

THE WITNESS AS THE FOUNDATION OF CRIMINAL JUSTICE

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CHAPTER 1: INTRODUCTION

1.1 Introduction

There is no doubt that the criminal justice system relies on the just and correct evaluation of whether the offence was committed and by whom. The role of witnesses is to provide information on the (in)direct circumstances or participants of the alleged offence. They can be useful both for investigations, for example – finding the offender, and for the adjudication process, for example – proving the guilt of the accused. Thus, witnesses can be an essential part of the (criminal) justice system.

Although witnesses might be critical for solving a crime, the statement of a witness is not necessarily true, reliable or relevant. There are various reasons why a witness might not be a reliable source of information – partial observations due to limited capabilities or psychological and emotional factors (stress, bias, desire to lie), limited involvement due to intimidation, psychological trauma, social pressure or lack of interest. The criminal justice system has to consider both the usefulness of witnesses for detecting criminals and potential issues with using witnesses for proving the guilt of the offender.¹

¹ INDIA CONST. art. 20, cl. 3.

1.2 Background and research problem

Generally speaking, witnesses are one of the most crucial elements of any criminal investigation. This is especially the case if there are no other forms of evidence which could be used for establishing the truth. In many cases, a witness might be the only source for identifying the accused or describing the offender (appearance, clothing, accent, etc.) or explaining the circumstances of the offence. In addition, the information provided by witnesses can be used for evaluating the credibility of other sources – for example, testimonies of witnesses can complement forensic evidence.

Nevertheless, there is a serious issue concerning the relevance and credibility of witness evidence. On the one hand, witnesses tend to be essential informants for conducting investigations and holding adjudicative proceedings. Yet, on the other hand, criminal justice systems need to ensure that witnesses are not exposed to risks (for example – witness intimidation) and the rights of the accused are not violated (for example – false accusations). Therefore, the issue of using witnesses in criminal justice is an aspect of broader tensions around witness protection. Put differently, the criminal justice system faces a dilemma between pursuing truth and protecting the rights of the accused through reliable evidence.²

1.3 Key terms and concepts

The terms and concepts described below will be used in this study with reference to specific definitions.

Witness: a person who provides information relevant to an ongoing investigation or adjudicative proceeding. A witness can be someone who directly observed the event under investigation or has some knowledge or expertise relevant to the case.

Witness testimony: information provided by a witness, usually as part of a formal proceeding (for example – a police interview, deposition or trial) – the form and legal standing of testimony might vary depending on the jurisdiction.

² Bharatiya Sakshya Adhiniyam, No. 47 of 2023, INDIA CODE (2023).

Eyewitness: a person who claims to have directly observed an event relevant to the offence under investigation.³

Expert witness: a person with relevant expertise who provides testimony to assist the court in understanding the technical or professional aspects of the case; the role of an expert witness is to remain impartial and provide assistance to the court, not to advocate for any party.

Credibility and reliability: credibility refers to the truthfulness of a witness – can the witness be considered believable? Reliability refers to the consistency of a witness – is the information provided by a witness consistent? These two concepts are often confused although credibility and reliability are clearly different – even if a witness is credible, they might not be reliable.

Witness protection and support: legal and other measures for ensuring the safety of witnesses and supporting them throughout the adjudicative process. Protection and support for witnesses can take various forms, depending on the jurisdiction – for example, providing practical help or ensuring the safety of a witness.

Fair trial: an adjudicative proceeding which meets the basic standards of procedural fairness and protects the rights of all parties involved, including rights of the accused (right to present evidence, to confront witnesses, etc.). Fair trial also considers the interests and needs of witnesses, for example – their right to protection.⁴

1.4 Aim and objectives

The object of this study is the role of witnesses as a foundation of the criminal justice system, with particular reference to the significance of their contribution as well as limitations and challenges to their involvement. This study aims to analyse the ways in which criminal justice systems can rely on the role of witnesses while also considering the rights of the accused.⁵

The objectives of this study are to analyse:

1. How witnesses are useful to investigation, prosecution and adjudication;
2. Different contributing and hindering factors to reliability of witness testimony;

³ Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, INDIA CODE (2023).

⁴ Bharatiya Nyaya Sanhita, No. 45 of 2023, INDIA CODE (2023).

⁵ Code of Criminal Procedure, No. 2 of 1974, INDIA CODE (1974) (repealed).

3. Different obstacles to involvement of witnesses (for example – reporting the crime or giving evidence in court);
4. Different forms of witness protection and support;
5. Protection of fair trial rights of witnesses and accused.

1.5 Research questions

The questions guiding this study are the following:

1. What are the functions of witnesses within the criminal justice system?
2. What are the contributing and hindering factors to reliability of witness testimony?
3. What are the possible obstacles to involvement of witnesses?
4. How can the witnesses be protected and supported?
5. How can the fair trial rights of witnesses and accused be respected?

