CHAPTER FOUR
LEGISLATIVE AND JUDICIAL RESPONSE
TOWARDS WITNESS PROTECTION

4.1 Overview

Previous chapter has revealed that the Law Commission of India has time and again taken up different issues related to witnesses. It has advocated for a specific law for the convenience, safety and protection of the witnesses in its reports. The present chapter will examine the response of the legislature as well as the judiciary to the needs of witnesses and relevance of providing protection to them. The chapter is divided into two parts. While first part explores the response of the legislature on the matter of witness protection, second part throws light on the judicial response towards the same.

4.2 Legal Response

Criminal procedural law in India lays down certain safeguards for witnesses. It provides that a police officer, investigating into an offence may require the attendance of any person acquainted with the facts and circumstances of the case. However, a male under the age of fifteen years or a woman are exempted to attend any place other than their residence.\(^1\) The police officer may examine the witness orally or may reduce his statement into writing. Ironically, under the law a witness is bound to answer truly all the questions put to him during investigation, but in case of threats and intimidation the same law fails to provide adequate protection to him\(^2\). Legal provisions relating to witnesses are discussed under following headings:

\(^1\) Section 160, the Code of Criminal Procedure, 1973.

\(^2\) Section 161, the Criminal Procedure Code, 1973," Examination of witnesses by police: (1) A police officer making investigation, may examine the witnesses orally. (2) He may reduce the statement of the witnesses into writing."
4.2.1 Protection of Witnesses from Intimidation

Earlier, there was no provision for the protection of witnesses under criminal law. However, the Criminal Law Amendment of 2006 has added a new section 195A in the Indian Penal Code, 1860. Accordingly, if a person causes a witness to give false evidence by threatening him with an injury to his person, reputation or property or of anyone in whom that witness is interested, shall be punished with imprisonment of either description for a term extending upto seven years, or with fine, or with both. It is further provided that if due to such false evidence, an innocent person is convicted and sentenced with death or imprisonment for more than seven years, the person accused of giving of giving false evidence shall be punished with the same punishment and sentence with which such innocent person is punished and sentenced. The object of this provision is to discourage threatening of witnesses by the accused and interested persons and to secure truthful testimony of witnesses. The law provides punishment for a person who threatens a witness but fails to provide for any protection to threatened witness.

Similarly, the Code of Criminal Procedure, 1873, provides that a witness who is threatened by someone can file a complaint against such person. The offence of threatening or inducing any person to give false evidence has been made cognizable and non-bailable.

4.2.2 Identity Protection of Witnesses under Special Acts

Before provisions were added in the Indian Penal Code, 1860, provisions relating to protection of identity of witnesses have been available in special Acts like the

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3 Section 195A, the Indian Penal Code, 1860, "Threatening or inducing any person to give false evidence: Whoever threatens another with any injury to his person, reputation or property or to the person or reputation of any one in whom that person is interested, with intent to cause that person to give false evidence shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both; and if innocent person is convicted and sentenced in consequence of such false evidence, with death or imprisonment for more than seven years, the person who threatens shall be punished with the same punishment and sentence in the same manner and to the same extent such innocent person is punished and sentenced."

4 ibid.

5 Section 195A, the Code of Criminal Procedure, 1973, "Procedure for witnesses in case of threatening, etc.: A witness or any other person may file a complaint in relation to an offence under Section 195A of the Indian Penal Code."
Terrorist and Disruptive Activities (Prevention) Act, 1987\(^6\), the Terrorist-Affected Areas (Special Courts) Act, 1984\(^7\), the U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986\(^8\), the Prevention of Terrorism Act, 2002\(^9\), the Unlawful Activities (Prevention) Act, 2005\(^10\) and the National Investigation Agency Act, 2008\(^11\). The bare provisions of abovementioned Acts are quite similar in words and effect. The analysis of the provisions of these Acts reveals that:

"(i) Under these special statutes the courts have discretion to hold the proceedings of a court *in camera*.

(ii) The court may take such measures as it deems fit for keeping the identity and address of any witness secret in following cases:

(a) on application by the witness himself; or

\(^6\) Section 16, the Terrorist and Disruptive Activities (Prevention) Act, 1987. Earlier section 13 of the Terrorist and Disruptive Act, 1985 also dealt with the Protection of Witnesses. However, in the old Act a proviso to sub-section (1) provided that on the application of Public Prosecutor any proceeding or part thereof may be held in open court. In the Act of 1987, the discretion of conducting the proceedings in open court lied only with the concerned court.

\(^7\) Section 12, the Terrorist-Affected Areas (Special Courts) Act, 1984.

\(^8\) Section 11, the U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986.

\(^9\) Section 30, the Prevention of Terrorism Act, 2002.

\(^10\) Section 44, the Unlawful Activities (Prevention) Act, 2005, "Protection of Witnesses:

(1) Notwithstanding anything contained in the Code, the proceedings under Act may, for reasons to be recorded in writing, be held in camera if the court so desires.

(2) A court, if on an application made by a witness in any proceeding before it or by the Public Prosecutor in relation to such witness or on its own motion, is satisfied that the life of such witness is in danger, it may, for reasons to be recorded in writing, take such measures as it deems fit for keeping the identity and address of such witness secret.

(3) In particular, and without prejudice to the generality of the provisions of sub-section (2), the measures which a court may take under that sub-section may include-

(a) the holding of the proceedings at a place to be decided by the court;
(b) the avoiding of the mention of the name and address of the witness in its orders or judgements or in any records of the case accessible to public;
(c) the issuing of any directions for securing that the identity and address of the witness are not disclosed;
(d) a decision that is in the public interest to order that all or any of the proceedings pending before such a court shall not be published in any manner.

(4) Any person, who contravenes any decision or direction issued under sub section (3), shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine."

\(^11\) Section 17, the National Investigation Agency Act, 2008.
(b) on application by the Public Prosecutor in relation to such witness; or

(c) on its own motion.

However, the *Prevention of Terrorism Act*, 2002, the *Unlawful Activities (Prevention) Act*, 2005 and the *National Investigation Agency Act*, 2008 specifically mention that such measures can be taken only if the court is satisfied that the life of such witness is in danger.

(iii) Measures that can be taken by the courts include holding of the proceedings at a place decided by the court, the avoiding of the names and addresses of the witnesses in its order or judgements or in any records of the case accessible to public and issuing directions for securing that the identity and addresses of the witnesses are not disclosed. The provisions of the *Terrorist and Disruptive Activities (Prevention) Act*, 1987, the *Prevention of Terrorism Act*, 2002, the *Unlawful Activities (Prevention) Act*, 2005 and the *National Investigation Agency Act*, 2008 also provide that court can also prohibit publication of any proceeding in the public interest.

(iv) Under these special Acts contravention of any direction of the court is punishable with imprisonment which may extend to one year and with fine which may extend to one thousand rupees. However, under the *Unlawful Activities (Prevention) Act*, 2005 and the *National Investigation Agency Act*, 2008, the maximum imprisonment which can be given is three years.

(v) As far as, the *Unlawful Activities (Prevention) Act*, 2005 is concerned it provides for protection of
witnesses as well as punishment for threatening witnesses. It is provided that if any person threatens a witness or any other person in whom such witness is interested, he shall be punished with imprisonment of imprisonment which may extend to three years and fine."\textsuperscript{12}

The perusal of these Acts makes it clear that witnesses are provided identity protection or anonymity in cases involving terrorism. The constitutional validity of these sections, challenged in many cases but that has been upheld by the courts. These cases are discussed in judicial trend towards witness protection.

Besides, special enactments dealing with juveniles and terrorists activities, law dealing with juveniles also provides for non disclosure of identity of accused as well as victims. The purpose is to secure reintegration and rehabilitation of the juvenile in the society. The \textit{Juvenile Justice (Care and Protection of Children) Act, 2000}, also provides that the identity of a juvenile in conflict with law and child in need of care and protection shall not be published.\textsuperscript{13}

\subsection*{4.2.3 \textit{In camera proceedings in rape case}}

In rape cases, where the victim is also the witness, the law provides for certain safeguards. The \textit{Code of Criminal Procedure, 1973}, provides that proceedings of

\begin{footnotesize}
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\item \textsuperscript{12} Section 22, the \textit{Unlawful Activities (Prevention) Act, 2005}, \textit{Punishment for threatening witnesses:} Whoever threatens any person who is witness or any other person in whom such witness may be interested, with violence, or wrongfully restrains or any other person in whom the witness may be interested, or does any other unlawful act with intent to cause any of the said acts, shall be punishable with imprisonment which may extend to three years, and shall also be liable to fine.

\item \textsuperscript{13} Section 21, the \textit{Juvenile Justice (Care and Protection of Children) Act, 2000}, \textit{Prohibition of publication of name, etc. of juvenile in conflict with law or child in need of care and protection involved in any proceeding under the Act:}

1. No report in any newspaper, magazine, news-sheet or visual media of any inquiry regarding a juvenile in conflict with law or a child in need of care and protection under this Act shall disclose the name, address or school or any other particulars calculated to lead to the identification of the juvenile or child nor shall any picture of any such juvenile or child be published.

Provided that for reasons to be recorded in writing, the authority holding the inquiry may permit such disclosure if in its opinion such disclosure is in the interest of the juvenile or the child.

2. Any person who contravenes the provision of sub section (1) shall be liable to a penalty which may extend to twenty five thousand rupees.
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rape cases should be held in camera. It is also provided that in camera proceedings should be held by a woman judge or magistrate. Publication of proceedings of such case is also prohibited under the law. Disclosure of identity of a rape victim is punishable with imprisonment of two years and fine. The name of the victim is not indicated in judgements of courts also. In Om Prakash v. State of Uttar Pradesh, the court held the purpose of this section is to prevent social victimisation of victim of a sexual offence. The object of all these provisions is to enable a rape victim to depose freely of any undue pressure.

4.2.4 Protection from Inconvenience by a Police Officer

The Code Criminal Procedure Code, 1973, provides that witness should not be subjected to unnecessary restraint or inconvenience by a police officer. However, the law fails to discuss the inconvenience meted out to witnesses in detail.

4.2.5 Transfer of Cases

The Code of Criminal Procedure, 1973, empowers the Supreme Court to transfer any particular case or appeal from one High Court to another High Court or from a criminal court subordinate to the one High Court to another criminal court subordinate to another High Court. The application for transfer can be filed by

14 Section 327, the Code of Criminal Procedure, 1973," Court to be open : (1) The place in which any criminal court is held for the purpose of inquiry into or trying any offence shall be deemed to be an open court to which the public generally may have access. However, the Magistrate is empowered to exclude the public generally or any particular person from the court.

(2) The cases relating to rape or an offence under section 376, 376-A, 376-B, 376-C or 376-D of the Indian Penal Code shall be conducted in camera.

It is also provided that in camera trial shall be conducted as far as practicable by a woman judge or magistrate [Inserted by Act 5 of 2009].

(3) Proceedings relating to a rape case shall not be published except with the previous permission of the court."

15 Section 228, the Indian Penal Code, 1860," Disclosure of identity of the victim of certain offences, etc." This Section makes disclosure of identity of victim against whom an offence under section 376, 376-A, 376-B, 376-C or 376-D is alleged or found to have been committed, punishable with imprisonment of two years and fine. Section 376 provides punishment for rape. Section 376A deals with intercourse by a man with his wife during separation. Section 376B provides punishment for intercourse by public servant with woman in his custody. Section 376C provides punishment for intercourse (not amounting to rape) by superintendent of jail, remand home etc. Section 376D deals with the offence of intercourse by any member of the management or staff of a hospital with any woman in that hospital.


the Attorney General of India or by an interested party. Similarly, the High Courts and the Session Judge can also transfer cases and appeals. It is apparent that courts can transfer a case if the witnesses are threatened and intimidated. In Nitish Katara Murder case as well as the Best Bakery case, the cases were transferred from one High Court to another on this ground.

In S.K. Shukla v. State of Uttar Pradesh an accused MLA and Minister in state government were charged under provisions of the Prevention of Terrorism Act, 2002, and other Acts. Witnesses were afraid to speak against accused persons and one of them was already killed. It was alleged that the state government was not serious to pursue cases against them as it had already withdrawn cases against accused under the Prevention of Terrorism Act, 2002. Therefore, it was held by the court that there is likelihood miscarriage of justice in the above background mentioned on record. Therefore, in the interest of justice both the cases were transferred to the court outside the court namely Madhya Pradesh.

