

## EVIDENTIARY VALUE OF HOSTILE WITNESSES

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### ABSTRACT

*In none of the legislation, there is a definition for hostile witnesses,” which has evolved through various judicial precedents. This article discusses the meaning and evidentiary value of hostile witnesses in detail. The efforts taken by the government to prevent it and whether it is punished. The applicability and usefulness of the existing legal provisions to deal with this widespread malaise in the criminal justice system are also thoroughly assessed. The implications of and reasons for a witness turning hostile or not speaking the truth to the investigating agencies are also explored.*

**Keywords:** Hostile Witnesses, Evidentiary Value, Witness Protection, Perjury.

### INTRODUCTION

Oral, documentary and electronic evidence have different uses under the Indian Evidence Act. Oral testimony consists of primary evidence and secondary evidence. Under section 60 of the Code of Criminal Procedure, the testimony consists of what witnesses have personally seen or heard. We require credible witnesses and substantive evidence to make a case before the court. If a certain witness tells something to the police but later disputes it before the court during the witness examination stage, then he is referred to as a hostile witness. There is a nuance, here that no Indian legislation explicitly defines a hostile witness, but the concept has evolved through various judicial precedents of our constitutional courts and common law. If a witness turns hostile, then it isn't presumed by law that everything he says is false and should be discarded. But only the parts of testimony which can be corroborated by credible witnesses are to be accepted. The parts of testimony that are held to be acceptable can be used by the prosecution and defense to strengthen their respective cases. Often crucial witnesses turn hostile, which can severely weaken the entire case of the prosecution. The results of this are glaring, people are losing faith in the system which can fairly punish the criminals and wrongful acquittals happen. Such people pose a serious threat to society and can keep on committing heinous crimes with impunity. It can severely weaken the entire case of the prosecution. The

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results of this are glaring, people are losing faith in the system which can fairly punish criminals and wrongful acquittals happen. Such people pose a serious threat to society and can keep on committing heinous crimes with impunity. Until witnesses keep turning hostile and not telling the truth to the court, justice will severely suffer and people's faith in the credibility of judicial processes will take a backseat. This grooms a culture for justification of extra-judicial methods like e.g., fake encounters.

*“Witnesses are the eyes and ears of the justice”- Jeremy Bentham*

Those who have witnessed an incident firsthand are known as witnesses. The Indian Evidence Act, of 1872 has discussed in detail who can testify as a witness, how to testify, and what other remarks he can make in sections 118 to 134. Often eyewitnesses require a very careful independent evaluation of their credibility, and it should not be adversely prejudiced by making other evidence as a touchstone for the test of such credibility. It is essential to review such evidence for its innate continuity, the possibility of the story, continuity with witness statements of other eyewitness accounts deemed believable, with undeniable facts, the believability of eyewitness accounts, their performance in the witness box, their power of observation, etc. Except for dead persons, anybody is qualified to depose as a witness to the event, barring the court-determined people who lack the mental understanding to comprehend the questions asked to them or respond properly to them.

Earlier I told you about a nuance that no legislation defines hostile witnesses. But it has evolved in common law that such people who “ruin the cause” of the party calling them are called hostile witnesses.

The Supreme Court in *Sat Paul v. Administration* said that with the court's approval, the prosecution cross-examined its witnesses. However, the value of their testimony was called into doubt. A hostile witness is hesitant to speak the truth, while an unfavorable witness is summoned by a party to show one fact but proves the opposite. Furthermore, in *Gura Singh v. The State of Rajasthan* attempted to define a hostile witness as one who is not desirous of telling the truth at the instance of one party calling him and an unfavorable witness is one called by a party to prove a fact in issue or relevant to the issue who fails to prove such facts or proves the opposite test.

## **EVIDENTIARY VALUE OF HOSTILE WITNESSES**

As I said earlier, the evidence of a hostile witness cannot be treated as washed off the record altogether. Still, only the parts of it should be accepted which are found to be reliable and credible after scrutiny. It is now well established that the portion of evidence advantageous to both parties may be used; however, the court before placing reliance must be very cautious. Supreme courts have held in their different decisions that admitting a witness to be hostile does not ipso facto dismiss the evidence. Just because the witness after stating the investigating agency regarding a criminal case, and later retracted from it there is no need to reject their evidence in altogether.

