CHAPTER V
JUDICIAL APPROACH TOWARDS VICTIMOLOGY UNDER THE INDIAN CRIMINAL JUSTICE SYSTEM.

It is not only the legislature, which has recognized the victims and Victimology as a part of the Indian Criminal Justice System. But also the Higher Judiciary particularly Supreme Court, which has changed the interpretation of provisions of Cr.P.C 1973 to include victims as a part of Indian Criminal Justice System including their right to participate in the trial of the accused.

This chapter shall, therefore, discuss the recognition of rights of victims as a part of trial and their right to “fair trial” etc by Higher Judiciary, which has in the recent times an emerging role of Victimology in the Indian Criminal Justice System. But, before discussing this new emerging trend, a brief reference to the traditional approach of the Judiciary towards rights of the victims is necessary in order to discuss the new approach of the judiciary towards victims of crime.

I. Traditional Judicial approach towards participation of victims in criminal proceedings against the accused

The C.r.P.C 1898 followed by C.r.P.C 1973 as is in force today, provides for a comprehensive procedure for trial of criminal cases in India and the relevant sections of
Cr.P.C 1973, have been referred earlier in chapter III. The law is, however, absolutely silent regarding the rights of the victims to either conduct the trial or even the right of being heard by the criminal Court trying an accused.

The traditional judicial approach towards the rights of the victims, had been that they cannot participate in the trial as it should not become the personal vendetta of the victim and criminal prosecution should not be used for wrecking personal vengeance by the victim. In other words, if the victim is allowed to participate in the trial, it will become his personal vendetta thereby denying the accused a “fair trial.”

A perusal of some judicial decisions will highlight the aforementioned Judicial approach towards the victims of crime in the criminal proceedings.

(a) Firstly the case of *Thakur Ram Vs State of Bihar.*

In this case, the Public Prosecutor moved an application for amending the charge before the trial Magistrate by incorporating two more offences exclusively triable by Court of Sessions and prayed that the case be committed to Court of Sessions. The said application was, however, rejected by the Magistrate. The said order passed by the Magistrate was not challenged by the prosecution. The informant, however, challenged the said order of the Magistrate before the Sessions Court.

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1 AIR 1966 SC 911
u/s. 435 of Cr.P.C. 1898. The Sessions Judge directed the Magistrate to commit the case to the Court of Sessions. The said order was challenged by the accused before the High Court. But he did not succeed before the High Court, which upheld the order of the Sessions Judge. The accused, thereafter, approached the Supreme Court invoking its jurisdiction for appeal by special leave under Article 136 of the Constitution. The Supreme Court after analyzing the provisions of C.r.P.C 1898 as were then applicable, held that in a case proceeded on a police report, a private party has really no locus standi.

(b) The afore stated legal position as laid down in Thakur Ram’s case was reiterated by the Supreme Court in the case of A.K. Subbaiah Versus State of Karnataka and others. The brief facts of the case was that the appellant was accused for the commission of an offence u/s 500 IPC for defaming the Director General of Police of State of Karnataka and the Chief Minister of Karnataka. After the filing of the complaint, the trial Court took cognizance of the same and issued process to the appellants, who were accused persons therein. Against the issue of process, the appellants approached the High Court in a Revision Petition u/s 397 and 401 Cr.P.C. In

the said Revision, Director General of Police and Chief Minister of Karnataka were impleaded as respondents. But High Court deleted their names. Aggrieved by the said order, he approached the Supreme Court. The Supreme Court by referring to Section 397 and 401 Cr.P.C. 1973 upheld the deletion of the names of Director General of Police and Chief Minister of Karnataka as respondents. It summarized the in Para 12 that -

It is not in dispute that these two respondents 2 and 3 were not parties before the Court below. Learned counsel for the appellants contended that the proceedings have been launched by the State Government on behalf of the respondent no 2 and therefore, indirectly respondent no 2 being the complainant is a party to the proceedings. That is too tall a proposition. The prosecution is launched by the State Government and before the Court below i.e. the trial Court the only parties are the petitioner's, who are accused persons and the State Government which stands in the place of a complainant. There are prosecution witnesses and there may even be defendant witnesses. But, the witnesses are not parties to the proceedings and admittedly these two respondents, who have been deleted by the impugned order of the High Court were not parties.

A mere reading of the aforesaid proposition of law, shows that the Court went by the traditional notions to hold that a "private party" has no right to participate in criminal cases instituted on a police report. It was influenced by the apprehension that a trial may not
become a personal vengeance of the aggrieved person/private party, if they are allowed to participate in the trial proceedings.

Perhaps, this traditional notion had time and again kept victims out of proceedings of criminal Courts, inspite of being actually affected by commission of the offence. This traditional belief was due to the fact that the accused persons, during British rule were subjected to serious prejudice. However, even after independence this traditional belief and prejudice towards the victims of crime, continued for a long period of time.

II. New Judicial approach towards participation of victims in criminal proceedings-

(a) Right of hearing in case of filling of the closure report-

However, the aforesaid traditional approach of the judiciary towards the rights of the victims of crime to participate in criminal proceedings in the trial Courts, changed with the later decision of the Apex Court in Bhagwant Singh Vs. Commissioner of Police. 3

In this case, Justice Bhagwati writing for the bench held that the informant must be heard by the Magistrate, if he decides not to proceed against the

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3 AIR 1985 SC 1285
accused as he is always interested in the decision of the case.

The brief facts of the case were that the deceased Gurinder Kaur died due to burn injuries received by her and allegedly to have been caused by her husband and her in-laws. The circumstances in which, the deceased died an unnatural death were investigated by the C.B.I., which submitted its report before the Metropolitan Magistrate after investigating stating that in its opinion, no offence was committed.

At the time of consideration of the said report, the father of the deceased moved an application for a right of hearing, which was not opposed by the CBI but was opposed by the accused. The question before the Supreme Court was regarding the right of a person other than the accused to be heard at the time of consideration of the report by the Magistrate.

The Supreme Court gave a new dimension to the concept of Victimology in Indian Criminal Justice System by recognizing right of hearing of the victims, before the Magistrate at the time of consideration of closure report. The Court drew inference from Section 173 (2) (i) C.r.P.C 1973, to hold that the informant has the right to know the action taken on the FIR lodged in his report. It was held in Para 3 of the judgment that-
It will be seen from the provisions, to which we have referred in the preceding paragraph that, when an informant lodges the first information report with the officer-in-charge of a police station, he does not fade away with the lodging of the first information report. He is very much concerned with, what action is initiated by the officer in charge of the police station, on the basis of in the First Information report lodged by him. No sooner he lodges, the FIR, a copy of it has to be supplied to him free of cost u/s.154(2) Cr.P.C. If notwithstanding the first information report, the officer in charge of a police station decides not to investigate the case on the view that there is no sufficient ground for entering an investigation, he is required the notify u/s. sub-section 2 of Section 157, the informant the fact that he is not going to investigate the case or cause it to be investigated. Then again, the officer in charge of a police station is obligated under subsection 2(ii) of 173 to communicate the action taken by him to the informant and the report forwarded by him to the Magistrate under sub-section 2(i) has, therefore, to be supplied by him to the informant. The question immediately arises as to why action taken by the officer in charge of a police station on the first information report, to be communicated and report forwarded to the magistrate under section 2 (i) of 173 required to be supplied to the informant. Obviously, the reason is that informant, who sets the machinery of investigation into motion by filing the first information report, must know what is the result of the investigation initiated on the basis of the first information report. The informant having taken the initiative in lodging the first information report with a view to initiate investigation by the police for the purpose of ascertaining, whether any offence has been committed and if so by whom, is vitally interested in the result of the investigation
and hence the law requires that the action taken by the officer in charge of a police station on the first information report, be communicated to him and the report forwarded by such officer to the Magistrate u/s. 2 (1) of Section 173, should also be supplied to him.

The traditional approach of the Courts, had been that accused and the State are the only parties to criminal proceedings and the victim or the informant has no right in such proceedings. However, in this case, the informant may be the victim or anybody else have been given a right of hearing before the Magistrate, if he decides to drop the proceedings against the accused person. The Apex Court summarized this new trend in the following words in Para 4 of the judgment -

But if the Magistrate decides that there is no sufficient ground for proceeding further and drops the proceedings or takes the view that though there is sufficient ground for proceeding against some, there is no sufficient ground for proceeding against others mentioned in the first information report, the informant would certainly be prejudiced because the first information report lodged by him would have failed of its purpose wholly or in part. Moreover, when the interest of the informant in prompt and effective action being taken on the first information report lodged by him is clearly recognized by the provisions contained in sub-section(2) of section 154, sub-section (2) of section 157 and subsection 2(ii) of section 173, it must be presumed that the informant would equally be interested in seeing that the magistrate takes cognizance of the offence and issue process because that would be culmination of the first information report lodged
by him. There can, therefore, be no doubt that when on a consideration of the report made by the officer in charge of a police station u/s. 2(i) of section 173, the Magistrate is not inclined to taken cognizance of the offence and issue process, the informant must be given an opportunity of being heard so that he can make his submissions to persuade the Magistrate to take cognizance of the offence and issue process. We are accordingly of the view that in a case where the Magistrate to whom a report is forwarded u/s 2(1) of Section 173, decides not to take cognizance of the offence and drop the proceedings or takes the view that there is no sufficient ground for proceedings against some of the persons mentioned in the first information report, the Magistrate must issue notice to the informant and provide him an opportunity of being heard at the time of consideration of the report.

The respondent State argued before Apex Court that doing so might unnecessary delay proceedings due to non-effecting of service on the informant. However, the Apex Court being very concerned about right of the informant of being informed about fate of his FIR, rejected this contention of the respondent State and held further in Para 4 of the judgment that -

It was urged before us on behalf of the respondents that if in such a case, notice is required to be given to the informant, it might result in unnecessary delay on account of the difficulty in effecting service of the notice on the informant. But we do not think, this can be regarded as a valid objection against the view we are taking because in any case, the action taken by the police of the FIR information report, has to
be communicated to the informant and a copy of this report has to be supplied to him under section (1) of Section 173 and if that be so, we do not see any reason why it should be difficult to service notice to the consideration of the report to the informant. Moreover, in any event, the difficulty of the service of notice on the informant cannot possibly provide any justification for depriving the informant of the opportunity of being heard at the time of when the report is considered by the Magistrate.

Interestingly, the Apex Court held that there is no obligation on the Magistrate to issue notice to the injured person or to a relative of the deceased. But, still gave them a right of appearance and participation in the proceedings before a Magistrate, at the time of consideration of the report not disclosing the commission of a cognizable offence. It was held in Para 4 of the judgment that -

The position may, however, be different when we consider the question whether the injured person or a relative of the deceased, who is not the informant, is entitled to notice when the report comes up for consideration of the Magistrate. We cannot spell out either from the provisions of Cr.P.C 1973 or from the principles of natural justice, any obligation on the Magistrate to issue notice to the injured person or to a relatives of the deceased for providing such person an opportunity of being heard at the time of consideration of the report, unless such person is the informant, who has lodge first information report. But even if such person is not entitled to nctice from the Magistrate, he can appear before the Magistrate and make his submissions when the report is considered by the Magistrate for the
purpose of deciding what action should be taken on the report. The injured person or any relative of the deceased though not entitled to notice from the Magistrate has locus to appear before the Magistrate at the time of consideration of the report, if he otherwise comes to know that the report is going to be considered by the Magistrate and if he wants to make submissions in regard to the report, the Magistrate is bound to hear him. We may also observe that even though the Magistrate is not bound to give notice of hearing fixed for consideration of the report to the injured person or to any relative of the deceased he may in exercise of his discretion if he so thinks fit give such notice to the injured person or to any particular relative of the deceased but not giving of such notice will not have any invalidating effect on the order which may be made by the Magistrate on a consideration of the report.