4.2.6 Refusal of Bail to Accused

Chapter XXXIII of the Code of Criminal Procedure contains provisions relating to bail. It is provided that the court shall impose conditions while granting bail to an accused. One of the conditions is that such person shall not directly or indirectly induce, threat or promise any witness acquainted with the facts of the case, so as to prevent him from disclosing true facts to the court or the police. In Kalyan Chandra Sarka v. Rajesh Ranjan, the Supreme Court dismissed the bail application of the accused on the ground that if accused is released on bail he would threaten witnesses and tamper with evidence. Thus, if the court feels that

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20 Section 408, the Code of Criminal Procedure, 1873.
21 State v. Vikas Yadav and other, SC no. 78/02, available at judis.nic.in, last visited on 2nd April, 2013.
23 2006 Cri.LJ 148 SC.
25 Section 437 (3) (c), the Code of Criminal Procedure, 1973.
26 2005 Cri.LJ 944 (SC).
the accused can intimidate witnesses, it can refuse or cancel the bail of the accused.

### 4.2.7 Protection from Aggressive Cross-Examination

Apart from provisions in criminal law, the *Indian Evidence Act*, 1872, also has provisions for the protection of witnesses from aggressive cross-examination. Since the character of a witness is allowed to be opened up during the cross-examination for the purposes of ascertaining his credit worthiness. It is natural that a person would not like to appear as a witness unless he was assured of some protection against aggressive cross-examination.\(^{27}\) The law ensures that during cross-examination, a witness's character is not unnecessarily attacked.

It is provided that during cross-examination a witness can be asked questions, with regard to his character.\(^{28}\) However, the victim of rape is protected under the Act from questions regarding her general immoral character.\(^{29}\) However, the court can prohibit asking of improper and irrelevant questions from a witness.\(^{30}\) Questions are considered to be proper if they can seriously affect the opinion of the court as to the credibility of the witness.\(^{31}\) The questions are considered to be improper if the imputation conveyed by them relates to a remote matter and which would not affect the opinion of the court as to the credibility of the witness with regard to his testimony.\(^{32}\)

Another important safeguard against assassination of the character of a witness is that a witness can be asked question, carrying an imputation, only if the person asking the question has a ground to believe that the imputation contained in the question is well founded.\(^{33}\) If an advocate asks a question without reasonable

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28 Section 146 (3), the *Indian Evidence Act*, 1872.
29 Proviso to section 146 (3), the *Indian Evidence Act*, 1872, provides that "in a prosecution for rape or attempt to commit rape, it shall not be permissible to put questions in the cross-examination of the prosecutrix as to her general immoral character."
30 Section 148, the *Indian Evidence Act*, 1872.
31 Section 148 (1), the *Indian Evidence Act*, 1872.
32 Section 148 (2), the *Indian Evidence Act*, 1872.
33 Section 149, the *Indian Evidence Act*, 1872.
grounds, the court may report the same to the High Court or other authority to which such advocate is subject, in the exercise of his profession.\textsuperscript{34}

The court are empowered to forbid indecent and scandalous questions from being asked, unless they are related to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed.\textsuperscript{35} The court may prohibit questions intended to insult or annoy a witness or which are offensive in form.\textsuperscript{36}

Thus, duty has been imposed on the judge to see that witness is not unnecessarily harassed. The purpose of these provisions is to save a witness from intimidating and unduly humiliating cross-examination. In \textit{Koli Nana Bhana v. State of Gujarat}\textsuperscript{37}, the High Court held that neither learned advocate for the accused should put nor the learned trial judge should allow questions which touch the moral character of a witness and harm his or her reputation without any material to substantiate the suggestion.

\textbf{4.2.8 Allowance for witnesses.}

The \textit{Code of Criminal Procedure}, 1973, provides that the witnesses appearing before court may be provided with adequate expenses but it is discretion of the court to order allowances to the witnesses.\textsuperscript{38} The witness cannot as a matter of right claim allowances for appearing in the court and has to spend out of his own pocket. It is submitted that granting of allowances should be made mandatory.

It is submitted that the analysis of aforementioned legal provisions reveals that threatening of a witness is an offence under the law and the law provides for a stringent punishment for the same. The law ensures that a witness is not unduly harassed during cross-examination. Witnesses appearing in cases relating to terrorism are provided identity protection. A rape victim as well as a juvenile is also provided

\begin{footnotesize}
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  \item \textsuperscript{34} Section 150, the \textit{Indian Evidence Act}, 1872.
  \item \textsuperscript{35} Section 151, the \textit{Indian Evidence Act}, 1872.
  \item \textsuperscript{36} Section 152, the \textit{Indian Evidence Act}, 1872.
  \item \textsuperscript{37} 1986 Cri.L.J 571.
  \item \textsuperscript{38} Section 312, the \textit{Code of Criminal Procedure}, 1973, \textit{"Expenses of complainants and witnesses: Any criminal court, if it thinks fit, order payment on the part of Government, of the reasonable expenses of any complainant or witness attending for the purposes of any inquiry, trial or other proceedings before such court."}
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anonymity under the law. However, considering the significance of the testimony of a witness in a criminal trial, it is important that in cases of serious threats to the life and property, physical protection as well as identity protection should be available for a witness.

4.3 Judicial Response

Of the trinity of legislature, executive and judiciary, justicing under our constitutional setup belongs to the judges. As such, the role to be played by the judges in the administration of justice is pivotal.\textsuperscript{39} It is submitted that problems faced by witnesses under Indian criminal justice system are multifarious. It is also evident that there is huge legal void relating to the protection of witnesses. In the absence of any specific legislation, the role of judiciary becomes even more crucial. However, Indian judiciary has taken a lead in taking up discussion on various issues relating to convenience and protection of witnesses. The present chapter discusses various landmark judgements, where the need and relevance of witness protection has been discussed in detail and various guidelines and directions have been issued for the protection of witnesses. Besides witness protection, the courts have passed orders for transfer of a case, cancellation of bail of the accused, video-conferencing, keeping the identity of the witnesses secret etc., so that witnesses should depose without any fear or intimidation. In some cases, the courts have elucidated that right of the accused to cross examine the witness deposing against him is not absolute and can be restricted in exceptional circumstances. The relevant case-law relating to the safety, convenience and protection of witnesses are discussed under following headings:

4.3.1. Physical Protection

Justice Arijit Pasayat in \textit{State of Maharashtra v. Mangilal}\textsuperscript{40} observed that "in a case of gruesome murder, police protection should be given to witnesses so that they can depose freely. Unless that is done result would be that justice would not be done to the victim. The accused persons with money and power can trample any witness who dares to depose against them. The victor will be injustice and it would be a slur on the


\textsuperscript{40} (2009) 15 SCC 418.
The landmark judgements in which the judiciary has not only taken up the issue of physical protection of witnesses, but has given concrete directions are discussed as follows:

4.3.1.1 Mrs. Neelam Katara v. Union of India

The facts of the case are that the deceased Nitish Katara, son of Neelam Katara, had attended the marriage of his friend and was killed. One of the accused was son of a sitting Member of Parliament. The mother of the deceased feared that witness may be influenced by the accused so she filed a writ petition before Delhi High Court, praying for the giving directions for protection of witnesses. The accused were held guilty and sentenced to life imprisonment by the trial court. The decision of the trial court was upheld by the Delhi High Court.

The Delhi High Court in issued certain guidelines for Witness Protection, which are applicable to cases involving offences, punishable with death or life imprisonment. These guidelines are of great importance as they are not limited to cases of rape, or sexual offences or terrorism or organized crime.

The guidelines define 'witness' as "a person whose statement has been recorded by the Investigating Officer under Section 161 of the Code of Criminal Procedure, 1973, pertaining to a crime punishable with death or life imprisonment and 'accused' is defined as a person charged with or suspected with the commission of a crime punishable with death or life imprisonment." As per the guidelines of the court "Secretary, Delhi Legal Services Authority, is appointed as the Competent Authority, to determine whether the witness requires police protection, to what extent and for what duration."

The court held that "in determining the question of granting police protection to a witness, the Competent Authority shall consider the nature of the risk to the security

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41 id., p. 428.
44 ibid.
45 ibid.
of the witness, the nature of the investigation in the criminal case, the importance of the information or evidence given or agreed to be given by the witness and the cost of providing police protection to the witness.\footnote{46}

The court held that "while recording statement of the witness under section 161 of the \textit{Code of Criminal Procedure, 1973}, it is the obligation of the Police to make the witness aware of the 'Witness Protection Guidelines' and also the fact that in case of any threat, he can approach the Competent Authority. In case, the Competent Authority passes an order that the witness should be granted protection, it shall be the duty of the Commissioner of Police to provide security to a witness."\footnote{47}

It is submitted that the Delhi High Court has taken the initiative of taking notice of the problems of the witnesses appearing in criminal cases and issuing directions for the protection of the witnesses. Such directions will be beneficial for witnesses in the absence of any specific law on the subject. However, the guidelines deal with cases involving offence punishable with death or life imprisonment. It does not cover cases, which are of less serious nature but where the accused party is influential and the witnesses are vulnerable to intimidation. Further, it only provides for physical protection and fails to cover identity protection of the witnesses.

The Government of India also filed its response by way of an affidavit in which it stated that "inadequate and non-realistic allowance is paid to witnesses, they are under constant fear of criminals and that there is an urgent need to provide adequate protection to a witness from harassment and intimidation of criminals."\footnote{48}

It is submitted that the Government has admitted that witnesses are intimidated by the criminals and the witness should be provided protection under the law, it should take responsibility and make thoughtful efforts to enact a law on the subject of witness protection.

\footnote{46}{\textit{id.}, pp. 50-51.}
\footnote{47}{\textit{id.}, at p. 51.}
This case involves important issues regarding witness protection, biased investigation as well as prosecution. While highlighting the importance of witnesses in a case, the court emphasised that "the time has become ripe to act on account of numerous experiences faced by courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingenuously adopted to smoother and stifle truth
and realities coming out to surface rendering truth and justice, to become ultimate casualties."\textsuperscript{56} Highlighting the need for protection of witnesses the court observed that "serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the court and justice triumphs and that the trial is not reduced to mockery."\textsuperscript{57}

The court highlighted the reluctance of the witnesses to come forward and depose against the people with muscle power, money power or political power in the following words\textsuperscript{58}.

"Some legislative enactments like the \textit{Terrorist and Disruptive Activities (Prevention) Act, 1987} (in short the 'TADA Act') have taken note of the reluctance shown by witnesses to depose against dangerous criminals-terrorists. In a milder form also the reluctance and the hesitation of witnesses to depose against people with muscle power, money power or again political power has become the order of the day. If ultimately truth is to be arrived at, the eyes and ears of justice have to be protected so that the interests of justice do not get incapacitated in the sense of making the proceedings before courts mere mock trials as are usually seen in movies."\textsuperscript{59}

Drawing attention to the need to protect witnesses the court observed that "the legislative measures to emphasise prohibition against tampering with witness, victim or informant have become the imminent and inevitable need of the day."\textsuperscript{60} According to the court "the conducts which illegitimately affect the presentation of evidence in proceedings before the courts have to be seriously and sternly dealt with. There should not be any undue anxiety to only protect the interests of the accused. That will be unfair to the needs of the society."\textsuperscript{61} The court stated that "efforts should be made to ensure fair trial where the accused and prosecution both get a fair deal. Public interest in the proper administration of justice must be given as much importance, if not more, as the interests of the individual accused."\textsuperscript{62}

\textsuperscript{56} \textit{id.}, pp.187-88.
\textsuperscript{57} \textit{ibid.}
\textsuperscript{58} \textit{id.}, p.188.
\textsuperscript{59} \textit{ibid.}
\textsuperscript{60} \textit{ibid.}
\textsuperscript{61} \textit{ibid.}
\textsuperscript{62} \textit{ibid.}
On the doubtful role of the prosecutor the court referred to the decision of the Supreme Court in *Vineet Narain v. Union of India*63 where it has directed that "steps should be taken immediately for the constitution of able and impartial agency comprising persons of unimpeachable integrity to perform functions akin to those of the Director of Prosecution in England." The court observed that "in the United Kingdom, the Director of Prosecution was created in 1879. His appointment is by the Attorney General from amongst the members of the Bar and he functions under the supervision of Attorney General. The Director of Prosecution plays a vital role in the prosecution system. He even administers "Witness Protection Programmes". Several countries for example Australia, Canada and USA have even enacted legislation in this regard. The court expressed its view that the Witness Protection Programmes are imperative as well as imminent in the context of alarming rate of somersaults by witnesses with ulterior motives and purely for personal gain or fear for security. According to the court, it would be a welcome step if something in those lines is done in India as well. That would be a step in the right direction for a fair trial."64

