CHAPTER 5

HOSTILE WITNESS: Emerging Challenges & Issues
5.1. INTRODUCTION

In today’s scenario the problem of witnesses turning hostile is quite evident. The crucial part played by the witnesses in bringing offenders to justice is central to any modern criminal justice system, since the successful conclusion of each stage in criminal proceedings from the initial reporting of the crime to the trial itself usually depends upon the cooperation of witnesses. Their role at the trial is particularly important in adversarial system where the prosecution must prove its case by leading evidence, often in the form of oral examination of witnesses, which can then be challenged by the defence at a public hearing.\(^1\) By deposing in a case, they assist the court in discovering the truth. But the witnesses turning hostile is a common thing happening in the criminal justice system. The whole case of the prosecution can fall only on a false statement of the witness. The result is that more and more citizens are losing faith in the effectiveness of the system in providing justice to the victims. As long as the witnesses continue to go hostile and do not make truthful depositions in court, justice will always suffer and people’s faith in efficacy and credibility of judicial process will continue to be eroded and shattered\(^2\).

\(^1\) Mackarel Mark, Raitt Fiona and Moody Susan, “Briefing Paper on Legal Issues and Witness Protection in Criminal Cases” Scottish Executive ,Central Research Unit, 2001
\(^2\) Mukherjee Subhrarag and Arya Vatsal, “Independent Witnesses: a Legal Crisis in India”, 2004, Cri. L. J. 186 (S.C.)
5.2. HOSTILE WITNESS : MEANING AND NATURE

Generally a witness is labeled as hostile, when he furnishes a certain statement on his knowledge about commission of a crime before the police but refutes it when called as witness before the court during the trial.

The term ‘hostile witness’ does not find any explicit or implicit mention in any Indian laws, be it Indian Evidence Act or the Code of Criminal Procedure or any other law. Historically, the term Hostile Witness seems to have its origin in Common Law. The term ‘hostile witness’ was first coined in the common law to provide adequate safeguard against the “contrivance of an artful witness” who willfully by hostile evidence “ruin the cause” of the party calling such a witness. Such actions hamper not only the interest of the litigating parties but also the quest of the courts to meet the ends of justice. The “safeguard” as envisaged under the common law, consisted of contradicting witness with their previous statements or impeaching their credit (which normally as a rule was not allowed) by the party calling such witnesses. To initiate the “safeguard”, it was imperative to declare such a witness “hostile”. For this purpose, common law, laid down certain peculiarities of a ‘hostile’ witness, such as, “not desirous of telling the truth at the instance of the party calling him” or “the existence of a ‘hostile animus’ to the party calling such a witness.”

The Wikipedia Encyclopedia defines ‘hostile witness’ as a witness in a trial who testifies for the opposing party or a witness who offers adverse testimony to the calling party during direct examination. A witness called by the opposing party is presumed hostile. A witness called by the direct examiner can be declared hostile by a judge, at the request of the examiner, when the witness' testimony is openly antagonistic or clearly prejudiced to the opposing party. The Law.Com Dictionary defines hostile witness technically an "adverse witness" in a trial who is found by the judge to be hostile (adverse) to the

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4 [en.wikipedia.org/wiki/Hostile_witness](en.wikipedia.org/wiki/Hostile_witness)
position of the party whose attorney is questioning the witness, even though the attorney called the witness to testify on behalf of his/her client. When the attorney calling the witness finds that the answers are contrary to the legal position of his/her client or the witness becomes openly antagonistic, the attorney may request the judge to declare the witness to be "hostile" or "adverse." If the judge declares the witness to be hostile (i.e. adverse), the attorney may ask "leading" questions which suggest answers or are challenging to the testimony just as on cross-examination of a witness who has testified for the opposition.

Atri Ajit defines hostile witness as 'an adverse witness in a trial who is found by the Judge to be hostile (adverse) to the position of the party whose attorney is questioning" the witness, even though the attorney called the witness to testify on behalf of his/her client. When the attorney calling the witness finds that the answers are contrary to the legal position of his/her client or the witness becomes openly antagonistic, the attorney may request the Judge to declare the witness to be 'hostile' or 'adverse'. If the Judge declares the witness to be hostile the attorney may ask leading questions which suggest answers or are challenging to the testimony just as on cross-examination of a witness who has testified for the opposition. Hostile witness is a witness who testifies for the opposing party or a witness who offers adverse testimony to the calling party during direct examination.'

Thus, a hostile witness, is also called as adverse witness, who weakens the case of the side he or she is supposed to be supporting i.e. instead of supporting the prosecution who has presented him as a witness in the court of law, the witness either with his evidence or statement became antagonistic to the attorney and thus "ruin the case" of the party calling such witness. In such a case, moreover, it is the attorney who asks the judge to declare the witness a hostile witness. Thus, it is the

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5 http://dictionary.law.com
6 Atri Ajit, “Hostile Witness: Not sufficient to earn acquittal”, 2008 Cri.L.J (Jour.) 191
court and no other than the court that has authority to declare a witness a hostile witness. It has to be remembered here that the court cannot by itself declare a witness a hostile witness but it can do so only on the request made by the prosecution attorney. If a witness has been declared a hostile witness, by the court of law, the attorney then has greater freedom in questioning the hostile witness. In other words, if a witness has been declared as hostile witness the prosecution may question the witness as if in cross-examination i.e. he or she may ask leading-questions to the witness declared hostile and this is the basic difference between the status of a witness declared hostile and the witness who has not been declared hostile or who is a common or favorable witness.

The word “hostile witness” is not defined in the Indian Evidence Act, 1872. The draftsmen of the Indian Evidence Act, 1872 were not unanimous with regard to the meaning of the words “adverse”, “unwilling”, or “hostile”, and therefore, in view of the conflict, refrained from using any of those words in the Act. The matter is left entirely to the discretion of the court. A witness is considered adverse when in the opinion of the judge, he bears a hostile animus to the party calling him and not merely when his testimony contradicts his proof.7

In Sat Pal V. Delhi Administration8 the Hon’ble Supreme Court tried to define hostile witnesses and laid that to steer clear controversy over the meaning of hostile witness, adverse witnesses, unfavorable witness which had given rise to considerable difficulty and conflict of opinions, the authors of the Indian Evidence Act, 1872 seem to have advisedly avoided the use of any of those terms so that in India the grant of permission to cross-examine his own witness by party is not conditional on the witness being declared adverse or hostile. The Supreme Court

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7 Supra note 6
in *Gura Singh V. State of Rajasthan*\(^9\), defined *hostile witness* as one “who is not desirous of telling the truth at the instance of one party calling him”.