1.6 Scope and limitations

This study will focus on the general role of witnesses within the criminal justice system. In particular, it will address their contribution to investigations and adjudicative proceedings as well as the evaluation of witness credibility and reliability. In addition, the paper will explore the risks and obstacles to witness involvement as well as measures for witness support and protection. This study will consider the theoretical and policy level implications of these issues. The scope of this study is limited to the analysis of the role of witnesses within the criminal justice system and related concepts. Therefore, the findings of this study might be applicable to a wide range of different crimes, evidence types and witnesses, but the reader is advised to consider the implications of the findings in their particular (jurisdictional) context. This study does not claim to provide an exhaustive analysis of the role of witnesses in all possible situations. In addition, the conclusions and recommendations of this study might be limited by the availability of resources and data.⁶

1.7 Methodology

This study will be conducted using a qualitative research design. The desk research methodology will be applied through the analysis of relevant legislation, case law, textbooks, journal articles,

⁶ Indian Evidence Act, No. 1 of 1872, INDIA CODE (1872) (repealed).

reports and other materials. These materials will be examined to highlight any recurring themes regarding the role of witnesses within the criminal justice system, with special reference to credibility, reliability, protection and support.⁷

1.8 Significance of the study

The significance of this study stems from the fact that testimonies of witnesses can be a crucial source of evidence within the criminal justice system. Moreover, witnesses tend to be one of the most important sources of information both for investigations (for example – describing the perpetrator or providing background information on the offence) and adjudicative proceedings (for example – establishing the truth).

On the one hand, witnesses can be essential informants for investigations and adjudication – on the other hand, witness evidence can also pose challenges to adjudication (for example – unreliable or unreliable witness testimony). Hence, this study will be beneficial to the reader in that it will provide a deeper insight into the usefulness and limitations of witness evidence as well as potential solutions to some of the problems. Moreover, this study will help the reader consider the ways in which witnesses and the rights of witnesses can be supported within the broader context of protecting fair trial rights of all parties to a criminal proceeding.⁸

CHAPTER 2: THE ROLE OF WITNESSES IN THE CRIMINAL JUSTICE PROCESS

2.1 Introduction

Witnesses are important in the criminal justice process, as they can enable relevant authorities to establish what has happened, who has done it, and whether what is happening is indeed an offence, or the evidence is relevant to an offence. Witnesses can play a part in everything from determining the focus for investigation, to helping with conviction or sentencing. There is no presumption that a witness is correct or that their evidence is sufficient to prove an offence – this must be evaluated with all other evidence and according to the law.

Witness is a broad term that encompasses those who are knowledgeable about something that happened, have specialist expertise knowledge that might be relevant, or have experienced the consequences of the alleged offence. Information provided by a witness could be first-hand

⁷ Zahira Habibulla H. Sheikh v. State of Gujarat, (2004) 4 S.C.C. 158 (India).

⁸ State of U.P. v. Shambhu Nath Singh, (2001) 4 S.C.C. 667 (India).

information, second-hand information, or information provided by someone with specialist knowledge. The law in different countries defines witnesses and procedures differently.⁹

2.2 Contribution to criminal investigations

Witnesses can provide descriptions, identification, explanations or location of items or people, and can help with general understanding. A first account of an offence by a witness can help police to establish the nature of the offence, locate and identify suspects, identify other witnesses and find and secure evidence such as video footage.

Investigations will often involve interviews with witnesses. These might be to get a general idea of the circumstances, or to go into more detail. The information provided by witnesses can enable investigations to focus on particular areas, but it should be cross-referenced with other forms of evidence, such as CCTV, forensic evidence or documents. This is because witnesses can be mistaken or misled, especially if they are providing information from memory, have been unduly influenced, or are not entirely truthful for other reasons.

Whether evidence from witnesses is reliable and therefore admissible depends on how it was gathered and the procedures used. Interviews should be held in a fair way, and where possible recorded, and should avoid suggesting answers or putting pressure on the witness to give certain information. Interviews should include recording any information that might support or weaken the case, rather than focusing on information that supports one side of the case.

2.3 Contribution to prosecution

Prosecutors can consider witness statements to establish whether they give sufficient evidence that would be admissible in court to prove the case. Witnesses can be asked to make a statement, and to give evidence in court and respond to questions from the prosecution and defence.

Prosecutors should consider the strengths and weaknesses of different witness accounts, and how any potential bias might affect the weight given to their testimony. The prosecution is responsible for revealing any relevant information to the defence where a duty to do so exists, such as where it might weaken their case or show that a witness is not entirely truthful.

⁹ State of U.P. v. Shambhu Nath Singh, (2001) 4 S.C.C. 667 (India).

The role of a witness is not to advocate for one side or the other – the responsibility for building a case falls to the prosecution and defence. This is important to ensure that all sides have access to the same information, and that a trial is seen as a fair test of competing views.¹⁰

2.4 Contribution to adjudication

At the trial, witnesses are questioned by the judge or jury to determine the facts. Witnesses can give evidence in person, and may be subject to cross-examination procedures. They can also give evidence by other means, depending on the country or system. Testimony from witnesses will be considered with all other evidence provided, and the role of the witness is to give an account they believe to be true in response to being questioned. A confident witness is not necessarily a correct one – and discrepancies in an account do not automatically mean that the account is untrue. It is for the judge or jury to determine how much weight to give to any evidence, and whether the standard of proof has been met in accordance with the law.

Testimony from witnesses can be relevant in sentencing or other proceedings, to explain the consequences of an offence, or provide other background or context information where permissible under the law.¹¹

2.5 Main categories of witnesses

Eyewitnesses: Witnesses who describe what they saw, heard or otherwise experienced. Eyewitnesses can be significant sources of information for an investigation, but the reliability of their testimony depends on things such as how well they saw or heard what they are saying, how long ago it was, and how well they remember it. Particular care must be taken when identifying a suspect, for example through a police line-up.

Expert witnesses: Witnesses with specialist knowledge in a particular area, such as medical practitioners, accountants or computer experts. Expert witnesses give evidence that helps to explain things that are not generally known, but they are not infallible. Expert opinion should only be given where the basis for it is explained and its limits acknowledged.

