CHAPTER 2

LAW RELATING TO WITNESS: Historical Development
CHAPTER-II

LAW RELATING TO WITNESS: HISTORICAL DEVELOPMENT

2.1. INTRODUCTION

Witness, through ages, has been a key player in the pursuit of justice delivery. The fundamentals of justice necessitate that the truth and impartiality must be quintessence of justice. This brings the role of an onlooker or third party as witness to confirm or report to criminal justice agencies the ingredients of the incident. The sanctity of the statements made by the witness is considered to be correct and factual as they are made under oath. Hence the role of witness has been paramount importance in assisting the course of justice.

Calling of witness to offer his testimony in a case is not a new idea. It was present even in ancient India. Kautilya in his famous work ‘Arthasastra’ says:

"The parties shall themselves produce who are witnesses and who are not far removed either by time or place. Witnesses who are far away or who will not stir out shall be made to present themselves by the order of the judge."¹

In ancient scriptures various means of proof were classified as human and divine. The human means of proof were sub – divided into documents, possession and witnesses. The famous work of Yajnavalkya² enumerates three means of proof. It also directs even for the comparison of handwriting³. However, in order to understand the role played by the witness in Indian Criminal Justice System we have to trace the history of Law of Evidence in the country. For this we have to study the subject referring to three different periods, namely:-

a) Witness in Ancient Hindu period

b) Witness during Muslim Rule

² Yajnavalkya, II, 22(100 A.D.); Kane, History of Dharmasstra, Vol. 3, P. 304
³ Vishnu, VIII, 12; M.K. Sharan, Court Procedure in Ancient India, (1978) P. 96
c) Witness during British Rule

2.2. ANCIENT HINDU PERIOD

The law of evidence in Ancient Hindu period can be traced from the Hindu Dharma Shastra’s. The historical background of the Law of Evidence and its later development has been elaborately discussed in Radha Kumod Mukherjee’s Endowment Lectures on Hindu Judicial System, delivered by Sir S. Vardhachariar.⁴

According to Hindu Dharma Shastras the purpose of any trial is the desire to find out the truth. Yajnavalkya says:

“Discarding what is fraudulent; the King should give decisions in accordance with the true facts.”

In order to discover the truth from the contradictory claims made by two parties in a case the Hindu law giver took every possible precaution. The Shastras enjoined the parties coming into the court must be prevailed on to admit the truth. Manu says:

“the King presiding over the tribunal shall ascertain the truth and determine the correctness of the testimonies of the witness, the description, time and place of the transaction or incident giving rise to the case as well as the usages of the country, and pronounce the true judgment”.

Vasistha recognizes three kinds of evidence: *Likhitam Sakshino Bukhti Parmanam Trividham Smritham i.e.*

a) Lekhya (Document)

b) Sakshi (Witnesses)

c) Bukhthi (Possession)

2.2.1. Lekhya (Documentary Evidence)

This Lekhya or documentary evidence was further classified into three categories, namely, Rajasaksika, Sasaksika and Asaksika.

i) Rajasaksika

Rajasaksika is a document which is executed in the King’s Court by the King’s clerk and attested by the presiding officer affixing the seal which resembles to a modern registered document.

ii) Sasaksika

Sasaksika is purely a private document written by anyone and in their own hands by witness.

iii) Asaksika

Asaksika is a document which has been written by the parties itself and hence admissible. Just like present days the Ancient Hindu Law of Evidence also preferred documentary evidence over oral evidence. The Hindu law givers, however, were probably aware of the weaknesses of the documentary evidence as against possible forgery. They have provided elaborate rules to ensure the genuineness of the document. In Ancient Hindu law a document written by the children, dependents, lunatics, women or person under fear was considered as vitiated. There were also rules for testing the genuineness of document by comparison of handwriting in question, particularly in cases where executants are dead.

