RIGHT OF WITNESS PROTECTION: A COMPARATIVE OVERVIEW

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Introduction

In the fight against serious crimes, it is crucial for the justice system to be able to provide effective protection to informants, whistleblowers and witnesses. In the interest of a fair and effective criminal justice response to organized crime, terrorism and other serious crimes, governments must be able to handle the problem of informant and witness intimidation and find ways to protect them effectively against intimidation, attacks and reprisals.

Right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying the existence of the courts of justice. The operative principles for a fair trial permeate the common law in both civil and criminal contexts. Application of these principles involves a delicate judicial balancing of competing interests in a criminal trial. The interests of the accused and the public and to a great extent that of the victim have to be weighed not losing sight of the public interest involved in the prosecution of persons who commit offences.[1]

Victim and witness cooperation is essential to ensure fair and successful prosecutions, yet often in post-conflict situations, individuals do not want to cooperate out of fear. Providing witness protection is therefore both an expedient for law enforcement as well as a fundamental legal obligation. This poses a significant challenge in countries where the impunity of powerful perpetrators of politically or ethnically motivated crimes has not been effectively confronted. Investigators and prosecutors who are biased in favor of one of the parties to the conflict, or involved with criminal-political power structures, may also jeopardize the safety of witnesses. While the need to investigate and prosecute serious crimes will arise at an early stage, it can take years to enact necessary legislation to establish effective mechanisms to

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1 *National Human Rights Commission* v. *State of Gujarat & Ors*, W P Crl No 109/2003.

protect witnesses, including building the capacity and ensuring the integrity of those who implement these mechanisms. In this context the researcher made an attempt to have a comparative overview on the rights of the witness protection.

The Concept in Various Countries

1. United States of America

Witness protection first came into prominence in the United States of America, in 1970s, as a legally sanctioned procedure to be used in conjunction with a programme for dismantling Mafia-style criminal organizations. Until that time, the unwritten *code of silence* among members of the Mafia – known as *omertà* – held unchallenged sway, threatening death to anyone who broke ranks and cooperated with the police. Important witnesses could not be persuaded to testify for the State and key witnesses were lost to the concerted efforts of crime bosses targeted for prosecution. That early experience convinced the United States Department of Justice that a programme for the protection of witnesses had to be instituted.[2]

A 'protected witness' could mean any witness who is offered some form of protection against intimidation or retaliation. In practice, however, this term is generally reserved for witnesses who receive the protection of a formal witness protection program.

2. Canada

In Canada, the Witness Protection Program Act[3] refers to these witnesses as 'protectees', a term not typically used in other jurisdictions. For the purpose of that and many other programs, the term 'witness' may also refer to other persons who, because of their relationship to the witness, may also require protection.

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[2] 1 Fred Montanino, Unintended Victims of Organized Crime Witness Protection, *Criminal Justice Policy Review*, Vol 2, No 4 (1987), pp 392–408.

[3] Witness Protection Program Act, S.C. 1996, c. 15. 'Witness' means (*a*) a person who has given or has agreed to give information or evidence, or participates or has agreed to participate in a matter, relating to an inquiry or the investigation or prosecution of an offence and who may require protection because of risk to the security of the person arising in relation to the inquiry, investigation or prosecution, or (*b*) a person who, because of their relationship to or association with a person referred to in paragraph (*a*), may also require protection for the reasons referred to in that paragraph.

The expression 'reporting persons'[4] designates another group of persons that may be in need of special protection. States parties are encouraged to consider measures to provide protection against unjustified treatment for any person who reports misconducts and crimes in good faith and on reasonable ground to the competent authorities. These measures are sometimes referred to as 'whistleblower protection' schemes. They are particularly important in cases involving economic and financial crimes[5], or corruption[6].