In the Indian context, the principles dealing with the treatment of hostile witnesses are encompassed in Section 154 of the Indian Evidence Act, 1872\(^{10}\). A hostile witness is one who from the manner in which he gives evidence shows that he is not desirous of telling the truth to the court. Within which is included the fact that he is willing to go back upon previous statements made by him\(^{11}\) A witness is not necessarily hostile if he is speaking the truth and his testimony goes against the interest of the party calling him. A witness’s primary allegiance is to the truth and not to the party calling him. Hence, unfavourable testimony does not declare a witness hostile. Hostility is when a statement is made in favour of the defence due to enmity with the prosecution\(^{12}\). The inference of the hostility is to be drawn from the answer given by the witness and to some extent from his demeanour. So, a witness can be considered as hostile when he is antagonistic in his attitude towards the party calling him or when he conceals his true sentiments and does not come out with truth and deliberately makes statements which are contrary to what he stated earlier or is expected to prove. When a prosecution witness turns hostile by stating something which is destructive of the prosecution case, the prosecution is entitled to request the Court that such witness be treated as hostile.\(^{13}\)

**5.3. CONCEPT OF HOSTILE WITNESS UNDER INDIAN LAW**

Though there are not enough provisions under domestic law dealing directly with the issue but there are certain provisions under the Indian Evidence Act, 1872 and

\(^{11}\) Panchanan Gogoi V. Emperor, A.I.R. 1930 Cal. 276 (278)  
\(^{13}\) G.S.Bakshi V. State, A.I.R. 1979 S.C. 569
the Code of Criminal Procedure, 1973 which are helpful in explaining the concept to some extent.

5.3.1. Code of Criminal Procedure, 1973

Section 160 of the Code of Criminal Procedure, 1973\textsuperscript{14} empowers the Police Officer making an investigation, to require the compulsory attendance before himself, of any person who appears to be acquainted with the facts and circumstances of the case under investigation. This provision is to be read in conjunction with Section 161 as per which the Police Officer making the investigation can examine orally any person supposed to be acquainted with the facts and circumstances of the case. Section 161(3) also permits the Police Officer to reduce into writing any statement made to him in the course of an examination under this section. However, once this is done, Section 162 of the Code comes into play. Section 162(1) consists of two main parts. The first part clearly mandates that any statement made to the Police Officer and reduced into writing by him, would not be signed by the maker of such statement. The second part of this provision creates a bar on the admissibility of statements made by any person to a police officer in the course of an investigation.

The Supreme Court in \textit{Tahsildar Singh V. State of U.P.}\textsuperscript{15} examined in detail the purpose and object of this provision. According to the Apex Court, the legislative intent behind this provision was to protect the accused person from police officers who would be in a position to influence the makers of such statements, and from third persons who would be inclined to make false statements before the police. This is a highly laudable objective and is truly reflective of the attempt to ensure fairness in the process of criminal investigation. At the same time, it was imperative that there be some mechanism for recording confessions and other statements in a fair and foolproof manner, especially in

\textsuperscript{14} Hereinafter referred to as the Code.

\textsuperscript{15} A.I.R. 1959 S.C. 1012
situations where the police thought the witnesses were unlikely to stick to the statements made by them under Section 161.\textsuperscript{16} It was precisely this objective that resulted in vesting of authority in the Judicial Magistrate to record statements by witnesses as well as confessions by accused persons, under Section 164 of the Code. The Supreme Court also observed in \textit{State of U.P. V. Singhara Singh}\textsuperscript{17} that Section 164 would be rendered wholly nugatory if the procedure prescribed by that provision was not held to be mandatory. Section 164 strikes a fine balance between the interests of the investigating agency and the accused person, and this is the primary reason for judicial insistence on strict compliance with the prescribed procedure. As rightly observed by a Full Bench of the Madras High Court in \textit{State of Madras V. G.Krishnan},\textsuperscript{18} the object of recording a statement under Section 164 is to deter a witness from changing his version later by succumbing to temptations, influences, or blandishments.

\textbf{5.3.1.1. The Evidential Value of Statements Recorded Under Section 164}

The significance in a criminal trial, of such statements recorded under Section 164, can be understood only through a scrutiny of various provisions of the Indian Evidence Act, 1872. Any statement made before a Magistrate and duly recorded under Section 164 is considered a public document under Section 74 of the Indian Evidence Act, 1872.\textsuperscript{19} Written documents containing such statements are also presumed to be genuine as well as duly recorded, under Section 80 of this Act. The effect of this provision is to dispense with the examination of the Magistrate who recorded the statement under Section 164. Moreover, Section 91 of the Indian Evidence Act, 1872, also excludes oral evidence in cases such as Section 164, where the contents of the statement are required by law to be reduced into

\begin{footnotes}
\item[17] A.I.R. 1964 S.C. 358
\item[18] A.I.R. 1961 Mad 92
\item[19] Ibid
\end{footnotes}
documentary form. As per Section 91, only the written statement recorded under Section 164 can be used as evidence of the verbal statement made by the witness before the Magistrate. These provisions of the Indian Evidence Act, 1872, read together, permit the admissibility of statements made by witnesses to the Magistrate, as long as such statements are duly recorded under Section 164.

5.3.2. Indian Evidence Act, 1872

Certain other provisions of the Indian Evidence Act, 1872, govern the use of such statements in a criminal trial, and thereby merit our attention. Section 141 of the Indian Evidence Act, 1872 defines leading questions, whereas Section 142 requires that leading questions must not be put to witness in an examination-in-chief, or in a re-examination, except with the permission of the Court. The court can however permit leading questions as to the matters which are introductory or undisputed or which in its opinion have already been sufficiently proved. Section 154 authorizes the court in the discretion to permit the persons who call a witness to put any quest to him which might be put in cross examination by other party. Such questions will include:-

- Leading questions (Section 143 of Evidence Act)
- Questions relating to his previous statements(Section 145 of Evidence Act)
- Questions, which tend to test his veracity to discover who he is and what his position in life or to shake his credit(Section 146 of Evidence Act)

It is to be taken into account that the courts are under a legal obligation to exercise the discretion vested in them in a judicious manner by proper application of mind and keeping in view the attending circumstances. Furthermore the permission of cross-examination Under Section 154 of the Evidence Act cannot and should not be granted at mere asking of a party calling the witness.

If we analyze the language of Section 154 following points come into picture:-

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20 Padmanabhan Ananth, “Retraction of Statements Made by Witnesses: Need for Legal Reform”, accessed at British Council’s Legal eNews publication
• **Firstly**, the provision (Section 154 of the Indian Evidence Act, 1872) only talks about permitting “such questions as may be asked in cross-examination.”

• **Secondly**, the law nowhere mentions, the need to declare a witness as hostile, before the provision can be invoked.

• **Thirdly**, the judicial consideration (under Section 154) is only to be invoked when the court feels that ‘the attitude disclosed by the witness is destructive of his duty to speak the truth.

This shows that domestic law differs from common law to a significant degree in this respect. Common law categorizes witnesses as “hostile” or “adverse” for the purpose of cross examination whereas Indian Law makes no such distinction. All that law seeks to do is elicit hidden fact from the witnesses for the sole purpose of determining the truth. Ultimately it is the court, which has to use its discretion in granting the permission to ask such questions as referred in Sec 154 of the Indian Evidence Act.21

Section 145 of this Act prescribes one of the most effective modes for impeaching the credit of a witness. This section allows for the cross-examination of any witness as to any previous statement made by him in writing. The previous statement made by the witness can be used for the purpose of contradiction of the witness, under this section, as long as his attention is taken to those parts of the writing that are to be relied on for such purpose. Section 145 statutorily incorporates one significant use of previous statements made by witnesses and assumes prominence especially in the context of the general principle that such statements cannot be used as substantive evidence. The other relevant provision is Section 157 of the Act, which states that any former statement made by a witness relating to the same fact, before any authority legally competent to investigate the fact, can be used to corroborate the oral testimony.