2.2.2. Sakshi (Witnesses)

The adduction of oral evidence was an important feature of the Hindu Law of Evidence. The Dharma Sastras go into great details as to the time at which and the ways in which witnesses are to be examined and how they are to be tested. The law-givers lay down that, in disputed case, the truth shall be established by means of witnesses. But there was a sharp distinction between the adduction of oral
evidence, in civil matters and criminal offences. “Ancient Hindu Law” as pointed out by the late Mr. B. Gururajah Rao in his little booklet “Ancient Hindu judicature” insisted on high moral qualifications in a witness in civil matters and did not permit any one being picked up from streets or from the court premises and made to depose, as is very often done in the modern Indian courts. One common qualification mentioned is that the witnesses should be as many as possible, “faultless as regard performance of their duties, worthy to be trusted by the court and free from affection for or hatred against either party”. It was carried to such an extreme limit that witnesses whose credibility alone would, according to modern law, be questioned, were, barred as legally incompetent witnesses. The tendency of ancient legislation in all countries was to regulate the competency of witnesses by artificial rules of exclusion, while the trend of modern jurisprudence is to widen the scope of oral testimony, leaving the determination of the credibility to the discretion of the tribunals. The ancient law-givers wisely relaxed these restrictions in the case of witnesses of criminal offences because they recognized crimes might happen in forests and secluded places and could only be spoken to by witnesses who happened to be there irrespective of their qualifications. The corresponding Latin maxim is that “if a murder happens in a brothel only strumpets can be witnesses.” The law-givers therefore state, witnesses should not be so tested in Sahasa, Serisamgrahana and Parusyas. In order to create an atmosphere for speaking the truth, the whole truth and nothing but the truth by the witnesses, our ancients invested great solemnity to the holding of courts and enjoined that the courts should be decorated with flowers, statues, paintings, idols of Gods. Judges wore distinctive robes and sat on high cane-seats. The courts were held in the mornings and did not work on full moon and new moon days. Before giving evidence, the witnesses had to perform, make a brief sankalpa, face an auspicious direction and then witnesses were exhorted to speak the truth in most

5 Gururajah Rao, B. “Ancient Hindu Judicature”
solemn appeals to their strongest religious motives. They were ordered to speak the truth on pain of incurring the sin of all degrading crimes.\textsuperscript{6}

The method of examining witnesses set out in Manu is insistence on examination in court and in the presence of parties. There are indications, however, that witnesses were also examined on commission. The Hindu law givers provided the rules for the purpose of determining the competency of witnesses. Persons whose character was highly dubious were considered as the tainted witnesses and were held to be not competent. Shastrakartas (similar to contemporary advocates) were enjoined in order to ensure the witnesses to speak the truth. Before giving evidence the witnesses were required to perform a brief \textit{Sankalpa} (ablution) and were to face towards the auspicious direction and were exhorted to speak the truth, in the most solemn apples to thei strongest religious sentiment. According to Hindu practice, it was the Judges who put questions to witnesses. They were directed to watch the behaviour of the witnesses and decide upon their reliability. Vishnu states, “a false witness may be known by his altered looks, by his countenance, changing colour and by his talk wandering from the subject.” Yagnavalkya states, “he who shifts from place to place, licks his lips, whose forehead perspires, whose countenance changes colour, who with a dry tongue and stumbling speech/talks much and incoherently, who does not heed the speech or sight of another, who bites his lips, who by mental, vocal and bodily acts falls into a sickly state, is considered a tainted person, whether he be a complainant or a witness.”\textsuperscript{7} But, as Mitakshara shrewdly comments, this is laid down to show the possibility of falsity but not its certainty. But these artificial rules of evidence are substantially governed by Yagnavalkya's general rule: “Having discarded that which has only an appearance of reality, the king should decide in conformity with the nature of things, for even an honest claim, if not properly pleaded, is liable to be defeated by the adverse party merely satisfying the

\textsuperscript{6} Woodroffe,Sir John and Syed Amir Ali, “\textbf{Law of Evidence}”,Vol.-12002, P. 14
\textsuperscript{7} Vardachari, S., “\textit{Ancient Hindu Judicature}”
legal formalities” or in other words, as Lord Justice Duparcy says, “we must not overvalue the forms of procedure at the expense of the substance of the right.”