3. Australia

In 1983, a royal commission emphasised the need in Australia for better use to be made of informers in the fight against organized crime, and accordingly, for lower-level players to be given an incentive to inform on organizers. At that time, arrangements for witness protection were a matter for individual police forces and approaches differed, with some placing emphasis on 24-hour protection and others preferring relocation of witnesses under new identities. In 1988, a joint Parliamentary committee conducted a comprehensive inquiry into the issue of witness protection and its report led directly to the introduction at the Commonwealth level of the Witness Protection Act, 1994 and the enactment of mirror legislation in several States, and the Australian Capital Territory. Now in Australia, the salient legislation is the Witness Protection Act, 1994. Consistent with the division of federal and state territory government responsibilities the WPA is concerned with offences under national law. The Act provides a statutory basis for provision of protection to people who:

a. have given or agreed to give evidence on behalf of the Crown in criminal or prescribed proceedings and persons who have otherwise given or agreed to give evidence in relation to a criminal offence;
b. have made a statement in relation to an offence; or
c. may require protection and assistance for any other reason

and are perceived to be in danger by reason of that testimony or statement. It includes protection for persons who are related to or associated with those people.

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4 Article 33 of the *United Nations Convention Against Corruption.*

5 Alexander, Richard, The Role of Whistleblowers in the Fight Against Economic Crime, *Journal of Financial Crime*, 2004, 12, 2:131-138.

6 UNODC, *Technical Guide to the United Nations Convention Against Corruption,* New York, United Nations, 2009.

Section 22 of the Act[7] creates offences relating to divulging information without lawful authority about Commonwealth

[7] Witness Protection Act, 1994, Sec 22.
Offences relating to Commonwealth or Territory participants
Disclosure of information about Commonwealth or Territory participant
(1) A person commits an offence if:
(a) the person discloses information about an individual; and
(b) the individual is a participant; and
(c) the individual is a Commonwealth participant or a Territory participant; and
(d) either or both of the following apply:
(i) the individual has a current NWPP identity at the time the information is disclosed and the information is about the original identity or a former NWPP identity of the individual;
(ii) there is a risk that disclosure of the information will reveal that the individual is a participant.
Penalty: Imprisonment for 2 years.
Disclosure of information about individual undergoing assessment as Commonwealth or Territory participant
(2) A person commits an offence if:
(a) the person discloses information about an individual; and
(b) the individual is undergoing assessment for inclusion in the NWPP at the time the information is disclosed; and
(c) if the individual were included in the NWPP following that assessment, the individual would be a Commonwealth participant or a Territory participant; and
(d) there is a risk that disclosure of the information will reveal that the individual is undergoing such assessment.
Penalty: Imprisonment for 2 years.
Disclosure of information that may compromise security of Commonwealth or Territory participant
(3) A person commits an offence if:
(a) the person discloses information about an individual; and
(b) the individual is a participant; and
(c) the individual is a Commonwealth participant or a Territory participant; and
(d) either or both of the following apply:
(i) the individual has a current NWPP identity at the time the information is disclosed and the information is about the original identity or a former NWPP identity of the individual;
(ii) there is a risk that disclosure of the information will reveal that the individual is a participant; and
(e) there is a risk that disclosure of the information will compromise the security of the individual.
Penalty: Imprisonment for 10 years.
Disclosure of information that may compromise security of individual undergoing assessment as Commonwealth or Territory participant
(4) A person commits an offence if:
(a) the person discloses information about an individual; and
(b) the individual is undergoing assessment for inclusion in the NWPP at the time the information is disclosed; and
(c) if the individual were included in the NWPP following that assessment, the individual would be a Commonwealth participant or a Territory participant; and
(d) there is a risk that disclosure of the information will reveal that the individual is undergoing such assessment; and

participants in the WPA scheme. It also creates offences that apply to participants in the event that they disclose information related to the scheme.