In the aforesaid decision, the Supreme Court did not use the term “victim” or “Victimology,” but the ratio of the judgment pointed out that the victim or to say the concept of Victimology started getting recognition by the Apex Court. Perhaps, this decision became the benchmark for the future growth of Victimology and its emerging role in the Indian Criminal Justice System, as is apparent from judicial decisions mentioned hereinafter.

(b) Right of hearing of the victims in quashing proceedings-

The Supreme Court had recognized the right of the victims to be heard before a Magistrate, before acceptance of the closure report in Bhagwant Singh's case. However,
a full bench of the Allahabad High Court in the case of *Satya Pal Vs State of U.P* 4 in a different context, widened it to include the right to appear before High Court in a petition filed by the accused seeking quashing or the criminal proceedings.

The brief facts of the case were that the accused petitioner's filed a writ petition before the Allahabad High Court for quashing of the FIR registered under section 420,467,468 and 471 IPC. One of the question before the full Bench of the High Court, was, whether in a cognizable case if the accused comes up with a petition before High Court seeking one or the other relief, the informant should be made a party or not before any final order is passed.

The full bench of the Allahabad High Court held that the informant would be vitally affected, if the FIR is quashed and should be afforded an opportunity to defend it by rebutting his prayer for the quashing. The full bench summarized the legal position in the judgment as follows-

Therefore, in view of the provision of the provision referred to above and also in view of the law laid down by the Apex Court in the case of Bhagwant Singh vs. Commissioner of police (supra),the respondents having reported the offence to the police under section 154 of the Code, has not only the right to know its result or outcome the investigation made on his information but also a

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4 2000 Cr.l.J 569( All)
right to insist for effective and fair investigation. Therefore, having considered the submissions made by the parties through their respective counsel and also having examined various provisions of the code and the law laid down by the Apex Court, it is hereby held that where an accused seeks quashing of the FIR regarding cognizable offence by invoking writ jurisdiction, the informant should be afforded an opportunity of hearing before passing the final order.

The rights of the victims and their plight was also acknowledged and given due recognition by Supreme Court though in a different context in the case of *State of Gujarat Vs. Hon'ble High Court of Gujarat.*

The Supreme Court held that prisoner’s should be paid equitable wages for the work done by them. However, Supreme Court not only considered this issue but went ahead and highlighted the plight of the victims of crime. It was held in Para 46 of the judgment -

One area, which is totally overlooked in the above practice is the plight of the victims. It is a recent trend in the sentencing policy listen to the wailings of the victims. Rehabilitation of the prisoner need not be done, by closing the eyes towards the suffering of victims of the offence. A glimpse at the field of Victimology, reveals two types of victims, first type consists of direct victims i.e. those who are alive and suffer on account of the harm inflicted by the prisoner, while committing the crime. The second type comprises of indirect victims, who are dependents of the direct victims

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of crime, who undergo sufferings due to deprivation of their bread winner.

While referring to Section 357 of Cr.P.C 1973, which provides for payment of compensation, the Supreme Court suggested the State to frame a law to provide for certain deduction out of the wages earned by the prisoners to be paid as compensation to the victims of crime.

Justice P. Wadhwa while giving his separate and partly concurring judgment also highlighted the plight of the victims and the need to look after their rights. His Lordships observed in Para 99 of the judgment that

In our efforts to look after and protect the human rights of the convict, we cannot forget the victim or his family in case of his death or who is otherwise incapacitated to earn his livelihood because of criminal act of the convict. The victim is certainly entitled to reparation, restitution, and safeguard of his rights. Criminal justice would look hollow if justice is not done to the victims of the crime. Subject of Victimology is gaining ground, while are the also concerned with the rights of the prisoners and prison reforms. A victim of crime cannot be a "forgotten men" in the criminal justice system. It is who, has suffered the most. His family is ruined particularly in the case of death and other bodily injury. This is apart from the factors like loss of reputation, humiliation etc. An honour, while is lost or life or life, which is sniffed out cannot be recompensed but then monetary compensation will at least provide some solace.
The Supreme Court in this case acknowledged the emerging role of Victimology and the rights of the victims for reparation etc by the offender in the Indian Criminal Justice System.

Perhaps, ignoring the victims of crime for a long period of time while over emphasizing the rights of the accused persons and convicts at the same time, had proved to be counter productive: The accused persons mis-used their constitutional and legal rights to circumvent the course of criminal justice delivery system resulting in injustice to the victims of crime. The victims were ignored on the other hand, due to which the Supreme Court emphasized the need to look towards the victims also and their rights.

(c) Right to participate in the trial of the accused

The rights of a victim to be a part of the criminal proceedings was further acknowledged in a wider sense by the Supreme Court with the decision in the case of M/s J.K. International Vs. State (Govt. of NCT of Delhi) & Ors. 6

In this case, the victim filed a complaint before the police stating that the respondents No.2 and 3 (accused before the trial Court) had committed the offence of

6AIR 2001 SC 1142.
criminal breach of trust and cheating. As he felt that no action was being taken by the police on his complaint, he approached Delhi High Court in a writ petition. But, before the High Court could decide the said writ petition, an FIR was registered by the police. Thereafter, the accused persons approached the High Court in a writ petition for quashing the criminal proceedings initiated against them on the basis of the complaint lodged by the complainant/victim. But the victim, who had been cheated by the accused person's was not made a party in the Writ Petition filed before the High Court. As such, the victim/complainant approached the High Court for being impleaded as a respondent in the petition filed by accused persons for quashing of criminal proceedings. However, High Court rejected the plea of complainant/victim for impleadment in a petition filed by accused persons for quashing proceedings by relying upon judgment of Supreme Court in Thakur Ram's case.

Aggrieved by the decision of High Court not impleading victim as a respondent, the victim approached the Supreme Court in appeal, which did not agree with the decision of High Court. The three Judges bench of Supreme Court also did not agree with observations in Thakur Ram's case made by the Court, way back in the year 1966.
Obviously, the experience of working of the criminal Courts in all these years was one of the reasons for the Supreme Court to change its approach towards the victims of crime. The Supreme Court recognized the right of the victims to participate in the trial proceedings. It held that the scheme envisaged in the Code of Criminal Procedure indicates that a person, who is aggrieved by the offence committed, is not altogether wiped all together from the scenario of the trial merely because the investigation was taken over by the police and a charge sheet is filed. Even, the fact that the Court concerned had taken cognizance, is not sufficient to debar the victim from reaching the court for ventilating his grievance. Even in the Sessions Court, where the Public Prosecutor is the only authority empowered to conduct the prosecution of the accused as per the section 225 Cr.P.C, a private person, who is aggrieved is also not altogether barred from participating in the trial of the accused. It was held in the Para 11 and 12 of the judgment as follows:

Para 11. In view of such a scheme as delineated above, how can it be said that the aggrieved private persons must keep himself outside the corridors of the Court, when the case involving his grievance regarding the offence alleged to have been committed by the persons arrayed as accused is tried or considered by the Court. In this context, it is appropriate to mention that when the trial is before a Magistrate Court, the scope of any other private person intending to participate in the conduct of the prosecution is still wider. This can
be noticed from Section 302 of the Code which reads thus:

(1) Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than a police officer below the rank of Inspector; but no person, other than the Advocate-General or Government advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission:

Provided that no police officer shall be permitted to conduct the prosecution if he has taken part in the investigation into the offence with respect to which the accused is being prosecuted.

(2) Any person conducting the prosecution may do so personally or by a pleader.

Para 12. The private person, who is permitted to conduct prosecution in the Magistrate's Court can engage a counsel to do the needful in the Court in his behalf. In further amplifies the position that if a private person is aggrieved by the offence committed against him or against any one in whom he is interested, he can approach the Magistrate and seek permission to conduct the prosecution by himself. It is open to the Court to consider his request. If the Court thinks that the cause of justice would be served better by granting such permission, the Courts would generally grant such permission. Of course, this wider amplitude is limited to Magistrates Courts, as the right of such private individual to participate in the conduct of prosecution in the Sessions Court is very much restricted and is made subject to the control of the Public Prosecutor. The limited role which a private person can be permitted to play for prosecution in the Session Court has been
adverted to above. All this would show that an aggrieved private person is not altogether to be eclipsed from the scenario when the criminal Court takes cognizance of the offences based on the report submitted by the police. The reality cannot be overlooked that the genesis in almost all such cases is the grievance of one or more individual that they were wronged by the accused by committing offences against them.

The aforesaid decisions of the Supreme Court proved to be a new era for the emerging role of Victimology in the Indian Criminal Justice System. These decisions recognized the following rights of a victim of crime namely:

i. The right of being informed about investigation by police.

ii. The right to participate in the trial of the accused.

iii. The right to engage a lawyer and conduct the prosecution of the accused, with the prior permission of the court.

iv. The reality of the victim being actually affected by the commission of the offence cannot be overlooked.

V The right of hearing before the High Court in the quashing proceedings initiated by the accused.

**III) New approach towards victims of sexual offences**-

While there was a change in general approach of the Supreme Court and High Court's towards victims of
crime, their problems and their right to seek justice, there has been specific change in the approach towards the problems of victims of sexual offences. Some of the judicial decisions in this regard will highlight, as to how the Judiciary has dealt with various problem of the victims of sexual offences and changing Judicial approach towards them--

(a) General directions regarding assistance to victims of sexual offences-

Firstly, the case of Delhi Domestic Working Women's Forum Vs. Union of India. In this case, some army jawans had been accused of raping 6 women, while travelling in a train. Appropriate action as per law was not initiated against them. The question before the Supreme Court was regarding the problems faced by the victims of sexual offences during investigation and trial. After discussing the various problems faced by victim of sexual assault, the Supreme Court issued the following guidelines In Para 15 of the judgment that-

15 (1) The complainant's of sexual assault cases, should be provided with legal representation. It is important to have someone who is well acquainted with the criminal justice system. The role of the victim's advocate would not only be to explain to the victim the nature of the proceedings, to prepare her for the case and to assist her in the police station and in Court but to provide her with

7 (1995) 1 SCC 14
guidance as to how she might obtain help of a different nature from other agencies, for example, mind counseling or medical assistance. It is important to secure continuity of assistance by ensuring that the same person who looked after the complainant's interests in the police station represents her till the end of the case.

(2) Legal assistance will have to be provided at the police station, since the victim of sexual assault might very well be in a distressed state upon arrival at the police station, the guidance and support of a lawyer at this stage and whilst she was being questioned would be of great assistance to her.

(3) The police should be under a duty to inform the victim of her right to representation before any questions were asked of her and that the police report should state that the victim was informed.

(4) A list of advocates willing to act in these cases should be kept at the police station for victims, who did not have a particular lawyer in mind or whose own lawyer was unavailable.

