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Hostile Witnesses: A Curse to Criminal Justice System

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ABSTRACT

India adopted adversarial system being a common law country for dispensing its criminal justice system. In adversarial system, the investigation is conducted by Police and other investigating agents, and relying on the said investigation, the trial is conducted against the accused. The important factor or the heart of the trial is the witness, the investigating officer records the statements of witnesses and as the prosecution has to prove the guilt of accused on the strength of the statements of witnesses, and relying on the deposition of witnesses, the Judge concludes the trial in acquittal or conviction of accused. During the entire trial, the accused is presumed to be innocent. This concept of innocence is premised from the doctrine of "Ten criminals may go unpunished, but one innocent person should not be convicted". In recent days, the accused along with this doctrine, are benefitting from the hostility of witnesses. The witnesses are frequently resiling from their statements made during investigation without any fear or action. Judges cannot take any action as the statements are not signed by the witnesses and are recorded by the Police. There is a huge cry about the acquittal of accused and low conviction rate against accused, but the society is totally unaware about the factor of hostile witnesses. In several cases the accused have been acquitted as the material witnesses turned hostile and there is nothing on record to punish the accused. In adversarial system, the statements are not recorded by the Judges and the statements are not signed by the witnesses, therefore, the accused gets the benefit of Hostility of witnesses. To curb these menace, strict laws for recording the statements of witnesses and investigation of crime have to be introduced and existing laws have to be reformed.

Keywords: *Adversarial, Inquisitorial, Accused, Victim, Hostile witness.*

I. INTRODUCTION

The contemporary Anglo-Indian adversary system has evolved over several hundred years. This system was originally generated from Germany and England. As per Indian Jurisprudence, a Judge delivers his judgment regarding controversial act between the parties, who act contradictory to each other, and a judicial intervention in form of trial is conducted. The

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responsibility for the production of evidence is placed on the party that seeks to establish guilt with the Judge acting as neutral referee between the opposing parties, both of which are allowed to introduce their evidence and cross-examine the witnesses.

The Judges play a passive role in course of a trial and the truth is supposed to emerge from the respective versions of the prosecution and the defence. All the inferences and conclusions of the Court as regards to the truth are essentially based upon the versions so presented, including of the witness. *There is an unfortunate tendency for a Judge presiding over a trial to assume the role of referee or umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable distortion flowing from combative and competitive elements entering the trial procedure.*² The accused is generally represented by a competent lawyer of his choice and while the prosecution is mostly left at the hands of incompetent and inefficient public prosecutors. The burden of proof by its virtue needs to be addressed by able and competent lawyers, while there is also lack of coordination between the police investigation and the prosecution as regards evidential updates of the case.³ All these circumstances and lack of coordination with witnesses may facilitate the witnesses turning to hostile.

Further, the criminal jurisprudence in adversarial system still strongly holds the presumption of innocence of accused. The accused should not hold guilty until his guilt is proved beyond reasonable doubt. All these principles are premised on the doctrine that **“Ten criminals may go unpunished, but one innocent person should not be convicted.”**⁴ The emphasis of this doctrine is that an innocent should not be punished for others wrong. Convicting an innocent lead to serious flaws in criminal justice system.⁵ That’s why the doctrine is still in existence, and the accused is enjoying its benefits. In India this doctrine is strictly followed by the Courts. Thus, it is for the prosecution to prove the guilt of the accused beyond reasonable doubt. The burden of proof as regards veracity of a fact lies on the person who wishes the Court to believe in it. Even if the case falls under exceptions where the burden of proof shifts to the accused, it is for the prosecution to again prove that the case does not falls within such exception. A fact is said to be proved, after considering the matter before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the

² Government of India, Report: Committee on Reforms of Criminal Justice System (Ministry of Home Affairs, 2003).

³ Ibid supra note No.1.

⁴ Dinubhai Boghadha Solanki v. State of Gujarat, (2018) 11 SCC 129) PN.154.