4. China

In China with reference to a call from the police for reform in 1994, the Hong Kong Police Force set up an *ad hoc* witness protection programme. A similar programme was set up in 1998 under the Independent Commission Against Corruption (ICAC). In 2000, the Witness Protection Ordinance[8] was enacted to provide

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(e) there is a risk that disclosure of the information will compromise the security of the individual.
Penalty: Imprisonment for 10 years.
(5) Subsections (1), (2), (3) and (4) do not apply to a disclosure by a person if:
(a) the person has been authorised by the Commissioner to make the disclosure; or
(b) the disclosure is made for the purpose of making a complaint, or providing information, to the Ombudsman under the Ombudsman Act 1976; or
(c) the disclosure is made for the purpose of referring to the Integrity Commissioner, under the Law Enforcement Integrity Commissioner Act, 2006 , an allegation or information that raises a corruption issue; or
(d) the disclosure is made for the purpose of:
(i) giving information that raises an AFP conduct or practices issue (within the meaning of the Australian Federal Police Act 1979); or
(ii) investigating or resolving an AFP conduct or practices issue under Part V of that Act.
Note: A defendant bears an evidential burden in relation to the matters in subsection (5) (see subsection 13.3(3) of the Criminal Code).
(6) Absolute liability applies to paragraphs (1)(c), (2)(c), (3)(c) and (4)(c).
Note: For absolute liability, see section 6.2 of the Criminal Code.
(7) To avoid doubt, a person may be convicted of an offence against subsection (1), (2), (3) or (4) because of a risk that a disclosure will have a particular effect even if the disclosure does not actually have that effect.

8 The Ordinance: (a) Establishes a witness protection programme to provide protection and other assistance to persons whose personal safety or well-being may be at risk as a result of their being witnesses. The programme is implemented, at the Police Force, by the Witness Protection Unit and, at ICAC, by the Witness Protection and Firearms Section. A third unit is currently being established by the Customs and Excise Department;
(b) Stipulates that the person authorized to make decisions on the management of the programme and the inclusion or removal of witnesses is to be designated in writing by the Police Commissioner and the ICAC Commissioner. As of this writing, that authority lay with the Director of Crime and Security at the Police Force and with the Director of Investigation (Government Sector) at ICAC;
(c) Defines the criteria for admission to the programme and the grounds for early termination, outlining the obligations of witnesses;
(d) Authorizes the officer with approval authority to take necessary and reasonable action to protect the safety and welfare of witnesses who have been assessed or are being assessed for admission to the programme, including changing their identity details;
(e) Establishes an appeals procedure against decisions that disallow inclusion of a witness in the programme, terminate protection or determine that a change

the basis for protection and other assistance to witnesses and persons associated with witnesses. This single piece of legislation provides uniform criteria for the operation of the witness protection programmes established by the Hong Kong Police Force and ICAC.

5. Germany

In Germany, there were no specific legal provisions to protect witnesses against organized crime. There were however a large number of regulations aimed to protect witnesses - largely independently of the nature of the offence committed; such regulations are, for instance, also applicable to terrorist crimes or offences against sexual self-determination, and they can be applied in respect of the criminal offences of organized crime. German criminal procedure law obliges the criminal prosecution authorities to prosecute all suspects provided there are 'sufficient factual indications' of a criminal offence which may be prosecuted.[9] Witnesses in Germany are on principle obliged to appear before the public prosecution office and in court in response to a summons, to testify truthfully and to swear an oath on their testimony if requested to do so. These are civil duties which are not established by the Code of Criminal Procedure, but are imposed as a condition.[10] The State has the possibility to enforce this obligation through coercive procedural measures.[11] On the basis of this obligation which has been imposed by the law, a particular obligation is incumbent on the State to protect the witness' legal interests, above all of life, limb and certain assets, if these are placed at risk as a result of the testimony.