(5) The advocate shall be appointed by the Court, upon application by the police at the earliest convenient moment, but in order to ensure that victims were questioned without undue delay, advocates would authorized to Act at the police station before leave of the Court was sought or obtained.

(6) In all rape trials anonymity of the victim must be maintained, as far as necessary.

(7) It is necessary, having regard to the Directive principles contained under Article 38(1) of the Constitution of India to set up Criminal Injuries Compensation Board. Rape victims frequently
incure substantial financial loss. Some, for example, are too traumatized to continue in employment.

(8) Compensation for victims shall be awarded by the Court on conviction of the offender and by the Criminal injuries Compensation Board whether or not a conviction has taken place. The Board will take into account pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of child birth if this occurred as a result of the rape.

(b) Sensitive Judicial approach towards victims of sexual offences-

The Supreme Court has not only emphasized the need to provide proper legal assistance to the victims of sexual offences and their rehabilitation, but has also emphasized upon the need for the trial Courts trying such offences to be more sensitive towards victims of such offences. It is no doubt that an offence of rape besides a dehumanizing act, is an unlawful intrusion on the right of privacy and sanctity of a female. It is a serious blow to her honour and offends her self-esteem and lowers her dignity in the eyes of the other members of the society. The offence of rape not only causes physical harm but also leaves mental scar on her. Keeping in view such plight of the victims of sexual offences, the Supreme Court in the case of *State of Punjab Vs. Ram Dev Singh*⁸ had observed in Para 1 of the judgment that

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⁸ (2004) 1 SCC 421
Sexual violence apart from being a dehumanizing act, is an unlawful intrusion on the right of privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity. It degrades and humiliates the victim and where the victim is a helpless innocent child or a minor, it leaves behind a traumatic experience. A rapist not only causes physical injuries but more indelibly leaves a scar on the most cherished possession of a woman i.e. her dignity, honour, reputation and not the least her chastity. Rape is not only a crime against the person of a women, it is a crime against the entire society. It destroys, as noted by this Court in Bodhisattwa Gautam v. Subhraj Chakraborty the entire psychology of a woman and pushes her into deep emotional crisis. It is a crime against basic human rights, and is also violative of the victim’s most cherished of the fundamental rights, namely, the right to life contained in Article 21 of the Constitution of India. The Courts are, therefore, expected to deal with cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely. A socially sensitized judge, in our opinion, is a better statutory armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and provisos.

(c) Non-mentioning of the name of victim of sexual offence

Not only this, the Apex Court has even directed that the name of the victim of sexual offence should not be mentioned in the judgment of either the Supreme Court, High Courts or the Trial Courts and they should be referred only as “Victims”. In the case of State of
Karnatka Vs Puttaraja, the Supreme Court specifically directed for non-mentioning the name of a victim of sexual offence and held in Para 2 of the judgment that-

We do not propose to mention name of the victim. Section 228-A of IPC makes disclosure of identity of victim of certain offences punishable. Printing or publishing name of any matter which may make known the identity of any person against whom an offence under Section 376, 376-A, 376-B, 376-C or 376-D is alleged or found to have been committed can be punished. True it is, the restriction, does not relate to printing or publication of judgment by High Court or Supreme Court. But keeping in view the social object of preventing social victimization or ostracism of the victim of a sexual offence for which Section 228-A has been enacted, it would be appropriate that in the judgments, be it of this Court, High Court or lower Court, the name of the victim should not be indicated. We have chosen to describe her as ‘victim’ in the judgment.

(d) Supreme Court’s caution against un-merited acquittals-

Moving a step ahead, the Supreme Court has been very much concerned about un-merited acquittals of the accused persons in sexual offences resulting in more harm and harassment to the victims in such cases.
In the case of *State of Punjab Vs. Ram Dev Singh* 10 the Supreme Court dealt with an appeal filed by the State of Punjab challenging the acquittal of the accused person in appeal preferred by him before the High Court. The High Court relied upon the evidence of the doctor that there were signs of previous sexual intercourse on the body of the victim and rejected the testimony of the victim on this ground for acquitting the accused. The Supreme Court took a strong view of such findings of the High Court and observed that in Para 13 of its judgment that-

Another factor, which seems to have weighted with the High Court, is the evidence of the doctor PW 2 that there were signs of previous sexual intercourse on the victim. That cannot, by any stretch of imagination, as noted above, be a ground to acquit an alleged rapist. Even assuming that the victim was previously accustomed to sexual intercourse, that is not a determinative question. On the contrary, the question which was required to be adjudicated, was did the accused commit rape on the victim on the occasion complained of. Even if it is hypothetically accepted that the victim had lost her virginity earlier, it did not and cannot in law give license to any person to rape her. It is the accused, who was on trial and not the victim. Even if the victim in a given case has been promiscuous in her sexual behavior earlier, she has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone.

10 (2004) 1 SCC 421
The Supreme Court expressed it anguish over the High Courts, relying upon irrelevant considerations for acquitting the accused persons, to hold that such unmerited acquittal result in more harm to the society and victims in particular. It was held in Para 16 that-

The High Court was not justified in reversing the conviction of the respondent and recording the order of acquittal. An unmerited acquittal does no good to the society. If the prosecution has succeeded in making out a convincing case for recording a finding as to the accused being guilty, the Court should not lean in favour of acquittal by giving weight to irrelevant or insignificant circumstances or by resorting to technicalities or by assuming doubts and giving benefit thereof where none reasonable doubt and not an excuse for a finding in favour of acquittal. An unmerited acquittal encourages wolves in the society being on the prowl for easy prey, more so when the victims of crime are helpless females or minor children. The Courts have to display a greater sense of responsibility and to be more sensitive while dealing with charges of sexual assault on women, particularly of tender age and children.

In yet another earlier decision in *Nollabothu Venkaih Vs. State of Andhra Pradesh* \(^{11}\) the Supreme Court had expressed its displeasure against wrong acquittal of the accused, resulting in people losing their confidence in Criminal Justice System and their tendency to settle their personal scores by use of muscle power. The serious concern of Supreme Court was in view of the

\(^{11}\) AIR 2002 SC 2945
factual matrix of the case, wherein 16 accused persons were charged and tried by Court of Session u/s 302 r/w Section 149 IPC and Section 3 & 5 of the Explosives Act for exploding bombs and causing murderous attack on the deceased. The trial Court convicted some of the accused persons.

However, in appeal the High Court acquitted 6 of the accused persons on the ground that public witnesses were inimical towards them and as such their evidence could not be relied upon for convicting the accused. When one of the accused persons filed appeal before the Supreme Court, the court expressed its anguish over wrong acquittal of some of the accused persons by the High Court.

The Supreme Court did not use the term “Victim” as the same was not very much in use in those days in Indian Criminal Justice System. But it pointed out the effect of wrong acquittal of an accused person and held in its judgment that-

It must be borne in mind the Criminal Justice System must be alive to the expectations of the people. The principle that no innocent man should be punished is equally applicable that no guilty should be allowed to go unpunished. Wrong acquittal of the accused, will send a wrong signal to the society. Wrong acquittal has its chain reactions. The law breakers would continue to break the law with impunity. People then would
lose confidence in criminal justice system and would tend to settle their score on the street by exercising muscle power and if such situation is allowed to happen, woe would be the rule of law.

IV Recent trends regarding emerging role of Victimology

The decisions of the Supreme Court referred herein before, laid down the foundation for the recognition of the concept of Victimology and rights of the victims of crime in the Indian Criminal Justice System. The most recent trends, show that rights of the victims, have not been limited only to the right of hearing before the Magistrate or taking part in the trial of the accused before the court concerned. But have also extended to include their right to personal liberty as a victim, right to fair investigation and "fair trial" etc. The victims have also been considered for the purpose of "Fair trial", which was traditionally a concept considered regarding the accused persons. These recent trends regarding the emerging role of Victimology in the Indian Criminal Justice System can be analysed as follows:-

(a) Right to get justice as part of "personal liberty"

Article 21 of the Constitution guarantees right to life and personal liberty to all the citizens. Article 21 concerns all the citizens as Article 21 has not defined any "class of citizens," who can seek protection of this Article. However, in relation to criminal trials, the right to
personal liberty as per various decisions of the Supreme Court and High Courts has been confined to the protection of the rights of an accused. For a very long period of time, the Courts had been concerned regarding the personal liberty of an accused. But the personal liberty of a victim of crime was not noticed by the Courts.

However, a major breakthrough in this traditional approach towards the concept of “personal liberty”, came with the decision of the Bombay High Court in the case *Kalpana Vs. State of Maharashtra.* The brief facts of the case were that the accused were alleged to have out attempted to outrage the modesty of a minor girl (victim) and were prosecuted for the commission of the said offence.

However, as the prosecution did not properly pursue the case resulting in non- framing of charge against the accused for a period of two years from the date of filing of the charge sheet, the accused persons were discharged by the Trial Court. The said order of discharge was challenged by the victim, before High Court but due to absence of her counsel, the High Court heard Public Prosecutor and dismissed the petition filed by victim holding that order of the Magistrate discharging the accused could not be faulted in view of judgment of Supreme Court in common cause case.

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12 2000 (2) AICLR 368 (Bom)
The victim later on, filed a Review Petition and took the plea that she could not be held at fault for the discharge of the accused as she had gone along with her father and lodged the FIR immediately after the occurrence and the accused persons were discharged by the Magistrate because of the lapse on part of the prosecution in not pursuing the case diligently. The Public Prosecutor took the plea that the public prosecutor concerned before the trial Court had to appear in other Courts also and could not appear on every date of hearing of the case before the Magistrate concerned. But, the High Court did not accept such plea and took strong exception to the failure of the State in diligently pursuing its case against the accused, resulting in failure of its constitutional obligation. After examining the concept of "personal liberty" the High Court held in Para 15 of the judgment that-

I have no hesitation to read that it would also include within itself a guarantee against the sufferings of the victims of the crime for their inability to get justice due to the failure of the State and its functionaries to provide for prosecution of all persons, who have been responsible for committing offences.

By this decision, Bombay High Court departed from traditional concept of "personal liberty" so far as a criminal trial is concerned and also focused on "personal liberty" of the 'victim' to get justice. The High Court had
also held that the mandate of the constitution to provide fair, just and reasonable procedure was not only for the accused persons but also for the victims. It was held in Para 19 of the judgment that

Crime is legally deemed an offence against the State or the community or the public and is punishable as a deterrent to the offenders and others for the sake of public order, peace and well-being and in the interest of the society. If criminals are allowed to go Scott just because the State fails to prosecute them, it threatens the security or well-being or good order of the society. Enforcement of criminal law is a major form of social control and failure of the State to prosecute offender will only send dangerous signals in society and will uproot the very foundation of rule of law. As offences committed by persons are major disturbances of peace, order and good government, the society needs to be protected by the State which is the sole repository of these powers and if the offender is not booked for the crime committed and made to suffer retribution for harm done and expiate his moral guilt, it will lead to chaos and disorder in society as people will be forced to take law in their hands.