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21 Pandey Sharan Brisketu, “**Hostile Witnesses in Our Criminal Justice System**”, 2005 Cr.L.J.(Jour.) 17
5.3.3. Indian Penal Code, 1860 & The Offence of Perjury

The Indian Penal Code, 1860 under Section 191 defines Perjury as “giving false evidence”. A witness has to give all the information correctly otherwise he will have to face the trial under Section 191 of The Indian Penal Code & thereafter he may be penalized under Section 193-195 of the same for the aforesaid offence. Section 191 is applicable only when a statement is made by a person bound by an oath or by an express provision of law to state the truth, or who is bound by law to state the truth, or who is bound by law to make declaration upon any subject. In other words it means that he is under legal obligation to speak truth in view of the oath administered to him or because of the express provision of law, which binds him to speak the truth.22

5.3.3.1. Concept of Perjury

Perjury in general sense is considered as lying. Perjury in legal sense means lying or making verifiable false statements on a material matter under oath or affirmation in a court of law or in any of various sworn statements in writing. Perjury is a crime because the witness/ accused23 have sworn to tell the truth & for the credibility of the court, witness testimony must be relied on as being truthful.24 Perjury is considered as a very serious crime as it could be used to usurp the authority of the courts, resulting in miscarriage of justice. It has been advocated by some of the jurists and judges that mere stringent and swift action for perjury is one antidote to stop the hostile witnesses.

The perjury principles and norms are applied to witnesses who have admitted or affirmed that they are telling the truth. A witness who is unable to

22 Chaterjee Mamta, “Problem of Hostile Witness”, available at www.legalservicesindia.com
23 Perjury also relates to false statement made by the accused, as statements of an accused should be proved or disproved on evidence. Mr. Bill Clinton, President of U.S.A was charged for perjury for lying in Monika Lewinsky incidence. He survived an impeachment attempt by congress.
swear to tell the truth uses affirmative. For example, in the United Kingdom and till a little while ago in India, a witness may swear on the Bible or holy book. If a witness has no religion, or does not wish to swear on a holy book, the witness may make an affirmation he or she is telling the truth instead. In some countries such as France, suspects cannot be heard under oath and thus do not commit perjury, whatever they say during their trail.\textsuperscript{25} The matter of perjury laws recently gathered considerable attention. The offence of perjury is not only applicable to criminal cases, but also extends to other judicial proceeding including civil case being tried by civil courts exercising original jurisdiction. While the problem of perjury in criminal cases is generally confined to giving of false evidence on oath, it has a wider spectrum as far as civil cases are concerned and includes giving false evidence, fabricating false/ forged documents to be used as evidence etc. Statements of interpretation of fact are not perjury because people often make inaccurate statements unwittingly and not deliberately. Individuals may have honest but mistaken beliefs about certain facts or their recollection may be inaccurate like most other crimes in the common law system, to commit the act, and to have actually committed the act (the actus reus).

\subsection*{5.3.3.2. Perjury: A critical appraisal of Indian law}

There are some specific provisions dealing with the offence of perjury. The section 191 of IPC\textsuperscript{26} defines perjury as "giving false evidence" and by interpretation it includes the statements retracted later as the person is presumed to have given a "false statement" earlier or later, when the statement is retracted. But hardly anyone, including the legal experts, could recall a single case in which a person was prosecuted for making a false statement before the court.

Any statement tendered under oath on an affidavit also constitutes perjury. Under section 191 of IPC\textsuperscript{27}, an affidavit is evidence and a person swearing to a false affidavit is guilty of perjury punishable under section 193 IPC that prescribes the period of punishment as seven years imprisonment. Sec 195(1)(b) of the code

\begin{footnotes}
\item[25] ibid
\item[26] Indian Penal Code, 1860
\item[27] ibid
\end{footnotes}
of criminal procedure provides that no court shall take cognizance inter-alia of the offence of perjury under Section 193 to 195 except on the complaint in writing of that court or the court to which that court is subordinate. Section 340 of Criminal Procedure Code prescribes the procedure to be followed for making a complaint contemplated by Section 195. Section 344, Criminal Procedure Code however prescribes an alternative summary procedure. It provides that if the Court of Sessions or Magistrate of first class if any time of delivery of judgment in the case expresses an opinion that the witness appearing in such proceeding had knowingly or willfully given false evidence or fabricated false evidence for use in the proceedings, the court may if satisfied that it is necessary and expedient in the interest of justice that the witness should be tried summarily, take cognizance after giving reasonable opportunity of showing cause, try such offence summarily and sentence him to imprisonment which may extend up to three months or to fine up to rupees five hundred or with both.

Certain legal provisions dealing with the offence of perjury are discussed as under:

5.3.3.3. **Perjury: Judicial Approach**

**Punishment for false evidence**

Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

**Prosecution for Contempt of Lawful Authority of Public Servants, for Offences against Public Justice and for Offences relating to documents given in Evidence:**

Under this section no Court shall take cognizance-

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28 Section 193 Indian Penal Code, 1860

29 Section 195 Indian Penal Code, 1860
i. of any offence punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code (45 of 1860), or

ii. of any abetment of, attempt to commit, such offence, or

iii. of any criminal conspiracy to commit, such offence,

Except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate;

i. of any offence punishable under any of the following sections of the Indian Penal Code, (45 of 1860) namely, sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, or

ii. of any offence described in section 463, or punishable under section 471, section 475 or section 476, of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court, or

iii. of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in sub-clause (i) or sub-clause (ii), except on the complaint in writing of that Court, or of some other Court to which that Court is subordinate.

Procedure in the cases mentioned in section 195 Indian Penal Code, 1860:

This section confers an inherent power on a Court to make a complaint in respect of an offence committed in or in relation to a proceeding in that Court, or as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, if that Court is of opinion that it is expedient in the interest of justice that an enquiry should be made into an offence referred to in clause (b) of sub-section (1) of Section 195 and authorizes such Court to hold preliminary enquiry as it thinks necessary and then make a complaint thereof in writing after recording a finding to that effect as contemplated under sub-section (1) of Section 340. The words "in or in relation to a proceeding in that Court" show that the Court which can take action under this section is only the Court operating within the definition of Section 195 (3) before which or in relation to

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30 Section 340 Cr.P.C,1973
whose proceeding the offence has been committed. There is a word of caution in built in that provision itself that the action to be taken should he expedient in the interest of justice. Therefore, it is incumbent that the power given by this Section 340 of the Code should be used with utmost care and after due consideration.

**Using Evidence known to be False**\(^{31}\):  
Whoever corruptly uses or attempts to use as true or genuine evidence any evidence, which he knows to be false or fabricated, shall be punished in the same manner as if he gave or fabricated false evidence.