Victims who testify: A victim might be asked to give evidence as a witness. They can give first-hand evidence about the events of an alleged offence and its consequences, but they are not

¹⁰ Mahender Chawla v. Union of India, (2019) 14 S.C.C. 615 (India).

¹¹ Delhi Domestic Working Women's Forum v. Union of India, (1995) 1 S.C.C. 14 (India).

necessarily more or less credible than any other witness. Victims might also need support in giving evidence, if for example they have been subjected to intimidation or trauma and may require a special court setting, or if they have been repeatedly interviewed.

Other witnesses: Witnesses who heard admissions or who had knowledge of events before or after the offence, those who had contact with or control of potentially relevant items or documents, and those who can give an opinion about the reliability of others or explain the relevance or authenticity of documents. Character witnesses might be called in some legal systems, where a defendant or claimant is able to give evidence about their character or where this is put to them.¹²

CHAPTER 3: WITNESS TESTIMONY, EVIDENCE, AND THE QUEST FOR TRUTH

3.1 Introduction

Witness testimony plays a critical role in criminal proceedings, providing investigators with information to reconstruct events, identify suspects, interpret physical evidence, and assist courts in assessing whether the prosecution has proved its case. Testimony may nonetheless be erroneous; an honest although inaccurate statement can be misleading and potentially harmful. Witnesses can be wrongly influenced, or fail to accurately recall past events. Testimony can be willfully false.

This chapter considers the evidential value of oral testimony, and factors that courts should consider when evaluating it, including corroboration, identification evidence, memory, cross-examination and the dangers of error. The key principles are that testimony is often not reliable, needs to be subjected to careful and impartial scrutiny by the court, and should be considered alongside other forms of evidence.¹³

3.2 Evidentiary value of oral testimony

Oral testimony allows a witness to describe what they saw, heard, or concluded in their professional assessment. It can allow the court to recreate a story or history, or explain aspects of physical evidence. For example, a witness can describe how a confrontation arose, who was involved, and what happened subsequently.¹⁴

¹² State of Punjab v. Gurmit Singh, (1996) 2 S.C.C. 384 (India).

¹³ Sakshi v. Union of India, (2004) 5 S.C.C. 518 (India).

¹⁴ State of Maharashtra v. Dr. Praful B. Desai, (2003) 4 S.C.C. 601 (India).

The value of oral testimony lies in its relevance, admissibility, and weight. Relevance refers to whether there is important evidence about a matter that is in issue in the case. The admissibility refers to whether the evidence is admissible (for example, whether it falls within the applicable rules). Weight is concerned with the persuasiveness of the evidence having taken into account the overall evidential value, including considerations of credibility. The three concepts are distinct; evidence can be highly relevant but inadmissible, admissible but carrying little weight, and so on. When assessing the evidential value of oral testimony, the court should take into account the opportunity for the witness to observe events, their ability to remember and describe past events, the clarity of the recollection, any potential bias, and how it fits with other evidence. The witness's general air of untruthfulness or confidence should be of limited concern, particularly if the witness is not being particularly honest.¹⁵

3.3 Credibility and reliability

Credibility refers to whether the testimony is accepted by the court to be honest, and reliability concerns whether the testimony is generally trustworthy or not. The concepts are related but distinct, and there may be cases in which testimony comes from a reliable witness but with some significant reliability issues.

Credibility assessments are often made on whether the witness might have a reason to lie, whether there are material inconsistencies, and whether the account fits with other evidence. There are times when minor inconsistencies can be expected to arise, however, particularly if the testimony is given at the time of the incident, or under pressure. Inconsistencies and changes should also occur when the same individual is asked substantially differing questions. Courts should focus on fundamental inconsistencies or contradictions, such as where there is disagreement about who committed a particular act, rather than minor variations.

Reliability should be assessed on the basis of the likelihood that the individual would be mistaken on the matter for which they testified. Factors should include the mental or physical condition of the person, including alcohol or drugs, emotional state, distance and lighting at the time of the alleged offence, the length of time that the person saw the suspect for, whether the witness was

¹⁵ Ranjit Singh v. State of Punjab, (1998) 7 S.C.C. 149 (India).

distracted or focused on something else (such as a weapon), and other factors relevant to the circumstances.¹⁶

3.4 Corroboration and supporting evidence

Corroboration refers to evidence that independently supports the testimony of a witness. It can take a variety of forms, including forensic evidence, medical evidence, CCTV footage, documents or digital communications, or other witnesses. Corroboration can be important when a witness's testimony may be weak, for example, on a matter of identification. However, corroboration is not always necessary, and the rules on corroboration vary depending on the jurisdiction and the type of offence. Courts can accept the testimony of a single witness, particularly if it is otherwise reliable. Particular procedures may also require corroboration in certain situations, or require courts to be cautious where corroboration is lacking.¹⁷

Evidence that is used to corroborate another witness must be independent. That is, multiple witnesses repeating substantially the same information may not necessarily constitute corroboration where they received that information from the same source. The presence of evidence that is consistent with an account may also not necessarily confirm that account if it could be the case that it supports an alternative account. Courts should carefully assess whether the evidence provided genuinely supports the account provided by another witness, rather than simply being consistent with that account.