While directing the State to pay Rs.10,000/- as compensation to the victim the High Court held

This Court hopes that by directing the State to pay compensation to the victim of crime for its failure to prosecute the criminals, the State will take steps to come back the menace by promptly attending to the sovereign business of providing the required infrastructure so that its Criminal Justice System meets the mandate of our Constitution to provide fair, just and reasonable procedure for both the victims and the accused.
(B) Right of the victim to have fair investigation:

It has been a settled legal proposition of law that the investigating officer, having prerogative to conduct investigation into commission of a cognizable offence, should conduct a fair investigation. It is the duty of the investigating officer to conduct investigation in a manner, which does not prejudice the accused. The investigating officer is not supposed to bolster up the prosecution case, in order to seek the conviction of the accused. He should also not conceal any material or other evidence, which comes to his knowledge during the course of investigation from Court and should put all facts before trial Court concerned, whether in favour or against the accused.

However, in all these years, the victims of crimes were never a part of the concept of “fair investigation” and the concept of fair investigation had been interpreted to mean an investigation, which does not prejudice the accused. However, with the growth of Victimology in the Indian Criminal Justice System, the victim of crime have been included in it and are now held to be entitled to “fair investigation.” In the context of victims of crime, “fair investigation,” will mean an investigation, which is not biased against them and does not help the accused directly or indirectly.
The right of the victims to seek fair investigation was recognized judicially by the decision of Supreme Court in case of *Nirmal Singh Kahlon Vs. State of Punjab* \(^\text{13}\) wherein the Supreme Court held in Para 27 of the judgment that -

> An accused is entitled to “fair investigation”. Fair investigation and fair trial are committant to preservation of fundamental right of an accused under Article 21 of the Constitution of India. But the State has a larger obligation i.e. to maintain law and order, public order and preservation of peace and harmony in the society. A victim of crime, thus, is equally entitled to a fair investigation.

The Supreme Court, therefore, laid great emphasis on the right of the victims to seek ”fair investigation”. It is obvious that it is a duty of the State to maintain law and order as held by the Supreme Court. This decision clearly recognized the victims as a part of the society and will lead the way as a emerging role of Victimology in the Indian Criminal Justice System.

**(C) Victims of crime and “fair trial”**

The term “fair trial” has not been defined either in the Indian Constitution or in Cr.P.C. 1973, but it has always being interpreted in the context of an accused. The concept of “fair trial”, which flows from Article 21 of the Constitution, was introduced in Indian Criminal Justice

\(^{13}\) AIR 2009 SC 984
System, in order to ensure that an accused gets a proper and reasonable opportunity to defend himself and prove his innocence, without being prejudiced. The reason for the introduction of concept of “fair trial” in Indian Criminal Justice System, was the prejudice caused to the accused persons during British Rule, when accused persons of Indian origin, were always seen with contempt and were morally regarded to be guilty without trial.

In order to prevent such prejudice being caused to accused persons, concept of “fair trial”, was considered and introduced in Indian Criminal Justice System. But, Indian Criminal Justice System, did not function in the manner it was intended to function. Right from its inception the Indian Criminal Justice System has been accused friendly. As a result, accused persons especially those who have political connections or money power, misused the privileges and protection available to them under the trial process, in order to circumvent the entire process in their favour and misused the loop holes in the Indian Criminal Justice System to their benefits.

As a consequence, threatening of witnesses and their turning hostile, thereby not supporting prosecution case against the accused became more common. Perhaps, the problems of witnesses turning hostile has gained alarming proportions.
The circumstances referred above, led to a mockery of “fair trial” and “fair trial” of an accused became his favoured trial. It is not only accused persons, who have circumvented the entire process of trial in their favour, but the trial Courts have also been responsible up to some extent for not initiating appropriate proceedings against the accused for threatening witnesses and tampering with evidence.

As such, the Supreme Court took strong exception to the mockery being made of “fair trial” and gave a new interpretation of “fair trial”, so as to also include the interest of the “victim of crime” and the society in general. But before discussing the new interpretation of the term “fair trial” given by the Supreme Court, it is necessary to make reference to traditional Interpretation of concept of “fair trial,” which can be discussed as follows-

(i) Traditional Interpretation of “fair trial”-

As stated above, before discussing the new emerging trend of changing Judicial approach towards the victims of crime as part of the concept of “fair trial”, it is necessary to make a reference to the traditional concept of “fair trial” and the initial Judicial interpretation in this regard. The right to “fair trial” as mentioned earlier, has always been traditionally regarding to be of an accused as it is the accused, which has to face the trial before the Court concerned. As such, the right to “fair trial” of an
accused enjoys a particular status and recognition, as an integral part of the Indian Criminal Justice System. It has been generally regarded to be a compendium of various rights and privileges, that have been evolved either by legislative process or by judicial interpretation. These can be summarized to include various rights such as protection against self-incrimination, fair procedure in view of Article 21 of the Constitution, presumption of innocence, right to speedy trial, right to be represented by an advocate and protection against illegal detention etc. These can be discussed in detail as follows:

(a) Protection against self-incrimination under article 20 (3) of the constitution:

As per this Article, no person accused of an offence, shall be compelled to be a witness against himself. This Article implies that an accused, cannot be compelled to be a witness against himself and, therefore, incriminate himself. He cannot be forced to State anything against himself or produce something, which implicates him or shows his involvement in the commission of the offence in question. The protection of this article starts right from the stage of investigation and continues till the completion of the trial.

Based upon this principle, the burden of proof in criminal case always lies upon the prosecution. The prosecution is under an obligation to prove the
commission of the offence by the accused, beyond reasonable doubt. Even the Statement of the accused recorded u/s 313 Cr.P.C is recorded without oath and the accused cannot be convicted on the basis of reply given by him in the said Statement. If the prosecution fails to prove its case against the accused beyond reasonable doubt, he is held not guilty.

The wider sweep of article 20 (3) of Constitution was Stated so by the Supreme Court, in case of *Nandini Satpathy and Anr Vs. P.L. Dani*, 14 wherein it was held in Para 53 of the judgment that-

The prohibitive sweep Art. 20(3) goes back to the stage of police interrogation-not, as contended, commencing in Court only: In our judgment, the provisions of Art.20(3) and Section 161(1) substantially cover the same area, so far as police investigation are concerned. The ban on self-accusation and the right to silence, while one investigation or trial is under way, goes beyond that case and protects the accused in regard to other offences pending or imminent, which may deter him from voluntary disclosure of incriminatory matter. We are disposed to read compelled testimony as evidence procured not merely by physical threats or violence but by psychic torture, atmospheric pressure environmental coercion, tiring interrogative prolixity, overbearing and intimidatory methods and the like-not legal penalty for violation. So, the legal perils following upon refusal to answer, or answer truthfully cannot be regarded as

14 AIR 1978 SC 1025
compulsion within the meaning of Art. 20(3). The prospect of prosecution may lead to legal tension in the exercise of a silence is running a calculated risk. On the other hand, if there is any mode of pressure, subtle or crude, mental or physical, direct or indirect, but sufficiently substantial, applied by the policeman for obtaining information from an accused strongly suggestive of guilt, it becomes 'compelled testimony' violative of Art.20(3).

While interpreting the term self-incrimination in a wider context the Supreme Court further held in Para 55 of the judgment that -

We have explained elaborately and summed up, in substance. What is self-incrimination or tendency to expose oneself to a criminal charge. It is less than 'relevant' and more than 'confessional'. Irrelevance is impermissible but relevance is licit but when relevant questions are loaded with guilty inference, is the event of an answer being supplied, the tendency to incriminate springs into existence. We hold further that the accused person cannot be forced to answer, merely because the answers thereto, are not implicative when viewed in isolation and confined to that particular case. He is entitled to keep his mouth shut if the answer sought has a reasonable prospect of exposing him to imminent, even though the investigation underway is not with reference to that.

(b) Right to free legal aid -

A criminal trial under our Criminal justice System, is conducted by a Public Prosecutor or by an Assistant Public Prosecutor. Besides this, the Public Prosecutor's,
also have the assistance of the machinery of the State and all infrastructure facilities.

On the contrary, every accused person does not have sufficient means to engage a lawyer in order to defend himself. Keeping in view such situation the right to seek legal aid i.e. right to get a lawyer at State expense, was introduced by Section 304 Cr.P.C. providing legal aid to the accused in Session trials in general and other trials as and when notified by the State Government. Section 304 Cr.P.C. reads as follows:-

304. Legal aid to accused at State expense in certain cases.– (1) Where, in a trial because the Court of Session, the accused is not represented by a pleader, and where it appears to the Court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State.

(2) The High Court may, with the previous approval of the State Government, make rules providing for –

(a) The mode of selecting pleaders for defence under sub-section (1);

(b) The facilities to be allowed to such pleaders by the Courts;
(c) The fee payable to such pleaders by the Government, and generally, for carrying out the purposes of sub-section (1).

(3) The State Government may, by notification, direct that as from such date as many be specified in the notification, the provisions of sub-sections (1) and (2) shall apply in relation to any class of trials before other Courts in the State as they apply in relation to trials before the Courts of Session.

However, the right conferred on an accused to seek legal aid u/s 304 IPC, was very soon interpreted by the Supreme Court as an important component of right to "fair trial" of an accused, which has emerged from judicial interpretation of Article 21 of Constitution, thereby making it to be fundamental right available to every accused person irrespective of the offence committed.

In other words, an accused, if is not in a position to engage an advocate of his choice, is entitled to get an advocate at the expense of the State to defend him in the trial proceedings against him and this right is available upto the stage of appeal before the Supreme Court and the same is now regarded to be a fundamental right in view of the judgment of the Supreme Court in the case of
It is now well settled, as a result of the decision of this Court in Maneka Gandhi Vs. Union of India, that when Article 21 provides that no person shall be deprived of his life or liberty except in accordance with the procedure establishment by law, it is not enough that there should be some semblance of procedure provided by law, but the procedure under which a person may be deprived of his life or liberty should be 'reasonable, fair and just'. Now a procedure, which does not make available legal services to an accused person who is too poor to afford a lawyer and who would, therefore, have to go through the trial without legal assistance, cannot possibly be regarded as 'reasonable, fair and just'. It is an essential ingredient of reasonable, fair and just procedure to a prisoner, who is to seek his liberation through the Court's process that he should have legal services available to him.

By referring to article 39-A of the Constitution, which provides for equal justice and free legal aid, it was further held by the Supreme Court in Para 7 of the judgment that

This article also emphasizes that free legal service is an unalienable element of 'reasonable, fair and just' procedure for without it, a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice. The right to free legal services is, therefore, clearly

15 (1980) 1 SCC 98
an essential ingredient of 'reasonable, fair and just' procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21. This is a constitutional right of every accused person, who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so required, provided of course the accused person does not object to the provision of such lawyer.

The right to free legal aid perhaps also includes within itself, the right of being informed by the court concerned about this right as held by the Supreme Court in the case of *Khatri (II) Vs State of Bihar*¹⁶ wherein it was held by in Para 6 of the judgment that-

But even this right to free legal services would be illusory for an indigent accused, unless the Magistrate or the Sessions Judge before whom he is produced informs him of such right. It is common knowledge that about 70 per cent of people in the rural areas are illiterate and even more than that percentage of people are not aware of the rights conferred upon them by law. There is so much lack of legal awareness that it has always been recognized as one of the principal items of the programme of the legal aid movement in this country to promote legal literacy. It would make a mockery of legal aid if it were to be left to a poor ignorant and illiterate accused to ask for free legal services. Legal aid would become merely a paper promise and it would fail of its purpose. The

¹⁶ (1981) 1 SCC 627
Magistrate or the Sessions Judge before whom, the accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the service of a lawyer on account of poverty of indigence, he is entitled to obtain free legal services at the cost of the State. Unfortunately, the Judicial Magistrates failed to discharge this obligation in the case of the blinded prisoner's and they merely stated that no legal representation was asked for by the blinded prisoners and hence none was provided. We would, therefore, direct the Magistrate and Sessions Judges in the country to inform every accused, who appears before them and who is not represented by a lawyer on account of his poverty or indigence that he is entitled to free legal services at the cost of the State. Unless he is not willing to take advantage of the free legal services provided by the State, he must be provided legal representation at the cost of the State.