⁵ Ibid supra note No.3 at PN.155.

particular case, to act upon the supposition that it exists.⁶

Due to such a heavy load on the prosecution, it has often led to failure to prove its case and the accused seeking the advantage of benefit of doubt. Hon'ble Justice Sabyasachi Mukherji has opined that, the cherished object of the Criminal Justice System is to ensure that every guilty person is punished and every innocent person is protected. Our experience shows that operation of the standard proof beyond reasonable doubt has contributed to large number of guilty persons escaping from punishment.⁷

The Hon'ble Supreme Court has held in **Swaran Singh v. State of Punjab**⁸ that, a criminal case is built on the edifice of evidence, evidence that is admissible in law. For that witnesses are required, whether it is direct evidence or circumstantial evidence. The oral evidence is generally adduced by the witnesses, be it a victim himself, the accused or any other person having any information relating to the said matter. A witness plays very important role in the criminal trials and helps the Court in the administration of justice. It is submitted that justice must not only be done, but must also be seen to be done. Fair trial is the another and very important foundation of criminal jurisprudence⁹ and witnesses play vital role in fair trial. Today the Indian criminal justice system is facing problems of low conviction rate due to unavailability of strong evidences and hostile witnesses.

The menace of witness turning hostile has now become a cause of grave concern in Indian judiciary. The Hon'ble Supreme Court has strongly reiterated in case of **Zahira Habibullah Sheikh v. State of Gujarat**,¹⁰ that "*legislative measures to emphasis prohibition against tampering with witness, victim or informant, have become the imminent and inevitable need of the day.*" The Law Commission of India in its various reports has emphasized on the need for anonymity of witnesses and physical protection of the witness during various stages of trial so as to prevent loss of vital evidence, on account of witnesses turning hostile.¹¹ However, no such restructured provision has been formulated by the legislation or judiciary entailing all these aspects.¹² The Courts have revisited the need and structure of witness programmes in various cases, but they still need to be improvised so as to completely deter the menace of witness

⁶ Ibid supra note No.2.

⁷ Ibid supra note No.2.

⁸ Swaran Singh v. State of Punjab, (AIR 2000SC 2017).

⁹ Vikas v. State of Rajasthan, (2014) 3 SCC 321.

¹⁰ Zahira Habibullah Sheikh v. State of Gujarat, (2004 (4) SCC 158).

¹¹ Law Commission of India's Consultation Paper on "Witness Protection" (2004), Available at: www.lawcommissionofindia.nic.in/summary%20of%20the%20Consultation%20paper%20on%20Witness%20protection%20AND%20Questionnaire.pdf.

¹² Suprio Bose, "Hostile Witness A Critical Analysis of Key Aspects Hitherto Ignored In Indian Law", Available at: www.legalserviceindia.com/articles/host.htm.

hostility. Though, the issue finds place in few legislative provisions, but they do not provide any concrete solution to curb the menace of hostility of witnesses. Common Law provides for a more efficient check on hostility of witnesses. Provisions concern to witness protection scheme and refraining witnesses from resiling from their previous testimonies by declaring them 'hostile animus' are pioneers amongst other prudent facets of common law which may be borrowed and inculcated by the Indian legal system.¹³ A glaring flaw in this shaky criminal justice system that frequently frustrates Courts is the loss of crucial testimony that prevents the prosecution from proving its case because a witness has turned hostile. Few witnesses voluntarily agree to help the investigating agencies by providing truthful testimony because of the obnoxious attitude of system functionaries and crime perpetrators towards witnesses. It is imperative to first analyze a witness' role and importance in a criminal proceeding and then identify the factors responsible for turning a witness hostile.¹⁴