For instance, the Allahabad High Court while deciding the criminal appeal in a case of murder held that a review of the witness's whole testimony reveals that the next day, he was forced to say something in favour of the appellants, as he seemed to have been won over. The later statement of the witness that there was utter darkness at the location is completely contradicted by the fact that the night of the incident was a moonlight night, and the occurrence took place in the open, thus there was no issue of pitch black. The assailants were likewise well-known to the witness. He had also incurred injuries, and the witness's attendance on the scene cannot be questioned, and his later statement was influenced by the appellants; so, the witness's entire proof can't be thrown out on this basis. It is an established legal concept that a statement of a hostile witness can be examined to the extent that it supports the prosecution's case. Furthermore, it has been established that if a hostile witness's testimony is backed by additional credible proof, there's no legal restriction on using such evidence to base a conviction. It is an established legal concept that a statement of a hostile witness can be examined to the extent that it supports the prosecution's case. Furthermore, it has been established that if a hostile witness's testimony is backed by additional credible proof, there's no legal restriction on using such evidence to base a conviction. But the truthfulness of it should be taken into proper consideration. The court clarified that a witness who provides contradictory testimony at various times shows little concern for the truth. When the witness fails to meet the standard in his general concern for truth, even though he makes consistent allegations about individual events, it is dangerous to rely on such testimony implicitly.

Although a Magistrate has the authority to record a person's evidence, including that of a witness, the statement so recorded is of no substantive value. Even if the witnesses become hostile and modify their accounts, remarks made under oath before a judicial magistrate should

be permitted to be used as substantial evidence against the accused. However, after examining the cross-examination and other evidence produced, the court should be granted discretion to decide the probative significance of the utterances. To resolve the issue of hostile witnesses, the quick recording of all relevant witnesses' statements by a judicial magistrate during the inquiry should be made mandatory, and the statements so recorded should be given substantive weight.

### **RELEVANT LEGAL PROVISIONS TO DEAL WITH HOSTILE WITNESSES**

Section 154 of the Indian Evidence Act stipulates, "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." This section has some nuances of itself.

Firstly, this section only permits those questions that could be asked during a cross-examination, which in a way reduces the scope of questioning for the hostile witnesses. Secondly, if we read the law, it is nowhere mentioned that we need to declare the witness hostile before we start cross-examining the witness.

It has evolved through various judicial precedents and can only be used when the person called by the examining party is giving testimony that is against his solemn responsibility to speak the truth. From this one thing could be deduced that unlike common law there is no difference between adversarial witness and hostile witness in India. The only intent is to extract the hidden facts for determining truth, truth, truth, and nothing else!

Section 155 of the Indian Evidence Act stipulates the following: The credit of a witness can be impeached in three ways:

- (1) Through the testimony of people who believe he is unworthy of credit;
- (2) Through proof that the witness has been bribed or accepted a bribe; and
- (3) Through proof of previous statements inconsistent with any part of his evidence that is liable to be contradicted. A witness who declares another witness unworthy of credit may not offer reasons for his belief, but he may be questioned why in cross-examination, and the answers he makes cannot be challenged, however, if they are incorrect, he may be charged with giving false testimony later.

In the evidence laws of our country there are a lot of sections to deal with such witnesses but in actuality how much of it is effectively used is a point of debate. The most important of all these is section 165 which states the following:

The Judge may ask any witness or party any question, in any form, at any time, regarding any fact pertinent or irrelevant, and may compel the production of any document or item. The judgment must be founded on facts deemed relevant by this Act and fully proven. The Judge, on the other hand, cannot force any witness to answer any question or produce any document that the witness would be allowed to decline to answer or produce under sections 121 to 131, both inclusive if the question or document was requested by the opposing party. The Judge may not ask any question that any other person would be prohibited from asking under sections 148 or 149. No dispensing of primary evidence shall happen.

But there is a very disturbing trend going on in the trial courts of our country that is the judges of trial courts don't participate in the proceedings where they preside. This has been highlighted multiple times by the constitutional courts of our country and the most recent being *Dinesh Kumar v. The State of Haryana*.