(c) Right to speedy trial

Another component of "fair trial" is right to speedy trial of an accused, which got recognition of Supreme Court in case of Hussainara Khatoon (i) Vs. Home Secretary.17

The issue of speedy trial of an accused came up for consideration before a three Judge's Bench of Supreme Court, by way of a writ petition of Habeas Corpus disclosing a shocking state of affairs prevailing in the State of Bihar, wherein a large number of men, women and children were behind prisons in the State for years.

17 (1980) 1 SCC 81
together, without any trial being faced by them. The Supreme Court gave a new dimension to the concept of "fair trial" to include "speedy trial". The Supreme Court interpreted this right "fair trial" in the following words in Para 5 of the judgment that -

We think that even under our Constitution, though speedy trial is not specifically enumerated as a fundamental right, it is implicit in the broad sweep and content of Article 21 as interpreted by this Court in Maneka Gandhi Vs. Union of India. We have in that case held that Article 21 confers a fundamental right on every person not to be deprived of his life liberty except in accordance with the procedure prescribed by law and it is not enough to constitute compliance with the requirement of that article that some semblance of a procedure should be prescribed by law, but that the procedure should be "reasonable, fair and just". If a person is deprived of his liberty under a procedure which is not "reasonable, fair or just," such deprivation would be violative of his fundamental right under Article 21 and he would be entitled to enforce such fundamental right and secure his release. Now obviously procedure prescribed by law for depriving a person of his liberty cannot be 'reasonable, fair or just' unless that procedure ensures a speedy trial for determination of the guilt of such person. No procedure, which does not ensure a reasonably quick trial, can be regarded as 'reasonable, fair or just' and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21.
(ii) New approach of the Supreme Court towards “Fair trial”.

The traditional approach towards “fair trial” was, primarily based on the concept of protection of the rights of an accused. However, with the passage of time, there was a shift in the approach of the Judiciary particularly of the Supreme Court towards the concept of “fair trial.”

While the traditional view was primarily based on the concept of protection of the rights of an accused, there was a gradual shift towards the larger interest of the society being one of the parameters for interpreting the concept of “fair trial”. It is not so that the accused persons are being denied of their fundamental and legal rights. What the Supreme Court has emphasized is that while protecting the rights of the accused, the Courts have to maintain a balanced approach between the accused and the right of the victims to seek justice.

As such, the traditional approach towards “fair trial”, was followed by the inclusion of “victims of crime” as part of the concept of “fair trial” and it has been an emerging role of Victimology in the Indian Criminal Justice System in the recent times. This emerging trend of Victimology in the Indian Criminal Justice System can be analysed from the following judicial pronouncements:-
In this case, the question before the Supreme Court was regarding transfer of a criminal case u/s 406 Cr.P.C. from State of Tamil Nadu to another State. The accused persons in this case, had been charged for committing the offences pertaining to Coimbatore Bomb Blast case of 1998. Some of the accused persons approached the Supreme Court u/s 406 Cr.P.C., seeking transfer of the case pending before the trial court, outside State of Tamil Nadu, on the ground that they will not get a "fair trial" because of the surcharged atmosphere in State of Tamil Nadu due to religious and fundamentalist sentiments.

The Supreme Court rejected the transfer petition filed by some of the accused persons for transfer of the case. The case and the issue before the Supreme Court, was primarily the transfer of the trial outside the State of Tamil Nadu. However, the Supreme Court shifted its focus from the protection of the rights of an accused to the need for impartial justice and the larger interest of the society.

Though, the term "victim" was not specifically referred to by the Supreme Court in its judgment, but its observations clearly pointed out the gradual changing

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18 AIR 2000 SC 2293
interpretation and approach of the Supreme Court towards the "fair trial" as the Supreme Court pointed out the requirement of impartial justice and larger interest of society while dispensing justice in the criminal cases. The Supreme Court observed in Para 7 of the judgment that -

The purpose of the criminal trial is to dispense fair and impartial justice uninfluenced by extraneous considerations. When it is shown that public confidence in the fairness of a trial would be seriously undetermined, any party can seek the transfer of a case within the State under Section 407 and anywhere in the country under Section 406 Cr.P.C. The apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable and not imaginary based upon conjectures and surmises. If it appears that the dispensation of criminal justice is not possible impartially and objectively and without any bias, before any Court or even at any place, the appropriate Court may transfer the case to another Court, where it feels that holding of fair and proper trial is conducive. No universal or hard and fast rules can be prescribed for deciding a transfer petition, which has always to be decided on the basis of the facts of each case. Convenience of the parties including the witnesses to be produced at the trial is also a relevant consideration for deciding the transfer petition. The convenience of the parties does not necessarily mean the convenience of the petitioner's alone who approached the Court on misconceived notions of apprehension. Convenience for the purposes of transfer means the convenience of the prosecution, other accused, the witnesses and the larger interest of the society.
The Supreme Court in this case, therefore, marked a departure from its earlier focus of a "fair trial," which primarily was introduced to focus on the protection of the rights of an accused, towards the protection of the interest of the society, which undoubtedly includes the victims of crime. It was followed by a totally new approach towards the victims wherein the term "victim" was used by the Supreme Court in various cases mentioned hereinafter.

b) *Zahira Habibulla H. Sheikh and another vs State of Gujarat.*

Though, the focus on the victims as a part of concept of "fair trial" was initiated by the Supreme Court with its observations in Abdul Nazir’s case, it all started with the decision in Zahira Sheikh’s case pertaining to the post Godhara Gujarat riots. In this case, the family member’s of the key eye witness and petitioner before the Supreme Court Zahira Sheikh were killed in the communal rights, which broke out in the State of Gujarat after the Godhara incident, wherein a train full of passengers was burned.

The accused persons in this case were tried by Sessions Court in State of Gujarat, but they were acquitted as the all the eye witnesses including the key eye witness Zahira Sheikh, turned hostile and did not support the prosecution case. The appeals filed by the

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19 2004 C.r.I.J 2050 (SC)
State of Gujarat before the High Court against the acquittal of the accused persons were also dismissed. All these circumstances, led to the filing of a writ petition before the Supreme Court by the key eye-witness in the case, Zahira Sheikh and by the National Human Rights Commission seeking a re-trial of the case outside the State of Gujarat.

As all the eye witnesses had turned hostile thereby making a mockery of fair trial, the Supreme Court allowed the petitions filed by the Zahira Sheikh and the National Human Rights Commission and directed for re-trial of the case by the Sessions Court at Bombay. The Supreme Court was very much concerned about the problems of witnesses turning hostile and as to how the trial was conducted in the present case.

As such, the Supreme Court adopted a new approach towards the concept of "fair trial." Contrary to the traditional notions of "fair trial" restricting its interpretation to the rights of an accused to seek fair trial, the Supreme Court expended its meaning to include the rights of the victim of trial to seek "fair trial." It was held by the Supreme Court in Para 38 of its judgment that-

This Court has often emphasized that in a criminal case, the fate of the proceedings cannot always be left entirely in the hands of the parties, crimes being public wrongs in breach and violation of public rights and duties, which affect the whole
community as a community and harmful to the society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies, interest of society is not to be treated completely with disdain and as persona non grata. Courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice—often referred to as the duty to vindicate and uphold the ‘majesty of the law’. Due administration of justice has always been viewed as continuous process. Not confined to determination of the particular case protecting its ability to function as a Court of law in the future as in the case before it. If a criminal Court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. Courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in rational to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of Judges or impartial and independent adjudicator’s.

It was further held in Para 39 of the judgment that—

The principles of rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the Courts of law. It has to be unmistakably understood that a trial, which is primarily aimed at ascertaining truth has to be fair to all concerned. There can be no analytical, all
comprehensive or exhaustive definition of the concept of a trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will be not correct to say that it is only the accused, which must be fairly dealt with. That would be turning Nelson’s eyes to the needs of the society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial.

Zahira Sheikh’s case, therefore, marked a departure from the traditional concept of “fair trial”. In this case, the Supreme Court specifically used the term “victim” and held them to be entitled to a “fair trial”. In view of this judgment of the Supreme Court, the victims of crime are now entitled to a fair trial, though the trial will always remain of an accused. As such, the concept of “fair trial” is now considered in a wider context, to mean that if an accused circumvents the trial procedure by threatening of witnesses or destruction of evidence, it will not be
regarded to be a “fair trial” as it will lead to denial of justice to the victims of crime.

c) **Himansu Singh Sabharwal Vs. State of Madhya Pradesh.**

Zahira Sheikh’s case no doubt, recognized rights of victims to “fair trial” and a similar approach was adopted by the Supreme Court in the later decision of Himansu Singh Sabharwal Vs. State of Madhya Pradesh.

In this case, the father of the petitioner before the Supreme Court Late Prof. Sabharwal, was working in the State of Bhopal. He was allegedly murdered by some students of the University due to political reasons. They were tried by the Court of Sessions in the State of Bhopal. But, the witnesses turned hostile and did not support the prosecution case including two police officers, thereby making a mockery of justice and “fair trial”. The son of Late Prof. Sabharwal filed a transfer petition before the Supreme Court u/s 406 Cr.P.C, seeking transfer of the trial of the accused persons outside the State of Madhya Pradesh.

Interestingly, the son of professor Sabharwal was neither the complainant nor a witness in the trial, yet he was considered as a “victim” and his transfer petition was considered and allowed by the Supreme Court, by

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20 AIR 2008 SC 1943
directing transfer of the trial to be held by the Sessions Court in Nagpur in the State of Maharashtra. The Supreme Court in this case re-affirmed the need to protect the “victim of crime” and their family members and also emphasized that “fair trial” of an accused includes within itself, the protection of the rights of the victims of crime and their family members.

d) **Sister Meena Lalita Borwa and others vs. State of Orissa.**

The principles of law regarding right of the victims to seek a “fair trial” laid down by the Supreme Court in Zahira Habibullah Sheikh and Himanshu Sabharwal’s case, were applied by Orissa High Court in the case of Sister Meena Lalita Borwa vs State of Orissa. In this case, the victim and two witnesses filed transfer petitions before the High Court on the ground that they were being threatened not to attend the Court proceedings. By relying upon the decisions of the Supreme Court referred above, the High Court transferred the trial of the cases from the Sessions Court at Phulbani, to the Sessions Court at Cuttack. Besides this, the High Court also issued several directions, for providing accommodation to the victim and the witnesses at the time of their examination in the Court as witnesses.
e) **Central Bureau of Investigation Versus Hoeson Ningshen and others.**

In this case, the Central Bureau of Investigation filed a transfer petition in the Supreme Court, seeking transfer of the trial of the respondent accused from Manipur to Delhi due to communal and ethical violence in the State of Manipur, due to which there was a threat to the life of the accused. However, the families of the victims opposed the transfer petition filed by the CBI. But, in view of the threat to the life of the accused, the Supreme Court allowed the transfer petition.