2.2.3. Bhukhti (Possession):

In an agricultural economy existing in ancient Hindu India, disputes regarding possession of landed property constituted the bulk of litigation. Possession was recognized as evidence of right and title and one of the modes of proving along with the documents and witnesses. In the present Evidence Act also there is a presumption that the possessor of anything is the lawful owner of that thing.

It was open to the opponent to bring to the notice of the court circumstances disqualifying or discrediting a witness. But this was to be done when the witness was giving evidence. Then the Judge would elicit witness's answer to the objections. It has been pointed out by Mr. Kane that witnesses were not permitted to be examined to discredit another witness. In examining witnesses, it was enjoined that the presiding officer of the court should treat them gently and persuasively. It is shrewdly remarked that if the witness is harshly treated, he might take fright and thus lose the thread of his narrative and become unable to remember material details and unfold the entire narrative in its logical sequence. Therefore severe penalty was enacted for a Judge, in the Arthasastra, who threatens, brow-beats or unjustly silences witnesses, or abuses or defames or asks questions which ought not to be asked, or makes unnecessary delay and thus tires parties or helps witnesses by giving them clues. The respectable treatment, says Mr. B. Gururajah Rao, which seems to have been accorded to witnesses in ancient times, must have been sufficient inducement to call forth disinterested witnesses. It is well admitted by everybody acquainted with the working of the present Indian courts that respectable witnesses try to avoid the witness-box, because courts do not pay heed to Sections 146 and 151 of the Indian

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8 Id at P. 15
9 Section 110, The Indian Evidence Act,1872
10 Gururajah Rao, B. “Ancient Hindu Judicature”
Evidence Act, 1872 which embodies the Hindu principles for examination of witnesses.

2.3. MUSLIM PERIOD

Often there is no true conception especially in the South of the highly developed Muslim rules of evidence, and prejudice prevails. Muslim rules of evidence can be gathered from the classics on the subject, viz., Sir Abdur Rahim's "Muslim Jurisprudence", Wahed Husain's "Administration of Justice during the Muslim Rule in India" (University of Calcutta Publication) and M. B. Ahmad, I.C.S. on, "Administration of Justice in Medieval India" (Aligarh Historical Research Institute Publication). The Al-quran lays great stress on justice. It holds that the creation is founded on justice and that one of the excellent attributes of God is "just". Consequently, the conception of Justice in Islam is that the administration of justice is a divine dispensation. Therefore, the rules of evidence are advance and modern.

The Muhammadan law-givers deal with evidence under the heads of oral and documentary, the former being sub-divided into direct and hearsay. There was a further classification of evidence in the following order of merit, viz., full corroboration, testimony of a single individual and admission including confession.

Though documents duly executed and books kept in the course of business were accepted as evidence, oral evidence appears to have been preferred to documentary. When documents were produced, courts insisted upon examining the party which produced them.

In regard to oral evidence, the Quran enjoins truthfulness. It says:

"O true believers, observe justice when you appear as witnesses before God, and let not hatred towards any induce you to do wrong: but act justly: this will approach

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nearer unto piety, and fear God, for God is fully acquainted with what you do.”\textsuperscript{12}

“O you who believe, be maintain of justice when you bear witness for God's sake, although it be against yourselves, or your parents, or your near relations; whether the party be rich or poor, for God is most competent to deal with them both, therefore do not follow your low desire in bearing testimony, so that you may swerve from justice, and if you swerve or turn aside, then surely God is aware of what you do.”\textsuperscript{13}

Great attention was paid to the demeanour of the parties, and a case is mentioned where a Hindu scribe sued a Mughal soldier for enticing away his wife. The wife denied that the complainant was her husband, but Emperor Shah Jehan, who was hearing the case, observing the demeanour of the wife in the witness-box, was not satisfied with her statement. Therefore, he suddenly ordered her to fill the court inkpot with ink. The woman did the work most dexterously, and the Emperor concluded that she was the wife of the Hindu scribe and granted him a decree.\textsuperscript{14}

