AN IGNORANCE OF PROTECTION TO THE HOSTILE WITNESSES BY THE INDIAN LEGISLATIONS: A STUDY

Tavneet Kaur[1] , Dr. Kanchal Gupta[2] , Dr. R.K. Chopra[3]

[1]PhD Scholar, UPES, Dehradun, tavneetkohli@gmail.com
[2]Associate Professor, School of Law, UPES, Dehradun, kgupta@ddn.upes.ac.in, ORCID: 0000-0002-4889-5934.
[3]Professor of Law, rakeshchopra998@gmail.com, ORCID: 0000-0002-8677-9283

Abstract

If the laws are examined collectively, several gaps might be discovered. When examining legislation collectively, it becomes apparent that there are inconsistencies between them in various aspects. The primary motivation for undertaking this work stems from the researcher's observation of a concerning issue. When the Constitution of India, Criminal Procedure Code, Witness Protection Scheme, 2018, and the Indian Evidence Act are examined collectively, it becomes apparent that the level of protection provided by the State to Hostile Witnesses is not ideal. Although the primary purpose of the Witness Protection Scheme is to safeguard witnesses and discourage them from becoming hostile, the Evidence Act allows for cross-examination of witnesses who have been turned hostile by the party who called them to the stand. While the Constitution of India guarantees the right for citizens to not be compelled to be witnesses against themselves, it does not provide the same level of protection for ordinary witnesses as it does for the accused. Additionally, the CrPC outlines the procedure for police officers to record statements from witnesses during investigations, which can later be used if the witness is declared hostile under the Evidence Act. Upon careful observation, a pressing question emerges: where is the safeguard for an impartial witness? Regardless of the circumstances, the witness's identity will inevitably come to light. By employing techniques such as cross-examination, a party can uncover the information that the witness is reluctant to divulge. The Constitution of India offers safeguards for the accused through Article 20(3); however, it does not explicitly extend any form of

protection to an impartial witness in a case. This is the reason why; initially, no one comes forward as a witness in certain criminal cases, resulting in the acquittal of the accused and ultimately leading to the delivery of injustice. The researchers aim to emphasize this through their work.

Keywords: witness; CrPc; hostile; evidence;

1. Introduction

A prevalent notion is that an individual should present information to the court if they know anything about a crime or a truth that will be crucial or useful in resolving a legal dispute. Nevertheless, there is no guarantee regarding the willingness of such a witness to appear in court, nor can it be assured that the witness will be able to attend court consistently due to the protracted nature of the legal proceedings. Is the witness being subjected to any form of intimidation or manipulation by the accused in relation to the presentation of such evidence? Alternatively, does the witness hold the belief that presenting such testimony in court could potentially have negative repercussions on their personal well-being? These comments or scenarios are contentious in nature, but they accurately reflect the truth in many cases as to why witnesses refrain from coming forward to provide testimony.

The executive apparatus of the nation provides limited assistance in this undertaking. The judiciary has communicated to the parliament, using its authority, the need to create a plan for safeguarding witnesses. The parliament has subsequently formulated the Witness Protection Scheme, 2018. Nevertheless, the question remains over the scope of the protection. Furthermore, the program exclusively safeguards a specific group of individuals: those who are prepared to provide testimony in a legal setting. There exists an entirely distinct group of witnesses that are unwilling to provide testimony in court (due to the aforementioned reasons). There is no legislation providing protection for them. The preceding set of legislations, including the Criminal Procedure Code (CrPC) and the Evidence Act, are adversely impacting the anonymity of witnesses who are unwilling to provide testimony in court. This papers endeavors to elucidate this phenomenon.

2. Protection to Individual Witnesses: Ignorance

In the case of Laxmipat Choraria and Ors., where Ram Jethmalani represented the petitioners and H.R. Khanna represented the respondents, the Court made an observation regarding Section 118 of the Evidence Act. This section states that any person is capable of giving testimony, unless the court determines that they are unable to comprehend the questions asked for the reasons specified in that section. According to Section 132, a witness cannot refuse to answer a question in a criminal proceeding, or any other relevant matter, on the basis that the answer may incriminate them or lead to a penalty or forfeiture.