3.5 Identification evidence

Identification evidence arises where a witness gives evidence identifying a suspect as having engaged in an offence, or provides details on who committed an offence, such as their personal description. It can be highly prejudicial to the accused, and potentially misleading, as an honest although mistaken identification can wrongly convict an innocent person. A witness may see the suspect for only a short time, or under difficult conditions, or be exposed to misleading evidence later. A witness may have a good memory, and be confident of their identification, and nonetheless be wrong.¹⁸

¹⁶ Swaran Singh v. State of Punjab, (2000) 5 S.C.C. 668 (India).

¹⁷ Namdeo v. State of Maharashtra, (2007) 14 S.C.C. 150 (India).

¹⁸ Rameshwar v. State of Rajasthan, A.I.R. 1952 S.C. 54 (India).

Factors that should be taken into account by the court include the length and distance of observation, the lighting and other obstacles, the level of concentration by the witness, levels of stress, and whether the witness knew the person beforehand. Courts should also consider whether their initial identification was correct, and whether it changed over time, and if so, why. Procedures must be fair to the accused, and to the extent possible, investigators should ensure that they do not suggest to the witness who they believe the suspect to be. The level of confidence of the witness should be recorded, preferably at the earliest opportunity, to ensure that it is not unduly increased by subsequent exposure to others (such as other witnesses, police or media). Courts should take such warnings into account, and be aware of the potential that the level of confidence may have been artificially inflated.¹⁹

3.6 Memory and the influence of later information

Memory is notoriously unreliable, and it is common for people to forget or conflate details in recalling past events. Leading questions can implant suggestions in the mind of a witness, particularly with children or those under the influence of drugs. Witnesses may become more confident of their recollections when questioned further, even if they are mistaken. Discussing the past with friends, family, media or investigators can also cause witnesses to change their recollections of events, even if they are honest. It is important to note that this does not apply to all witnesses, but rather that there are potential factors that may impact the ability of a witness to accurately remember and recount a past event.²⁰

Law enforcement investigators should take this into account when obtaining information from a witness, such as by obtaining an open ended account, and recording the recollection at the earliest possible moment. Questions should be neutral unless they are to investigate suggested inaccuracies. Courts should consider the possibility that a witness may not only be mistaken, but that the process of obtaining that testimony may have caused them to adopt new recollections as their own.

3.7 Cross-examination

¹⁹ *Vadivelu Thevar v. State of Madras*, A.I.R. 1957 S.C. 614 (India).

²⁰ *Lallu Manjhi v. State of Jharkhand*, (2003) 2 S.C.C. 401 (India).

Cross-examination allows the opposing party to question a witness, pointing out flaws in their evidence, highlighting weaknesses and alternative explanations, and generally challenging a witness to explain their testimony. It is therefore important that cross-examination focuses on issues of relevance and weight. It can also allow the accused to challenge evidence made against them by another witness, and provide the court with the opportunity to scrutinise the evidence.²¹

Cross-examiners should ensure that questioning is relevant and fair, and should avoid tactics that may confuse or distress a witness, particularly where a witness is a child, disabled, or otherwise under pressure. There may also be specific measures that are appropriate for such witnesses, such as breaks during testimony, interpreters, or alternative methods for communicating (such as through a representative). The approach should depend on the particular circumstances, including whether the law allows alternatives to the standard mode of cross-examining a witness.

3.8 Mistaken, false, and unreliable testimony

Witnesses may provide misleading testimony for various reasons, including mistakes, dishonest testimony, or unreliable evidence. Mistaken testimony is provided in good faith, although it is incorrect. False testimony is provided deliberately, and without belief, while unreliable testimony is testimony that cannot be relied on, whether it is intended to be dishonest or not. False testimony, however, may sometimes take the form of testimony that is deliberately false but believed to be true by the witness.²²

False testimony can arise when a witness acts out of a desire to retaliate or protect someone else, or where there is pressure from officials to testify in a particular manner. Mistaken testimony can arise from problems with perception or recall. The categories should not be seen as completely distinct, particularly where it is the witness's perception that has caused an apparent falsehood (such as a mistaken identification).

Unreliable testimony can have a range of consequences, from convicting an innocent person to failing to convict a guilty person. It can damage community confidence in the criminal justice system, and should be dealt with carefully. Measures to prevent unreliable testimony should be taken when obtaining witness statements, such as ensuring that questions are not leading, and that potentially identifying features are not unduly emphasised. Identification procedures should be

²¹ State of Rajasthan v. Teja Ram, (1999) 3 S.C.C. 507 (India).

²² State of H.P. v. Gian Chand, (2001) 6 S.C.C. 71 (India).

fair, and relevant evidence (such as material documents) should be disclosed to the defence. Witnesses should be cross-examined thoroughly, and where appropriate, judicial directions should be given to examine the reliability of a witness (such as by pointing out the potential for them to misremember). Evidence should be compared with other evidence, both supportive and contradictory, to highlight inconsistencies.²³

CHAPTER 4: CHALLENGES FACING BY WITNESSES

4.1 Introduction

Those who give evidence are critical to criminal proceedings but can face challenges that impact on their willingness to give evidence or cooperation, the detail and accuracy of their evidence, and their ability to give evidence to the court. In a justice system that values fairness, this requires consideration of both the rights of the accused and the need to support those giving evidence. The specific steps that can be taken will vary according to the jurisdiction.²⁴

4.2 Intimidation, threats, and retaliation

Witnesses can face intimidation both directly and indirectly, including threats and physical violence, persistent harassment, pressure from family or community groups and organisations, and attempts to influence their evidence. It can occur prior to, during and following a trial, particularly where a person's family, business or community reputation is at risk. This is particularly the case in trials relating to organised crime, domestic abuse, gangs, or powerful individuals.