Witnesses were examined and cross-examined separately out of the hearing of the other witnesses. Leading questions were not allowed on the ground that this would lead to the suspicion that the court was trying to help one party to the prejudice of the other; but if a witness was frightened or got confused, the judge could put such questions so as to remove the confusion, though they may be leading questions. It was enjoined that the questions should be put in such a manner as not to make the judge liable to the charge of partiality and that he was purring questions in order to get answers to facts which should be proved by the witness. Certain classes of witnesses were held to be incompetent witnesses, viz., very close relatives in favour of their own kith and kin, or of a partner in favour of another partner. Certain classes of men, such as professional singers and mourners,

\textsuperscript{12} Holy Quran, Chapter 5, Verse 8
\textsuperscript{13} Holy Quran, Chapter 4, Verse 135
\textsuperscript{14} Krishnamachari, V., The Law of Evidence, 2003, P. 6
drunkards, gamblers, infants or idiots, or blind persons in matters to be proved by ocular testimony were regarded as unfit for giving evidence.

**Documentary Evidence**

The Ancient Muslim Law also recognizes the *Documentary evidence*. However, there were some documents which were not recognized as evidence in the Ancient Muslim Courts. Under Ancient Muslim Law documents executed by certain classes of persons were considered as vitiated and were not recognized to be admitted as evidence. Persons like women, children, drunkards, gamblers, criminals were not considered competent to execute any documents and thus the documents executed by such type of persons were inadmissible as evidence in the Ancient Muslim Courts.

**2.4. BRITISH PERIOD**

Before the introduction of Indian Evidence Act, there was no systematic enactment on this subject. The English rules of evidence were always followed in the courts established by the royal charter in the presidency towns of Calcutta, Madras and Bombay. "Such of these rules, as were contained in the Common Law and the Statutory Law, which prevailed in England before 1726, were introduced in Presidency towns by the Charter".  

Outside the presidency towns there were no fixed rules of evidence. The law was vague and indefinite and had no greater authority than the use of custom. However, a practice had grown to follow. Some rules of evidence on the basis of customs and usages of Muslims.

The British rulers, though they do not have any codified or consolidated law of evidence in their country, thought fit to frame some rules to be followed by the courts in India. During the period of 1835 to 1853 A.D., a series of Act were passed by the Indian legislature introducing some reforms of these Acts which superficially dealt with the law relating to the witness are summarized as follow:

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15Bunwaree V. Het Narain 7, MIA 148
(i) Lord Denman's Act\textsuperscript{16} provides that no witness should be schedule from giving evidence either in person or by deposition by reason of "incapacity for crime interest".

(ii) The same Act\textsuperscript{17} declares that the parties to the proceedings their wives or husband and all other person capable of understanding the nature of oath and the duty to speak truth, as competent witnesses in the country courts.

(iii) Lord Broughams Act\textsuperscript{18} declared that the parties and the person on whose behalf any suit, action or proceeding many be brought or defended, are competent as well as compellable to give evidence in any court of justice.

(iv) Lord Broughams Act of 1853\textsuperscript{19} made the husbands and wives of the parties to the records competent and compellable witnesses.

(v) Act XIX of 1834 abolished the incompetence of the witness by reason of a correction for criminal offences.