Witness protection programmes have been in place in Germany since the mid-1980s. They were first used in Hamburg in connection with crimes related to motorcycle gangs. In the following years, they were systematically implemented by other German States and the Federal Criminal Police Office. In 1998,

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of identity would not be among the applicable measures. The appeal is reviewed by a special board having the power to confirm or reverse the original decision. Nothing in the legislation prevents a witness from challenging further a decision of the original authority or the review board by means of judicial review;

(f) Penalizes the disclosure of information about the identity and location of a witness who is or has been a participant in the programme or information that may compromise the security of a witness.

9 German Code of Criminal Procedure (*Strafprozessordnung*), *Federal Law Gazette*, 1987 Part I, p 1319.

10 Section 48 subs 1 StPO.

11 Section 51 StPO.

the Witness Protection Act was promulgated.[12] The Act included provisions that regulated criminal proceedings. Also in 1998, the Criminal Police Task Force developed a witness protection concept outlining for the first time the objectives and measures to be implemented by agencies involved in witness protection. That led to the issuance of general guidelines for the protection of at-risk witnesses by the federal and state ministries of the interior and justice. Until the adoption in 2001 of the Act to Harmonize the Protection of Witnesses at Risk, the guidelines served as the main basis for Germany's witness protection programme. With the adoption of the Act to Harmonise Witness Protection in 2001, the Legislature created a statutory basis for specific witness protection measures, and hence for greater legal security in this field. The Legislature opted not to limit the area of application to the fields of crime 'organised crime' and 'terrorism'.[13] Having said that, Section 2 Subs. 2 Sentence 2 of the Act to Harmonise Witness Protection contains a special proportionality clause according to which witness protection measures in accordance with the Act to Harmonise Witness Protection are ultimately only considered in cases of serious crime. The 2001 Act[14] was introduced to harmonize legal conditions and criteria for witness protection at the federal and state levels. In May 2003, the guidelines were aligned with the legal provisions of that Act and

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[12] The Act included provisions that regulated criminal proceedings, with a focus on:
(a) Use of video technology for interviewing at-risk witnesses (especially children testifying as victims);
(b) Improved possibilities for ensuring the confidentiality of personal data of witnesses at all stages of criminal proceedings;
(c) Provision of legal assistance for victims and witnesses.

[13] The Draft of the Federal Council still provided for such a restriction. (*Federal Council printed paper* [*BR-Dr.*] 458/98).

[14] Its main provisions cover the following areas:
(a) Categories of witnesses entitled to be considered for inclusion in the programme and the respective admission and removal criteria. Under the Act, admission may be granted to persons who are in danger because of their willingness to testify in cases involving serious crime or organized crime. Participants must be both suited and willing to enter the programme;
(b) Decision-making and implementing authority. While the Act provides that the protection unit and public prosecutor should take decisions on admission jointly, it also recognizes that witness protection units should hold decision-making authority on measures to be applied independently, using for that purpose such criteria as the gravity of the offence, the extent of the risk, the rights of the accused and the impact of the measures;
(c) Confidentiality of information relating to the personal data of protected witnesses within witness protection units and other government and non-state agencies. The files on protected witnesses are maintained by the protection units and are not included in the investigation files, but they are made available to the prosecution on request.

now serve as the implementing provisions of the Act for all witness protection offices in Germany.

6. Netherlands, Norway and New Zealand

Witness protection programmes have commonly developed because of need. It resulted in some countries the progressively developed witness protection capabilities and programmes without a specific legislative basis, such as the Netherlands, Norway and New Zealand. In these countries, policy, coupled with the agreements signed with witnesses admitted to the programme, provide a sufficient and adequate framework for the programme's operations. It is also interesting to note that countries without a specific legal basis include both common law as well as civil law countries that would normally require authorizing legislation.[15]

Other International Standards

There are a number of international instruments which recognize the need to protect witnesses from intimidation, threats and harm. These include the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power which was adopted by the UN General Assembly in 1985. According to the Declaration, States should take measures to 'minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation'.[16]

Another instrument is the UN Convention Against Transnational Organized Crime of 2000 and its three Protocols. States Parties are required to take appropriate measures to 'provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings' who give testimony concerning offences covered by the Convention (money laundering, corruption, trafficking in persons, smuggling of migrants *etc.*) and for their relatives and other persons close to them.[17]

According to the UN Convention Against Corruption of 2003 States Parties shall take appropriate measures in accordance with

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15 Kramer, Karen, Protection of witnesses and whistle blowers: How to encourage people to come forward to provide testimony and important information, *149th International Training Course visting expert's paper*, p 21.