Even in the absence of direct pressure, a witness may believe that providing evidence will place them or their loved ones at risk. As such, they may be reluctant to report a crime, retract their evidence, give evidence identifying a suspect, or attend court. Similarly, intimidation can result in witnesses giving untruthful evidence in their belief that it is the only way to protect themselves, their families or their business and reputation.

Appropriate responses to the risks of intimidation, threats, and retaliation should be designed on a case by case basis and may include risk assessments, police protection, restrictions on publication of a witness's identity, remote or video testimony, and relocation where appropriate. Such steps

²³ Takhaji Hiraji v. Thakore Kubersing Chamansing, (2001) 6 S.C.C. 145 (India).

²⁴ Bhim Singh v. State of Haryana, (2002) 10 S.C.C. 461 (India).

should be taken in a manner that does not prevent the defence from obtaining information that may assist in testing the evidence provided. The safety and wellbeing of a witness should never be used as leverage to prevent the defence from being able to scrutinise evidence provided.²⁵

4.3 Trauma and emotional distress

Trauma relating to the crime or the process can impact on a witness's ability to provide evidence effectively. Providing evidence may involve re-telling the events of the crime, direct confrontation with the accused, and responding to intrusive questions in the course of investigations and court proceedings, potentially causing anxiety and distress.²⁶

A person may experience significant emotional distress as a result of testifying, including sleep loss, feelings of shame, anxiety or anger. Similarly, the nature of the crime and/or details may trigger these emotions. A witness may also experience distress when recounting events to others, potentially impacting on their ability to testify to the court in a coherent manner.

The potential for trauma and distress should be taken into account when designing supports and procedural responses to the needs of witnesses. These may take the form of providing appropriate explanations of processes, access to psychological services and trauma-informed care, breaks during court appearances, and access to appropriate waiting or support areas. Witnesses should not be encouraged to provide specific information, although appropriate support can assist in ensuring that a person is able to provide evidence in a coherent manner that reflects the facts as they see them.²⁷

4.4 Bias, relationships, and credibility concerns

Witnesses can bring varying levels of personal bias to the courtroom, may have different levels of concern about providing evidence or testify in particular ways based on their relationship to any parties, and have different levels of credibility as evidence-givers. Witnesses may be family members, friends, neighbours, employees, or involved in the incident in some way.

Where bias is evident, this should be taken into account during investigative and court proceedings. However, a person's level of bias should not be assumed to be an indicator of whether their

²⁵ Kalyan Kumar Gogoi v. Ashutosh Agnihotri, (2011) 2 S.C.C. 532 (India).

²⁶ State of U.P. v. Krishna Gopal, (1988) 4 S.C.C. 302 (India).

²⁷ Pulukuri Kottaya v. Emperor, A.I.R. 1947 P.C. 67 (India).

evidence is true, and should not be raised as a point of attack in an effort to discredit a witness. Where a witness knows the parties to the case, they may provide particularly valuable information, although potential bias should be revealed and considered when determining how a person's evidence should be assessed.

Bias may also be present due to misinformation or assumptions made by the witness, prejudice, or media coverage and pressure to provide particular information. Careful consideration of evidence, revealing any interest in the case and potential bias, and undertaking appropriate cross-examination will assist in minimising the risks.²⁸

4.5 Social and economic pressures

Cooperating with investigations or testifying in court can impact significantly on the social and economic wellbeing of witnesses, who may be subjected to community censure, lose employment, be socially isolated, or find that their relationship and family dynamics are strained. This is particularly the case in small, close-knit communities and in relation to sexual and domestic violence.

Witnesses may be discouraged from engaging in the process due to the social stigma associated with giving evidence. Similarly, they may be unable to sustain themselves financially and/or afford transportation, childcare or other expenses associated with attending interviews and court appearances. Where a person has insecure employment, they may feel that they cannot afford to miss work to attend court.²⁹

Such challenges can be minimised by providing appropriate economic supports such as reimbursement for expenses incurred, information about childcare options, and flexible scheduling where possible. These considerations should be implemented as a matter of course and not withheld as punishment for providing certain evidence.

4.6 Delay and burden of proceedings

Crime investigations and court proceedings can be lengthy and involve substantial procedural steps prior to a trial date being set. Trials themselves can be days, weeks or even months long. This can cause substantial stress and uncertainty for witnesses who are required to give evidence.

²⁸ Nandini Satpathy v. P.L. Dani, (1978) 2 S.C.C. 424 (India).

²⁹ Selvi v. State of Karnataka, (2010) 7 S.C.C. 263 (India).

Additionally, witnesses may need to provide evidence multiple times during the course of an investigation and trial, for example to police and to the court.

It can be challenging to recall events many months after they occurred, particularly when a person has little recollection of what occurred. Notes, witness statements at the time, and careful recording of interviews can assist, but the value of such evidence should not be overstated.

Minimising unnecessary procedural delays and ensuring that witnesses are kept well informed can reduce stress and uncertainty. Additionally, unnecessary repetition of the giving of evidence should be avoided where possible.³⁰

4.7 Accessibility, communication, and comprehension barriers

Various barriers to accessibility, communication and comprehension can impact on the ability of a witness to understand questions and provide evidence to the court. A person who has a disability, cognitive or developmental delays, is a child, or does not understand the language being used in court, may struggle to comprehend the nature of questions or give evidence effectively.