Sec 4 of the Evidence (further amendment) Act of 1869 removes the disability attached to the atheist and such infidels (i.e. on Christians) as were atheist to be reason and to testify they were declared competent witness to testify. These reforms had a great impact on the working of the courts in British India. However, despite of these reforms the administration of Law of Evidence in the Mofussil Courts was for from satisfactory. The courts were still governed by the customary laws which were mostly vague and indefinite. Though the Acts XIX of 1853 and II of 1855 made the law followed by the Presidency Courts applicable to the Mofussil Courts but these rules were not enough to force the problems relating to hostile witness and evidence of an accomplice. Thus in the year 1870, Sir James Stephen prepared a new bill which was passed by the parliament in 1872 which

\textsuperscript{16} 6 and 7 Vic. C.85 of 1843
\textsuperscript{17} 9 and 10 Vic. C.95 of 1843
\textsuperscript{18} 14 and 15 Vic. C.95 of 1843
\textsuperscript{19} 6 and 17 Vic. C.83 of 1852
codified consolidated the rules relating to admissibility of fact competency of witness, examination and cross-examination of the witness.

2.5. **WITNESSES IN MODERN TIMES**

The Halsbury’s Laws of India classified witnesses into different categories viz;

- Eye witnesses,
- Natural witnesses,
- Chance witnesses,
- Official witnesses,
- Sole witnesses,
- Injured witnesses,
- Independent witnesses,
- Interested, related and partisan witnesses,
- Inimical witnesses,
- Trap witnesses,
- Rustic witnesses,
- Child witnesses,
- Hostile witnesses,
- Approver, accomplice etc.

2.6. **WITNESS UNDER INDIAN EVIDENCE ACT, 1872**

Chapter IX titled “OF WITNESSES” of the Indian Evidence Act, 1872 consists of seventeen Sections spreading from Sections 118 to 134 deals with

i. Competency;
ii. Compellability;
iii. Privileges; and
iv. Quantity of Witnesses required for judicial decisions
Sections 118 to 121 and Section 133 of this Act provide for competency of witnesses whereas Section 121 (Judges and Magistrates) and Section 132 (Witness not excused from answering on the ground that answer will criminate) refers to the compellability of the witnesses. Privileges of the various witnesses find place in various forms in Section 122 to 131 of this Act. Section 134 of the Indian Evidence Act 1872 envisages that no particular number of witnesses is required for proof of any fact. The last Section 134 of the Chapter IX enshrines the well-recognized magazine that Evidence has to be weighed and not counted.

2.6.1. Distinction between Competency and Compellability

Competency of a witness may be distinguished from his compellability and from privilege. A witness is said to be competent when there is nothing in law to prevent him from being sworn and examined if he wishes to give evidence. Though the general rule is that a witness who is competent is all compellable, yet there are cases where a witness is competent but not compellable to give evidence as for example sovereigns and ambassadors of foreign states. (Section 125 and 133)20

Further a witness though compellable to give evidence may be privileged or protected from answering certain questions21. Even if witness be willing to depose about certain things, the court will not allow disclosure in some cases.22 The Legislature has consciously made a broad distinction between compellability to be sworn or affirmed and compellability, when sworn to answer specific question. Thus a witness though compellable to give evidence may be privileged or protected under Section 122, 124, 125 and 128 Evidence Act from answering certain question. Similarly even if a witness be willing to depose about certain things, the court will not allow disclosure in some cases keeping in view the provisions of Section 123, 126 and 127 Evidence Act.

21 Section 122, 124, 125 and 129 of the Evidence Act, 1872
22 Section 123, 126 and 127 of Evidence Act, 1872
2.6.2. Classification of Witnesses and their reliability

“I suppose” said Archbishop Whately "it will not be divide that the three following are among the most important ports to be ascertained in deciding credibility of witnesses. First whether they have the means of gaining correct information; secondly, whether they have any interest in concealing truth; thirdly whether they agree in their testimony."23 The first two of these tests are applicable to the witness individually; the third to the whole of the testimony taken together. Generally speaking oral testimony of a witness may be classified into three categories: namely-

   i) Wholly reliable
   ii) Wholly unreliable
   iii) Neither wholly reliable nor wholly unreliable24.