**False Statement made in declaration, which is by Law receivable as Evidence**\(^{32}\):  
Whoever, in an declaration made or subscribed by him, which declaration any Court of Justice, or any public servant or other person, is bound or authorized by law to receive as evidence of any fact, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, touching any point material to the object for which the declaration is made or used, shall be punished in the same manner as if he gave false evidence. In context of cases under above sections section 195 of the Criminal Procedure Code is applicable. According to this section the Court shall take cognizance of such offence only on the complaint of such Court or any other Court to which such Court is subordinate.

**Perjury: Judicial Approach**

- **K. Karunakaran v TV Eachara Warner**\(^{33}\) established the two pre-conditions for an enquiry held under Section 340(1) of the Code. These are that there has to be prima facie case to establish the specified offence and that it has to be expedient in the interest of justice to initiate such enquiry.

- This was relied upon in the case of **KTMS Mohd, V UOI**\(^{34}\), where the Court held that Section 340 of the Code should be alluded to only for the purpose

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\(^{31}\) Section 196 Indian Penal Code, 1860  
\(^{32}\) Section 199 Indian Penal Code, 1860  
\(^{33}\) AIR 1978 S.C. 290  
\(^{34}\) 1992(2) RCR (Criminal) 398 (S.C.)
of showing that necessary care and caution is to be taken before initiating a criminal proceeding for perjury against the deponent of contradictory statement in a judicial proceeding. In India, law relating to the offence of perjury is given a statutory definition under Section 191 and Chapter XI of the Indian Penal Code, incorporated to deal with the offences relating to giving false evidence against public justice. The offences incorporated under this Chapter are based upon recognition of the decline of moral values and erosion of sanctity of oath. Unscrupulous litigants are found daily resorting to utter blatant falsehood in the courts which has, to some extent, resulted in polluting the judicial system.35

- In *State of Gujrat v Hemang Prameshrai Desai*36, the Court stressed upon the need to corroborate the falsity of a statement with ample evidence. Mere police evidence was held insufficient to convict the accused. Also where the conviction of the accused was based on his voluntary admission of guilt, his statements were to be construed literally and strictly.

- In the same year in the Allahabad High Court in *Narmada Shankar v Dan Pal Singh*37, a case of malicious prosecution, where defendant-respondent was charged under Section 193 of the IPC for having arrested the Petitioner and subsequently lying under oath as to the presence of such orders, admitted during cross-examination that he had previously lied about the orders. It was held in this case that when a witness comes to Court prepared to make a false statement and makes it, but is cornered in cross-examination and compelled to admit his false statements he cannot claim that the admission neutralises the perjury committed by him. The real test in all such cases was held to be whether the witness voluntarily corrected himself due to realisation of his error or genuine feeling of remorse before his perjury was exposed. In the given circumstances, though, the defendant was let off with a warning.

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35 Re: Suo Moto Proceedings against Mr. R. Karuppan, Advocate, AIR 2001 SC 2004 (Para 12)
36 1966 Cri. L. J. 474
37 AIR 2001 S.C. 2004
The Supreme Court in Re : Suo Moto Proceedings against Mr. R. Karuppan, Advocate has stressed upon stern and effective to prevent the evil of perjury. It remains a fact that most of the parties despite being under oath make false statements to suit the interests of the parties calling them. In the present case the respondent filed an affidavit stating that the age of the then CJI was undetermined by the President of India according to Article 217 of the Constitution of India in another matter in 1991. As regards this the affidavit prima facie was held to have made a false statement. It was not disputed that an affidavit is evidence within the meaning of Section 191 of the Indian Penal Code and a person swearing to a false affidavit is guilty of perjury punishable under Section 193 IPC. The respondent herein, being legally bound by an oath to state the truth in his affidavit accompanying the petition was prima facie held to have made a false statement which constitutes an offence of giving false evidence as defined under Section 191 IPC, punishable under Section 193 IPC.

In KTMS Mohd. V UOI\(^{38}\) the Bench observed that the mere fact that a deponent has made contradictory statements at two different stages in a judicial proceeding is not by itself always sufficient to justify a prosecution for perjury under Section 193 IPC but it must be established that the deponent has intentionally given a false statement in any stage of the ‘Judicial proceeding’ or fabricated false evidence for the purpose of being used in any stage of the judicial proceeding. Further, such a prosecution for perjury should be taken only if it is expedient in the interest of justice. According to Section 199 of the IPC to constitute an offence the declaration made by the accused must be of such nature as may be admissible as evidence in a Court of Law and any public authority or public servant must be bound by law to accept such declaration as evidence. The statement, which is alleged to be false in such a declaration, must be of material importance to the object of the declaration and the accused must have

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\(^{38}\) A.I.R. 1969 SC 7
reasonable knowledge of its falsity. If the falsity of the statement is proved then the accused will be punished as he would be for giving false evidence.

- In *Jotish Chandra v State of Bihar*\(^{39}\), the falsity of the statement as touching upon any point material to the object of the declaration was held to be essential to constitute an offence under Section 199 of the IPC.

- The section was subjected to further interpretation in *M S Jaggi v Registrar, Orissa HC*\(^{40}\) Herein the accused was held to have made a reckless and false allegation against a Judge in order to have a revision petition to which he is a party, transferred to another Judge. Dwelling upon the essentials of constituting a crime under Section 199 of the IPC there must be a deliberate false statement. Statement made in a reckless and haphazard manner, though untrue in fact, need not constitute an offence when the person making such statements immediately admits the mistake and corrects the statements. If, however, a person makes a reckless and false allegation against a Judge in an affidavit, he lays himself open to prosecution under this section.

- **The Case of Jeffrey Archer:**

  Jeffery Archer, a well-known novelist of Britain, was sentenced for four years imprisonment for perjury. In 1987 he sued the Daily Star for libel when they alleged that he had sex with an Irish prostitute, Monica Coughlan. He won the case and was £ 500,000 damages, but not everyone was convinced by the verdict. The journalist, Adam Raphael wrote an article at the time which carefully avoided libel but implied a number of things that Archer probably had gone with a prostitute; that at the trail Archer and his lawyers had shifted attention from this issue to the tactics used by the Daily Star to trap Archer; and that the Daily Star had only themselves to blame for this. Before sentencing him the judge Mr. Justice Potts told Lord Archer. "These charges represent as serious an offence of

\(^{39}\) A.I.R. 1969 SC 7

\(^{40}\) 1983 Cri. L.J. 1527
perjury as I have had experience of and have been able to find the books". The jury found him guilty of lying and cheating in his 1987 libel case against the Daily Star. The verdicts were unanimous on each count. Lord Archer, who was ordered to pay £175,000 costs within 12 months, was told by the judge he would have to serve at least half of his sentence. This case has set a new trend in the contemporary society about the sanctity of legal system in Britain.

- The Indian scenario, on the contrary presents a rather dismal picture. Even the apex court of the country expressed its concern over this matter and again. In one of the cases, the Supreme Court held that "unscrupulous litigants are found daily resorting to utter blatant falsehood in the Courts". While "most of the witness....makes false statements to suit the interests of the parties calling them". The perjurer in the case happens to be Advocate R. Karuppan, who is also president of the Madras High Court Advocates Association. The perjury committed by Karuppan is that he filed a petition questioning the authenticity of Justice A. S. Anand's date of birth in spite of knowing full well that the issue had already been settled by the President of India.