At the same time, the Supreme Court passed certain landmark directions for the protection of the interests of the family members of the deceased persons as it directed the CBI and the State Govt of Manipur to render full assistance to the victims legal heirs in the matter of legal representation by way of engaging advocates of their choice and also for arranging for journey and stay etc for one family member belonging to the families of each of the deceased persons on the date of hearing.

Perhaps such assistance to the family members of the victims is required in order to protect their interests. In the present times, the accused gets legal assistance of an advocate at the State expense in order to protect his
interests and rights. As the Supreme Court has already held that "fair trial" includes the right of the victims also to seek a "fair trial", all possible help including legal assistance should be provided to the victims. In fact, this decision of the Supreme Court has pointed out the emerging role of Victimology in the Indian Criminal Justice System in the present times.

**iii) Need for a provision to provide protection to victims and witnesses**

However, the question arises as to whether there should a separate provision in Cr.P.C 1973 to deal with the problems of victims and if so what should be the frame work of such a provision. In my opinion, there is definitely a need for a legislative provision in this regard. The Supreme Court and the High Court's have been giving directions for the protection of witnesses and the victims but that does not happen in each and every case.

It is only in such cases, which attract the attention of the media or where the victim approaches the Court that necessary directions are issued. It is not so that victims and the witnesses are threatened in each and every case. But in view of the ever increasing problem of victims and witnesses being harassed and threatened, there is a urgent need for a statutory solution to this problem.
In my opinion, in order to deal with the aforementioned problem, amendment should be made in section 312 Cr.P.C, which deals with the payment of expenses to the complainant or the witnesses. But before considering such amendments, it is necessary to discuss the various reports including reports of the Law Commission of India in this regard-

(a) Law Commission's 14th Report 23

In the 14th Report of the Law Commission, 'witness protection' was considered from a different angle. The Report referred to inadequate arrangements for witnesses in the Court house, the scales of travelling allowance and daily batta (allowance) paid for witnesses for attending the Court in response to summons from the Court.

This aspect too is important if one has to keep in mind the enormous increase in the expenses involved and the long hours of waiting in Court with tension and attending numerous adjournments. Here the question of giving due respect to the witness’s convenience, comfort and compensation for his sparing valuable time was involved. It was stressed that if the witness is not taken care of, he or she is likely to develop an attitude of indifference to the question of bringing the offender to justice.

(b) Fourth Report of National Police Commission

In Fourth Report of National Police Commission, certain inconveniences and handicaps from which witnesses suffer had been referred to. The Commission again referred to the inconveniences and harassment caused to witnesses in attending Courts.

The Commission referred to the contents of a letter received from a senior District and Sessions Judge to the following effect:

A prisoner suffers from some act or omission but a witness suffers for no fault of his own. All his troubles arise because he is unfortunate enough to be on the spot when the crime is being committed and at the same time ‘foolish’ enough to remain there till the arrival of the police.” The Police Commission also referred to the meagre daily allowance payable to witnesses for appearance in the Courts. It referred to a sample survey carried out in 18 Magistrates’ Courts in one State, which revealed that out of 96,815 witnesses who attended the Courts during the particular period, only 6697 were paid some allowance and even for such payment, an elaborate procedure had to be gone through.

(c) Law Commission’s 154th Report

In the 154th Report the Law Commission in Chapter IX, while dealing with Protection and Facilities to

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24 Submitted to the Union Home Ministry in year 1980.
Witnesses’ referred to its 14th Report and Report of the National Police Commission and conceded that there was ‘plenty of Justification for the reluctance of witnesses to come forward to attend Court promptly in obedience to the summons”. It was stated that the plight of witnesses appearing on behalf of the State was pitiable not only because of lack of proper facilities and conveniences but also because witnesses have to incur the wrath of the accused, particularly that of hardened criminals, which can result in their life falling into great peril. The Law Commission recommended in Para 6 and 7 as follows:

6. We recommend that the allowances payable to the witnesses for their attendance in Courts should be fixed on a realistic basis and that payment should be effected through a simple procedure which would avoid delay and inconvenience. Adequate facilities should be provided in the Court premises for their stay. The treatment afforded to them right from the stage of investigation upto the stage of conclusion of the trial should be in a fitting manner giving them due respect and removing all causes which contribute to any anguish on their part. Necessary confidence has to be created in the minds of the witnesses that they would be protected from the wrath of the accused in any eventuality.

7. Listing of the cases should be done in such a way that the witnesses who are summoned are examined on the day they are summoned and adjournments should be avoided meticulously. The Courts also should proceed with trial on day-to-day basis and the listing of the cases should be one
those lines. The High Courts should issue necessary circulars to all the criminal Courts giving guidelines for listing of cases.

The following points emerged from the above recommendations:

(a) Realistic allowance should be paid to witnesses for their attendance in Courts and there should be simplification of the procedure for such payment.

(b) Adequate facilities should be provided to witnesses for their stay in the Court premises. Witnesses must be given due respect and it is also necessary that efforts are made to remove all reasonable causes for their anguish.

(c) Witnesses should be protected from the wrath of the accused in any eventuality.

(d) Witnesses should be examined on the day they are summoned and the examination should proceed on a day-to-day basis.

(d) Law Commission's 172nd Report

In March 2000, the Law Commission submitted its 172nd Report on 'Review of Rape Laws.' The Law Commission took the subject on a request made by Supreme Court vide its order dated 9.8.1999 passed in Sakshi vs. Union of India.

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The petitioner ‘Sakshi’, an organization, interested in the issues concerning women, filed a writ petition in the Supreme Court, seeking directions for amendment of the definition of the expression ‘sexual intercourse’, as contained in section 375 of the IPC. The Supreme Court requested the Law Commission to examine the issues submitted by the petitioner’s and examine the feasibility of making recommendations for amendments of the Indian Penal Code or to deal with the same in any other manner so as to plug the loopholes.

The Law Commission discussed the issues raised by the petitioner with Petitioner NGO and other women organizations. The Commission also requested ‘Sakshi’ and other organizations to submit their written suggestions for amendment of procedural laws as well as the substantial law. Accordingly, these women organizations submitted their suggestions for amendment of Cr.P.C. and the Evidence Act and also I.P.C. One of the views put forward by the organizations was that a minor complainant of sexual assault shall not have to give his/her oral evidence in the presence of the accused, as this will traumatic to the minor. It was suggested that appropriate changes in the law should be made for giving effect to this provision.

It was further suggested that a minor’s testimony in a case of child sexual abuse should be recorded at the
earliest possible opportunity in the presence of a judge and the child-support person, which may include a family friend, relative or social worker whom the minor trusts. For the purpose of proper implementation of the above suggestion, it was urged that the court should take steps to ensure that at least one of the following methods is adopted:

(i) Permitting use of a video-taped interview of the child's statement by the judge in the presence of a child support person;

(ii) Allowing a child to testify via closed circuit television or from behind a screen to obtain a full and candid account of the acts complained of;

(iii) The cross examination of the minor should only be carried out by the Judge based on written question submitted by the defence upon perusal of the testimony of the minor;

(iv) Whenever a child is required to give testimony, sufficient breaks shall be given as and when required by the child.

The Commission considered the above suggestions along with other issues raised and the order of the Supreme Court and gave its 172nd Report on 25.3.2000. In respect of the suggestion that a minor who has been assaulted sexually, should not be required to give his/her
evidence in the presence of the accused and he or she may be allowed to testify behind the screen, Law Commission referred to section 273 of the Cr.P.C, which requires that 'except as otherwise expressly provided, all evidence taken in the course of a trial or other proceeding, shall be taken in the presence of the accused or when his personal attendance is dispensed with, in the presence of his pleader'. The Law Commission took the view that his general principle, which is founded upon natural justice, should not be done away with altogether in trials and enquiries concerning sexual offence. However, in order to protect the child witness the Commission recommended that it may be open to the prosecution to request the Court to provide a screen in such a manner that the victim does not see the accused, while at the same time providing an opportunity to the accused to listen to the testimony of the victim and give appropriate instructions to his advocate for an effective cross-examination.

Accordingly, the Law Commission in Para 6.1 of its 172nd Report recommended for insertion of a proviso to section 273 of the Cr.P.C. 1973 to the following effect:

Provided that where the evidence of a person below sixteen years who is alleged to have been subjected to sexual assault or any other sexual offence, is to be recorded, the Court may, take appropriate measures to ensure that such person is not confronted by the accused while at the same time
ensuring the right of cross-examination of the accused.

In respect of other suggestions mentioned above, made by Sakshi organization, Law Commission expressed its view that these suggestions were impracticable and could not be accepted.

(e) Law Commission 178th Report

In December 2001, Law Commission gave its 178th Report for amending various statutes, civil and criminal. It dealt with hostile witnesses and precautions, which the Police should take at the stage of investigation to prevent winning over of the witnesses when they are examined later at the trial. The Commission recommended three alternatives, (in modification of the two alternatives suggested in the 154th Report). They are as follows:

1. The insertion of sub-section (1A) in Section 164 of the Code of Criminal Procedure (as suggested in the 154th Report) so that the statements of material witnesses are recorded in the presence of Magistrates. [This would require the recruitment of a large number of Magistrates].

2. Introducing certain checks so that witnesses do not turn hostile, such as taking the signature of a witness on his police statement and sending it to an appropriate Magistrate and a senior police officer.

3. In all serious offences, punishable with ten or more years of imprisonment, the statement of important witnesses should be recorded, at the

earliest, by a Magistrate under Section 164 of the Code of Criminal Procedure, 1973. For less serious offences, the second alternative (with some modifications) was found viable.

The law Commission recommended insertion of sections 164-A and section 311-A in C.r.P.C. 1973 as follows-

164 A-evidence of material witnesses to be recorded by Magistrate in certain cases

(1) Any police officer making an investigation into any offence punishable with imprisonment for ten years or more (with or without fine) including an offence which is punishable with death, shall in the course of such investigation, forward all persons whose evidence is essential for the just decision of the case, to the nearest Magistrate for recording their statements.

(2) The Magistrate shall record the statements of such persons forwarded to him under sub-section (1) on oath and shall keep such statements with him awaiting further police report under section 173.

(3) Copies of such statements shall be furnished to the investigating officer.

(4) If the Magistrate recording the statement is not empowered to take cognizance of such offence, he shall send the statements so recorded to the magistrate empowered to take cognizance of the case.

(5) The statement of any person duly recorded as a witness under sub-section (1) may, if such witness is produced and examined, in the discretion of the
court and subject to the provisions of the Indian Evidence Act, 1872, be treated as evidence.”

**Section 311A.** The statement of the witness duly recorded under sub-section (1) of section 164 of this Code may, in the discretion of the presiding judge, if such witness is produced and examined, be treated as evidence in the case for all purposes subject to the provisions of the Indian Evidence Act, 1872.

However, it is to be noted that Law Commission in the above Report, did not suggest any measures for physical protection of witnesses from the ‘wrath of the accused’ nor dealt with the question whether the identity of witnesses can be kept secret and if so, in what manner the Court could keep the identity secret and yet comply with the requirements of enabling the accused or his counsel to effectively cross-examine the witness so that the fairness of the judicial procedure is not sacrificed.