II. CONCEPT OF HOSTILE WITNESS

The term 'hostile witness' is nowhere defined in any Indian Criminal laws like the Indian Penal Code, the Indian Evidence Act, 1872, the Code of Criminal Procedure, 1973 or any other law. Because there was disagreement among the writers of the Evidence Act on the definitions of the terms "adverse", "unwilling" and "hostile" none of those terms were used in the finalized version of the Act, the complete discretion is left over the Court to declare a witness as hostile. A witness is considered adverse when in the opinion of the Judge; he bears a hostile mentality to the party who has called him and not merely when his testimony contradicts his proof.¹⁵ Historically, the term hostile witness seems to have its origin in Common Law. The term 'hostile witness' was firstly introduced in the common law to provide adequate safeguard against the "contrivance of an artful witness", who willfully by his hostile evidence ruin the case of the party calling such a witness. Such actions hamper not only the interest of the litigating parties, but also the quest of the Courts to meet the ends of justice. The safeguard as envisaged under the common law, consisted of contradicting witness with their previous statements or impeaching their credit (which normally as a rule was not allowed) by the party calling such witnesses. To initiate the safeguard, it was imperative to declare such a witness "hostile". For this purpose, common law, laid down certain peculiarities of a 'hostile' witness, such as, not desirous of telling the truth at the instance of the party calling him or the existence

¹³ Swapnesh Warg, "Witness Protection Law vis-a-viz Hostile Witness", Available at: jurisonline.in/2010/05/witness-protection-law-vis-a-vis-hostile-witness-2/.

¹⁴ Law Commission of India, 185th Report on Review of the Indian Evidence Act, 1872' Part-III A (Mar, 2003), Available at www.lawcommissionofindia.nic.in/reports/185thReport-PartIIIA.pdf

¹⁵ Arti Ajit, "Hostile Witness: Not Sufficient to earn acquittal", 191 Cri.L.J. (2008).

of a “hostile mentality” to the party calling such a witness.¹⁶

Sir James Fitzjames Stephens defined a hostile witness “as one who is not desirous of telling the truth at the instance of the party calling him.” This definition is useful because it makes no assumptions as to the motive for the witness’ lack of co-operation. It does not talk of a hostile animus etc. but nearly proceeds on what can be gauged from the witness demeanor. Generally a witness is labelled as hostile, when he furnishes a certain statement on his knowledge about commission of a crime before the police but refutes it when called as witness before the Court during the trial.¹⁷ A hostile witness is also defined as a witness in a trial who testifies for the opposing party or a witness who offers adverse testimony to the calling party during direct examination.¹⁸ A hostile witness technically is an “adverse witness” in a trial who is found by the Judge to be hostile (adverse) to the position of the party whose attorney is questioning the witness, even though the attorney called the witness to testify on behalf of his/her client.¹⁹

III. JUDICIAL PRECEDENTS

Indian judiciary in various cases has tried to conceptualize the concept of hostile witness, some are mentioned below;

In the case of **Sat Paul v. Delhi Administration**,²⁰ the Hon’ble Supreme Court observed:

...to steer clear controversy over the meaning of hostile witness, adverse witnesses, unfavorable witness which had given rise to considerable difficulty and conflict of opinions, the authors of the IEA 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 party is not conditional on the witness being declared adverse or hostile.

In the case of **Gura Singh v. State of Rajasthan** ²¹, the Hon’ble Supreme Court has defined the concept of hostile witness as one “who is not desirous of telling the truth at the instance of one party calling him”.

¹⁶ Ibid supra note No.12.

¹⁷ In Oxford Dictionary the word ‘Hostile’ is defined as “very unfriendly or aggressive and ready to argue or fight”. This is a Latin origin word derived from “hostlis”, from “hostis”, means enemy. Available at: Oxford Dictionary 17th edition.

¹⁸ Available at: http://en.wikipedia.org/wiki/Hostile_witness.

¹⁹ Available at: <http://dictionary.law.com>.

²⁰ Sat Paul v. Delhi Administration, (1976 Cri. LJ 295).

²¹ Gura Singh v. State of Rajasthan, (2001Cri. LJ 487).