Ordering a complaint of perjury to be filed against Karuppan before a magistrate, the Apex court warned; "If the system is to survive, effective action is the need of the time." Indeed, Karuppan's perjury may not be exceptional but the action initiated in his case that too suo motu, seems to be an exception to the general practice among the courts to condone perjury. And it would not be out of place to suggest that Karuppan also would have probably got away with his perjury had the aggrieved party not been former Chief Justice of India A S Anand himself.  

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41 http://news.bbc.co.uk/1/hi/uk/1424501.stm.
42 “Perjury Here and There” Indian Express: July 26, 2001
43 As quoted in an article by Sairam Bhatt in Kerela Law Journal, 2006
5.3.4. HOSTILE WITNESS: Recent Judicial Pronouncements

5.3.5. Best Bakery case

Best Bakery trial is the glaring example of miscarriage of justice where the witnesses turned hostile due to external pressures by the rich and powerful accused. The first track trial began on May 9 and was completed on 29 June, 2000. Twenty one persons were named accused in the case and the prosecution mainly depended on the testimony of the survivor Zahira Sheikh. Before the newly instituted court, she refused to identify any of the accused and was contrary to her previous statement before the police and the National Human Rights Commission. The court recorded a verdict that the prosecution had failed to prove the charges. Later Ms. Sheikh asserted that she had lied to the court under threat and fear for her life.

5.3.6. The Case of Jessica Lal

On April 29, 1999, leading socialite Bina Ramani organized a party at her restaurant, Tamarind Court Cafe. Several youngsters and models were serving drinks at the 'Once upon a time' bar, including Jessica Lall and her friends Malini Ramani and Shyan Munshi.

At about 0200 hours when the party was almost over, Manu Sharma with his friends Amardeep Singh, Alok Khanna, Amit Jhingan and Vikas Yadav, allegedly entered the restaurant and demanded liquor from Jessica. Since the bar was being closed, Jessica told Sharma that no more drinks would be served. After some altercation, Sharma lost his temper and fired his gun -once in the air and the second time at Jessica. The bullet struck her temple and she died on the spot. Sharma fled from the restaurant, leaving his car which was later moved by his friends. Then on 3rd August 1999, delhi police filed the charge sheet in the court of metropolitan magistrate, where manu Sharma was named the main accused charged under section 302, 201, 120(b) and 212 of indian penal code and sections 27, 54 and 59 of arms act. While other accused, like Vikas Yadav, Coca-Cola

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44 (2004) 4 SCC 158
45 2001 Cri.L.J. 2404
Company officials Alok Khanna and Amardeep Singh Gill (destroying evidence of the case and conspiracy); were all charged variously under sections 120(b), 302, 201 and 212 of the IPC (for giving shelter to the accused and destroying evidence).

The case went up for trial in August 1999. Four of the witnesses who had initially said they had seen the murder happen eventually turned hostile. Shayan munshi, a model and friend who was serving drinks beside Jessica Lall, changed his story completely; as for earlier testimony recorded with the police, he said that the writing was in Hindi, a language he was not familiar with, and it should be repudiated. Also, it appears that the cartridges used in the murder were altered. Although the gun was never recovered, these cartridges were for some reason sent for forensic evaluation, where it turned out that they had been fired from different weapons. This led to a further weakening of the prosecution’s case.

After extensive hearings with nearly a hundred witnesses, a Delhi trial court headed by Additional Sessions Judge S. L. Bhayana, acquitted 9 accused in Jessica Lall Murder case, on 21 February 2006. Those acquitted were, Manu Sharma, Vikas Yadav, Manu’s uncle Shyam Sundar Sharma, Amardeep Singh Gill and Alok Khanna, both former executives of a multinational soft drinks company, cricketer Yuvraj Singh’s father Yograj Singh, Harvinder Chopra, Vikas Gill and Raja Chopra. The judgment faulted the police for deciding on the accused first and then collecting evidence against him, instead of letting the evidence lead them to the murderer. Since the prosecution had failed to establish guilt beyond doubt, all nine accused were acquitted.

After an immense uproar, hundreds of thousands e-mailed and sms-ed their outraged on petitions forwarded by media channels and newspapers to the president and other seeking remedies for the alleged miscarriage of justice. On 25 March 2006, the Delhi High Court admitted an appeal by the police against the Jessica Lall murder acquittals, issuing non-bailable warrants against prime accused Manu Sharma and eight others and restraining them from leaving the country. This was not a re-trial, but an appeal based on evidence already marshalled in the lower court.
On 19 April 2010, the Supreme Court of India has approved the life sentence for the guilty. The two judge bench upholding the judgement of the delhi high court stated that, “The prosecution has proved beyond reasonable doubt the presence of Manu Sharma at the site of the offence”\textsuperscript{46}.

5.3.7. Phoolan Devi Case

An eye-witness in the Phoolan Devi murder case turned "hostile" by claiming that his earlier testimonies against prime accused Sher Singh Rana and others were given under police pressure. Kalicharan, the personal assistant of the slain bandit-turned politician, who in 2005 had told the court that he could identify the assailants, was declared hostile by the prosecution after he resiled from his statements saying the accused had "muffled up" their faces at the time of crime.

"In fact, I was shown the photographs of Rana and others at the police station and was threatened to identify them in the court at the time of recording of my testimony," he said before Additional Sessions Judge V K Bansal.

Earlier, he had testified in court that though he did not see the faces of Phoolan's killers but going by the height and built of the accused, it was clear that Rana alias Sheru alias Pankaj was firing at the MP while his accomplice was firing at Balender, personal security officer (PSO) of the leader.

The witness, who had earlier said that a recovery memo, bearing his and accused Rana's signatures, was prepared at 44, Ashoka Road residence of the MP, found himself in a peculiar situation when special public prosecutor S K Saxena asked about the veracity of the documents.

"Which of your statements is correct", Saxena asked saying once he told that accused signed at the memo in his presence and later gave an opposite statement controverting his earlier utterances. My recent statement is correct, Kalicharan said claiming that his earlier testimonies were recorded under police pressure.

\textsuperscript{46} Sidhartha Vashisht @ Manu Sharma V. State (NCT Of Delhi) Bench: P. Sathasivam, Swatanter Kumar
5.3.8. BMW Hit and Run case

On 10 January, 1999, a BMW driven by Sanjeev Nanda, grandson of the former Chief of Naval Staff and arms dealer admiral S.L. Nanda had allegedly run over sleeping pavement dwellers in Delhi. Three people died on the spot and others received serious injuries. As the trial progressed, a large number of witness turned hostile- Monoj Mallick, the lone survivor of hit−n- run, told the court that he was hit by a truck. Key witness, Hari Shankar, refused to identify the BMW and another witness absconded. In fact, none of the witness supported the prosecution. In the end, Sidharth and Manik were granted bail.