In the first category of proof, the court should have no difficulty in coming to its conclusion either way; it may conviction or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and to look for corroboration in material particulars by reliable testimony, direct or circumstantial.25

There are four ways by which a trial can hold a witness unworthy of belief:

1. The witness statement is inherently improbable or contrary to the course of nature e.g. he says that he identified the accused by face in pitch darkness, or that he recognized his voice from a mile away or that he saw the accused killing the deceased with a lathi whereas medical evidence proves he died of a bullet wound;

24 VadiveluThevar V. State of Madras, AIR 1957 SC 614
25 State of Punjab V. Tarlok Singh, AIR 1971 SC 1221
2. The witness deposition contains mutually contradictory or inconsistent passage e.g. at one place he says 'A' was the murderer but at another that it was 'B'.

3. The witness is found to be a bitter enemy of the opposite party and therefore, possesses ample motive for wishing him harm;

4. The witness demeanour whilst under examination is found abnormal or unsatisfactory.\textsuperscript{26}

The evidence of a witness has to be judged mainly and broadly on the strength of the nature of the evidence he has given in a case and not on so much as to how he has been able to impress the court while in the witness box\textsuperscript{27}.

The ordinary presumption is that a witness speaking under an oath is truthful unless and until he is shown to be untruthful or unreliable in any particular respect. Witnesses solemnly deposing on oath in the witness box during a trial upon a grave charge of murder must be presumed to act with a full sense of responsibility of the consequences of what they state. It may be that what they say is so very unlikely or unnatural or unreasonable that it is safer not to act upon it or even to disbelieve it. It should not be assumed that witnesses are untruthful unless it is proved that they are telling the truth.\textsuperscript{28}

There is presumption in law of absolute truthfulness of prosecution witness. The evidence of witnesses in trial whether they depose for the prosecution or defense is to be judged by the courts with the same standard of the test of reliability. The defense evidence should not be by passed or overlooked by the courts simply because the witness had deposed in favour of accused. The trial has to give cogent and convincing reasons for discarding the defence evidence.

In this country it is rare to come across the testimony of a witness which does not have a fringe or embroidery of untruth, court should separate the grain

\textsuperscript{26} 1957 Cri LJ 32
\textsuperscript{27} Koli Nana Bhana V. State of Gujrat, 1986 Cri. L. J. 571
\textsuperscript{28} The State of Punjab V. Hari Singh, A.I.R. 1974 S.C. 1168
from the chaff and accept what appears to be true and reject the rest. It is only where the testimony of witness is tainted to the core, the falsehood and the truth inextricably intertwined that the court should discard his evidence in toto.29

Where a person gives evidence on oath the presumption is that he has spoken the truth and the burden lies on him that challenges the veracity of that statement. Throwing overboard a sworn testimony merely by using phrases like statement does not ring true or does not carry conviction is highly undesirable. The law does not demand that one should act upon certainties alone30

A witness in not like a tape record when he is giving evidence more than a year later about what happened a year earlier his memory may not serve him completely right. He may not be able to report the exact words used on the occasion, or all the words. Allowance must be made for these factors.31

The Hon’ble Supreme Court in Bhogin Bhat Kirji v. State of Gujarat32 observed about certain presumptions regarding an ordinary witness.

i. By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

ii. Ordinary it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so after has a statement of surprise. The mental faculties therefore, cannot be expected to be attuned to absorb the details.

iii. The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one persons mind whereas it might go unnoticed on the part of another.

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30 Tahsildar Singh V. State, 1958 Cri.L.J. 324
32 1983 Cri.L.J. 1096 (S.C.)
iv. By and large people cannot accurately recall a conversation and reproduce the very words use by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

v. In regard to exact time of an incident, or the time duration of an occurrence usually, people make their estimates by guess work on spur of the moment at the time of interrogation and one cannot expect people to make very precise or reliable estimates in such matters. Again it depends on the time sense individuals which vary from person to person.

vi. Ordinary a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused or mixed up when interrogated later on.

vii. A witness though wholly truthful, is liable to be overawed by the court atmosphere and piercing cross-examination made by counsel and out of nervousness mixes up facts gets confused regarding sequence of events. Or fills up details from image on the spur of moment. The subconscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witness by him perhaps it is a sort of psychological defense mechanism activated on the spur of the moment. People react to situations not always in a uniform way. An educated, an illiterate a city dweller, a villager or an adivasi will react differently according to the degree of their sophistication. Moreover even in the case of the same class, the reaction would vary with the physical courage, mental equipment and social awareness of the individual.