There are historical precedents in India for this like *Ram Chander v. The State of Haryana* where the court stated "Every criminal trial is a voyage of discovery in which truth is the quest. A presiding judge must explore every avenue open to him to discover the truth and advance the cause of justice. For that purpose, he has expressly invested powers under Section 165 of the Evidence Act with the right to put questions to witnesses. Indeed, the right given to a judge is so wide that he may ask any question he pleases, in any form, at any time, by any witness, or of the parties about any fact relevant or irrelevant." Now we will deal with the penal provisions for dealing with hostile witnesses as mentioned under the Indian Penal Code, of 1860.

Section 193 of the Indian Penal Code stipulates the following: The most important details in this text are that anyone who intentionally gives false evidence in any stage of a judicial proceeding or fabricates false evidence to be used in any stage of a judicial proceeding is punished with imprisonment of either type for a term that may extend to seven years, as well as a fine. Furthermore, anybody who willfully offers or fabricates false evidence in any other matter faces imprisonment of any kind for a duration of up to three years, as well as a fine.

Section 196 of the Indian Penal Code stipulates the following: “Whoever corruptly uses or attempts to use as true or genuine evidence any evidence which he knows to be false or fabricated, shall be punished in the same manner as if he gave or fabricated false evidence.”

Section 199 of the Indian Penal Code stipulates the following: Whoever makes a false statement in any declaration signed or subscribed by him, which any Court of Justice, public official, or other person is obligated or authorized to accept as proof of any truth, must be penalized as if he submitted false evidence. Touching any point material to the item for which the declaration is made or utilized is included.

There is a statutory definition in the Indian Penal Code for the offense of perjury in section 191 and chapter XI to deal with offenses that pertain to giving untrue evidence and obstructing the best interests of justice.

### **REASONS FOR WITNESS TURNING HOSTILE**

We have legal provisions to deal with hostile witnesses, but we don't know exactly why they turn hostile. In this section, I will explore why witnesses turn hostile before understanding the consequences of it in detail. But one thing is clear: it severely weakens the prosecution's case.

Protracted trials: In India, there are a lot of criminal trials that get unduly delayed and cross-examination is scheduled for a lot of dates. The witnesses get summoned only to find that the date is postponed due to often frivolous reasons which severely irritate them. As the witness became angrier, the witness became hostile to avoid such harassment.

Accused is granted bail: Every undertrial can apply for bail while in custody under section 437 of the Code of Criminal Procedure<sup>21</sup> but after committing heinous offenses such a thing heavily discourages the witnesses as they are left alone to fight a criminal case and effectively lose faith in the judiciary. It is often observed that when high-profile personalities are involved the court is inclined to grant bail to the accused which discourages the witness and then the accused can create an atmosphere that will prevent them from saying anything in court and the absence of a witness protection: The witness has the power to reveal the identity of the perpetrator and help bring justice to the victim. But the accused can cross any limits to prevent this from happening because if this happens smoothly in the way the victim expected then the accused will get convicted. And then there is a high chance that the convict will get a lengthy prison term or in rare cases capital punishment. The witnesses can be subjected to different types of

threats, coercion, violent attacks, a threat to life, rape threats, and even actual attempts on life. To prevent this Witness Protection Scheme<sup>22</sup> was laid by the government of India but there have been glaring cases of failure and non-compliance with the guidelines by state and district authorities which have been highlighted by multiple court precedents. The constitutionality and importance have been rightly upheld by the apex court in Mahender Chawla and Ors. v. Union OF India and Ors. The Supreme Court in the National Human Rights Commission v. State of Gujarat & Ors, People's Union for Civil Liberties (PUCL) v. Union of India, Zahira Habibullah H Sheikh and Anr v. State of Gujarat and Ors, Sakshi v. Union Of India and other variables such precedents held that the state must protect every witness who gives evidence to the prosecution. The principle is very simple. Protect and uphold the best interests of the prosecution witnesses. It helps in achieving convictions. Even the Law Commission of India in its 198<sup>th</sup> report held that witness protection is crucial and essential and that the current facilities for it are inadequate.

Insufficient and delayed payment of money to witnesses: As we know from earlier, witnesses are called multiple times the purpose of for examination and cross-examination during the trial, but the witnesses aren't adequately compensated for it and even if they are then it is delayed for an unreasonably high amount of time. A lot of witnesses come from poor neighbourhoods which can't afford to lose daily wages. Code Criminal Procedure (CrPC) has a provision for the following which should be followed.