The Supreme Court, on the subject of fair trial, observed that "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."65 The court while discussing the alleged absence of congenial atmosphere for a fair and impartial trial observed that "it causes disquiet and concern to a court of justice if a person seeking justice is unable to appear, present one's case, bring one's witnesses or adduce evidence."66

The Apex Court remarked that "though the accused persons have been acquitted by the trial court and the acquittal has been upheld, but if the acquittal is unmerited and based on tainted evidence, tailored investigation, unprincipled prosecution and perfunctory trial and evidence of threatened or terrorised witnesses, it is no acquittal

63 1998 (1) SCC 226.
64 *id.*, p. 193.
65 *id.*, p. 184.
66 *id.*, p. 185.
in the eyes of the law and no sanctity or credibility can be attached to the so called findings.\footnote{67}

The court while directing retrial of the case, directed the State of Gujarat "to ensure that the witnesses are produced before the concerned court whenever they are required to attend that court. Necessary protection shall be afforded to them so that they can depose freely without any apprehension of threat or coercion from any person. In case, any witness asks for protection, the State of Maharashtra shall also provide such protection as deemed necessary, in addition to the protection to be provided for by the State of Gujarat. All expenses necessary for the trial shall be initially borne by the State of Maharashtra, to be reimbursed by the State of Gujarat.\footnote{68}"

It is submitted that this case is a blatant illustration of the problems faced by witnesses in cases related to communal riots. It shows how the mighty and powerful can not only intimidate witnesses but can influence the prosecution as well as the investigation. Evidently, the manipulated investigation and prosecution and influenced statements of witnesses can lead only to failure of a trial and miscarriage of justice. The court has very rightly opined that "in a fair trial there should be balance between the rights of the accused and the interests of the society. If required, in certain cases, the rights of the accused may be restricted to protect the witnesses and to secure truthful evidence.\footnote{69}"

\textit{4.3.1.3 National Human Rights Commission v. State of Gujarat}\footnote{70}

In the present case, the National Human Rights Commission (NHRC) filed a public interest litigation seeking retrial of the \textit{Best Bakery case} on the ground that the witnesses were pressurised by the accused to go back on their earlier statements and the trial was totally vitiated. The Supreme Court referred to the absence of a law on the subject of witness protection and observed that conviction rate has dropped as trials in most of the sensational cases till the witnesses being won over. The court directed the Gujarat Government, to file an counter affidavit stating the steps taken for granting protection to the lives of victims, their families and their relations. The court

\footnotesize{\textit{id.}, p. 196.}
\footnotesize{\textit{id.}, p. 202.}
\footnotesize{ibid.}
\footnotesize{ibid.}
\footnotesize{2003 (9) SCALE 329.}
also asked the Gujarat Government to state whether any action had been taken against those who had allegedly threatened the witnesses to change their statements before the court. The court also directed the Union of India to inform the court about the proposals made to enact a law for protection of the witnesses.71

4.3.1.4 National Human Rights Commission v. State of Gujarat72

This is a landmark judgement of Supreme Court where important directions were issued for the protection of witnesses. The Supreme Court directed the Gujarat Government to constitute, five members Special Investigation Team, to undertake investigation in nine cases relating to Godhra riots. SIT submitted its consolidated report on 11.2.2009.73 On the issue of witness protection the Supreme Court observed as follows:74

"It is an established fact that witnesses form the key ingredient in a criminal trial and it is the testimonies of these very witnesses, which establishes the guilt of the accused. It is, therefore, imperative that for justice to be done, the protection of witnesses and victims becomes essential, as it is the reliance on their testimony and complaints that the actual perpetrators of heinous crimes during the communal violence can be brought to book."

The court also observed that "since the protection of a witness is a paramount importance it is imperative that if and when any witness seeks protection so that he or she can depose freely in court, the same has to be provided. The court directed that if a person who is examined as a witness needs protection, to ensure his or her safety to depose freely in a court, he or she shall make an application to the SIT and the SIT shall pass necessary orders in the matter and shall take into account all the relevant aspects and direct such police official or officials as it considers proper to provide the protection to the concerned person. It shall be the duty of the State to abide by the direction of the SIT in this regard."76

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71 See, ibid.
73 See, id., p.773.
74 id, p.780.
75 ibid.
76 id., p. 788.
The court also discussed briefly the prevailing laws on witness protection in United Kingdom, Hong Kong, United States, Canada, Australia and South Africa, relating to the issue of witness protection.\textsuperscript{77}

However, after the submission of report by SIT, the Supreme Court issued various directions for the protection of witnesses appearing in cases related to \emph{Godhra riots}. The court directed that "for ensuring of a sense of confidence in the mind of the victims and their relatives, and to ensure that witnesses depose freely and fearlessly before the court, following steps shall be taken:"\textsuperscript{78}

\begin{itemize}
  \item [(a)] Ensuring safe passage for the witnesses to and from the court precincts;
  \item [(b)] Providing security to the witnesses in their place of residence wherever considered necessary; and
  \item [(c)] Relocation of witnesses to another state wherever such a step is necessary.
\end{itemize}

The court held that "as far as the first and the second is concerned, the SIT shall be the nodal agency to decide as to which witnesses require protection and the kind of witness protection that is to be made available to such witness. In the case of the first and the second kind of witness protection, the Chairman, SIT could, in appropriate cases, decide which witnesses require security of the paramilitary forces and upon his request same shall be made available by providing necessary security facilities."\textsuperscript{79}

The court held that in "the third kind of a situation, where the Chairman, SIT is satisfied that the witness requires to be relocated outside the State of Gujarat, it would be for the Union of India to make appropriate arrangements for the relocation of such witness. The Chairman, SIT shall send an appropriate request for this purpose to the Home Secretary, Union of India, who would take such steps as are necessary to relocate the witnesses."\textsuperscript{80}

Thus, in this case the court issued concrete directions for the purpose of providing protection to the witnesses in cases related to Godhra riots. The SIT was made nodal agency for deciding the kind of protection to be given to the threatened witnesses.

\textsuperscript{77} \emph{id.}, pp. 781-83.
\textsuperscript{78} \emph{id.}, pp.790-91.
\textsuperscript{79} \emph{ibid.}
\textsuperscript{80} \emph{ibid.}
Interestingly, the court directed that if required, the witnesses could be relocated to a new place outside Gujarat, by the Central Government. This direction shows the concern of the judiciary towards the difficulties faced by witnesses appearing in serious cases like communal violence. It is submitted that a law on witness protection must contain a provision regarding relocation of witnesses to a safe place in required cases.

4.3.1.5 Durgaram Ramrao Chaudhary v. State of Maharashtra and others

By this petition under Article 226 of the Constitution of India, direction was sought against the respondents to provide necessary and requisite armed police protection to the petitioner and his family members so as to ensure that the life and limbs of the petitioner and of his family members are protected from the impending danger.

The background, in which this petition is filed, is that petitioner was one of the important witness in connection with a criminal case against four gangsters. He was granted police protection on account of perceived threat perception to his life from the said gang. It is the case of the petitioner that even while police protection was made available to the petitioner he had received threatening calls on his landline. As a result the petitioner had lodged police complaint. Eventually, in March, 2010, the petitioner deposed before the court. The petitioner alleged that the police protection was withdrawn abruptly on 3rd August, 2010, without any prior notice to the petitioner. According to the petitioner, the said criminal trial was pending and the threat perception perceived by the petitioner was still subsisting, for which reason it was obligatory on the part of the respondents to continue police protection to the petitioner.

The counsel for the petitioner relied on the decision of the Apex Court in case of the National Human Rights Commission v. State of Gujarat and others to contend that even though the petitioner may have already deposed before the trial court as

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81 2011 Cri.L.J. 1526.
82 ibid.
83 ibid.
prosecution witness, that ought not be made the basis to discontinue the police protection extended to him.\textsuperscript{85}

The court held that the above said decision of the Supreme Court was an interim order issued to the State of Gujarat, whereas the present case was already ended in acquittal of the accused. The court while considering the question regarding the continuance of police protection, even after the testimony of the witness observed as follows:\textsuperscript{86}

"That however, does not mean that even if the threat perception persisted after the witness had already deposed before the court, such witness would not deserve personal protection. In a given case, where such threat perception persists, the authorities would be bound to offer such protection to the witnesses until the threat subsides."

The court while dismissing the petition held that even after petitioner deposed before the trial court in March, 2010, the police protection was continued until it was realised, on the basis of information collected by the concerned official, that the threat perception no more persists qua the petitioner. The court further held that it essentially being subjective satisfaction reached by the authorities, no interference in writ jurisdiction is warranted.\textsuperscript{87}

\textbf{4.3.1.6 Javed Alam v. State of Chhatisgarh and Another.}\textsuperscript{88}

The present appeal was filed before the Supreme Court to challenge the judgement of the Chhatisgarh High Court, Bilaspur, upholding the conviction of the appellants. The appellants were convicted under section 302 of the \textit{Indian Penal Code} for committing murder of a girl. The accused had crushed the head of the deceased under the jeep in the campus of Government Girls College, Ambicapur. The incident occurred in front of many witnesses. However, most of the witnesses resiled from their statements made during investigation. The Supreme Court taking note of the witnesses resiling from their statements, observed as follows:\textsuperscript{89}

"It is a classic case of deficiency in the criminal justice system to protect the witnesses from being threatened by accused."

\begin{flushright}
\textsuperscript{85} 2011 Cri.L.J.1526 at 1527.
\textsuperscript{86} \textit{id.}, p. 1528.
\textsuperscript{87} \textit{id.}, p. 1529.
\textsuperscript{88} (2009) 6 SCC 450.
\textsuperscript{89} \textit{id.}, p. 454.
\end{flushright}
The court observed that "the witnesses are the classmates of the deceased who were there with her. As appeared from the evidence of witnesses they backed out from what was stated during investigation. The statement made before the police during investigation is no evidence. The court further remarked that in cases involving influential people the common experience is that witnesses do not come forward because of fear and pressure. In a brutal manner, the accused who was driving the vehicle run over the girl and she lost her life."\(^{90}\)

The Apex Court remarked that the High Court has rightly noted that something had transpired later on, which led to the witnesses giving a complete go bye to their earlier version. The court noted that PW-8, who blurted out during cross examination some traces of truth was labeled as unfair and dishonest during cross examination by learned counsel for the appellants. At the end of the ordeal of her evidence she cried and requested the court not to call her again for evidence since they were disturbed for the entire year.\(^{91}\)

The court highlighted the relevance of witness protection in the following words\(^{92}\):

"The plight of the girls who were under pressure depicts the tremendous need for witness protection in our country if criminal justice administration has to be a reality. Even close reading of the evidence shows that how she (PW 8) was under tremendous pressure not to speak the truth."

This case throws light on the reality of intimidation of witnesses by powerful and influential accused.

4.3.1.7 Rishipal Yadav v. State of Uttar Pradesh\(^{93}\)

In the present case the appellant and his co-accused were convicted for the murder of six persons, alongwith one other person who was a juvenile. Many villagers had seen the incident. The accused threatened to kill the person, who dared to give evidence against them. The appellant was awarded death sentence by the Additional Sessions Judge. Hence, the appellant filed the present appeal before the Allahabad High Court,

\(^{90}\) ibid.

\(^{91}\) id., p.455.

\(^{92}\) ibid.

against his conviction. One of the arguments put forward by the counsel for the appellant was that in the FIR, it was mentioned that incident was seen by many villagers but no independent eyewitness were named in the FIR.\textsuperscript{94} The court observed that FIR states that as the villagers were threatened by the accused their names were not mentioned in it.\textsuperscript{95}

It is also significant to note that two of the witnesses sought protection from the trial court, on the ground that they were being terrorised by the relatives of the accused. The court granted them the protection on the same date.\textsuperscript{96} This shows the interest of the court to protect the witnesses.