In India, the privilege to refuse to answer a question is nonexistent, hence mitigating the inclination to engage in falsehoods. The safeguard is additionally strengthened by Article 20(3) of the Constitution, which stipulates that those accused of any wrongdoing cannot be coerced into testifying against themselves. This Article provides protection for individuals who are accused of committing a crime, rather than those who are being questioned in the capacity of witnesses. When an individual willingly responds to questioning while testifying in court, they give up their right to refuse to testify against themselves. This is because, in that moment, they are no longer testifying against themselves but against other individuals. In this regard, the witness is not at a disadvantage compared to the accused who willingly testifies in their own defense or on behalf of a co-defendant. In such a scenario, the accused voluntarily renounces the legal protection granted to him by the article, as he is subjected to cross-examination and may be interrogated with questions that could implicate him.

2.1. Hostile Witness

Continuing from the previous discussion, it is crucial to comprehend the procedure followed in India when dealing with a hostile witness and determining the admissibility of the evidence provided by the witness before they became uncooperative. A witness who provides testimony that is unfavorable to the party who summoned them is referred to as a hostile witness[1].

[1] P Ramanatha Aiyar, *P Ramanatha Aiyar : Cross-Examination Principles & Precedents* (LexisNexis, 4th Edn., 2011).

Although Section 154[2] the Indian Evidence Act refers to a witness who exhibits antagonistic behavior as a "Hostile Witness," but it does not explicitly use the phrase "Hostile" witness. Typically, this phrase is employed to distinguish between an ordinary witness and a witness who is considered "hostile" to the party who summoned them. A hostile witness is one who does not testify in line with their previously supplied witness statement[3].

An important point that is to be remembered is that, Section 142[4] of the Act, does not permit leading questions to be raised in an examination-in-chief, or in a re-examination (if objected to by the adverse party) and these kinds of questions can only be raised once the Court permits[5].

When the party who summoned the witness is unable to elicit the same testimony from the witness as previously given, and the testimony provided in court is completely or partially contradictory to the previous one, it is customary for the party to request the court's permission to designate the witness as "hostile." When a witness is deemed "Hostile" by the Court, the opposing party may be allowed to ask the witness any questions that could be asked during cross-examination by the adverse party. In simpler terms, this means that the party who called the witness may be allowed to ask "leading" questions to that witness. If a witness becomes hostile, the party which summoned them has the right to cross-examine them in order to undermine their adversarial position. However, cross-examining a hostile witness can only be done with the court's authorization.

[2] [S. 154: **Question by party to his own witness.:** (1)] The Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.
(2) Nothing in this section shall disentitle the person so permitted under sub-section (1), to rely on any part of the evidence of such witness.]

[3] P Ramanatha Aiyar *supra.*

[4] [S. 142: **When they must not be asked.**
Leading questions must not, if objected to by the adverse party be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court.
The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.]

[5] Woodroffe and Amir Ali, *Law of Evidence* (LexisNexis, 21st Edn. 2019)

Of course, Permission for cross-examination in terms of Section 154 of the Evidence Act cannot and should not be granted at the mere asking of the party calling the witness.[6]

2.2. Evidentiary value of the hostile witness

Whenever a prosecution witness turns hostile, his testimony cannot be discarded altogether[7].