**(f) The Criminal Law (Amendment) Bill, 2003**

In Criminal Law (Amendment) Bill 2003, introduced in Rajya Sabha in August, 2003, the above recommendations of the Law Commission had been accepted by further modifying the recommendations of recording statement before a Magistrate to apply where the sentence for the offence could be seven years or more. A further provision was proposed for summary punishment of the witness by the same Court if the
witness goes back on his earlier statement recorded before the Magistrate. Another provision is also being made to find out whether the witness is going back on his earlier statement because of inducement or pressure or threats or intimidation.

Thus, aforesaid analysis of various recommendations of Law Commission made from time to time, including 178th Report shows that they did not address the issue of ‘protection’ and ‘anonymity’ of witnesses and the victims in particular and the procedure to be followed for balancing rights of the victims on one hand and the right of an accused to a fair trial.

Between 1958 and 2004, there has been a total change in the crime scene, in as much as, not only crime has increased and cases of convictions have drastically fallen, but there is more sophistication in the manner of committing offences for today, the offender too has the advantages of advances in technology and science.

There are now more hostile witnesses than before and the witnesses are provided allurements or are tampered with or purchased and if they remain firm, they are pressurized or threatened or even eliminated. Rape and sexual offence cases appear to be the worst affected by these obnoxious methods.
(g) Law Commission's 198th report on Witness Identity Protection

The law Commission in view of certain strong observations made by the Supreme Court regarding protection and safety of the victims and the witnesses from time to time led it to consider the issue of protection of the victims and witnesses afresh and, therefore, submitted its 198th report, whereby it made several recommendations for protection of witnesses and victims in particular in the form a proposed bill called "The Witness (Identity) Protection Bill, 2006." The Commission specifically dealt with problems of victims while giving evidence and also referred to various past experiences in the form of decisions particularly of the Supreme Court. Therefore, while proposing the Witness Protection bill 2006, it defined the term "witness" to include "victims" by virtue of section 2 (g) of the proposed bill, which read as follows -

2(g) "witness" means

(i) any person who is acquainted with the facts and circumstances, or is in possession of any information or has knowledge, necessary for the purpose of investigation, inquiry or trial of any crime involving serious offence, and who is or may be required to give information or make a statement or produce any document during investigation, inquiry or trial of such case, and

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28 198th report on witness identity protection and witness protection programmes dated 31.8.2006
(ii) includes a victim of such serious offence.

(h) words and expressions not defined in this Act and defined in the Code of Criminal Procedure, 1973 (2 of 1974) shall have the meanings assigned respectively to them in that Code”

The Law Commission made several recommendations in the proposed Witness Protection bill 2006. The relevant provisions of the proposed bill are as follows-

(i) **Application for seeking Identity protection order:**

As per section 4 of the proposed bill, during the course of investigation of any serious offence, if the officer in-charge of investigating agency is satisfied that for the purpose of effective investigation of the case, it is necessary to protect the identity of any threatened witness, he may, through the Public Prosecutor or Assistant Public Prosecutor, as the case may be, apply in writing to the Judicial Magistrate First Class or Metropolitan Magistrate, seeking an identity protection order. The Magistrate could conduct an Ex parte preliminary inquiry u/s 5 and thereafter pass an order u/s 6. Sections 4 to 6 were as follows-

4(1) During the course of investigation of any serious offence, if the officer in-charge of investigating agency is satisfied that for the purpose of effective investigation of the case, it is necessary to protect the identity of any threatened witness, he may, through the Public Prosecutor or Assistant Public Prosecutor, as the case may be
apply in writing to the Judicial Magistrate First Class or Metropolitan Magistrate, seeking an identity protection order.

(2) In every application made under sub-section (1), the true identity of the threatened witness, and any other particulars which may lead to the identification of the threatened witness, shall not be mentioned, and instead a pseudonym or a letter of English alphabet shall be mentioned to identify the threatened witness, but the true identity and other particulars shall be disclosed to the Magistrate.

(3) Every application under sub-section (1),(a) shall accompanied by the relevant material and documents which are evidence that the witness is a threatened witness and of the need to grant a protection order, and

(b) May be accompanied by a certificate of an officer of the rank of Superintendent of Police or Commissioner of Police certifying that the witness is a threatened witness.

5 Ex parte preliminary inquiry by the Magistrate (1). The Magistrate shall, upon receipt of an application under section 4, hold a preliminary ex parte inquiry in camera to determine whether the witness is a threatened witness as claimed in the application and whether there is necessity to pass a protection order, and shall follow the procedure laid down in this section for such determination.

(2) The Magistrate may require the prosecution to place before him any material or document which has not been already submitted, and which he considers relevant for the disposal of the application.
(3) The Magistrate shall hear the prosecution and, in his discretion, may examine any person including the witness who is subject of the application orally, and shall record the substance of the statement.

(4) During the course of the preliminary inquiry, no prosecutor, officer of the Court, or other person present or involved in the preliminary hearing shall disclose or reveal or leak out any information regarding the true identity of the witness, or any other particulars likely to lead to the witness's identification.

(5) During the course of the preliminary inquiry, no oral evidence shall be given, and no question may be put to any person, if such evidence or question relates directly or indirectly to the true identity of the witness who is subject of the application.

(6) While considering the application, the Magistrate shall have regard to the following:

(i) The general right of the accused to know the identity of witness;

(ii) the principle that witness anonymity orders are justified only in exceptional circumstances;

(iii) the gravity of the offence;

(iv) the importance of the threatened witness's evidence in the case;

(v) whether the witness's statement, if any, under subsection;

(vi) As to why he is a threatened witness and as to why there is necessity to pass a protection order, is reliable; and

(vii) whether there is other evidence, which corroborates the threatened witness's evidence in respect of the offence.
6 Order by the Magistrate (1) If, after consideration of (a) the application and all material and documents submitted in support of the application under section 4; and

(b) The statement of any person recorded, if any, under subsection (3) of section 5 and after hearing the prosecution, the Magistrate is satisfied that

(a) The witness who is subject of the application is a threatened witness;

(b) withholding the threatened witness's identity until the investigation is completed and final report or charge sheet is submitted in the court, would not be contrary to the interests of justice; and

(c) the need for passing a protection order outweighs the general right of the accused to know the identity of the witness, he shall, pass a reasoned judicial order that until the investigation is completed and the police report referred to in sub section (2) of section 173 of the Code of Criminal Procedure, 1973 or charge sheet under any other law is forwarded to the Magistrate or Judge, the identity of threatened witness shall not be reflected or mentioned in:

(a) Any document prepared or any statement recorded under sections 161 and 164 of the Code of Criminal Procedure, 1973 (Act 2 of 1974) or any other statement recorded during the course of investigation, including the case diary;

(b) The police report or charge sheet referred to above and documents forwarded along with the police report or charge sheet;

(c) Any other document forwarded to the Magistrate or Judge in any proceeding in relation to such offence;
(d) Any proceeding before the Magistrate or before any other Court, during investigation, in relation to such offence.

(2) If, however, after such consideration and hearing as referred to in sub-section (1), the Magistrate is satisfied that

(a) The witness who is the subject of the application is not a threatened witness, or
(b) Withholding the identity of such a witness
(i) Would be contrary to the interests of justice, or
(ii) Would not outweigh the right of the accused to know the identity of the witness he shall, by a reasoned judicial order, dismiss the application.

7. Prohibition of mentioning identity of witness.- (1) The true identity of witness who is subject of the application shall not be mentioned or reflected in any order sheet or proceeding under this part.
(2) It shall not be lawful for any person to print or publish in any manner any matter in relation to any proceeding under this part

(ii) Application for seeking Identity protection during the trial-

Just as the witnesses and victims were sought to be protected during the investigation, the proposed bill also proposed their protection during the pre-trial stage by the following provisions namely sections 8 to 11, which are as follows-

8 Application for Identity Protection (1). If, after the Police Report referred to in sub section (2) of section 173 of the Code of Criminal Procedure, 1973 (2 of 1974) or charge sheet referred to in any
other law is forwarded to the Magistrate or Judge, as the case may be, but before the examination of witnesses begins to commence at the trial, including inquiry, the Assistant Public Prosecutor or the Public Prosecutor, as the case may be, is if opinion that it is necessary to protect the identity of a threatened witness, whether or not, identity protection in respect of such threatened witness was sought or ordered at the stage of investigation under Part I, he may, move an application in writing to the Judicial Magistrate First Class or Judge, before whom the case is pending seeking an identity protection order.

(2) The application referred to in sub-section (1) may also be moved by the threatened witness, if such a witness intends to seek a protection order.

(3) Provisions of sub-sections (2) and (3) of section 4 shall apply mutatis mutandis to the application made under this section.

(4) Where an application filed under subsection (1) before the Magistrate or Judge, as the case may be, has been rejected at any time under Part I or this Part, such rejection, shall not preclude afresh application being filed before the Magistrate or Judge, if fresh circumstances have arisen after the rejection of the earlier application for the grant of a protection order.

9. **Preliminary Inquiry by Magistrate or Judge**-
(1) The Magistrate or Judge, as the case may be, shall, upon receipt of an application under section 8, hold a preliminary inquiry in camera to determine whether the witness is a threatened witness as claimed in the application and whether there is necessity for the passing of a protection order and shall follow the procedure laid down in this section for such determination.
(2) The Magistrate or Judge, as the case may be, may require the prosecution or the threatened witness who has moved the application under section 8, to place before him any material or document which has not already been submitted, and which he considers relevant for the disposal of the application.

(3) The Magistrate or the Judge, as the case may be, shall hear the prosecution, and subject to provisions of sub-sections (4) and (5), the accused and may examine any person including the witness who is subject of the application, orally and shall record the substance of the statement.

(4) The Magistrate or Judge, as the case may be, shall, on the basis of the information which has come before him under sub section (1) of section 8(1) and sub section (2) and (3), inform the accused or his pleader as to the apprehensions of the witness and as to why he is a threatened witness and the necessity for passing a protection order and, for that purpose, give a hearing to the accused before passing an order of protection.

Provided that the Magistrate or Judge shall not disclose the identity of the witness or any other particulars, which may lead to the identification of the said witness.

Provided further that if the accused or his pleader wants to elicit further information from the prosecution of the threatened witness on the question of likelihood of danger to the life or property of the said witness or his close relatives, they may be permitted to furnish a list of questions to be answered by the prosecution or the said witness but no question or information which may lead directly or indirectly to the identification of the said witness shall be permitted.
(5) The accused and his pleader shall not be allowed to remain present during such inquiry when the Magistrate or Judge, as the case may be, is

(i) Examining the witness or any other person under subsection (3); and

(ii) Hearing the submissions of the prosecutor or the applicant witness, as the case may be.

(6) Provisions of sub-sections (4) to (6) of section 5 shall, mutatis mutandis, apply to the preliminary inquiry under this part.