Those who have impairments or disabilities may require various forms of support in order to testify, including interpreters, specialist support, or physical modifications to a courtroom. Where a person does not understand the language being used they may be entitled to an interpreter depending on a jurisdiction's specific requirements. Children and people with communication difficulties may require specialist intermediaries or alternative means of communicating their evidence to the court that are permitted by law.³¹

4.8 Vulnerable witnesses

A vulnerable witness is typically one who is likely to have difficulty giving evidence or be subject to additional risks due to their age, disability, level of trauma, intimidation, or the nature of the alleged offence. Children, people with intellectual disabilities, witnesses to sexual or domestic violence, and those being intimidated by groups or organisations may be considered vulnerable witnesses.

Various procedures may be available to support vulnerable witnesses, including video or screen links, recorded evidence, or communication support, depending on the nature of the vulnerability

³⁰ Khatri v. State of Bihar, (1981) 1 S.C.C. 627 (India).

³¹ Hussainara Khatoon v. State of Bihar, (1980) 1 S.C.C. 81 (India).

and the jurisdiction. Vulnerable witnesses should not be made to testify in person if it can be avoided, and should only be placed in difficult positions if it is necessary for the trial to proceed and the information they provide is required to test the evidence of the defence.

CHAPTER5: WITNESS PROTECTION, RIGHTS AND INSTITUTIONAL SAFEGUARDS

5.1 Introduction

Although protecting and supporting witnesses are important aspects of a fair criminal process, such measures entail risks to the rights of the accused. In particular, witness protection measures should respect the rights and interests of the accused person to deal with any allegations impartially and challenge the evidence presented against them.

Each justice system sets out specific measures to ensure witness protection and support in its legislation. This depends on the nature of the offence and the potential risks to the witness.³²

5.2 Witness rights and protections

Witnesses have a right to protection as human beings and to be treated respectfully, fairly and with dignity throughout the criminal process. They may be entitled to the following, depending on the case and jurisdiction:

- safety and security
- respect and courtesy
- information
- assistance
- confidentiality
- support
- protection from unnecessary distress

These rights do not include rights as to a particular outcome of the proceedings or control of the prosecution over the evidence.

Procedural protections that could reduce potential distress to a witness at court include:

³² A.R. Antulay v. R.S. Nayak, (1992) 1 S.C.C. 225 (India).

- giving evidence by way of live video link or video recorded evidence from a different courtroom or location
- presentation screens or separation of the witness in the courtroom to limit direct view of the accused person
- support persons or intermediaries
- separate waiting rooms and arrival and departure procedures
- limitations on press and public access or matters that may be published or reported
- variations to the manner in which a child or witness gives oral evidence or is cross-examined by the defendant or their counsel.³³

5.3 Legal and procedural protection

Legal and procedural protection measures for witnesses may apply at both the investigative and trial stages. At the investigative stage, police or other relevant authorities should record threats, inform the witness of reporting procedures, provide the witness with any relevant evidence, and make assessments about whether the witness and suspect should be separated. Prosecutors or police may provide safety advice or plan contact with the witness.³⁴

5.4 Witness protection programmes

In some cases, particularly where there is a credible threat to the safety or wellbeing of the witness, standard procedural protections may not be sufficient to justify the use of protective measures. Where there is a significant risk to a witness's safety or wellbeing, more intensive, individually tailored protections may be available through a witness protection programme.

A witness protection programme may involve risk assessments based on the nature and seriousness of the threat. Such witness protection services may involve a relocation programme or other security measures, depending on the needs identified in the risk assessment, and in accordance with legal requirements. These programmes usually have a limited and targeted scope, to avoid unnecessary disruption to the witness and their personal network. Appropriate witness protection should be implemented with consultation and where possible, consent, and should be reviewed on an ongoing basis in line with changes to the risk assessment. Protection measures should be kept

³³ P. Ramachandra Rao v. State of Karnataka, (2002) 4 S.C.C. 578 (India).

³⁴ State of Maharashtra v. Dr. Praful B. Desai, (2003) 4 S.C.C. 601 (India).

confidential wherever possible and should not be discussed with unauthorized persons, as such disclosure may place the witness and others at risk of harm.

5.5 Witness support services

Support services can provide relevant information to witnesses, arrange assistance as needed, and provide or refer witnesses to appropriate services such as counseling. These services may be able to support a witness throughout the process, by explaining procedures and timelines or arranging other witness assistance in areas such as childcare or transport. Support services may assist a witness to prepare to give evidence, for example by discussing expectations and experiences of giving evidence, but should not control or direct a witness in terms of what they disclose.³⁵

5.6 Confidentiality and information management

Depending on the nature of the case, the personal information of a witness may include private or sensitive information, for example, medical or personal information or contact details. As a result, it is important that institutions handling such data adopt appropriate procedures for storing documents containing such information, limiting access to such information, and disclosing such information where required by law.³⁶

Generally, confidentiality does not extend to information that should be disclosed to the accused or their representative, for example information relevant to the case or protected by law. It is important for authorities dealing with the case to be absolutely clear about what information can and cannot be disclosed, and what powers they have to withhold such information. In particular, information should not be withheld on the grounds that such information may endanger a witness or be detrimental to the interests of justice, except where an alternative order or protection has been issued by a court or other competent authority.³⁷

5.7 Vulnerable witnesses and special measures

Children, witnesses with disabilities, survivors of violence and witnesses experiencing distress or trauma may need to have certain adjustments when appearing in court. These adjustments can

³⁵ Kartar Singh v. State of Punjab, (1994) 3 S.C.C. 569 (India).