In the case of Gura Singh[8] the court observed that,

"There appears to be misconception regarding the effect on the testimony of a witness declared hostile. It is a misconceived notion that merely because a witness is declared hostile his entire evidence should be excluded or rendered unworthy of consideration. Court in Bhagwan Singh v. State of Haryana MANU/SC/0093/1975: 1976 Cri LJ 203 held that merely because the Court gave permission to the Public Prosecutor to cross-examine his own witness describing him as hostile witness does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base conviction upon the testimony of such witness. In Rabindra Kumar Dey v. State of Orissa MANU/SC/0176/1976: 1977 Cri LJ 173 it was observed that by giving permission to cross-examine nothing adverse to the credit of the witness is decided and the witness does not become unreliable only by his declaration as hostile. Merely on this ground his whole testimony cannot be excluded from consideration. In a criminal trial where a prosecution witness is cross-examined and contradicted with the leave of the Court by the party calling him for evidence cannot, as a matter of general rule, be treated as washed off the record altogether. It is for the court of fact to consider in each case whether as a result of such cross-examination and contradiction the witness stands discredited or can still be believed in regard to any part of his testimony. In appropriate cases the court can rely upon the part of testimony of such witness if that part of the deposition is found to be creditworthy."

The Indian Evidence Act does not recognize the terms "hostile", "adverse", or "unfavorable" witnesses. The words "hostile witness", "adverse witness", "unfavorable witness", and

[6] Gura Singh vs. State of Rajasthan, (2001) 2 SCC 205.
[7] *Krishan Chander v. State of Delhi*, (2016) 3 SCC 108.
[8] Supra note

"unwilling witness" are all terminology used in English Law. Under common law, the prohibition against allowing a party who called a witness to cross-examine them is modified through the recognition of the concepts of a "hostile witness" and a "unfavorable witness". In common law, a hostile witness is defined as someone who is unwilling to tell the truth when called by the party summoning them. An unfavorable witness, on the other hand, is a witness called by a party to establish a specific fact that is relevant to the case, but fails to do so or proves the opposite. The provisions of the Indian Evidence Act, 1872, govern the right of the party calling a witness to cross-examine them in India. According to Section 142, it is prohibited to ask leading questions to the witness during examination-in-chief or re-examination, unless the court grants authorization. The court has the authority to allow leading questions regarding introductory or undisputed issues, or matters that have previously been adequately proven in its judgment. Section 154 grants the court the power to allow the person who invites a witness to ask any question that could be asked during cross-examination by the opposing party. The courts are legally obligated to exercise their discretion in a prudent manner by carefully considering the circumstances at hand and applying their judgment appropriately. Permission to conduct cross-examination under Section 154 of the Evidence Act should not be given only based on the request of the party summoning the witness. In the case of Sat Paul v. Delhi Administration AIR 1976 SC 2941, this Court extensively discussed the phrases "hostile, adverse, and unfavorable witnesses" and the purpose of the provisions of the Evidence Act.

"To steer clear of the controversy over the meaning of the terms 'hostile' witness, adverse' witness, 'unfavorable' 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'. Whether it be the grant of permission under Section 142 to put leading questions, or the leave under Section 154 to ask questions which might be put in Cross-examination by the adverse party, the Indian Evidence Act leaves the matter entirely to the discretion of the court (see the observations of Sir Lawrence Jenkins in Baikuntha Nath v. Prasannamoyi

MANU/PR/0133/1922: AIR 1922 PC 409. The discretion conferred by Section 154 on the court is unqualified and untrammelled, and is apart from any question of hostility'. It is to be liberally exercised whenever the court from the witness's demeanour, temper, attitude, bearing, or the tenor and tendency of his answers, or from a perusal of his previous inconsistent statement, or otherwise, thinks that the grant of such permission is expedient to extract the truth and to do justice. The grant of such permission does not amount to an adjudication by the court as to the veracity of the witness. Therefore, in the order granting such permission, it is preferable to avoid the use of such expressions, such as 'declared hostile', 'declared unfavorable, the significance of which is still not free from the historical cobwebs which, in their wake bring a misleading legacy of confusion, and conflict that had so long vexed the English Courts."

