by Sessions Court to prove contents of the said statement is improper". According to Section 80 of Evidence Act "Whenever any document is produced before any court, purporting to be a record or memorandum of the evidence, or any part of the evidence, given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence, or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the court shall presume - that the document is genuine, that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was dully taken"¹².

This are the sections in CrPC which is used in recording of statement by the police officer and the by magistrate. But the loophole in these provisions is that police don't have the power to record the statement in oath may be because of which in most of the cases witness turn hostile during court trial. Why oath is important I will discuss it later?

2.2. CONCEPT OF HOSTILE WITNESS UNDER INDIAN EVIDENCE ACT

Basically there are three stages for examination of witness under Section 137 of Evidence Act. The following are the stages-

¹⁰ <http://devgan.in/crpc/section/164/>

¹¹ http://mja.gov.in/Site/Upload/GR/Summary%20criminal%20side164%20cri.p.c._3rd%20workshop.pdf

¹² *ibid.*

- 1) Examination-in-chief- Here the party who call the witness will examine him first. This is also called as examination.
- 2) Cross-Examination- After the examination the adverse party will examine him to test his veracity. According to Section 143 of Indian Evidence Act, Leading questions may be asked during Cross examination.
- 3) Re-examination- The examination of a witness, subsequent to the cross examination by the party who called him, shall be called his re-examination.

Now under certain circumstances the Court gives permit to the party calling the witness to cross examine its own witness which the adverse party do in a case if the witness turns hostile as per Section 154 of Evidence. This section allows a party, with the permission of the court, to cross-examine his own witness in the same way as the adverse party do. Therefore, in such cross-examination firstly, leading questions under Section 143 can be asked. Secondly, questions relating to his previous statement in writing under Section 145 can be asked. This has to be seen in the light of Section 146 which states that any former statement made by a witness relating to the same fact, before any authority legally competent to investigate the fact, can be used to corroborate the oral testimony. This is the basis of recording of evidence before the magistrate during the course of investigation under Section 164 of the CrPC. Finally, the questions which tend to test his / her veracity, to discover who he /she are and what his position in life is or to shake his / his credit under Section 146. Now questions which comes to our mind that WHY DO THE WITNESSES TURN HOSTILE?

3. REASONS FOR WITNESS TURNING HOSTILE

There are a number of reasons for witnesses to turn hostile. The major reason is the absence of police protection during and after the trial. Consequently, the witness faces the wrath, intimidation, threat (as noted by the Delhi High Court) or inducement from the aides of the convicts who may be well connected.

The Supreme Court also observed that, "A witness is not treated with respect in the Court... He waits for the whole day and then finds the matter adjourned... And when he does appear, he is subjected to unchecked examination and cross-examination and finds himself in a hapless situation"¹³. Jessica Lal case is a well known example where 32 prosecution witnesses turned hostile due to threats from the accused side resulting into acquittals of the accused. Even the judge of Priyadarshini Mattoo rape and murder case during the judgement said that "Though I know he is the man who committed the crime, I acquit him, giving the benefit of doubt"¹⁴. There are so many examples which show that there is a need of protection of witness for fair justice.

Solutions:

1. Proactive Judiciary: In India, Court has been provided immense legal powers to decide the course of trial by actively participating in the examination of the witnesses in order to aid the discovery of the truth. As justice V.N. Khare¹⁵, a former Chief Justice of India, criticised the trial judge, saying that Jessica trial should be an "open and shut"¹⁶ case and that "Sometimes when the police, the prosecution and the lawyers all have connections with the criminals, the judge should be slightly proactive. He should try to get to the truth, and not depend totally on the evidence provided in court. In a case like this, he is not going to get proper evidence.

¹³J.S. Rajawat, Plight of witness, <http://www.lawyersclubindia.com/articles/Plight-of-witness-5739.asp>

¹⁴ Ibid

¹⁵Geeta Pandey, India campaign for murdered Delhi model, BBC News, http://news.bbc.co.uk/2/hi/south_asia/4783394.stm

¹⁶ Ibid.

Mostly the judiciary is depended on the evidence provided by the investigative agencies, but now when the situation is so bad, the judges have to wake up, be proactive and find the truth.”¹⁷

2. Witness Protection:

Though the law implicitly puts the responsibility of witness protection on the police force but due to various pressures and vested interests the duty of witness protection is not conducted. However, no concrete statutory implementation of the same has materialized despite the 198th Law Commission Report of India submitting a comprehensive report on the subject in 2006 advocating for implementation of witness protection schemes. According to 198th Law Commission Report of India, 2006¹⁸ there are three types of witnesses which are as follows –

1. witnesses who are known to the accused
2. witnesses not known to the accused
3. Witnesses whose identity is not known to the accused

While the 1st category requires protection from trauma, 2nd and 3rd Categories require protection against disclosure of identity.

Even the courts have been taking strict note of this lacking by the police. For instance in the Best Bakery case, while comprehensively dealing with issues surrounding witness protection, the Supreme Court observed that the State has a definite role to play in protecting the witnesses so as to avert the trial getting derailed and the truth becoming a mere casualty, to start with at least in sensitive cases involving those in power, those who have political patronage and those who could wield muscle and money power. As a protector of its citizens, the State has to ensure that during a trial, the witness safely deposes without any fear of being haunted by those against whom he wishes to depose.

3. Reduction in witness harassment:

Witnesses to the crime face harassment in repeatedly going to the courts for deposition. As observed by the courts, they are not treated well and become discouraged to appear before the court. It is therefore suggested that firstly, the courts should try to reduce the time involved in examination of witnesses. Especially, the delay in disposal of cases and frequent adjournments should be avoided, especially when the case is fixed for examination or cross-examination of witnesses the judges should exercise reluctance to adjourn the case i.e. the procedural laws must be streamlined in favour of the witnesses and the victims. Secondly, some remuneration must be provided to the witnesses who would lose a day's wage otherwise in the court.

In numerous cases Supreme Court has observed that like in National Human Rights Commission v. State of Gujarat, “no law has yet been enacted, not even a scheme has been framed by the Union of India or by the State Government for offering protection to the witnesses. For successful prosecution of the criminal cases, protection to witnesses is necessary as the criminals often have access to the police and influential people.”¹⁹

Now for the purpose of the protection of the witness turning Hostile, The Witness Protection Bill (Bill No. 341 of 2015) was enacted but this Bill is still pending for approval.

3. CONCLUSION AND SUGGESTION

¹⁷ Ibid.

¹⁸ Mehrul, Witness protection in India, <http://crlreview.in/witness-protection-in-india/>

¹⁹ <https://www.thehindu.com/opinion/op-ed/a-plea-for-witness-protection-laws/article4944925.ece#comments>

The following are the suggestion for stopping witness in turning hostile witness-

- a) Punishment should be given to the witness who turns hostile.
- b) Testimony of Eye witness should be recorded first in presence of magistrate.
- c) Remuneration must be provided to the witnesses who would lose a day's wage.
- d) Police protection for the witness and their family members should be made compulsory from day one to deposition of statement.
- e) The pending Bill should be passed immediately.

By making few changes in law we can protect witness from turning hostile. And for the sake of Natural Justice also it's important for the judiciary and law maker to protect the witness.

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3. Prof. T. Battacharyya, Indian Penal Code, Central Law Agency, 7th Edn., Allahabad, 2013
4. Prof. S.K. Mishra, The Code of Criminal Procedure, Allahabad Law Agency, 2nd Edn., 2013