5.3.9. Prof Sabharwal’s case

Late Prof. H.S. Sabharwal was a professor in Government College, Ujjain, M.P. He was brutally beaten up by certain persons, for taking a rigid stand in the college union elections. Though the assaults were made in the presence of several police officials, media persons and members of public, attempt has been made to project as if his death was as a result of an accident. Initially, First Information Report was lodged and after investigation charge sheet was filed and charges have been framed against several persons. During examination of several witnesses who were stated to be eye-witnesses, such witnesses resiled from the statements made during investigation. There were even three police witnesses who also resiled from their earlier statements. They are Dhara Singh (PW-32), Sukhnandan (PW-33) and Dilip Tripathi (PW-34).

The Supreme Court came heavily upon the state Government of M.P. by issuing a contempt notice and asked its explanation about the action taken against the police officials who turned hostile before the session court. The Bench in this case observed: "What action have you taken against those police officers turn hostile? Our anxiety is that if every police officer turns turtle all the accused will be given clean chit". This case assumes significance as some 70 persons including police officials were present on the scene of occurrence and none came

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48 Himanshu Singh Sabharwal V. State of M.P. and Ors
49 The Hindustan Times, July 11,2007
forward for testimony. The Police officials who earlier submitted their statements naming the accused later turned hostile.

Two sensational criminal cases- the *Best Bakery* related to the Gujarat communal riots and *Model Jessica Lall's murder*-have brought into sharp focus the issue of “Perjury”. The criminality of buying of witnesses by influential accused can be handled by strictly enforcing the penal law on perjury. *Zahira Sheikh* the key witness in the Best Bakery case was sentenced to imprisonment for the offence of perjury. While the Bombay special trial court in the Best Bakery case has issued notices to Zahira Sheikh for “perjury” and “false evidence” as she had retracted her statements several times, the Delhi high court has *suo moto* taken cognizance of the police /prosecution theory on “hostile witness” in the Jessica Lall murder case. Though Zahira is not the lone example of perjury-in a majority of cases in Indian courts, false evidence or retraction of statement is a common phenomenon. Our cavalier toleration of perjury is a major, underestimated reason why our justice system has been farcical.51

The brazenness that was seen in BMW case where the lawyers were caught in a sting operation by a TV channel for bribing a key witness to turn hostile is a real slur on the judicial history of this nation. Such instances call for strict penal action. The experiences in many sensational cases wherein the witness turned hostile lead us to look at the legal remedy of this criminality which too often involves "buying" of witness by influential accused can be handled only by strictly enforcing the penal law on perjury.

However, the action against making a false statement should be initiated during the trial itself, & not at the end of it-which may take a long time. That may be a deterrent against persons who intentionally mislead the court or make false

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50 Zahira Sheikh, the main prosecution witness in the high profile Best Bakery case, has been sentenced to a year in prison for lying in the court and with a fine of rupees 50,000. Zahira Sheikh changed his testimony many times. A committee appointed by the Supreme Court said it believed she had been bribed for lying in the court.

statements under oath or file tainted affidavits52 much against the public good. Initiating action against a person for perjury after the trial is over is one of the reasons -why in India several perjury cases go totally unnoticed as a fresh trial begins on perjury running into years53.

In Swaran Singh V. State of Punjab54, J. Wadhwa expressing the plight of witnesses stated that:

“Perjury has also become a way of life in the law courts. A trial judge knows that the witness is telling a lie & 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 Cr.P.C. 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 Cr.P.C”.

In Surinder Singh V. State of Haryana55 The Supreme Court on witness resiling from statement and denying participation during investigation observed -

“We are pained to see that the trial courts willingly or unwillingly are not taking action against hostile witnesses. A number of witnesses who should be deposing as per their statements given under section 161 of the Code of Criminal Procedure and should be supporting the prosecution turn hostile. The trial court cannot be mute spectator to the statement of such witnesses, when the witnesses are intentionally giving false evidence (a statement to help the accused). Action should be taken under the relevant provisions of law against such witnesses, so that the administration of criminal justice does not suffer”.

52 The Delhi High Court on April 17th 2005 summoned the Deputy Commissioner, Municipal Corporation, Delhi, East N.K. Sharma and three other officials to appear before it following a complaint that the officials have filed a false affidavit regarding the ongoing demolition drive in the capital’s Krishnanagar and Gandhinagar areas. http://www.Newkerala.com/
53 The Law Commission of India has examined aspects of this in 1958, 1966 and more recently in a consultative paper in 2005.
54 A.I.R. 2000 S.C. 2017
55 2009 Criminal Court Cases 921 (P&H) (DB)
A witness intentionally giving false or fabricated evidence in the court, the very court before which a hostile witness gave false evidence itself has power under Section 344 Cr.P.C. to award punishment to the witness summarily after giving reasonable opportunity of showing cause why he should not be so punished. Provisions of section 344 should be used effectively and frequently to stop the menace of perjury, which has bearing on alarming rise. Witnesses taking U-turn at trial has become a menace to criminal judicial system.

In another case Mahila Vinod Kumari v. State of Madhya Pradesh, where the petitioner had lodged FIR against two persons on the allegations of having committing rape and it was only on the basis of the same that charge-sheet was filed against them and they were put to trial. During trial, the prosecutrix resiled from her statement made during the investigation and even denied lodging of the FIR or having had given any statement to the police. The Hon'ble Supreme Court observed as under:

"The purpose of enacting Section 344 Cr.P.C. corresponding to Section 479A of the Code of Criminal Procedure, 1898 (hereinafter referred to as 'the Old Code') appears to be further arm the Court with a weapon to deal with more flagrant cases' and not to take away the weapon already in its possession. The object of the legislature underlying enactment of the provision is that the evil of perjury and fabrication of evidence has to be eradicated and can be better achieved now as it is open to the Courts to take recourse to Section 340(1) (corresponding to Section 476 of the Old Code) in cases in which they are failed to take action under Section 344 Cr.P.C."

"This Section introduces an additional alternative procedure to punish perjury by the very Court before which it is committed in place of old Section 479 A which did not have the desired effect to eradicate the evils of perjury."

"For exercising the powers under S.344 of the Code, the Court at the time of delivery of judgment or final order must at the first instance express an opinion to the effect that the witness before it has either

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56 2008(8) SCC 34
intentionally given false evidence or fabricated such evidence. The second condition is that the Court must come to the conclusion that in the interests of justice the witness concerned should be punished summarily by it for the offence which appears to have been committed by the witness. And the third condition is that before commencing the summary trial for punishment the witness must be given reasonable opportunity of showing cause why he should not be so punished. All these conditions are mandatory. The object of the provision is to deal with the evil of perjury in a summary way."

The Hon'ble Supreme Court held that this provision should be used effectively and frequently to stop the menace of perjury, which has bearing on alarming rise. The apex Court held as under:

"The evil of perjury has assumed alarming propositions in cases depending on oral evidence and in order to deal with the menace effectively it is desirable for the courts to use the provision more effectively and frequently than it is presently done."