High rate of bribery and corruption: This is known in colloquial terms as "purchase" or "buy off". Usually in such cases, the victims and/or witnesses belong to poor households and are extremely vulnerable. They are desperately in need of money and this vulnerability is thoroughly exploited. To exploit this vulnerability the process is extremely easy. The opposing parties or their attorneys pay the witnesses to not participate in the investigation or take a stand that is favorable to the accused. If the trial has already begun, then they are told to deny or refute making any such incriminating statement during the witness examination stage of the trial.

Disclination to get involved in court proceedings: There is a trust deficit between the real witnesses and the investigating authorities. There is fear among real witnesses that the government won't help them in any way and will punish them for telling the truth by implicating them in false cases, so they don't turn up. There are misconceptions among people that if you are a witness in a criminal trial then you are ineligible to apply for a government

job. They also have to face discrimination while looking for housing and other things because a lot of people think that having them is attracting trouble.<sup>30</sup> To tackle such misconceptions, we need to spread awareness and prevent the flow of misinformation. We need to spread the message to people that being a witness in a criminal trial is not in conflict with the law of the land.

Sympathetic attitude towards the accused: A lot of times the witnesses know the accused and are often in close contact with the accused. In such cases, the parties or their attorneys may contact the witnesses and can emotionally blackmail them by saying if they testify before the court their loved ones will go to prison for a very long term. Similarly, if the accused is very young then the witness might show leniency in her statement and avoid mentioning heinous things to avoid it from being made a felony because of a concern that we can destroy his life by sending him to prison for very long.

Use of stock witnesses by the police: Due to the above-mentioned reasons real witnesses don't come forward to the police. So, the police strengthen their cases by using stock witnesses. Such people are with dubious details and are planted by the prosecution which almost certainly turns hostile during trial and even if they don't, they aren't relied on by the court as their testimony isn't presumed to be completely credible. Sometimes people are threatened by the police to give statements in such a way as implicating a lot of people and which is often observed in high-profile cases. The court is looking for corroborative evidence and the failure of such a quest result in acquittal as there is no trustworthy evidence or proof on record to convict the accused. The use of stock witnesses, the legal implications arising out of it and subsequent problems, and other such questions of law arising from such a situation have been properly addressed by the Supreme Court in Prem Chand (Paniwala) vs Union Of India (Uoi) And Ors.

### **IMPLICATIONS OF WITNESS TURNING HOSTILE**

Acquittals: This outcome is obvious. If crucial witnesses turn hostile, then the whole case of the prosecution can collapse which will result in acquittals. It will heavily decrease the morale of the investigating authorities, especially in high-profile cases where there is a high amount of political and social pressure.

Penalizing perjury: Every person is legally obliged to tell the truth in court. If he fails to do so and if proven so in court, then he can be punished under section 191 of the Indian Penal Code



<sup>32</sup>. Also, section 164 of the Criminal Procedure Code <sup>33</sup> holds witnesses accountable for intentionally contradicting themselves in a court of law.

Misplaced trust in the judicial system: People are discouraged from choosing a criminal trial and going to the police and instead engaging in illegal activities to settle their problems because nothing would happen if there are acquittals after a criminal prosecution. The judiciary and executive should work to increase public confidence in the criminal justice system.

Waste of precious judicial time: If it is a false case lodged at the behest of settling personal scores or for other malafide reasons using stock witnesses then genuine cases don't get adequate time to be heard and result in the miscarriage of justice. This results in the waste of precious judicial time.

## CONCLUSION

A detailed study of our criminal justice system and evidence laws reveals a massive disparity between the written law and its actual application of the law. We need to actively use the current safeguards to protect the witnesses from any type of undue influence. The evidence and other important documents should be kept in safe custody to avoid any suspicions and doubts over their credibility and tampering. We need to use of process of law enforcement which leaves zero scope for error and those who intentionally commit it are severely punished. This is difficult but not impossible. The precise facts should be known by all in the trial the presiding judicial officer, the defense, and the prosecution. Before the facts may be used as evidence, they must be gathered in a safe place. For justice to win, the government and judicial system must persuade ordinary individuals testifying under unique circumstances to speak the truth. It is not difficult for legal minds to see why, in most circumstances, testimony failure happens. The need for a party, to discredit his witness talks about inadequate legislative and adjudicatory mechanisms.

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