In the case of **Panchanan Gogoi v. Emperor**²², it was observed that, a hostile witness is one who from the manner in which he gives evidence shows that he is not desirous of telling the truth to the court. Within which is included the fact that he is willing to go back upon previous statements made by him.

Similarly, In the case of **R. K. Dey v. State of Orissa**²³, it was held that a witness is not necessarily hostile, if he is speaking the truth and his testimony goes against the interest of the party calling him. A witness's primary allegiance is to the truth and not to the party calling him. Hence, unfavorable testimony does not declare a witness hostile. Hostility is when a statement is made in favour of the defence due to enmity with the prosecution.

The inference of the hostility is to be drawn from the answer given by the witness and to some extent from his demeanor. So, a witness can be considered as hostile when he is antagonistic in his attitude towards the party calling him or when he conceals his true sentiments and does not come out with truth and deliberately makes statements which are contrary to what he stated earlier or is expected to prove. When a prosecution witness turns hostile by stating something which is destructive of the prosecution case, the prosecution is entitled to request the Court that such witness be treated as hostile.²⁴

IV. CAUSES OF WITNESS HOSTILITY

A hostile witness not only weakens the prosecution's version by revoking vital testimonies which could be used to establish the guilt of the accused, but also contributes to miscarriage of justice upon subsequent acquittal of accused. It is therefore vital to identify the factors that persuade a witness to turn hostile. Common factors for hostility can be summed up as follows:

- i) Major Lacuna in present Criminal Justice System in Protecting Witnesses.
- ii) Criminal Intimidation and threat to Witnesses by accused and his family.
- iii) Inducement to the witnesses to adduce the evidence in the Court is also one of the reasons of the hostility of witness. Inducement means to induce the witness either by offering money or any bait to change the statement or to retract the statement by turning hostile.
- iv) The rule of practice is that an eye witnesses and other witnesses have to be summoned once, and they should be examined on the same date, but now in spite of several

²² Panchanan Gogoi v. Emperor, (AIR 1930 Cal. 276 & 278).

²³ R. K. Dey v. State of Orissa (AIR 1977 SC 170).

²⁴ G. S. Bakshi v. State, (AIR 1979 SC 569).

attendances, the witnesses are not examined due to delaying tactics of the lawyer of the accused.

- v) Stock/Habitual witnesses are individuals of a certain type who have poor character and credentials, but are willing to testify for the police when true witnesses are hard to come by.
- vi) Lack of adequate facilities in Courts and Court premises.
- vii) Default in payment of allowances and other facilities to witnesses.
- viii) Rude and negligent behaviour of Police towards witness and their family members.
- ix) The main aim of the criminal legislation is to do justice to the victim of crime by penalizing the accused. Legislation rest on the fundamental principle that witness is an instrument of providing justice to the victim and penalizing accused. However, it is quite surprising to note that sometimes such legislation favors the hostility of witness.

V. CONCLUSION

Thus, a hostile witness, is also called as an adverse witness, who weakens the case of that side who has presented him as a witness in the court of law, the witness is supposed to support that party/prosecution, but instead of supporting the said party/prosecution, the witness resile from his previous statement or change his version. The evidence of such witness “ruins the case” of the party calling such witness. In such a case, moreover, it is the attorney who asks the Judge to declare the witness a hostile witness. Thus, it is the Court and no other than the Court has authority to declare a witness a hostile witness. It has to be remembered here that the Court cannot by itself declare a witness a hostile witness, but it can do so only on the request made by the prosecution. If a witness has been declared a hostile witness, by the Court of law, the attorney then has greater freedom in questioning the hostile witness. To curb this menace the present laws, have to be reformed with present situation and stringent laws have to be framed for protection of witnesses and from tampering the evidence. As a result, the present adversarial system in India has to be strengthened and changed by incorporating some aspects of the inquisitorial system, as suggested by the committee led by Hon. Justice Malimath in their report.