10. Order by the Magistrate or Judge (1). If, after consideration of-

(a) the application and all materials and documents submitted in support of the application by the parties; and

(b) The statements recorded under sub-section (3) of section 9 if any; and, after hearing the submissions of the prosecutor or the applicant witness, as the case may be, and the accused, the Magistrate or Judge, as the case may be, is satisfied that

(i) The witness who is subject of the application is a threatened witness;

(ii) Withholding the threatened witness's identity until the judgment in trial is given and if any appeal or revision is presented against the judgment, until the decision in the appeal or revision, as the case may be, is given, would not be contrary to the interests of justice; and

(c) the need for passing a protection order outweighs the general right of the accused to know the identity of the witness, he shall, pass a reasoned judicial order that until the judgment in trial is given and if any appeal or revision is presented against the
judgment, until the decision of the appeal or revision, as the case may be, is given, the identity of threatened witness shall not be reflected or mentioned in,

(i) Any document produced before the Magistrate or Judge, or before an appellate or revisional Court, in relation to such case;

(ii) Any proceeding (including judgment and order) before the Magistrate or Judge, or before an appellate provisional Court, in relation to such case;

(iii) any copy of documents required to be supplied to the accused as specified in, sections 207 and 208 of the Code of Criminal Procedure, 1973 (2 of 1974) or under any other special law.

(2) If, however, after such consideration and hearing as referred to in sub-section (1), the Magistrate or Judge, as the case may be, is satisfied that
(a) The witness who is subject of the application is not a threatened witness, or
(b) That withholding the identity of such a witness

(i) Would be contrary to the interests of justice, or

(ii) Would not outweigh the right of the accused to know the identity of the witness, he shall, by a judicial reasoned order, dismiss the application.

11 Prohibition of mentioning identity of witness
(1) The true identity of witness who is subject of the application shall not be mentioned or reflected in any order sheet or proceeding under this part.

(2) It shall not be lawful for any person to print or publish in any manner any matter in relation to any proceeding under this part.
(iii) Protection of Witnesses and victims at the trial-

However, the most relevant provisions in the proposed bill were section 12 and 13, which provided for protection of witnesses and victims during trial. The proposed sections read as follows:

12. **Recording of statements of threatened witnesses at the trial by close-circuit television**

(1) When in respect of a threatened witness, an order for identity protection has been passed under sub section (1) of section 10, his statement in the Court during trial shall be recorded as per the procedure indicated in Schedule I, by using two-way closed circuit television or video link in such a manner that the accused and his pleader shall not be able to see the face or body of the witness.

Provided that the accused and his pleader shall, subject to the Provisions of subsection (2), be entitled to hear the voice of the Witness during recording of the statement.

(2) The Presiding Judge may, on his own or on an application made by the prosecution or the threatened witness, if he is so satisfied, direct that while recording the statement referred to in subsection (1), the voice of the witness shall be distorted, and in that event, the accused or his pleader shall be entitled to hear the distorted voice:

Provided that the undistorted voice-recording shall be kept in a sealed cover and the Presiding Judge shall have the exclusive right to access the undistorted voice.

(3) When the statement is recorded as mentioned in subsection (1), the public generally, including the media personnel, shall not have access to, or be or
remain, in the room or other places used by the court for the purpose of recording of the statement.

(4) Where the statement of the threatened witness is recorded as mentioned above in subsections (1) and (2), it shall not be lawful for any person to print or publish in any manner whatsoever, the identity of the threatened witness whose statement is so recorded.

13. Recording of statements of victim at the trial of serious offences where protection order has not been sought or has been refused.-Where in the case of trial of a serious offence, no application for a protection order has been made or having been made, has been refused but where the victim seeks that he may be permitted to depose without seeing the accused either physically or through television or video link to avoid trauma, the Court may, except for enabling the victim to identify the accused either physically or through television or video link, direct that examination of the witness shall be conducted by using two-way closed circuit television or video link and two-way audio system in the manner specified in Schedule II.

The law Commission, therefore, made very useful recommendations for protection of victims and specifically included victims within the meaning of the term "witness." But, the question arises as to whether the proposed bill will serve the purpose intended to be achieved if the same becomes a law. The law Commission has made very useful suggestions but it has proposed the protection under the Act to be available only in respect of the offence, which are triable by the Court of Sessions and
not in other offences, which is not the correct approach in my opinion. A victim of offence is a victim and all the victims should be treated at par. Therefore in my opinion, section 312 C.r.P.C 1973 can also be amended by incorporating the necessary provisions as proposed by the Law Commission. Section 312 should read as follows-

Section 312 – Protection and payment of expenses of the victims and witnesses-

(1) Notwithstanding anything contained in this code or any other law for the time being in force, the Court trying an accused for an offence punishable under IPC or any other law for the time being in force, shall pass necessary directions to the investigating officer of the case to make suitable arrangements for the visit, stay and protection of the witnesses and the victim at any stage of investigation, inquiry or trial on an application made by the investigating officer of the case or the officer in charge of the police station where the FIR was registered or where the case is being investigated in case of transfer of the investigation.

(2) It shall be the responsibility of the State Government within whose jurisdiction the offence was committed, to provide the necessary funds for the travelling and stay of the witnesses.

(3) At the time of serving of the summons, the witness shall be informed about the travelling expenses to which he is entitled to and the arrangements made for his stay, if so required.

(4) The Court may also on application made by the victim or his dependants pass necessary directions as referred to in sub- section (1).
Explanation-The victims or his dependants, when summoned as witnesses shall be dealt with as per the provision of sub-section (1);

(5) It shall be the responsibility of the station house officer of the concerned police station, which has investigated the case, to provide protection to the witnesses and the victims and to investigate into any complaint regarding threat to the witnesses and the victims or his dependants.

Provided that where witnesses, the victim or his dependants, do not reside within the jurisdiction of the police station which has investigated the case, the powers under sub-section (1) shall be exercisable by the station house officer within whose jurisdiction the witnesses, the victim or his dependants as the case may be, reside.

(6) The Court may direct for not disclosing the name or any fact which may reveal the identity of the victim or the witness and provisions of sub-section (1) shall apply.

Besides this, in order to ensure that the provision of section 312 as stated above is properly complied with, there is a need for a penalty clause in the form of prosecution and sentence to be imposed for non-compliance of the directions issued by the court u/s 312.

**Section 312-A - Penalty for non-compliance of order passed under section 312**- Where the officer in charge of a police station or an officer of the State government authorised by it in this behalf, fails to comply with an order of the court passed under section 312 of the code without any reasonable explanation, shall be liable to
punishment which may extend to six months and shall be also liable to fine.

Explanation-1 The procedure provided in chapter XXI of this code for summary trial, shall apply to the proceedings under this section and the same shall be completed within a period of six months.

Provided that the non-completion of the proceedings under this section within a period of six months, shall not render the same as invalid and shall not be called in question on this ground.

Explanation-2 While deciding the amount of fine to be imposed on the accused, the court shall take into consideration, the amount of expenses incurred by the witness for travelling and stay if any and the officer in charge of a police station or an officer of the State government shall account for the same.

(iv) Pro-active Role of Judges to do Justice to the victims-

Protection of the rights of the victims of crime and the need to do justice to them by the judiciary by performing a pro-active role, has been another trend in the emerging role of Victimology in the Indian Criminal Justice System in the recent times. A criminal trial of an accused, is held by the Court presided over by a judge commonly known as trial Judge. The Court conducts the trial of the accused persons and decides the case on the basis on the evidence led by the prosecution against the accused and the defence witnesses, if any examined by the accused and other material evidence placed on record.
As such, the Court and the Judge presiding over the same are regarded to be independent of both the prosecution and the accused.

Past experience shows that trial Courts have been acting as silent spectators to the injustice being done to the victims by the accused persons. Even when a witness turns hostile and does not support the prosecution case, he is merely declared hostile by the prosecution and is cross-examined by the Public Prosecutor after seeking permission of the Court. Though, there are various provisions in the Cr.P.C. 1973 to deal with such a situation especially where the witnesses have turned hostile due to threatening by the accused persons, the courts hardly resort to such remedies available to them including cancelation of bail of the accused if so granted. As a result, the accused persons are often acquitted due to lack of evidence and ultimately it is the victim, who suffers and also becomes a victim of the Indian Criminal Justice System itself.

However, a perusal of the recent judgments of the Supreme Court shows that one of the emerging trend of Victimology in the Indian Criminal Justice System has been that the Higher Judiciary, has stressed upon the need for the trial Court judges to act not merely as recording machines at the time of examination of
witnesses in the Court and to play a pro-active role in the trial of the accused persons.

It has been emphasized that the Courts exist for doing justice to the persons, who are the affected ones i.e. the victims of crime. The trial Court’s and even the Appellate Court’s can’t be swayed away by technicalities and act merely as tape recorders for recording of evidence overlooking that the object of the trial is to get at the truth. It has duty and responsibility to render justice in a case where the role of prosecuting agency is itself and issue and the prosecuting agency is in hand and globe with the accused person thereby making a mockery of the Criminal Justice Administration itself.

In fact, the focus has shifted from the complete emphasis on the trial of an accused and his rights, towards a balanced approach between the accused persons and the need to do justice to the victims of crime as well as the society. As in Zahira Sheikh’s case, the Supreme Court held in Para 46 that

The Court’s have to take a participatory role in a trial. They are not expected to be tape recorders to record whatever is being stated by the witness. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on the presiding officers of the Court to elicit all necessary material by playing an active role in the evidence.

29 2004 C.r.r.J 2050 (SC)
collecting process. They have to monitor the proceedings in aid of justice in a manner that something which is not relevant is not unnecessarily brought on record. Even if the prosecutor is remiss in some way, it can control the proceeding effectively so that ultimate object i.e. truth is arrived at. This becomes more necessary where the Court has reasons to believe that the prosecuting agency or the prosecutor is not acting in the requisite manner. The Court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on part of the prosecuting agency. The prosecutor who does not act fairly and acts more like a counsel for the defence is a liability for the fair judicial system and the Courts could not also play into the hands to such prosecuting agency showing indifference or adopting an attitude of total aloofness.

Perhaps, the shift in the overall perception towards the victim of crime, was also highlighted by the Supreme Court in the same very case, when it held in Para 44 that

Broader Public and Societal Interest require that the victims of crime who are not ordinarily parties to the prosecution and the interest of State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irrevocably and destroy public confidence in the administration of justice which may ultimately pave way for anarchy, oppression and in justice resulting in complete break down and collapse of the edifice of rule of law enshrined and jealously guarded and protected by the Constitution.
The decision in Zahira Sheikh’s case and Himanshu Shabharwal’s case of the Supreme Court, proved to be a new emerging trend of Victimology and its emerging role in the Indian Criminal Justice System for the protection of the rights of the victims.

These judicial decisions, marked a clear departure or to say a shift in the interpretation of the term “fair trial” and the role of the criminal courts during the trial of an accused. While earlier, the term “fair trial” as interpreted by the Supreme Court, was concerned only with the rights of an accused, the Supreme Court gave a new interpretation to the term “fair trial” to include the right of the victims of crime to seek “fair trial” in a manner, which does not makes a mockery of the same, and if it does so, it is not regarded to be a ‘fair trial,” as it results in injustice to the victims.

As a consequence, the Supreme Court and the High Courts now entertain writ petitions and transfer petitions filed by the victims or the family members of the victims for seeking transfer of investigation or trial outside a particular State and other directions for seeking fair and impartial trial of the accused including protection of witnesses.
The Legal position is, therefore, very clear that the victims of crime are now well within the meaning of the term "fair trial" and the traditional approach of "fair trial of the accused" is not been followed now by the Courts and fair trial now means fairness towards both the accused and the victim.