The High Court while upholding the conviction of the appellant, converted the death penalty into life imprisonment. The court took serious note of terrorising the witnesses by the accused and made following observations:\textsuperscript{97}

"The incident happened at noon. Six murders were committed. It is not possible that it was not seen by the unrelated or independent witnesses. Yet, no one came forward to depose. While discussing sub-heading 'No Unrelated or Independent Witness --Not Fatal' under third point, we have observed the reasons as to why no one came forward. The IO deposed that no one was coming forward even to get the statement recorded. Even the husband of the Pradhan was terrorised."

The court remarked that "this indicates that everything is not well with Indian criminal delivery system. Unless remedied, it may be its death knell. Witness protection programme is the need of the hour. Witnesses have to have confidence that system will protect them; the system has to instil confidence in them. The court observed that the police is also is not as effective in villages as it should be. The court rightly pointed out that the subject of witness protection is yet to receive consideration. The sooner it is done, better it would be not only for criminal justice system but also for the society."\textsuperscript{98} This case makes it evident that the role of judiciary has always been proactive for the cause of witness protection.

\begin{itemize}
  \item \textsuperscript{94} ibid.
  \item \textsuperscript{95} ibid.
  \item \textsuperscript{96} ibid.
  \item \textsuperscript{97} ibid.
  \item \textsuperscript{98} ibid.
\end{itemize}
In this case the fourteen year old minor daughter of the petitioner was kidnapped. In the course of investigation the girl was recovered and her statement was recorded under section 164 of the *Code of Criminal Procedure, 1973*. The principal accused was arrested and released on bail. The petitioner alleged that the accused persons and their associates threatened and intimidated the petitioner and his minor daughter who are vital witnesses of the case that his daughter would be kidnapped again. The court took notice of the predicament of the petitioner and his daughter and observed:

"The efficacy of criminal justice administration depends on the security and safety of the witnesses. It is the bounden duty of the State to create a congenial atmosphere so that confidence is instilled in the minds of the witnesses so as to enable them to depose truthfully in a court of law without any fear or favour."

The court while accentuating the need for protecting the witnesses, referred to the observations of the Apex Court made in *Zahira Habibullah Sheikh and others v. State of Gujarat and others* and *National Human Rights Commission v. State of Gujarat*. The court very fairly pronounced that the need for witness protection is furthermore in sexual offences, particularly when victim is a minor as in the instant case. It is submitted that minor victims of rape are more vulnerable to intimidation, consequently physical protection to such victims and witnesses becomes imperative.

In this case a witness for the defence, retracted from all statements made by him. The defence cross-examined him, with the permission of the High Court. The defence discovered that the witness had made certain statements before the Income Tax Authorities in which he had admitted some of the statements retracted by him in the present case. The defence called him for further examination. However, the witness

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99 2012 Cri.L.J. 2983 SC.
100 id., p. 2984.
101 2004 Cri.L.J. 2050.
103 2012 Cri.L.J. 2983 SC at p. 2985.
104 AIR 1967 SC 1.
105 id., p.4-5.
sought protection from the High Court to prevent the publication of his evidence in
press. He stated that the publication of his earlier evidence had caused him business
losses.\textsuperscript{106}

The High Court granted him protection, prohibiting publication of his evidence. The
present appeal was filed against the decision of the court. It was alleged that "the
impugned order infringes petitioner's Fundamental Right under Article 19(1) and that
it is not saved by any of the provisions contained in clauses (2) to (6).\textsuperscript{107} It was
submitted that a restriction imposed in the interests of the witness cannot be held to be
justified under Article 19(2) and that in passing the impugned order, the learned judge
has exceeded his jurisdiction."\textsuperscript{108}

The Hon'ble Supreme Court while emphasising the importance of public trial
remarked as follows:\textsuperscript{109}

"We cannot overlook the fact that the primary function of the
courts is to do justice between the parties who bring their
cause before it. If a judge trying a cause is satisfied that the
very purpose of finding the truth in the case would be retarded,
or even defeated if witnesses are required to give evidence
subject to public gaze is it or is it not open to him in exercise of
his inherent jurisdiction to hold the trial in-camera either partly
or fully."

The Supreme Court affirmed the decision of the High Court and dismissed the
petition. The court held that "the High Court has inherent jurisdiction to hold a
trial in camera if the interests of justice clearly and necessarily require the
adoption of such course."\textsuperscript{110} It is clear that there was no risk or danger to the life or
property of the witness. However, the witness feared loss in his business due to the
publication of statement given by him in court. The court prohibited the
publication of the statement of the witness in order to protect his business
interests.

\textsuperscript{106} ibid.
\textsuperscript{107} See id., p.6.
\textsuperscript{108} ibid.
\textsuperscript{109} id., p.8.
\textsuperscript{110} ibid.
The present appeal was filed by the petitioners, three male students of Rajendra Medical College, against an order of the Patna High Court, dismissing the petition filed by them, praying for quashing the order passed by the Principal of the college, expelling them for two academic sessions.

A complaint was filed by thirty six girl students residing in the girl's hostel against the male students for trespassing into the premises of girl's hostel and walking in the corridor without any clothes on them. An internal inquiry was held by the college. The names of the girls who had made the complaint were not disclosed to the accused boys. The statement of the girls was not recorded in the presence of the appellants. The male students were held guilty and expelled from the college.

The appellants contended that the rule of natural justice had not been followed, while the order was passed against them. They also argued that the witnesses who gave evidence against them were examined in their absence, and they were not given an opportunity to cross-examine them. Hence, the enquiry was vitiated and the order passed by the principal was illegal.

The Supreme Court did not find the procedure adopted by the college authorities, as violative of the principles of natural justice and observed:

"We know of statutes in India like the Goonda Acts which permit evidence being collected behind the back of the goonda and the goonda being merely asked to represent against the main charges arising out of the evidence collected. Care is taken to see that the witnesses who gave statements would not be identified. In such cases there is no question of the witnesses being called and the goonda being given an opportunity to cross-examine the witnesses. The reason is obvious. No witness will come forward to give evidence in the presence of the goonda. However unsavoury the procedure may appear to a judicial mind, these are facts of life which are to be faced. The girls who were molested that night would not have come forward to give evidence in any regular enquiry and if a strict..."
enquiry like the one conducted in a court of law were to be imposed in such matters, the girls would have had to go under the constant fear of molestation by the male students who were capable of such indecencies."

This case is an example where the right of the accused persons to cross examine the witnesses was restricted to protect witnesses from re-victimisation and intimidation at the hands of the accused persons.

4.3.2 Identity Protection under Special Laws

As discussed earlier, many special Acts contain provision for granting identity protection to witness. The constitutional validity of these provisions has been challenged nay times. However, the judiciary has held that the provisions regarding keeping the identity of the witness secret for the purpose of his security are valid and constitutional. The important cases dealing with the identity protection of the witnesses are discussed as follows:

4.3.2.1 Bimal Kaur v. Union of India\textsuperscript{116}

In this case, section 16 of the \textit{Terrorists and Disruptive Activities (Prevention) Act}, 1987, was challenged, whereby the court can make orders to keep the identity of the witnesses secret. The Full Bench of the Punjab and Haryana High Court upheld the validity of the section and observed\textsuperscript{117}:

"A witness deposing in a criminal trial supposedly does so from a sense of public duty, which enlightened citizenship enjoins. One has to perform the public duty even at some risk to itself within the aforementioned constraints the court can take such steps as may stop the dissemination of the information regarding the address and identity of a prosecution witness by ensuring that his name and address and the identity are not given publicity by the media, that in public record he is merely mentioned as PW1, PW2 and PW3 etc. and the documents identifying as to who are PW1, PW2 and PW3 etc. are kept confidential in sealed cover by the court barring access of the same to the public. The court would also be within its right to allow the shielding of a witness from public gaze when he is brought to the court room where of course he would be made to depose openly and not from behind the purdah and in any case

\textsuperscript{116} AIR 1988 P&H 95.
\textsuperscript{117} \textit{id.}, pp.120-21.
where the trial is in open court, the identity of the witness shall not be screened from the accused, his counsel and the court."

Section 16 provides that "a designated court may, on an application made by witness in any proceedings before it or by the public prosecutor in relation to such witness or on its own motion, take such measure as it deems fit, keeping the identity and address of the witness secret."\(^{118}\)

The court observed that "from the perusal of section 16 of the Act it becomes clear that the legislature has left the matter to the discretion of the court. The court in exercise of its discretion, in the matter, shall on the one hand try to ensure that a witness is able to depose in the court free from all mental constraint and fear, it would also at the same time ensure that the accused is put in a position to effectively cross-examine the witness."\(^{119}\) The court held that the procedure given in the said provisions is not unreasonable, unjust or unfair.

4.3.2.2 Kartar Singh v. State of Punjab\(^{120}\)

In this case, again the constitutional validity of the section 16(2) and (3) of Terrorists and Disruptive Activities (Prevention) Act, 1987 was challenged. It was argued that "sub-sections of section 16 except sub section (1) empower a court to keep back from the defence the names and addresses of the witnesses, without which the accused cannot prepare his defence or successfully defend himself at the trial. The object of the cross-examination, according to them, in such circumstances, becomes futile and

\(^{118}\) Section 16, the Terrorist and Disruptive Activities (Prevention) Act, 1987, "Protection of witnesses: (1) Notwithstanding anything contained in the Code, the proceedings under this Act may be held in camera if the Designated Court so desires.
(2) A Designated Court may, on an application made by a witness in any proceedings before it or by the Public Prosecutor in relation to such witness or on its own motion, take such measures as it deems fit for keeping the identity and address of any witness secret.
(3) In particular, and without prejudice to the generality of the provisions of sub-section (2), the measures which a Designated Court may take under that sub-section may include-the holding of the proceedings at a place to be decided by the Designated Court; the avoiding of the mention of the names and addresses of the witnesses in its orders or judgments or in any records of the case accessible to public; the issuing of any directions for securing that the identity and addresses of the witnesses are not disclosed. That it is in the public interest to order that all or any of the proceedings pending before such a court shall not be published in any manner.
(4) Any person who contravenes any direction issued under sub-section (3) shall be punishable with imprisonment for a term which may extend to one year and with fine which may extend to one thousand rupees."

\(^{119}\) See id., p. 120.

\(^{120}\) 1994 (3) SCC 569.
impotent. It was also urged that section 16(2) and (3) of the Act empower the designated court to take measures for keeping the identity and address of witnesses secret and to issue directions for securing that their identity is not disclosed, due to which a trial turns into a farce. Such measures may include the holding of the proceedings at a protected place, the avoiding of the mention of the names and addresses of witnesses in order or judgement or in any records of case accessible to public and the issuing of any direction that the identity and address of the witness will not be disclosed."\(^{121}\)

Section 16(2) empowers the Designated Court to keep secret the identity and address of any witness, in the following three circumstances:\(^{122}\)

"(1) on an application made by a witness in any proceedings before it; or

(2) on an application made by the Public Prosecutor in relation to such witness; or

(3) on its own motion."

Section 16(3) deals with the measures that can be taken by the Designated Court while exercising its discretion under subsection (2).

The court held that "notwithstanding the provisions of the Indian Evidence Act, 1872, and the procedure prescribed under the Code of Criminal Procedure, 1973, there is no imposition of constitutional or statutory constraint against keeping the identity and address of any witness secret if some extraordinary circumstances or imperative situations warrant such non-disclosure of identity and address of the witnesses."\(^{123}\)

The court observed that "sub-section (3) classifies only the measures to be taken by the designated court while exercising its discretion under sub-section (2). If neither the witness nor the Public Prosecutor has made an application in that behalf nor the court has taken any decision of its own then the identity and addresses of the witnesses have to be furnished to the accused. The court stressed that the measures are to be taken by the designated court under any one of the above contingencies so that a

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\(^{121}\) ibid.

\(^{122}\) ibid.