5.4. FACTORS RESPONSIBLE FOR WITNESSES TURNING HOSTILE

The experiences have shown that the witnesses of the police or prosecution tend to turn hostile during the prosecution of the case. The instances of disowning the statements made before the police has grown to be a real dilemma before the system of criminal justice in this country. This weakens the whole case in the interest of the offender. While there is enough popular understanding as what causes a witness to turn hostile, there is hardly any empirical knowledge confirming the same. It is generally felt that the main cause for the high acquittal rate in our criminal justice system is the witness turning hostile. In order to get rid of this cross examination as early as possible, either the witness will give the false statements or to make the matter worse, he will turn hostile i.e. he will retract from his previous statement.

"It was an avowed task of the police and the prosecution to protect witness earlier. Now it does not appear to be so. That is why witness
A witness may turn hostile for various reasons. Generally it is the combination of money and muscle power, threat / intimidation, inducement by various means, allurement/seduction etc. but the major one being the absence of protection to the witnesses during and after the trial. The witness is afraid of facing the wrath of the convicts who may be well connected. Witnesses are extremely vulnerable to intimidation in the form of threats by the accused. The People’s Union for Civil Liberties (PUCL) made a press release on July 2, 2003 pertaining to the Best Bakery case saying that there were two ways to explain why witnesses turn hostile. The first is that the police had recorded the statements incorrectly. The second and more plausible was that the police had recorded the statements correctly but was retracted by the witnesses because of “intimidation and other methods of manipulation”.

A systematic research is needed to know as to why the witnesses turn hostile. There are experiences that in the olden days it was pretty rare to see prosecution witness going hostile. It’s not that money and muscle power factors were absent in those days. It seems it has something to do with the quality of investigation. The SHO himself used to carefully conduct the entire process of investigation and it was seldom left to the junior functionary. Secondly, the SHO used to remain present during all the hearings and his presence was a definite deterrent to the witness to twist his statements. Thakur.(2001) is of the opinion that earlier an eye witness used to be summoned only once and he would be examined on the same day. Hostile witness is also 'stock witness' or pocket witness with police and they are planted to go hostile only.

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57 Paliwal, Anand “Witness Protection Program- Necessary to Ensure Justice”, 2008 Cr.L.J. (Jour.) P. 113
59 From the Lawyers Collective, August 2001
Das. J (2002)\textsuperscript{60} quoted many reasons for the hostility of witness and resultant effects on declining rates of conviction in India. His paper report following data:

According to a recent survey by the Directorate of Civil Rights Enforcement (DCRE) the following are the main reasons for the low conviction rate:—

- Hostile witnesses — 26 per cent,
- Hostile victims — 27 per cent,
- Lack of abysmally low at 6.8 percent.

The situation has reached such a stage that, in cases relating to lesser grave offences, there are certain "stock witnesses" who give evidence in trials. The problems in this instance are compounded by the fact that people are not willing to come forward or are discouraged to give evidence in cases while the police claim that they have to make do with whoever is available.

Common causes for hostility can be summed up as follows:-

\textbf{5.4.1. Absence of Witness Protection Programs}

The need for comprehensive witness protection legislation has been long felt in India. In most cases, witnesses are threatened or injured-sometimes even murdered-before giving testimony in Court. In Swaran Singh’s case, the Apex court also observed, “not only that a witness is threatened; he is maimed; he is done away with; or even bribed. There is no protection for him”\textsuperscript{61}. The threat to the lives of witnesses is one of the primary reasons for them to retract their earlier statements during the trial. Section 151 and 152 of the Indian Evidence Act, 1872 protect the victims from being asked indecent, scandalous, offensive questions, and questions likely to insult or annoy them. Apart from these provisions, there is

\textsuperscript{60} ‘Witness Protection -Legal Crisis In India’, Cri. L. J,2002

\textsuperscript{61} Swaran Singh Vs. State of Punjab 2000 Cr.L.J 2780 (S.C.)
nothing in the law to protect witnesses from external threats, inducement or intimidation.\(^6^2\)

### 5.4.2. Protracted Trials

Apart from the absence of witness protection programme another major reason of this growing menace is protracted trials. The working of judicial process is very slow. Several dates are fixed for cross-examination of the witnesses, who becomes frustrated over because of being summoned again and again only to find that the date is adjourned. The frustration takes its toll, & the witness decides to turn hostile to get rid of the harassment. In Swaran Singh’s Case, the Supreme Court said:

> “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 the adjournments for one excuse or the other till a witness is won over or is tired, (omitted). In adjourning the matter without any valid cause a Court unwittingly becomes party to miscarriage of justice. A person abhors becoming a witness. It is the administration of justice that suffers.”

The evil of incessant adjournments – for sufficient reasons and otherwise – has plagued the Indian judiciary for long. They are instrumental in causing hardship and inconvenience to the parties and witnesses. They are required to come repeatedly to courts, from long distances, at their own expense, to know that the case is only posted for hearing on another day. This causes frustration for the witnesses, and thus gives an opportunity to the opposite party to threaten or induce them not to speak the truth\(^6^3\). If the witness does not turn up at the fixed date, harsh measures are initiated against him. Even if he/she appears at the fixed date, there is likelihood that the case would be again adjourned. Besides,


\(^6^3\) 178th, Law Commission Report, 2003, p. 142
even if he appears and evidence is taken, he is subjugated by aggressive defence counsels, or declared hostile or unreliable by the prosecutor.  

Section 309 of the Cr.P.C. regulates adjournments. It says that the "proceedings shall be held as expeditiously as possible" and that the Court shall record the reasons for adjournments (Section 309(1)). If, after the commencement of the trial or taking Cognizance of an offence, the Court finds reasons for adjournment, it may do so by recording such reasons. (Section 309(2)). Proviso 2 of clause (2) says that when witnesses are in attendance, any adjournment or postponement shall be granted only after examining them, except for special reasons when it may be done without examining them, which shall be put in writing. The object of the Section is to speed up trials and put an end to the lax practice of Magistrates who hear cases piecemeal involving many adjournments. Unless absolutely necessary, courts must not grant adjournments. However, the Code does not prescribe any remedy if the Courts do not adhere to the general or particular direction in sub-section (l). The Report of the Justice Malimath Committee on Criminal Justice Reforms suggested that Section 309 should be amended to make it obligatory to award costs against the party who obtains the adjournments.

5.4.3. Easy Availability of Bail to the Accused

In many cases involving high profile personalities or heinous crime, the courts easily grant bail to the accused thereby making the witness vulnerable to threats and intimidation by the accused. No doubt Section 439(2) of the Code of Criminal

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66 However, Section 437(6) of the Code enables the accused to obtain bail if he is in detention, and his trial in the Magistrate's Court is not completed within 60 days from the first date fixed for hearing; R V. Kelkar, Criminal Procedure, Dr. K. N. Chandrasekharan Pillai (Ed.), Eastern Book Company, Lucknow, (4th ed., 2004), p. 391.
Procedure provides for the arrest of a person who has been released on bail; it is seldom used by the State in cases where there exists a reasonable apprehension that the accused might try to influence the witness.