At common law, **leading questions** may be put to a witness called by a party who has been granted leave to treat him as hostile[9]. The rationale for this exception lies in the very test for determining hostility. Where the witness shows no desire to tell the truth at the hands of the party calling him, to whom he displays a hostile animus, it is both fair and pragmatic that the party calling him should have the opportunity to put to him what he has previously stated, and this is so even if the witness showed signs of hostility before the trial, for example by retracting a statement or making a second statement.[10]

It is crucial to acknowledge that there are significant differences between the English statute and the law outlined in the Indian Evidence Act when it comes to the process of cross-examination and contradicting one's own witness by a party. According to English Law, a party is prohibited from challenging the credibility of their own witness by presenting broad evidence of their negative character, questionable past, or prior conviction. In India, this can be accomplished by obtaining the court's approval in

[9] *Thompson* (1977) 64 Cr. App. R. 96. As to the right to cross-examine upon previous inconsistent statements, see also the Criminal Procedure Act 1865 s.3.

[10] See *Mann* (1972) 56 Cr. App. R. 750; and *Vibert* Unreported October 21, 1974. However, in appropriate circumstances, it seems that the judge may hold a voir dire to decide whether to prevent such a witness from being called at all: see *Honeyghon and Sales* [1999] Crim. L.R. 221 and *Dat* [1998] Crim. L.R. 488.

accordance with Section 155. According to the English Act of 1865, a party who calls a witness can question and challenge the witness on their earlier comments that do not match with their current testimony, but only with the permission of the court. This permission is granted when the court determines that the witness is 'adverse'. It should be noted that Sections 154 and 155 of the Indian Act do not provide any specific conditions for granting leave. The decision to give leave is entirely at the discretion of the court and is not influenced by the witness's 'hostility' or 'adverseness'. The Indian Evidence Act is more progressive than English Law in this regard. In its recent 11th Report, the Criminal Law Revision Committee of England has proposed the adoption of an updated version of Section 3 of the Criminal Procedure Act, 1865. This revised version would permit the contradiction of both unfavorable and unfriendly witnesses by the presentation of additional evidence, without requiring permission from the court. The Report, meanwhile, supports maintaining the limitation on a party's ability to discredit their own witness by presenting proof of their bad character.

The danger of importing, without due discernment, the principles enunciated in ancient English decisions, for, interpreting and applying the Indian Evidence Act has been pointed out in several authoritative pronouncements. In Prafulla Kumar Sarkar v. Emperor MANU/WB/0313/1931: AIR 1931 Cal 401 an eminent Chief Justice, Sir George Rankin cautioned, that 'when we are invited to hark back to dicta delivered by English Judges, however, eminent, in the first half of the nineteenth century, it is necessary to be careful lest principles be introduced which the Indian Legislature did not see fit to enact'. It was emphasized that these departures from English Law 'were taken either to be improvements in themselves or calculated to work better under Indian conditions.

Based on the summary provided, it is evident that in a criminal trial, when a witness is questioned and challenged by the party who called them with the court's permission, their testimony cannot be completely disregarded according to legal principles. The responsibility lies with the Judge to determine, in each case, whether the witness has been completely discredited or if their testimony can still be trusted, based on the cross-examination and contradiction shown. If the Judge determines that the credibility of

the witness has not been fully undermined during the proceedings, he may, after carefully reviewing and considering the witness's testimony as a whole, cautiously accept the portion of the testimony that he deems trustworthy and base his actions on it, taking into account the other evidence presented in the case. If, in a particular situation, the entirety of the witness's testimony is called into question and, as a result, the witness is completely discredited, the Judge should, as a precautionary measure, completely disregard their evidence.

Considering the same according to the law in UK, in the case of Honeyghon and Sayles, it was held that, "it appears that if a person refuses to assist the prosecution or court, or claims to be no longer able to remember anything, the judge has a discretion to hold a voir dire in order to decide whether to prevent him from being called".