\(^{123}\) id., pp. 686-87.
witness or witnesses may not be subjected to any harassment for having spoken against the accused.\textsuperscript{124}

The court, advocating the keeping of the identity of witnesses secret in certain cases, observed that the witnesses are unwilling to come forward to depose against the accused persons who are terrorists and disruptionists. The held that under such circumstances it is right to keep the identity of witnesses secret.\textsuperscript{125}

The court held that "sub-sections (2) (3) of section 16 are not liable to be struck down. However, in order to ensure that the purpose and object of the cross-examination, the court reiterated the decision of Full Bench of the Punjab and Haryana High Court in \textit{Bimal Kaur's case} and stated that the identity, names and addresses of the witnesses may be disclosed before the trial commences; but it should be subject to an exception that the court for weighty reasons in its wisdom may decide not to disclose the identity and addresses of the witnesses especially of the potential witnesses whose life may be in danger."\textsuperscript{126}

It is submitted that while in \textit{Bimal Kaur's case} the High Court has held that the identity of the witnesses may be disclosed before the trial commences, the Supreme Court in the present case went a step further and held that the same may not be disclosed even at the commencement of the trial, if in the opinion of the court the witness is in serious danger.

\textit{4.3.2.3 Simranjit Singh v. Union of India,}\textsuperscript{127}

In this case, section 30 of the \textit{Prevention of Terrorism Act,} 2002 was challenged on the ground that it denies fair trial to the accused. It is important to note here that provisions of Section 30 are similar to those in section 16 of the \textit{Terrorist and Disruptive Activities Act,} 1987, as it also deals with providing identity protection to witnesses, appearing in cases against terrorists, whose life is in danger. The court observed as under:\textsuperscript{128}

\begin{itemize}
  \item \textsuperscript{124} \textit{id.}, p. 688.
  \item \textsuperscript{125} \textit{id.}, pp. 688-89.
  \item \textsuperscript{126} \textit{id.}, p. 713.
  \item \textsuperscript{127} 2002 Cri.L.J. 3368.
  \item \textsuperscript{128} \textit{id.}, pp.3378-79.
\end{itemize}
"A perusal of the provision of section 30 shows that the special court can, for reasons to be recorded in writing order that the proceedings be held in camera. Under clause 2, a witness or the public prosecutor can make an application. The court can proceed even suomoto. If it finds, for reasons to be recorded in writing, that the life of such witness is in danger, then it can take such measure as it deems fit for keeping identity and address of such witness secret. Clearly, the provision is only intended to provide a sense of security to the witness, not to deny a just and fair opportunity to the accused. It is only in a case where the court is satisfied that there is danger to the life of the witness that his identity and address can be kept secret. The provision only promotes the interest of justice. It is meant to guarantee that the witnesses are able to appear and depose without fear of retribution at the hand of terrorists or the other members of their gangs. The legislative intent is clear. The real purpose of the provision becomes obvious on perusal of provision in clause 3 whereby the special court is empowered to hold the proceedings at a place it considers appropriate. The names and addresses of the witnesses may not be recorded in the orders, judgements or placed on record of the case which may be accessible to public. The court is empowered to issue directions to ensure that the identity and address of the witnesses are not disclosed. In the larger interest of public, the publication of the proceedings can be regulated. Violation of an order of the court has been punishable with imprisonment."

The court held that the provision of the said section is not arbitrary or unfair. It has a purpose to serve. It seeks to ensure a fair trial for the accused and to protect the life of the witness. The existing circumstances and the past experience justify it. There is not infraction of any right or law.\(^{129}\)

A review of the abovementioned case reveals that the courts have emphasised that in cases where the accused is a dreaded terrorist and the life of the witness is in danger, his identity i.e. his name and address can be kept secret from the accused and his counsel. In such exceptional cases there is no violation of principles of natural justice, according to which an accused has a right to know the identity of the witness and right to cross examine him. In the view of courts, such provisions are significant for the effective prosecution of the terrorists and for protecting life of witnesses who give evidence against such witnesses.

\(^{129}\) \textit{ibid.}\n
146
In the present case, a batch of writ petitions was filed before the Supreme Court to challenge the constitutional validity of various provisions of the Prevention of Terrorism Act, 2002. One of the challenges was against section 30, which deals with the protection of witnesses. Petitioners challenged the constitutional validity of this Section by on the ground that it is violative of Article. It was further argued that fair trial includes the right for the defence to ascertain the true identity of an accuser. Therefore, the section has to be declared unconstitutional.

Learned Attorney General submitted "that such provisions are enacted to protect the life and liberty of a person who is able and willing to give evidence in prosecution of grave criminal offences. The section is not only in the interest of witness whose life is in danger but also in the interest of community, which lies in ensuring that heinous offences like terrorist acts are effectively prosecuted and punished. If the witnesses are not given immunity they would not come forward to give evidence and there would be no effective prosecution of terrorist offences and the entire object of the Act would be frustrated."131

On the issue of violation of right of the accused to know the identity of the witnesses and to cross-examine him the court observed that "it is not per se taken away by section 30. This section only confers discretion to the concerned court to keep the identity of witness secret if the life of such witness is in danger. The court further stressed that threat to the life of a witness prevents him from deposing before the court which creates challenges for the criminal justice administration due to non-conviction of heinous terrorists, who need to be effectively prosecuted and punished.132 The court opined that a fair balance between the rights and interests of witness, rights of accused and larger public interest has been maintained under section 30, as anonymity to witnesses is granted only in exceptional circumstances, where the special court is satisfied that the life of the witness is in jeopardy."133 The court upheld the validity of section 30 and observed:

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130 2003 (10) SCALE 967.
131 ibid.
132 ibid.
133 ibid.
"Keeping secret the identity of witness, though in the larger interest of public, is a deviation from the usual mode of trial. In extraordinary circumstances we are bound to take this path, which is less travelled. Here the special courts will have to exercise utmost care and caution to ensure fair trial. The reason for keeping identity of the witness has to be well substantiated. It is not feasible for us to suggest the procedure that has to be adopted by the special courts for keeping the identity of witness secret. It shall be appropriate for the concerned courts to take into account all the factual circumstances of individual cases and to forge appropriate methods to ensure the safety of individual witness."

4.3.3 In Camera Proceedings in Rape Cases

The Code of Criminal Procedure, 1973, provides that the proceedings of a rape case should be held in-camera so that the victim is able to testify without any undue pressure and hesitation. The Indian courts have vigilantly followed this provision. The important cases relating to this aspect are discussed as follows:

4.3.3.1 State of Punjab v. Gurmit Singh

The present appeal was filed under section 14 of the Terrorist Affected areas (Special Courts) Act, 1984, against the decision of Special Court, Ludhiana, by which the respondents were acquitted of the charge of abduction and rape. In this case the court discussed the relevance of holding in camera proceedings in rape cases under the Criminal Procedure Code. The significant remarks of the court are mentioned as follows:

"...the expression that the inquiry into and trial of rape "shall be conducted in camera" as occurred in sub-section (2) of section 327 of the Criminal Procedure Code is not only significant but very important. It casts a duty on the court to conduct the trial of rape cases etc. invariably in-camera. The courts are obliged to act in furtherance of the intention expressed by the legislature and not to ignore its mandate and must invariably take recourse to the provisions of section 327(2) and (3) of the Criminal Procedure Code and hold the trial of the rape cases in-camera."

134 AIR 1996 SC 1393.
135 Section 327 (2) and (3), the Code of Criminal Procedure, 1973.
136 AIR 1996 SC 1393 at p. 1405.
The court observed that "these provisions enable the victim of crime to be a little comfortable and answer the questions with greater ease. According to the court, in-camera proceedings are likely to improve the quality of the evidence of a prosecutrix as she would not be hesitant to depose frankly, as she may be an open court, under the gaze of the public. The improved quality of her evidence would assist the court in arriving at the truth and sifting truth from falsehood."\(^{137}\)

Regarding keeping the identity of the victim secret the court observed that "the courts should as far as possible avoid disclosing the name of the prosecutrix in their orders to save further embarrassment to the victim of sex crime. The anonymity of the victim of the crime must be maintained as far as possible. In the present case the trial court has repeatedly used the name of the victim in its order. The court held that the trial of the rape case in-camera should be the rule and an open trial in such cases should be an exception."\(^{138}\)

4.3.3.2 *Sakshi* v. *Union of India*\(^{139}\)

This writ petition under Article 32 was filed by way of public interest litigation, by *Sakshi*, which is an organisation to provide legal, medical, residential, psychological or any other help, assistance or charitable support for women, especially victims of sexual abuse.\(^{140}\) The petitioner requested that "certain precautions should be followed while recording statements of victims of sexual abuse, since mere sight of the accused may induce an element of extreme fear in the mind of the victim or the witnesses, or can put them in a state of shock and since questions put in cross-examination are purposely designed to embarrass or confuse the victims of rape or child abuse."\(^{141}\) The petitioner requested that especially in the cases of child sexual abuse the following precaution shall be followed:\(^{142}\)

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

\(^{137}\) *ibid.*  
\(^{138}\) *id.*, p.1406.  
\(^{139}\) (2004) 5 SCC 518.  
\(^{140}\) *id.*, pp.524-25.  
\(^{141}\) *id.* p.521.  
\(^{142}\) *ibid.*
"(ii) Allow 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 a minor should only be carried out by the judge based on written questions submitted by the defence upon perusal of the testimony of the minor;

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

The Supreme Court referred the matter to the Law Commission of India for its suggestions.\textsuperscript{143} The Supreme Court held that "the whole inquiry before a court being to elicit the truth, it is absolutely necessary that the victim or the witnesses are able to depose about the entire incident in a free atmosphere without any embarrassment. According to the court section 273 of the \textit{Code of Criminal Procedure, 1973}, merely requires the evidence to be taken in the presence of the accused. It does not say that the evidence should be recorded in such a manner that the accused should have full view of the victim or the witnesses."\textsuperscript{144}

The court observed that "the recording of the evidence by way of video-conferencing vis-a-vis section 273 has been upheld to be permissible in \textit{State of Maharashtra v. Praful Desai}.\textsuperscript{145} A screen or some such arrangement can be made where the victim or witnesses do not have to undergo the trauma of seeing the body or the face of the accused."\textsuperscript{146}

The court also held that "it will be better if the questions to be put by the accused in cross-examination are given in writing to the presiding officer of the court, who may put the same to the victim or witnesses in a language which is not embarrassing."\textsuperscript{147}

A perusal of these cases reflects the concern of the legislature as well as judiciary for the victims of rape and sexual abuse.

\textsuperscript{143} The observations and suggestions of the Commission on the subject, given in One Hundred and Seventy Second Report, have been discussed in chapter three of the present thesis.

\textsuperscript{144} (2004) 5 SCC 518 at p. 544.

\textsuperscript{145} (2003) 4 SCC 601.

\textsuperscript{146} (2004) 5 SCC 518 at p.544.

\textsuperscript{147} id., p. 545.
4.3.4 Transfer of the Case

In a number of cases the courts have transferred the cases from one place to another to ensure that the trial takes place in a congenial environment. In *Amarinder Singh v. Prakash Singh Badal*\(^{148}\) the court observed that "assurance of a fair trial is the first imperative of the dispensation of justice. The purpose of the Criminal trial is to dispense fair and impartial justice, uninfluenced by extraneous considerations, when it is shown that the public confidence in the fairness of a trial would be seriously undermined, the aggrieved party can seek the transfer of case within the State under section 407 and anywhere in the Country under section 406 of the *Criminal Procedure Code, 1973.*"\(^{149}\) The important cases dealing with this aspect are discussed as follows:

4.3.4.1 *Nahar Singh Yadav and another v. Union of India and others*\(^{150}\)

This case involves prayer for "transfer of the case from Ghaziabad to Delhi, with the direction to the trail court to conduct the trial of the case on a day to day basis, and to complete it within a period of two years."\(^{151}\)

The transfer was sought by the CBI on the ground that "charge-sheet has been filed against six former District Judges of Ghaziabad, three of whom were later elevated as Judges of the Allahabad High Court and forty eight class III and class IV employees of the District Court, Ghaziabad."\(^{152}\) It was alleged that "all these persons and their close associates have been working in the District Court, Ghaziabad for many years and have close contacts with various Judges and Magistrates, who remained posted in Ghaziabad and other districts of Uttar Pradesh."\(^{153}\) "The Special Judge, CBI, in whose court the charge-sheet had been filed, had also worked with or under some of the charge-sheeted judicial officers in the past. Thirteen judicial officers and more than twenty five employees of the District Court, Ghaziabad have been cited as prosecution witnesses in the case,

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\(^{149}\) ibid.

\(^{150}\) (2011) 1 SCC 307.

\(^{151}\) *id.*, p. 309

\(^{152}\) *id.*, p. 310.