16 Art. 6(d), *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.*

17 Art. 24, UN Convention Against Transnational Organized Crime of 2000.

their domestic legal system and within their means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences covered by the Convention (money laundering, bribery of public officials, embezzlement or misappropriation by a public official, abuse of functions, illicit enrichment *etc.*) and for their relatives and other persons close to them.[18]

Witness Protection in India

In India, there is no law relating to the protection of witnesses as in developed countries like UK, US, Canada and Australia. As a result of this, the witnesses are not getting justice properly; and at the same time they and their family members are also not secure since they are sometimes subjected to life threatening intimidations. Now a day the vulnerability of the witnesses is so prominent, that even the courts have broken their silence and have appealed for the witness protection law.

The criminal justice system in our Country has been the focus of several studies and reports of expert bodies. The Law Commission of India has itself submitted several reports on topics related to the substantive and procedural aspects of the criminal justice system. In its *Report*[19] the Law Commission has considered the issue of 'witness protection' from a different angle. The *Report* referred to inadequate arrangements for witnesses in the courthouse, the scales of travelling allowance and daily *bhatta* (allowance) paid for witnesses for attending the court in response to summons from the court. This aspect too is important if one has to keep in mind the enormous increase in the expense involved and the long hours of waiting in court with tension and attending numerous adjournments. Here the question of giving due respect to the witness's convenience, comfort and compensation for his sparing valuable time is involved. If the witness is not taken care of, he or she is likely to develop an attitude of indifference to the question of bringing the offender to justice.

In June 1980, in the *4th Report of the National Police Commission*, certain inconveniences and handicaps from which witnesses suffer have been referred to. The Commission again referred to the inconveniences and harassment caused to witnesses in attending courts.

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18 Arts. 32, 37(4) UN Convention Against Corruption, 2003.
19 *14th Law Commission Report*, 1958.

In the *154th Report of the Commission*[20] (1996), in Chapter X, the Commission, while dealing with 'Protection and Facilities to Witnesses', referred to the *14th Report of the Law Commission* and the *Report of the National Police Commission* and conceded that there was 'plenty of justification for the reluctance of witnesses to come forward to attend court promptly in obedience to the summons'. It was stated that the plight of witnesses appearing on behalf of the State was pitiable not only because of lack of proper facilities and conveniences but also because witnesses have to incur the wrath of the accused, particularly that of hardened criminals, which can result in their life falling into great peril.

In December, 2001, the Commission gave its *178th Report* for amending various statutes, civil and criminal. That *Report* dealt with hostile witnesses and the precautions the Police should take at the stage of investigation to prevent prevarication by witnesses when they are examined later at the trial.

Thus, the above analysis of the various recommendations of the Law Commission made from time to time, including the *178th Report* shows that they do not address the issue of 'protection' and 'anonymity' of witnesses or to the procedure that has to be followed for balancing the rights of the witness on the one hand and the rights of the accused to a fair trial.