Every person who witnesses a murder reacts in his own way. Some are stunned, some become speechless and some stand rooted to the spot. Some become hysterical and start walling, some start shouting for help. Those others who
run away to keep themselves as far removed from the spot as possible are not necessary incredible yet others rush to the rescue of the victim even going to the extent of counter attacking the assailants. Every one reacts the evidence of witnesses on the ground that they did not react in a particular manner is to appreciate the evidence in a wholly unrealistic unimaginative way.\textsuperscript{33}

Different persons admittedly seeing an event give varying accounts of the same. That is because that perceptiveness varies and a recount of the same incident is usually at variance to a considerable extent.

The evidence of a witness to the occurrence in a criminal trial is not to be accepted merely because the defense has not been able to say as to why the accused has been involved or as to why a witness has come person. Disinterested evidence is not necessarily true and interested evidence is not necessarily false.

2.7. WITNESSES: EMERGING PERSPECTIVES

The present judicial system has taken the witnesses completely for granted. Witnesses are summoned to the court regardless of the fact that they have no money, or that they cannot leave their family, children, business etc. and appear before the Court. But that’s not all. On reaching the Court, some are told that the case has been adjourned (for reasons that may turn into infinity) and the respective lawyer politely gives them a further date for their next appearance. The plight of a witness, who comes forward to depose before a court with full sense of conviction, can be seen by the criticism from the Supreme Court in the case of \textit{State of Uttar Pradesh v. Shambhu Nath Singh}\textsuperscript{34}

\begin{quote}
“Witnesses tremble on getting summons from Courts, in India, not because they fear examination or cross-examination in Courts but because of the fear that they might not be examined at all for several days and on all such days they would be nailed to the precincts of the Courts awaiting their chance of being examined. The
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\textsuperscript{33} Rana Partap V. State of Haryana, 1983 Cri.L.J. 127 (S.C.)

\textsuperscript{34} (2001) 4 S.C.C. 667
witnesses, perforce, keep aside their avocation and go to the Courts and wait and wait for hours to be told at the end of the day to come again and wait and wait like that. This is the infelicitous scenario in many of the Courts in India so far as witnesses are concerned. It is high time that trial Courts should regard witnesses as guests invited (through summons) for helping such Courts with their testimony for reaching judicial findings. But the malady is that the predicament of the witnesses is worse than the litigants themselves…. The only casualty in the aforesaid process is criminal justice.\textsuperscript{35}

This criticism from the Supreme Court of India pithily sums up the problem facing witnesses.\textsuperscript{36} In the case of \textit{Swaran Singh v. State of Punjab},\textsuperscript{37} Wadhwa J. while delivering the judgment expressed his opinion about the conditions of witnesses in the following words:

\begin{quote}
"the witnesses …are a harassed lot. A witness in a criminal trial may come from a far-off place to find the case adjourned. He has to come to the Court many times and at what cost to his own-self and his family is not difficult to fathom. It has become more or less a fashion to have a criminal case adjourned again and again till the witness tires and he gives up. It is the game of unscrupulous lawyers to get adjournments for one excuse or the other till a witness is won over or is tired. Not only that a witness is threatened; he is abducted; he is maimed; he is done away with; or even bribed. There is no protection for him. In adjourning the matter without any valid cause a Court unwittingly becomes party to miscarriage of justice. A witness is then not treated with respect in the Court. He is pushed out from the crowded courtroom by the peon. He waits for the whole day and then he finds that the matter adjourned. He has no place to sit and no place even to have a glass of water. And when he does appear in Court, he is subjected to unchecked and prolonged examination and cross-examination and finds himself in a hapless situation."
\end{quote}