\(^{153}\) *id.*, pp.310-11.
whose testimony would be crucial to establish the criminal cases against the charge-sheeted accused persons.\textsuperscript{154}

The Attorney General submitted that "it is a settled principle that justice should not just be done, but should also be seen as being done, and in view of the fact that some of the named accused happen to be ex-judge or administrative judges, there would be reasonable apprehension in the mind of the public at large that the trial judge being their former colleague, may be biased in favour of the accused and therefore, the peculiar circumstances of the case warrant that in the interests of justice the trial be shifted to a neutral venue."\textsuperscript{155}

The learned counsel appearing on behalf of the petitioners said that "there is a serious apprehension that the trial may not be free and fair because of the past association between the accused, witnesses and the trial judge."\textsuperscript{156}

The Supreme Court rejected the request of the CBI for transfer of the trial from Ghaziabad to any other place. According to the court, while considering an application for transfer of the trial, following factors should be kept in mind:\textsuperscript{157}

\textquotedblleft (i) when it appears that the State machinery or prosecution is acting hand in glove with the accused, and there is likelihood of miscarriage of justice due to the lackadaisical attitude of the prosecution; or\

(ii) when there is material to show the accused may influence the prosecution witnesses or cause physical harm to the complainant;\

(iii) comparative inconvenience and hardship likely to be caused to the accused, the complainant or the prosecution and the witnesses, besides the burden to be borne by the State exchequer in making payment of travelling and other expenses of the official and non-official witnesses;\

(iv) a communitiously surcharged atmosphere, indicating some proof and impartial trial because of the accusations made and the nature of the crime committed by the accused; and"
"(v) existence of some material from which it can be inferred that some persons are so hostile that they are interfering or are likely to interfere either directly or indirectly with the course of justice."

It is pertinent to note that according to court, a case may be transferred on the ground that the accused may influence the prosecution in witnesses or may cause physical harm to the complainant.

4.3.4.2 Sister Meena Lalita Borwa v. State of Orissa and others\textsuperscript{158}

In this case, the petitioner filed transfer application under section 407 read with section 482 of the \textit{Criminal Procedure Code}. It was alleged that during communal violence in Kandhamal District, Orissa, Sister Meena Lalita Borwa was allegedly sexually assaulted, raped and paraded naked by a mob of forty-fifty persons.

It was alleged that that "the petitioners were still being threatened not to go to Baliguda or to participate in the trial and the witnesses were also threatened with dire consequences and hence are scared to attend the trial in Phulbani. It was further alleged that the situation in Phulbani continues to be tense and the friends and relatives of the accused being residents of Phulbani, the petitioners apprehend danger to their lives and also the possibility of hampering a free and fair trial. It was submitted that the situation in Kandhamal continues to be communally volatile and has cited various instances where witnesses have either turned hostile or have approached the trial court seeking protection."\textsuperscript{159} The petitioner prayed before the court, for the transfer of trial under section 407 of the \textit{Code of Criminal Procedure}. 1973, for the conduct of a fair and an impartial trial and also keeping in view the convenience of the parties and witnesses.\textsuperscript{160}

It was alleged that "not only the informant but also the witnesses are threatened by the accused persons who are the local people of Phulbani and the aggressors of the said communal violence. Therefore, they are apprehending danger to their lives and limbs

\textsuperscript{158} 2010 Cri.L.J. 2779
\textsuperscript{159} \textit{id.}, p. 2780.
\textsuperscript{160} \textit{ibid.}
if they will go to Phulbani. This fact is been further fortified from the fact that the informant and the witnesses are still staying outside the Kandhamal District.\textsuperscript{161}

The petitioner referred to the observations made by the Supreme Court in \textit{Himanshu Singh Sabharwal v. State of Madhya Pradesh}\textsuperscript{162}, in which the court had observed as follows:

"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, witnesses or the cause which is being tried is being eliminated. If the witnesses are threatened or are found 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."

The Orissa High Court, while allowing the transfer petition, directed that "the Orissa State Police shall provide all necessary assistance and security and escort to both the prosecutrix as well as all witnesses and when necessary also provide them suitable and safe accommodation at safe location prior to their production before the trial court for recording their evidence. The court also directed that all efforts should be made by the learned Sessions Judge or the trial court to whom the matter is transferred, to take up trial on a day-to-day basis and to conclude the same at the earliest."\textsuperscript{163} Thus, in this case the High Court not only transferred the case but directed that the victim as well as witnesses should be provided protection as well as assistance by the State police.

\textit{4.3.4.3 Surendra Pratap Singh v. State of Uttar Pradesh & Others.}\textsuperscript{164}

The above-mentioned case also deals with transfer petition, filed, under section 406 of the \textit{Code of Criminal Procedure}, before the Supreme Court. The petitioner's brother was allegedly murdered by the accused, an M.L.A, and his associates. The petitioner alleged that the investigating agencies were influencing the prosecution witnesses to change their statements in favour of the accused persons.

\begin{itemize}
  \item \textsuperscript{161} \textit{id.}, p. 2781.
  \item \textsuperscript{162} (2008) 3 SCC 602, AIR 2008 SC 1943 quoted in \textit{ibid}.
  \item \textsuperscript{163} 2010 Cri.L.J. 2779 at p. 2786.
  \item \textsuperscript{164} 2011 Cri.L.J. 690.
\end{itemize}
Learned counsel appearing for the petitioner submitted that the investigating agencies, in connivance with the State Government, wanted to shield the accused from prosecution in connection with the complaint filed by the petitioner. It was submitted that in such circumstances there was a genuine apprehension in the mind of the complainant, who was the brother of the deceased, that the deceased would not receive free and fair justice within the State of Uttar Pradesh. The Supreme Court while agreeing to the apprehension of the petitioner that the perspective of the prosecution may become polluted, allowed the transfer petition.

4.3.4.4 Madan Lal and others v. State of Rajasthan and others

In this case the petitioner was accused of murdering the son of a sitting MLA. He moved the Rajasthan High Court for transfer of the case from the court of Additional District and Sessions Judge, Kishangarh, to any other court in District Ajmer. For this purpose, the petitioners challenged the order passed by the Sessions Judge, Ajmer whereby the learned Judge had dismissed their transfer petition. The petitioners alleged that when they attend the trial, they find a mob of hundred-two hundred people waiting for them. The atmosphere was so surcharged that the petitioners and the respondent nos. 2 to 4 found it extremely difficult to hire the services of advocates from Kishangarh for defending themselves. Therefore, they had to hire the services of lawyers from Ajmer.

The learned Special Public Prosecutor, has raised the following counter-contentions before the court: firstly, the petitioners are desperately trying to delay the trial. Their application for transfer of the case is merely a ploy to delay the trial. Secondly, the petitioners are trying to delay the trial with a view to have sufficient time to pressurize the witnesses to change their stand. In fact, the witnesses have already filed applications for seeking protection from the accused petitioners. The learned Special Public Prosecutor submitted copies of the application moved by the witnesses seeking police protection before this court.

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165 id., p.691.
166 2012 Cri.L.J. 1430.
167 id., p. 1432.
168 id., p. 1433.
During the course of arguments a new ground emerged for transferring the case, namely the threat faced both by the accused and by the witnesses. Hence, the court felt the need for protection of both the sides. The court observed as follows:169

"Witness protection has recently engaged the attention of the judiciary. Bentham, the famous English political philosopher, had opined that witness is the eyes and ears of justice. Without the free and fearless testimony of a witness, a court is handicapped. It is the witness who resurrects the incident; it is the witness who narrates the details of the alleged offence; it is the witness who unravels the diabolical mind of the accused to the court; it is the witness who reveals ‘the truth’. Since the endeavor of the court is to discover ‘the truth’, the witness is the medium through which the court reaches ‘the truth’ about the case. If the witness is frightened, is under duress, or is under temptation, his testimony is likely to be opaque, likely to be false, likely to be custom-tailored in favour of a particular party who has frightened or tempted him. The truth is likely to be lost; justice is likely to be buried."

The court then discussed the case of National Human Rights Commission v. State of Gujarat and others170, wherein the Hon’ble Supreme Court had observed as under:

"The importance of witnesses in a criminal trial does not need any reiteration. It is an established fact that witnesses form the key ingredient in a criminal trial and it is the testimonies of these very witnesses, which establish the guilt of the accused. It is, therefore, imperative that for justice to be done, the protection of witnesses and victims becomes essential, as it is the reliance on their testimony and complaints that the actual perpetrators of heinous crimes during the communal violence can be brought to book."

The court discussed the observations of the Supreme Court that "since the protection of a witness is of paramount importance it is imperative that if and when any witness seeks protection so that he or she can depose freely in court, the same has to be provided."171 The court observed that "despite the directions of the Apex Court, given in the case of National Human Rights Commission v. State of Gujarat172, to the Central and the State Governments

169 ibid.
171 ibid.
to enact a law for witness protection, no action has been taken by either of the
two governments."\(^{173}\)

In the present case, the witnesses had asked for protection. The learned trial
court had written to the concerned police officer to provide protection to the
witnesses. The court directed the DIG, Ajmer to ensure that the eyewitnesses
in this case are immediately provided police protection. The court directed as
under:\(^{174}\)

"The police protection shall include a guard at the residence of
the eyewitness and shall include bringing the eyewitness, to and
fro, from the court under heavy police protection. However, in
case any other witness were to request for police protection,
then the same protection, as mentioned above, shall be
provided to him/her. If the relatives of the accused persons also
require police protection, then the same shall be provided to
them as well, in the terms deem fit by the DIG, Ajmer. In case
any harm is caused to a witness in this case, the responsibility
shall be squarely of the DIG, Ajmer."

The court while allowing the petition for transfer observed as under:\(^{175}\)

"The criminal delivery system is afflicted by a poor rate of
conviction. One of the major causes is that witnesses turn
hostile during the trial. They turn hostile either because they are
threatened, or they are tempted. In order to stop this trend, the
Law Commission of India has recommended the enactment of
law for the protection of witnesses. Such laws do exist in other
countries, such as USA, Canada, England and Ukraine.
...Perhaps the State of Rajasthan should take a lead in this
arena. It is hoped that both the Legislature and the Executive of
the State would rise to the occasion and would address one of
the major problems adversely affecting the performance of the
criminal delivery system."

Hence, in this case not only the case was transferred so as to protect the interests of
accused as well as witnesses, the court also directed that witnesses as well as their
relatives shall be given police protection. It is submitted that it is important that the
trial should take place in a congenial environment so that witnesses may depose
without any apprehension or pressure.

\(^{173}\) 2012 Cri.L.J. 1430 at p. 1439.
\(^{174}\) id., pp.1439-40.
\(^{175}\) ibid.
4.3.5 Role of the State in the Protection of Witnesses

As discussed earlier, a witness performs his civil duty by deposing before the court, it is the duty of the state to provide adequate security to him in case of danger to his life and property. In various judgements courts have made it clear that the State has a definite role to play in the protection of the witnesses. The main cases dealing with this aspect are discussed as under:

4.3.5.1 Zahira Habibulla H. Sheikh and Another v. State of Gujarat and Others

While discussing the role of the State in the protection of the witnesses the court observed as follows:

"The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who has political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. As a protector of its citizens it has to ensure that during a trial in court the witness could safely depose truth without any fear of being haunted by those against whom he has deposed."

4.3.5.2 Sister Meena Lalita Borwa v. State of Orissa and others

The main facts of the case have been discussed earlier. On the issue of role of the State in the protection of witnesses the court observed:

"It is now well settled principle of law that the State has a definite role to play in protecting the witnesses.... the object of the criminal trial, is not only to mete out justice to accused, but also to protect the innocent. A criminal trial is in essence a search for truth. In our criminal justice system, which is substantially dependent on the oral testimony of witnesses, truth can only be arrived at, if such witnesses, who are the eyes and ears of justice system, can come fearlessly and depose the truth in court. Therefore, witnesses need to be protected by the State (in appropriate cases) in order to ensure that the interest of justice is best served and


\[177\] ibid.

\[178\] 2010 Cri.L.J. 2779

\[179\] id., pp. 2785-86.
to ensure that criminal proceedings do not become mere mock trials."

It is submitted that the State can no longer overlook its duties towards witnesses, who are the keystones of a criminal case.