³⁶ Manu Sharma v. State (NCT of Delhi), (2010) 6 S.C.C. 1 (India).

³⁷ Best Bakery Case, Zahira Habibulla H. Sheikh v. State of Gujarat, (2004) 4 S.C.C. 158 (India).

include support persons, accessibility supports, interpreters, simplified explanations, and intermediaries who are authorized to give instructions or ask questions, depending on the needs of the witness and the procedures of the jurisdiction. Vulnerable witnesses should be treated in a manner appropriate to their needs, with consideration to their capacity and ability to participate in the justice process.

A vulnerable witness should not be treated as less of a witness or presumed to be lying solely on the basis of their personal characteristics, such as age or disability. However, such witnesses should not have automatic protection from challenges to the correctness or relevance of their knowledge or recollection of events. Courts should make sure that questions to such witnesses are clear and appropriate.³⁸

5.8 Ethical duties of justice professionals

Many justice professionals have a responsibility to treat witnesses fairly, avoid discrimination and intimidation, protect confidential information or explain procedures honestly. This includes, among others, police, prosecutors, defense lawyers, judges, interpreters, and support workers.

Prosecutors should not induce or encourage a witness to give evidence that provides favorable evidence against the accused person or hide weaknesses in the evidence. Defense lawyers may challenge the evidence of witnesses, but should refrain from harassing questions that exceed their legal authority. Judges should exercise appropriate impartiality throughout the proceedings and safeguard the rights of the accused, the dignity of witnesses and the integrity of the process. This may include specific directions for witnesses or evidence in exceptional circumstances in which questions or evidence may appear inappropriate or contain dangerous information.³⁹

5.9 Balancing protection with the accused's fair-trial rights

When making decisions on the use of protective procedures and measures, courts must weigh the benefits to the witness against the prejudice to the accused. In particular, such measures should respect and protect the fundamental rights of the accused. These rights include the right to an objective assessment of one's position and the opportunity to challenge allegations, including by examining evidence, reviewing evidence disclosures and presenting one's views to an impartial

³⁸ R. v. State of Haryana, (2016) 1 S.C.C. 463 (India).

³⁹ Laxmi v. Union of India, (2014) 4 S.C.C. 427 (India).

judge or jury. Therefore, when choosing between protective measures, appropriate attention should be paid to the alternative options and their impact. In particular, if the court grants a protection measure, it should assess what questions the defense has the opportunity to ask the witness, and what impact that may have on the assessment of the evidence.

Where the restrictions significantly restrict the opportunity for the defense to challenge critical evidence, the court should consider whether the defense should be able to rely on that evidence with caution. In particular, this applies to evidence that may contain information about a witness's untruthfulness, biases, views or intentions. In such cases, unless such measures can be avoided without exceeding the limits under Article 5, the court may be justified in relying on such evidence.⁴⁰

CHAPTER 6: FINDINGS, RECOMMENDATIONS, AND CONCLUSION

6.1 Introduction

Witnesses are integral to criminal law. Their testimony can guide investigation, help secure a conviction, and enable a court to deliver justice. However, witnesses face intimidation, trauma, memory loss, financial hardship, delays, language barriers and other obstacles to justice. The preceding chapters demonstrate that the value of a witness's evidence depends not only on the contents of their statement, but on how the evidence is presented, examined and evaluated.

This chapter synthesizes the key findings, assesses the implications for the witness and the accused, and proposes practical and legal recommendations. Witnesses and the accused have complementary rights: for a fair trial, justice system participants must both protect witnesses and respect the defendant's rights.⁴¹

6.2 Central findings

1. Witnesses carry out a range of roles.

Witnesses play multiple roles in an investigation or trial. They can notify of an offence, give investigative leads, identify a suspect, describe events, interpret technical evidence or explain the harms suffered. Eyewitnesses, expert witnesses, victims and other witnesses have different needs and should be assessed according to the type of evidence and not conflate it into one category.

⁴⁰ Bodhisattwa Gautam v. Subhra Chakraborty, (1996) 1 S.C.C. 490 (India).

⁴¹ Chairman, Railway Board v. Chandrima Das, (2000) 2 S.C.C. 465 (India).

Although victims may be witnesses, their interests are not the same as those of other witnesses. Expert witnesses and eyewitnesses give different types of evidence and so have different evidential needs. Their evidence has different credibility and bears different weights in a trial – and so should be treated as such.

2. Testimony can provide useful information to a court, but it is often not reliable.

Testimony can give a court valuable detail that goes beyond written and documentary evidence. However, honest witnesses can make mistakes – human memories are faulty and prone to suggestion. Confidence should not be used as an indicator of truthfulness. Identification evidence in particular should be handled with care, as mistaken identification can lead to wrongful convictions. Investigative practices should be scrutinized – does the identification procedure used have a proven track record of avoiding mistaken identifications? If investigators have interviewed the witness, they should record the description and level of certainty, and not use potentially coercive identification methods. Wherever possible, testimony should be supplemented and tested by other forms of evidence, such as forensic, documentary, communication or other witness evidence.⁴²

3. Credibility and reliability are two separate issues.

Credibility refers to whether a witness is truthful; reliability refers to whether their testimony corresponds to reality. A witness can be reliable – that is, tell the truth – but have limited reliability if they cannot describe the events accurately. Equally, a witness should not be dismissed as dishonest simply because their appearance or manner is unimpressive – body language is a poor indicator of truthfulness. Courts should distinguish between testimony that is clearly inconsistent with known facts, and minor inconsistencies that may be explained away. Cross examination is a vital tool to test reliability, but it must be used fairly and not wielded in an overly intimidating or humiliating fashion. The principle of a fair trial should prevail over the interests of the accused in ensuring that cross-examination is not unduly harsh.⁴³

⁴² State of Rajasthan v. Union of India, (1977) 3 S.C.C. 592 (India).