3. How CrPC and Evidence Act is dealing with the problem

According to Section 161[11] of the Criminal Procedure Code, when a Police officer interrogates someone who has knowledge of the facts and circumstances of a case, the officer has the authority to document the interrogation in writing, as well as by audio-video electronic methods. According to Section 162 of the Code, it is required that written statements should not be signed by the witness who made them. Furthermore, any written statements shall not be utilized during the Trial or for any purpose in relation to the ongoing investigation of the offense at the time the statements were given. However, there is a caveat to this. According to the Indian Evidence Act, 1872, if the statements made by a witness during an inquiry or trial are proven and recorded in writing, they can be used by the Court or the Prosecution to challenge the witness's subsequent statements. This is in accordance with the provisions outlined in Section 145 of the Act.

In this process, if observed, it is like flow of water under the bridge, as one cannot observe, the basic right that is provided by Section 162 of the CrPC is being dethroned by Section 145 of the Evidence Act. The Doctrine of Colorable legislation[12] can also be applied in understanding this concept. This is derived from the maxim, Quando aliquid prohibetur ex directo, prohibetur et per

[11] Examination of witnesses by police.
[12] D D Basu, *Commentary on the Constitution of India* (9th Edn. 2019)

obliquum[13], it means that, "what you cannot do directly, you should not do it indirectly". On the one hand the legislation is providing the protection to the witness and on the other, it is taking away the same. The object behind the rule of exclusion contained in section 162 is to prevent unfair use being made by the persecution of statements of witnesses to the Police during investigation, while the Proviso is intended to secure the ends of justice[14]. It needs to be observed that, to what extent it can be gone for the sake of securing the ends of Justice? Once the witness is called on to the Stand and if the witness does not want to answer any question that is put by the Party, the legislation gives a power to the Party in the form of Section 145 to ask the Court to permit the witness to be treated as hostile in order to destroy the hostility of the witness. Also, once the Court permits the same, the party calling the witness will be having the power to cross-examine the witness that he called. Once that starts, the witness can be put forwarded any leading questions, and also, the Party will be given a right to put forward the statements those were recorded by the Police under Section 162 whose main object is that, "to encourage the free disclosure of the information to the Police or to protect the person making the statement from a supposed unreliability of Police testimony as to an alleged statement by them"[15]. Also, one of the reasons behind this section is that, "the exclusion is based on the public policy that a confession made by an accused to a police officer or when in police custody should not be trusted to convict him"[16]. All these protections were granted to the witness only to take away these when the witness turns hostile in the form of Section 145.

In the Countries like USA[17] and England[18], not only the accused but also any witness to a proceeding is protected from answering incriminating questions, a mere witness has no constitutional protection under the present Clause of our Constitution. This

[13] P Ramanath Aiyer, *Advanced Law Lexicon–The Encyclopaedic Law Dictionary with Legal Maxims, Latin Terms, Words & Phrases* (LexisNexis 6th Edn. 2019).
[14] *Raghunandan v State of UP,* AIR 1974 SC 463.
[15] *Pakala Naraswamy v Emp.*, AIR 1939 PC 47
[16] *Nagesia v State of Bihar,* AIR 1966 SC 119.
[17] *McCarthy v Arndstein*,(1924) 266 US 34 (*40*).
[18] Taylor on Evidence, 12th Edn,1931.

Article protects a person who is accused of an offence and not those questioned as witnesses.

4. Opinion

The Witness Protection Scheme, 2018 should ensure the protection of witnesses who come forward to testify, as well as those who are unwilling to testify. Additionally, it should provide protection for the testimonies given by these witnesses during the pre-trial investigation process to police officers. Drawing insights from countries such as the USA and England, it is advisable not to subject witnesses to trial proceedings if they are unwilling to submit testimony. In order to ensure justice is served, it is necessary to summon witnesses to present evidence. However, if a witness expresses disinterest in testifying, they should not be forced to do so using methods such as Section 154 of the Evidence Act, which allows for cross-examination of the witness.