Supreme Court of India on Witness Protection

The Supreme Court of India has rightly pointed out its concern about the predicament of a witness in the words of Wadhwa, J. while delivering the judgment and expressed his opinion about the conditions of witnesses as follows: "A criminal case is built on the edifice of evidence, evidence that is admissible in law. For that witnesses are required, whether it is direct evidence or circumstantial evidence. Here are the witnesses who are harassed a lot. 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

20 *154th Report of the Commission*, (1996), Chapter X.

cause a court unwittingly becomes party to miscarriage of justice. A witness is then not treated with respect in the court. He is pushed out from the crowded courtroom by the peon. He waits for the whole day and then he finds that the matter adjourned. He has no place to sit and no place even to have a glass of water. And when he does appear in the court, he is subjected to unchecked and prolonged examination and cross-examination and finds himself in a hapless situation. For all these reasons and others a person abhors becoming a witness. It is the administration of justice that suffers. Then appropriate diet money for a witness is a far cry. Here again the process of harassment starts and he decides not to get the diet money at all. High Courts have to be vigilant in these matters. Proper diet money must be paid immediately to the witness (not only when he is examined but for every adjourned hearing) and even sent to him and he should not be left to be harassed by the subordinate staff. If the criminal justice system is to be put on a proper pedestal, the system cannot be left in the hands of unscrupulous lawyers and the sluggish State machinery. Each trial should be properly monitored. Time has come that all courts, district courts, subordinate courts are linked to the High Court with a computer and a proper check is made on the adjournments and recording of evidence. The Bar Council of India and the State Bar Councils must play their part and lend their support to put the criminal system back on its trail. Perjury has also become a way of life in the law courts. A trial judge knows that the witness is telling a lie and is going back on his previous statement, yet he does not wish to punish him or even file a complaint against him. He is required to sign the complaint himself which deters him from filing the complaint. Perhaps law needs amendment to Clause (b) of Section 340(3) of the Code of Criminal Procedure, 1973 in this respect as the High Court can direct any officer to file a complaint. To get rid of the evil of perjury, the court should resort to the use of the provisions of law as contained in Chapter XXVI of the Code of Criminal Procedure."[21]

It is also important to note that, the Delhi High Court issued guidelines to the police on providing protection to witnesses to curb the menace of their turning hostile leading to acquittal of accused in heinous crimes. This decision given by a Bench comprising of Usha Mehra, J. and Pradeep Nandrajog, J. on a petition filed by Neelam Katara whose son Nitish was allegedly kidnapped form a marriage party in Gaziabad by *Rajya Sabha* MP

[21] *Swaran Singh* v. *State of Punjab*, (2000) 5 SCC 68 at 678.

D. P. Yadav's son Vikas and his nephew Vishal, and killed in Febuary 2002. The guidelines were as follows:

- Member Secretary, Delhi Legal Services Authority would be competent authority who on, receipt of a request on a witness, decide "whether a witness requires protection, to what extent and for what duration", the Court said.
- However the protection would be available only to witnesses who were to depose in cases punishable with death sentence or life imprisonment.
- In deciding whether to grant protection to a particular witness, the competent authority 'shall' take into account the nature of the risk to the security of witness emanating from the accused or his associates and the nature of probe or the criminal case.
- The authority shall also consider the importance of the witness and the value of evidence given or agreed to be given by him/her besides the cost of giving protection to him or her.
- While recording the statement of witness under Section 161 of the Code of Criminal Procedure, 1973, it would be the duty of the investigating officer to make the witness aware of these guidelines and also the fact that in case of any threat he/she can approach the competent authority.
- Once the competent authority decides to extend the protection to a particular witness, it 'shall' be the duty of the police commissioner to provide protection to him or her.

The question in *Best Bakery* case from Gujarat which came up to the Supreme Court is another landmark in the series. In *Zahira Habibulla H. Sheikh and Another* v. *State of Gujarat and Others*[22], the Apex Court was emphatic on the role of a State to play in protecting the witnesses. It has been observed that as a protector of its citizens, the State has to ensure that during the trial in the court the witness could safely depose the truth without any fear of being haunted by those against whom he had deposed. The Supreme Court reminded the State that it has a constitutional obligation and duty to protect the life and liberty of the citizen.