\textsuperscript{35} ibid
\textsuperscript{36} Access To Justice: Witness Protection and Judicial Administration. Justice Madan B. Lokur. Delhi High Court. Source: www.humanrightsinitiative.org/
\textsuperscript{37} (2000)5 S.C.C. 68 at 678
For all these reasons and others a person abhors becoming a witness. It is the administration of justice that suffers. Then appropriate diet money for a witness is a far cry. Here again the process of harassment starts and he decides not to get the diet money at all. High Courts have to be vigilant in these matters. 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 pedestal, the system cannot be left in the hands of unscrupulous lawyers and the sluggish State machinery. Each trial should be properly monitored. Time has come that all the Courts, district Courts, subordinate Courts are linked to the High Court with a computer and a proper check is made on the adjournments and recording of evidence. The Bar Council of India and the State Bar Councils must play their part and lend their support to put the criminal system back on its trail. Perjury has also become a way of life in the law Courts. A trial judge knows that the witness is telling a lie and is going back on his previous statement, yet he does not wish to punish him or even file a complaint against him. He is required to sign the complaint himself which deters him from filing the complaint. Perhaps law needs amendment to clause (b) of Section 340(3) of the Code of Criminal Procedure in this respect as the High Court can direct any officer to file a complaint. To get rid of the evil of perjury, the Court should resort to the use of the provisions of law as contained in Chapter XXVI of the Code of Criminal Procedure...

The witnesses, who are considered to play a vital role in the proceedings, have to face a lot of hurdles during the administration of the criminal justice system. Some of them are mentioned below:

a. First of all, when a witness is called to a court, to give statements, they sometimes have to come all the way from their remote town or village where they reside. He is not at all paid for his traveling expenditure. If a witness is from the poor strata of society or say of
the labour class, then he has to sacrifice his one day work and has to come to the court just to answer a few questions. Even in this case he is neither compensated nor does the court reimburses his travel expenditure.

b. When he somehow reaches the court, he is not at all treated in a proper manner. The Mallimath Committee has expressed its opinion about such witnesses by saying, “The witness should be treated with great respects and should be considered as a guest of honour.”  

When a witness goes to the court for giving evidence or statements, there is hardly any officer of the court, who is there to receive him, provide a seat and tell him where the court, he is to give evidence is located or to give him such other assistance as he may need. In most of the Courts, there is no designated place with proper arrangements for seating and resting while waiting for his turn to be examined as a witness in the court. He is not even asked for a glass of water. Similarly, toilet facility and other amenities like food and refreshment are not provided.

c. All these things are quite enough to frustrate a witness. But this frustration is at its zenith when he comes to know that the case, in which he has to appear, has been adjourned. It is quite a common scene. In fact, it is a fashion in India to adjourn a case. This is also perhaps the main reason for the huge backlog of cases in India. This adjournment demoralizes the witness to such an extent, that when he is called for appearance next time, he has to think several times before deciding whether to go or not. A few more adjournments like these, and he voluntarily gives up and refuses to come to the court to give statements, evidences or for the cross – examination. Now this act of the witness has many a times proved to be a blessing for the

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38 ‘Committee on Reforms in Criminal Justice System’, headed by Justice Mallimath, Vol. I, P.151
accused, who normally gets acquitted in such cases due to lack of evidence.

d. Now if he somehow comes forward to for cross-examination by the defendant, then he is subjected to a lot of harassment. He is being cross-examined in such a way that he is under an immense mental pressure while answering the questions asked to him.

Not only this, in order to get rid of this cross examination as early as possible, either he will give false statements or to make the matter worse, he will turn hostile i.e. he will retract from his previous statement. Mr. Soli Sorabjee, the former Attorney General has rightly said, “Nothing shakes public confidence in the criminal justice delivery system more than the collapse of the prosecution owing to witnesses turning hostile and retracting their previous statements.”

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39 The Indian Express, October 26, 2003, The Columnists, **Witness Protection** by Soli Sorabjee