### 4.3.6 Cancellation of the Bail of the Accused

Besides giving directions on physical and identity protection of witnesses, the courts have in a number of cases cancelled the bail of the accused to ensure that he may not be able to tamper with evidence or influence the witnesses. Some of the cases on this aspect are discussed as follows:

#### 4.3.6.1 Atul Bagga v. State of Chattisgarh\(^{180}\)

In the present case the petitioner was charged with economic offences of high magnitude under sections 407, 409, 420, 467, 468 and 471 of the *Indian Penal Code*, 1860. According to government advocate for the State, petitioner has even approached the Session Judge, due to which the learned Sessions Judge passed an order declining to hear the matters of the petitioner. He further alleged that if the petitioner could take steps to approach the Sessions Judge, the apprehension of the learned Judicial Magistrate First Class in the impugned order that the petitioner, if released on bail, was likely to influence the prosecution witnesses was also not out of place.\(^{181}\)

While determining the question as to what factors should weigh with the magistrate while refusing bail under sub-section (6) of section 437 of the *Code of Criminal Procedure*, 1973, the court opined that, apart from the gravity of offence and the quantum of punishment, one or more of the following factors among others may weigh with the magistrate while refusing bail:\(^{182}\)

"(a) the overall impact of the offence and the release of person accused of such offence on the society,

(b) the possibility of tampering of evidence by the accused,"

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\(^{180}\) 2010 Cri.L.J. 508.

\(^{181}\) id., p. 510.

\(^{182}\) id., p. 511.
"(c) the possibility of the accused absconding if released on bail, and lastly,
(d) the delay in conclusion of the trial within a period of sixty days if attributable to the accused."

The High Court while dismissing the criminal revision observed as follows:\(^\text{183}\)

"In the present case, since the petitioner did not even hesitate to approach the Session Judge, the possibility that if he was released on bail, he would tamper evidence and dissuade the witnesses from giving evidence cannot be ruled out. The economic offences alleged against the petitioner are such serious magnitude that his release is likely to affect the society at large."

This case is a glaring example of how far accused can go to get case in their favour. In a criminal justice system where powerful accused can dare to influence the judges, the helpless position of witnesses is imaginable.

It is important to mention that the court observed that it is also the duty of the presiding magistrate of the trial courts to ensure that before proceeding on leave, they should make arrangement for informing the witnesses for not attending the court on the date fixed for evidence. The court further observed that the abounding faith which the people still have in the judiciary gets shaken when witnesses turn up for testifying before the court from long distance and find that the case is adjourned because the presiding judge is on leave.\(^\text{184}\)

4.3.6.2 Ravindra Pal Singh v. Ajit Singh and another\(^\text{185}\)

In this case deceased Ranbir Singh, son of the appellant, was allegedly killed by accused police officials in cold-blooded fashion. When the appellant contacted the police officials, he was threatened by them. The bail application of the respondents was rejected by the Sessions Court. However, they were granted bail by the High Court. Aggrieved by the aforesaid order, the complainant, father of the deceased, moved the Supreme Court. The Supreme Court after that taking into account the seriousness of allegations and possibility of undue influence on witnesses, set aside the bail order.

\(^{183}\) id., p. 512.
\(^{184}\) ibid.
\(^{185}\) 2012 Cri.L.J. 1848.
A perusal of the aforementioned cases makes it evident that the courts have cancelled the bail of the accused to prevent the tampering of evidence and intimidation of witnesses.

4.3.6.3 Talab Haji Hussain v. Madhukar Purushottam Mondkar

The facts of the above case were that "the person was accused had committed an offence, which was bailable but the High Court, in exercise of its inherent power, allowed an application by the complainant for cancelling the bail on the ground that it would not be safe to permit the appellant to be at large. The Supreme Court confirmed the order of cancellation and observed that the primary purpose of the Code of Criminal Procedure was to ensure a fair trial to an accused person as well as to the prosecution." The court observed:

"It is, therefore, of the utmost importance that, in a criminal trial, witnesses should be able to give evidence without inducement or threat either from the prosecution or the defence....the progress of a criminal trial must not be obstructed by the accused so as to lead to the acquittal of a really guilty offender.... there can be no possible doubt that, if any conduct on the part of an accused person is likely to obstruct a fair trial, there is occasion for the exercise of the inherent power of the High Court to secure the ends of justice.... and it is for the continuance of such a fair trial that the inherent powers of the High Courts, are sought to be invoked by the prosecution in cases where it is alleged that accused person, either by suborning or intimidating witnesses, or obstructing the smooth progress of a fair trial."

The cancellation of bail was reasonable on the basis of the conduct of the accused after his release on bail.

4.3.7 Unnecessary Adjournments and Inadequate Allowances

In the cases mentioned below, the observations of the Supreme Court highlight the problem of unnecessary adjournments and inadequate allowances:

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186 AIR 1958 SC 376
187 ibid.
188 ibid.
4.3.7.1 Swaran Singh v. State of Punjab\textsuperscript{189}

In the present case the court observed that "proper diet money must be paid immediately to the witness not only when he is examined but for every adjourned hearing and even sent to him and he should not be left to be harassed by the subordinate staff. If the criminal justice system is to be put on a proper pedestrian, the system cannot be left in the hands of unscrupulous lawyers and the sluggish state machinery. Each trial should be properly monitored. The court expressed its view that the time has come that all the courts are linked to the High Court with a computer and a proper check is made on the adjournments and recording the evidence."

4.3.7.2 State of Uttar Pradesh v. Shambhu Nath Singh\textsuperscript{191}

In the words of Supreme Court," This case demonstrates the agony and ordeal suffered by witnesses who attended a Sessions Court on several days and yet they were not examined in full. The party who succeeded in dodging examination of such witnesses finally enjoyed the benefit when the Sessions Court acquitted them for want of evidence. The only casualty in the aforesaid process is criminal justice."

This case is a glaring example of dilatory tactics used by the accused persons. In five years, prosecution side was given forty five dates for producing evidence but the prosecution failed to lead any evidence, whereas, the prosecution has filed a list of thirty four witnesses in the court. Ultimately accused were acquitted for want of evidence. The Sessions judge observed that the police and prosecution side had colluded with the defence side and, therefore, have not produced any witnesses in the court. After the order of acquittal was passed the state moved the High Court seeking leave to appeal which was refused. The State of Uttar Pradesh filed appeal by Special leave before the Supreme Court against the order of the High Court and against the acquittal of the accused.

The court held that "if a witness is present in court he must be examined on that day. The court observed that most of the witnesses could attend the court only at heavy

\textsuperscript{189} AIR 2000 SC 2017.
\textsuperscript{190} ibid.
\textsuperscript{191} 2001 (4) SCC 667.
\textsuperscript{192} ibid.
cost to them, after keeping aside their own avocation. Certainly they incur suffering and loss of income. The meagre amount of bhatta (allowance) which a witness may be paid by the court is generally a poor solace for the financial loss incurred by him. It is a sad plight in the trial courts that witnesses who are called through summons or other processes stand at the doorstep from morning till evening only to be told at the end of the day that the case is adjourned to another day. This primitive practice must be reformed by presiding officers of the trial courts and it can be reformed by everyone provided the presiding officer concerned has a commitment to duty. No sadistic pleasure in seeing how other persons summoned by him as witnesses are stranded on account of the dimension of his judicial powers can be a persuading factor for granting such adjournments lavishly, that too in a casual manner."\(^{193}\)

The court then referred to "section 309 of the Code of Criminal Procedure, 1973, which confers power on the trial court for granting adjournments in criminal proceedings. The conditions laid down by the legislature for granting such adjournments have been clearly incorporated in the section."\(^{194}\)

The court held that "first sub-section mandates on the trial courts that the proceedings shall be held expeditiously but the words as expeditiously as possible have provided some play at the joints and it is through such play that delay often creeps in the trials. Even so, the next limb of the sub-section sounded for a more vigorous stance to be adopted by the court at a further advanced stage of the trial. That stage is when examination of witnesses begins."\(^{195}\) The court observed that "legislature which diluted the vigour of the mandate contained in the initial limb of the sub-section, by using the words as expeditiously as possible, has chosen to make the requirement for the next stage (when examination of witnesses has started) to be quite stern. Once the case reaches that stage the statutory command is that such examination shall be continued from day to day until all the witnesses in attendance have been examined." According to the court," Solitary exception to the said stringent rule is, if the court finds that adjournment beyond the following day to be necessary, the same can be granted for which a condition is imposed on the court that reasons for the same should be recorded. Even this dilution has been taken away when witnesses are in attendance

\(^{193}\) id., pp.671-72.
\(^{194}\) ibid.
\(^{195}\) id., pp. 672-73.
before the court. In such situation the court is not given any power to adjourn the case except in the extreme contingency for which the second proviso to sub-section (2) has imposed another condition, provided further that when witnesses are in attendance, no adjournment or postponement shall be granted without examining them, except for special reasons to be recorded in writing.  

The court observed that "the legal position is that once examination of witnesses started, the court has to continue the trial from day to day until all witnesses in attendance have been examined (except those whom the party has given up). The court has to record reasons for deviating from the said course. Even that is forbidden when witnesses are present in court, as the requirement then is that the court has to examine them. Only if there are special reasons, which reasons should find a place in the order for adjournment that alone can confer jurisdiction on the court to adjourn the case without examination of witnesses who are present in court."  

The court showed its distress to note that "it is almost a common practice and regular occurrence that trial courts flout the said command with immunity. Even when witnesses are present cases are adjourned on far less serious reasons or even on flippant grounds. Adjournments are granted even in such situations on the mere asking for it. Quite often such adjournments are granted to suit the convenience of the advocate concerned. The court commented that at any rate inconvenience of an advocate is not a special reason for bypassing the mandate of section 309 of the Code." In the words of the court," If any court finds that the day to day examination of witnesses mandated by the legislature cannot be complied with, due to the non-cooperation of accused or his counsel the court can adopt any of the measures indicated in the sub-section i. e. remanding the accused to custody or imposing cost on the party who wants such adjournments (the cost must commensurate with the loss suffered by the witnesses, including the expenses to attend the court). Another option is, when the accused is absent and the witness is present to be examined, the court can cancel his bail, if he is on bail (unless an application is made on his behalf seeking permission for his counsel to proceed to

196  ibid.
197  id., p. 673.
198  ibid.
examine the witnesses present even in his absence provided the accused gives an
undertaking in writing that he would not dispute his identity as the particular
accused in the case."^{199}

It is submitted that facts of this case throw light on how adjournments are granted on
flimsy grounds without taking into consideration the convenience of the witnesses.
The witnesses are not given adequate allowance for their attendance in the courts.
However, the court in the present case has made significant observations which if
followed by the courts can give respite to the witnesses.

4.3.8 Preventive Detention of the Accused

4.3.8.1 Harpreet Kaur v. State of Maharashtra^{200}

In this case, an order of preventive detention passed under the *Maharashtra
Prevention of Dangerous Activities of Slumlords Bootleggers and Drug offenders Act*,
1981, was challenged. The order was passed against the detenu on the ground that he
was likely to indulge in activities prejudicial to the maintenance of public order. Four
witnesses A, B, C, D, who agreed to give statements to the police on conditions of
anonymity, clearly stated "that they would not depose against the detenu for fear of
retaliation, as the detenu had threatened to do away with anyone who would depose
against him."^{201} The court held:^{202}

"The evidence of witnesses shows that the *detenu* was
indulging in transporting of illicit liquor and distributing the
same in the locality and was keeping arms with him while
transporting liquor. The activities of the *detenu*, therefore,
were not merely 'bootlegging' but went further to adversely
affect the even tempo of the society by creating a feeling of
insecurity among those who were likely to depose against
him as also the law enforcement agencies. The fear psychosis
created by the *detenu* in the witnesses was aimed at letting
the crime go unpunished which has the potential of the
society, and not merely some individual, to suffer. The
activities of the *detenu*, therefore, squarely fall within the

[^199]: *ibid.*

[^200]: AIR 1992 SC 979.

[^201]: *ibid.*

[^202]: *id.*, p. 985.
deeming provision enacted in the explanation to section 2(a) of the Act. It, therefore, follows that the activities of the detenu were not merely prejudicial to the maintenance of law and order but were prejudicial to the maintenance of public order."

The court while dismissing the petition held that the order of detention does not suffer from any infirmity. Thus, the courts had allowed preventive detention of the accused to make witnesses feel secure and safe.