⁴³ Mahender Chawla v. Union of India, (2019) 14 S.C.C. 615 (India) (approving the Witness Protection Scheme, 2018)

4. The practical and personal challenges a witness faces can undermine their testimony.

Threats and intimidation can deter witnesses both from reporting the offence and from giving evidence at trial. Trauma can affect a person's recollection and willingness to testify. Witnesses may also have social, economic and care-related reasons for reluctance to give evidence or give evidence that implicates friends or family members. Long waiting times can cause stress and affect a witness's ability to testify. Inaccessible buildings, unfamiliar procedures, and a lack of interpreters or other support can also put unwitnessed witnesses at additional risk. These challenges should be addressed to ensure a fair trial and not deter witnesses from testifying.⁴⁴

5. Witness protection measures must balance the need to protect the witness with the right of the accused to a fair trial.

Confidentiality, protective security, witness support and special measures – such as screens, remote video-link and interpreters – can help keep a witness safe during trial. However, protections should be proportionate to the risks faced by the witness, and should consider the impact on the accused's rights. Where possible, steps should be taken to ensure that the accused can effectively challenge the evidence, including through cross-examination.

6.3 How supportive is the system to witnesses?

The justice system acknowledges that witnesses need protection and support. However, this can be inconsistent and reactive, and the resources or support a witness receives can depend on their location, the seriousness of the case and available funding. Witnesses can receive good support, or receive little or no support. It depends on the circumstances of their case and the resources available.

The support to witnesses should be proactive and comprehensive, starting when the witness first interacts with the justice system and providing advice and practical support throughout the process, not just on the day of the hearing. A fair trial is not achieved by focussing solely on the court hearing itself. Similarly, the needs of witnesses should not be viewed as binary – a witness is not

⁴⁴ Ministry of Home Affairs, Government of India, Witness Protection Scheme, 2018 (2018).

“supported” or not based on whether they appear to cooperate with investigators or behave confidently in court. Witnesses need practical, emotional and procedural support throughout.⁴⁵

6.4 Recommendations

A. Better communication and coordination

Assign a contact person – perhaps trained in witness care – to explain procedures to the witness, answer their questions, provide information about the timeline of the case, any potential delays and support services. Coordinate police, prosecutors, interpreters and witness support providers so that a witness does not receive contradictory advice, undergo unnecessary interviews, or face conflicting requirements. Provide information in accessible formats and languages.

B. Better evidence gathering

Investigating officers and prosecutors should receive training on memory, interviewing techniques, identification procedures and how to deal with potential trauma. Where permissible by law, interviews should be recorded, and identification evidence should be gathered using standardized, transparent procedures. Interviewers should note any concerns about a witness’s reliability. Prosecutors and investigators should seek corroboration of a witness’s evidence wherever possible, bearing in mind that not all truthful accounts will have supporting documentary evidence.

C. Make support measures practical and accessible

Provide interpretation and other language support; make sure that disabled witnesses have the support they need; provide transport where possible and support witnesses in claiming expenses or loss of earnings; provide childcare support where appropriate; and give appropriate advice and support to witnesses about their rights.⁴⁶

⁴⁵ Law Commission of India, 154th Report on the Code of Criminal Procedure, 1973 (1996).

⁴⁶ Law Commission of India, 178th Report on Recommendations for Amending Various Enactments, Both Civil and Criminal (2001).

D. Better protection and risk assessment

Carry out timely and appropriate risk assessments for each witness, and make sure that appropriate support – such as confidential liaison, protective security, or other measures – is in place. Ensure that witnesses understand the limitations of confidentiality and the available options, so that they feel able to make informed decisions about their safety.

E. Use special measures wisely

Special measures should be used, where appropriate, to support vulnerable witnesses such as children. Decisions to grant special measures should be made in a timely manner – ideally before the trial – and should be based on a reasoned assessment of the witness's needs.

F. Monitoring and evaluation

Build appropriate monitoring systems to record the practical challenges faced by witnesses, such as the reasons for cancellations or delays to court appearances, the use of special measures, any reports of intimidation or harassment and the use of interpreters or other support services. This data can be used to inform improvements and witness support strategies. Justice sector staff should receive appropriate training, and witnesses should have accessible channels to report concerns.

6.5 Conclusion

Witnesses are central to the administration of criminal law: their evidence can guide investigations, help secure convictions, and enable courts to deliver justice. However, evidence is not always reliable: sincerity does not equal truthfulness, and confidence should not be used as a proxy for accuracy. A responsible justice system will consider carefully whether a witness's evidence should be presented to a court, corroborated where possible, and subjected to rigorous cross-examination. Careful gathering and presentation of evidence, including by the accused, helps deliver the fair trial that is the cornerstone of justice.

The system should see support to witnesses as an essential component of justice, and take appropriate steps to safeguard the rights of both the witness and the accused. By providing good support to witnesses – such as keeping them informed, ensuring they can access the support they need, and treating them with dignity – the justice system ensures that justice is done, not through witness protection, but through proper procedures that safeguard the rights of both sides.

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