It has also observed that if the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed. Following excerpt from the said decision will be appropriate in this context: "The incapacitation may be due to

[22] 2000 (4) SCC 187.

several factors like the witness being not in a position for reasons beyond control to speak the truth in the court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by the courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle truth and realities coming out to surface rendering truth and justice to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of the State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the court and justice triumphs and that the trial is not reduced to a mockery."[23]

In a public interest case *i.e.*, in *National Human Rights Commission* v. *State of Gujarat* [24] a series of orders were passed by the Supreme Court. There, the National Human Rights Commission (NHRC) filed a public interest case seeking retrial on the ground that the witnesses were pressurised by the accused to go back on their earlier statements and the trial was totally vitiated. In its order dated 8.8.2003 *NHRC* v. *State of Gujarat*, the Supreme Court observed: "……. A right to a reasonable and fair trial is protected under Articles 14 and 21 of the Constitution of India, Art. 14 of the International Covenant on Civil and Political Rights, to which India is a signatory, as well as Art. 6 of the European Convention for Protection of Human Rights and Fundamental Freedoms. On perusal of the allegations in the special leave petition an number of criminal cases coming to this Court, we are *prima facie* of the opinion that criminal justice delivery system is not in sound health. The concept of a reasonable and fair trial would suppose justice to the accused as also to the victims. From the allegations made in the special leave

[23] *Ibid.*
[24] W P Crl No 109/2003 and Batch.

petition together with other materials annexed thereto as also from our experience, it appears that there are many faults in the criminal justice delivery system because of apathy on the part of the police officers to record proper report, their general conduct towards the victims, faulty investigation, failure to take recourse to scientific investigation *etc*."

Then, on the question of protection of witnesses, the Supreme Court referred to the absence of a statute on the subject, as follows: "No law has yet been enacted, not even a scheme has been framed by the Union of India or by the State Government for giving protection to the witnesses. For successful prosecution of the criminal cases, protection to witnesses is necessary as the criminals have often access to the police and the influential people. We may also place on record that the conviction rate in the Country has gone down to 39.6% and the trials in most of the sensational cases do not start till the witnesses are won over. In this view of the matter, we are of opinion that this petition (by NHRC) be treated to be one under Art. 32 of the Constitution of India as public interest litigation."

The Court directed that in the counter-affidavit of the Gujarat Government, it should indicate the steps, if any, taken by it for extending protection to the lives of victims, their families and their relations; if not, the same should be done. The Court also wanted to know whether any action had been taken by the Gujarat Government against those who had allegedly extended threats of coercion to the witnesses, as a result whereof the witnesses had changed their statements before the Court. The Court also directed the Union of India to inform the Court about the proposals, if any, 'to enact a law for grant of protection to the witnesses as is prevalent in several countries'. By a subsequent order passed on 12th July, 2004, the Supreme Court issued directions to all States and Union Territories to give suggestions for formulation of appropriate guidelines in the matter.

Conclusion

It is an undebatable fact that effective witness protection is indispensable to detect and suppress organized crime. It shall not lead to serious difficulties in ascertaining the truth, or pose a detriment to the possibility of defence of the accused to a degree which is objectionable or indeed unjustifiable in terms of the rule of law. It is not a matter of ascertaining the truth at any price, and especially not at the expense of endangering the life or limb of a witness. In this difficult area, criminal prosecution authorities,

courts and the preventive police, if possible in cooperation with counsel for the defence, must find viable compromises which are justifiable for all interests.

The responsibility of witness protection is not solely for the Judiciary and the police, but for society as a whole, in particular for all State bodies, which need to accept and support the witness protection measures implemented by the Judiciary and the police.

In practice, effective witness protection requires from all involved a high degree of sensitivity, mutual consideration and understanding for the interests of the State and of all concerned, as well as courage and, in particular, trust in the State measures on the part of witnesses, as well as imagination and discernment in selecting the right measures; money should not play.