4.3.9 Externment Orders against the Accused

4.3.9.1 Gurbachan Singh v. The State of Bombay and Another203

An application under Article 32 of the Constitution was filed by Gurbachan Singh, praying for a writ, in the nature of Mandamus restraining the respondents from enforcing an externment order served on the petitioner under section 27(1) of the *City of Bombay Police Act*, 1902.204

It was alleged the order was infringement of Fundamental Right to Freedom of Movement under Articles 19(1) (d) and 19(5). Under the said order the petitioner was asked to remove himself from Bombay and to go to his native place in Amritsar. Later on his request, he was allowed to stay at Kalyan. The purpose of the externment order was that witnesses may depose freely against the petitioner in Bombay.

Section 27(1) of the *City of Bombay Police Act*, 1902 provides as follows:

"Whenever it shall appear to the Commissioner of Police, (a) that the movements or acts of any person in the Greater Bombay are causing or calculated to cause alarm, danger or harm to person or property, or that there are reasonable grounds for believing that such person is engaged or is about to be engaged in the commission of an offence involving force or violence, or an offence punishable under Chapters XII, XVI or XVII of the *Indian Penal Code*, or in the abetment of any such offence, and when in the opinion of the Commissioner witnesses are not willing to come forward to give evidence in public against such person by reason of apprehension on their part as regards the safety of their person or property."

203 AIR 1952 SC 221.
204 *id.*, p. 223.
The court observed that "the law is certainly an extraordinary one and has been made only to meet those exceptional cases where no witnesses for fear of violence to their person or property are willing to depose publicly against certain bad characters whose presence in certain areas constitute a menace to the safety of the public residing therein."\textsuperscript{205}

The court further held that "section 27(1) of the City of Bombay Police Act, 1902, does not contravene the provisions of Article19 of the Constitution and the restrictions that it imposes on the Fundamental Right of free movement of a citizen which is guaranteed by Article19 (1) (d) of the Constitution are reasonable and come within the purview of Article19 (5)."\textsuperscript{206}

The Supreme Court observed that "the procedure which provided that the suspected person was not allowed to cross examine the witnesses who depose against him was not unreasonable having regard to the avowed intention of the legislature in the making of the enactment."\textsuperscript{207} According to the Supreme Court," the law was certainly an extraordinary one and had been made only to meet those exceptional cases where no witnesses for fear of violence to their person or property were willing to depose publicly against certain bad characters whose presence in certain areas constitute a menace to the safety of the public residing therein. This object would be wholly defeated if a right to confront or cross examine these witnesses was given to the suspect."\textsuperscript{208}

It is clear from the decision of the court that right of the accused to cross examine the witnesses can be restricted under exceptional circumstances to encourage the witnesses to depose freely against certain bad characters.
4.3.10  *Suo moto Action of the Court*

4.3.10.1 *Court on its own motion v. State of Punjab*\(^{209}\)

This case is a thought-provoking example of proactive role played by the judiciary to effectuate the cause of justice, by acting against witnesses turning hostile. In this case, the accused were booked under section 489(B) and (C) of the *Indian Penal Code*, 1860. Counterfeit currency worth Rupees five lakh twenty thousand was recovered from their possession. In the course of trial, ten police witnesses examined by prosecution turned hostile. Even the Manager of the State Bank of Patiala, Raikot, who verified that the currency notes of the value of Rupees five lakhs twenty thousand were forged, also resiled from his statement. As a result the accused were acquitted by the trial court. Thereafter, a news item was published in the issue of the Hindustan Times dated 14\(^{th}\) November, 2007 entitled," Fake currency case witnesses resile as SSP Pherurai, brother walk free". Taking note of the aforesaid news, learned Judge Ranjit Singh of Punjab and Haryana High Court passed the following order\(^{210}\).

"Hindustan Times dated 14\(^{th}\) November, 2007 has published a news item titled "fake currency case witnesses resile as SSP Pherurai, brother walk free" revealing that G.S. Pherurai, Senior Superintendent of Police has been acquitted by Additional Sessions Judge (Adhoc) working as Fast Track Court at Ambala. The news item would also show that G.S. Pherurai, SSP was prosecuted for being found in possession and for circulating fake currency in the market. Acquittal, as such, may not be a cause of much concern, but the manner in which this has come about, may be a matter of serious concern. Ten police witnesses examined by prosecution have turned hostile. Portion of their versions has been reproduced in the newspaper, which may be disturbing feature of the case. They can clearly be seen hiding the truth to favour the accused police officer. The trial judge appears to have remained silent spectator and may be seen to have not performed his duties well. It is a failure of justice. Allegation against the accused was of recovery of fake currency of Rupees five lakhs, which was covered by various forms of media and displayed by way of photograph or by video on channels. It can either be a case of fake recovery or an unfair acquittal. Both aspects would need some looking into."

\(^{209}\) 2012 Cri.L.J. 2440

\(^{210}\) id., p. 2443.
On the basis of the aforesaid order *suo-moto* writ was registered. The division bench of the court observed that two conclusions can be drawn in the matter, namely, that the two accused were falsely implicated or that the witnesses were won over and such witnesses, for extraneous and ulterior purposes, did not support the prosecution case leading to the acquittal of the accused. In so far as the conduct of the police officials is concerned, the division bench observed as follows:

"We are also of the considered opinion that there is a total inaction on the part of the DGP, Punjab and the Home Secretary to take corrective measures when responsible officers of their offices have resiled from their statements in the court. We are of the view that there is a total breach of rule of law. If the official witnesses had falsely implicated the accused (one of them was SSP), what was the hesitation on the part of the authorities to dispense with the services of such kind of officers, who had falsely implicated the accused, otherwise, if the accused were rightly found to have committed the offence during investigation, then as to why the witnesses have resiled in the Court of law, should be a matter of grave concern for the authorities of the State of Punjab."

The court issued notices to the witnesses and fixed fresh date for the hearing of the case. Thereafter, in response to the notices directed to be issued by the court to all the aforesaid prosecution witnesses (except PW1), affidavits were filed by PW5, PW6, PW7, PW8, PW9 and PW10 to the effect that what was stated by them before the Investigating Officer was the true and correct version of the occurrence and that they were compelled to resile from the aforesaid statement(s) due to threat, intimidation and coercion of the senior or high-ranking police officials, particulars of whom were also mentioned in the affidavits filed. The report of the Inspector General of Police, Zone-I, Punjab dated 30.10.2008 also indicates that the witnesses were prevailed upon or influenced by or at the behest of the accused. The court observed as follows:

"The trial Judge had remained a mute spectator in a scenario where, one by one, all the prosecution witnesses were turning hostile. The learned Judge conducted himself as if, under the law, he was obliged to remain silent and consider only the versions narrated by the prosecution witnesses in

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211 *ibid.*
212 *id.*, p. 2444.
213 *id.*, p. 2447.
214 *ibid.*
215 *id.*, p. 2448.

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Court and on that basis he was left with no option but to acquit the accused. The manner in which the trial was conducted leaves no doubt in our minds that the whole process was tainted and the outcome thereof was wholly detrimental to the rule of law which the court is duty bound to uphold. The casualty of the entire process, which can be characterized as perverse, is the justice delivery system resulting in enormous loss of public confidence which is vital to the sound health and even for the survival of the system of dispensation of justice."

The court referred to the decision of the Hon'ble Apex Court in *Zahira Habibullah Sheikh* and held that there can be no two opinions that the trial of the two accused in the court of the learned Additional Sessions Judge, Fast Track Court, Ambala and the judgment of acquittal passed therein are wholly unacceptable being exercises determined by forces that have no room in an acceptable system of jurisprudence. The court declared the trial against the two accused to be wholly vitiated and, therefore, nonest in law. The acquittal of the two accused is set aside. The court directed that the two accused be retried by the learned Sessions Judge, Ambala and such retrial be completed within a period of four months from date of receipt of this order by the learned Sessions Judge, Ambala. While referring to the Sections 193 and 195(A) the court observed that:

"It is a tribute to the lawmakers that the possibility of such abuses and perversities had been foreseen and visualized and suitable provisions in the *Indian Penal Code* had been made to counteract such situations. Adequate provisions of law exist whereby the tendering of false evidence as well as threats and intimidation to any person to give false evidence have been made penal offences i.e. Sections 193 and 195(A) of the *Indian Penal Code*. A distinct procedure to deal with such offences when committed in relation to a proceeding in a Court are dealt with by specific provisions contained in the Code of Criminal Procedure i.e. sections 195 and 340 *Criminal Procedure Code*. Naturally, the aforesaid provisions of law will now have to govern the situation."

Accordingly, the court directed the presiding officer of the court of learned Additional Sessions Judge, Fast Track Court Ambala to file a complaint under section 340 of the

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217 *id.*, p. 2450.
218 *ibid.*
219 *ibid.*
Code of Criminal Procedure, 1973, before a court of competent jurisdiction highlighting the illegalities that had occurred in the course of trial of Sessions Case by that court. The court further directed that in the course of the trial of such offences, as may be registered on the basis of the complaint to be filed by the Presiding Officer of the Fast Track Court, Ambala, the role played by any functionary of the State in pressurizing the prosecution witnesses to give false evidence, shall also be inquired into in the event any material to the said effect is laid before the learned court. The trial court shall conduct the said inquiry/trial expeditiously and bring the same to its logical conclusion at the earliest.\textsuperscript{220}

It is apparent that in this the court has acted strongly against the unmerited acquittal on account of witnesses turning hostile. The court's role is indeed enthusiastic and admirable.

4.3.11 Irrelevant Questions from the Prosecutorix not Permitted

4.3.11.1 Sunil Atmaram More v. State and Another\textsuperscript{221}

This case discusses observations of the Bombay High Court regarding objects of cross-examination of witness as given in Section 138 of the \textit{Indian Evidence Act}, 1872. The victim, a college student was raped by the police officer in police station. The accused was convicted under sections 342, 506(II), 376(2) (a) and (b) of the \textit{Indian Penal Code}, 1860, by the trial court. Aggrieved by the decision of the court, both the parties i.e. accused as well State filed appeals before the Bombay High Court.

The High Court took serious notice of the irrelevant and unnecessary questions asked from the victim and observed as follows:

"The prosecutrix was required to face volley of questions during her stressful cross-examination, which consumed about seven working days. The questions were put to her about location of the spot, the distance between local railway station and the spot, width of the road, how she crossed the road, size of the police chowky, number of windows to the police chowky and her home condition like vocation of her father, details about her joining Civil Defence course, the nature of training

\textsuperscript{220} \textit{id.}, pp. 2450-2451.

\textsuperscript{221} 2011 Cri.L.J. 3281.
imparted in the Civil Defence course, period of acquaintance with PW-2 Pramod, number of trainees in Civil Defence course, their names, assignments she got from time to time as Civil Defence cadet, location of chowpaty, her visit to canteen for taking lunch and many more. This seems to be reason for the prosecutrix being required to stand in the witness box over a period of eight days. The court further observed that the prosecutrix was questioned on the issue like her date of birth. Obviously, this is unnecessary as it is not the prosecution case that she was below sixteen years of age and her consent had become immaterial."222

While discussing provisions of section 138 of the Indian Evidence Act, 1872, which gives defence right to cross-examine the witness, the court further observed:

"The objects of cross-examination are to impeach the accuracy, credibility, and general value of the evidence given in-chief, to sift the facts already stated by the witness, to detect and expose discrepancies, or to elicit suppressed facts which will support the case of the cross-examining party. Section 138 does not mandate that cross-examination should be confined to the facts spoken during the examination-in-chief. The parties have liberty to elicit anything from the witness as long as it relates to the relevant facts. Irrelevant topics sometimes pursued at great length, and persistence shown in going over the same ground again and again in the hope of making the witness to give discrepant statements must not be permitted. Control over the court proceedings by the Presiding Officer in such a situation is expected."223

4.4 Sum-Up

In the context of aforementioned discussion, it is summed-up that there is an urgent need to pass statute for witness protection. The Apex Court has observed again and again that Parliament must consider enacting a law on the subject of 'Witness Identity Protection' and 'Witness Protection' at the earliest. In Neelam Katara's Case the Delhi High Court laid down certain 'Guidelines for Witness Protection', which would operate until legislation in this regard is passed. The issue of witness protection received limited attention of the law makers. It is submitted that legislature should be more sensitive towards witnesses and their problems. It is imperative that the legislature should acknowledge the needs of witnesses. Nevertheless, despite a legal void relating to witness protection, the judicial trend seems to be in its favour.

222 id., p.3286.
223 id. pp. 3286-3287.