5.4.4. Defaults in Payments of Allowances

The Law Commission of India 154th Report68 observed that the allowances paid to witness for appearing in Court are inadequate, and called for a prompt payment, no matter whether they are examined or not. Section 312 of the Cr.P.C. says that “subject to any rules made by the State Government, any Criminal Court may “if it thinks fit, order payment, on the part of Government, of the reasonable expenses of any complainant or witness attending for the purpose of any inquiry, trial or other proceeding before such Court under this Code”. However, in most cases proper diet money is not paid to the witnesses.

5.4.5. Lack of Adequate Facilities in Courts

Despite the crucial role of witnesses in criminal trials, the facilities provided to them are minimal and insufficient. The 14th Law Commission Report69 highlighted that in several States, the witnesses are made to wait under trees in Court campuses, or in the verandahs of court houses. They are not protected from the vagaries of the weather. Even the sheds in some courts are dilapidated and utilized for other court purposes. Apart from suffering such indignities and inconvenience, they have to spend time and money to come to courts from far distances.70

5.4.6. Use of Stock Witness

‘Stock witnesses’ refer to certain persons of doubtful credentials who are available to serve the police as ‘witnesses’ where real witnesses are not forthcoming.

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69 Law Commission of India, Reform of Judicial Administration, 14th Report, First Law Commission under the Chairmanship of Mr. M.C.Setalvad 1955-1958, in 1958
70 Supra note 67
Planting such pliable witnesses as prosecution witnesses quite invariably leads to such witnesses turning hostile as they can be bought for a small price. The result is failure of case ending in acquittal of all the accused, there being no evidence or reliable evidence on record.

5.4.7. Use of Money Power by the Accused

In many cases the witnesses are bought off or “purchased” with the use of money. In such cases the victims/witnesses are mostly poor who are badly in need of money. The procedure is simple. The prime witnesses in a case are contacted either directly by the party or through the lawyers litigating that case and then offered a sum of money for not cooperating in the investigation and/or are told to take a pre decided stand at the trial. If, however, the trial has already started then he is told to turn away from what he had said earlier or to contradict his own statement.

5.4.8. Threat / Intimidation

The Delhi High court observed that witnesses in a large number of cases were turning hostile due to “intimidation and threat”. The Home Ministry in its affidavit admitted that in all important case witnesses were under constant threat from criminals. The affidavit said, “There is need to take steps to stop harassment of witnesses so that he does not feel frustrated. There is also urgent need to provide adequate protection to the witnesses from intimidation by criminals”.

5.4.9. Other Factors

Political pressure, self-generated fear of police and the legal system, absence of fear of the law of perjury, an unsympathetic law enforcement machinery and corruption are some of the other reasons for witnesses turning hostile in the course of trial. Psychological studies carried on witnesses seem to suggest that grueling

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71 Neelam Katara V. Union of India ILR (2003) II Del 377 260
cross examination, frequent adjournments, courtroom intimidations are some of the major reasons that force a witness to turn hostile. The successful working of the criminal justice system depends critically on the willingness of individuals to furnish information and tender evidence without being intimidated or bought. As symbolized by Zahira Sheik’s flip flops in the Best Bakery case, the threat of retaliation, which could include physical violence, is a major reason why witnesses (some of them victim) do not cooperate.

5.5. HOSTILE WITNESS: Proposed Legislative Remedies

Today, hostility of witnesses in serious crimes and crimes committed by ‘high profile’ persons has challenged the system of criminal justice. As observed by the Apex Court:

“increasingly people are believing that laws are like spider’s webs: if some light or powerless thing falls into them, it is caught, but a bigger one can break through and get away”. Conducts which illegitimately affect the presentation of evidence in proceedings before the courts have to be seriously and sternly dealt with.\(^72\)

Consistent action by our courts to punish the ones who turn hostile and those who influence them is necessary in our criminal justice system for the truth to prevail. Legislative measures in this regard have become the inevitable need of the hour to maintain and improve the effectiveness of the criminal justice delivery system. Protection to witnesses in all aspects, especially in sensitive cases would, to a great extent, be effective in preventing them from turning hostile.\(^73\) The following steps will go a long way in protecting witnesses from external influences and will adequately control the malady of hostile witnesses:-

5.5.1. Amendment in the Existing Laws

5.5.1.1. Amendment to Section 161 and Section 162 Cr.P.C.


\(^73\) Kaur Paramjit, “Testimony of Hostile Witness : Recent Developments”, available at http://www.lawherald.in/
Statements of witnesses by police under section 161, Cr. P. C. should be signed by the witnesses and used during trial of the case for corroboration and contradiction of their testimony. The existing law under Section 162, Cr. P. C. says that the person making it shall not sign the statement of witnesses under Section 161. An amendment in the Cr. P. C. would to a small extent apply moral pressure on the witness against changing his course in the court subsequently.

While the 14th Law Commission Report suggested that the statement of every prosecution witness who is to be examined at the trial should be reduced to writing by the police officer, the 37th Report of the Commission took a step further to suggest that the statement of every witness questioned by the police should be recorded. The 41st report of the Commission however brushed aside the suggestion and said that there was no need to place any letter on the discretion of the police-officer. The 178th Law Commission Report recommended that the statement of a witness under Section 161 shall be recorded in the language of the deponent, and shall be read over to him by the recording officer and the signature or thumb impression shall be obtained on the statement. The copies of the statement shall be sent to the Magistrate and the Superintendent of Police of the District, immediately. This would ensure that the discrepancies in investigation are eliminated.

5.5.1.2. Amendment to Section 164 Cr.P.C.

The 14th Law Commission Report made the following recommendations:

“It is necessary to amend Section 164 Cr.PC so as to make it mandatory for the investigating officer to get statements of all material witnesses questioned by him during the course of

investigation recorded on oath by the magistrate. The statement thus recorded will be of much evidentiary value and can be used as previous statement. Such recording will prevent the witnesses turning hostile at their free will.”

Obviously, the lawmakers failed to act on the excuse that to implement this recommendation too large a number of magistrates will have to be appointed. In the year 2001, the Law Commission headed by Justice B.P. Jeevan Reddy in its 177th Report recommended:

“….In all offences punishable with 10 or more years imprisonment, including offences for which death sentence can be awarded, the police shall have the statements of all important witnesses recorded under Section 164 by a magistrate. Indeed, it would be more appropriate if this is done at the earliest opportunity i.e. at the very inception of the investigation. It is well-known that generally witnesses stick to truth at the early stages but may change in course of time”.

The Malimath Committee appointed by the Government of India in 2001 to suggest reforms to the criminal justice system in its report submitted in March, 2003, supported the views of the law commissions.76

5.5.2. Stringent Implementation of Section 311 of the Cr.P.C.

The first part of Section 311 of Cr.P.C. gives the Court the discretionary power to:

(i) Summon any one as a witness;

(ii) Examine any person present in the Court.

(iii) Recall and re-examine any witness.

The second part of the section makes it mandatory on the court to take any of the above steps if the new evidence appears to be essential to the just decision of the case. The paramount consideration of this section is doing justice to the case and not filling up the gaps in the prosecution of defence evidence. In fact, both the

prosecution and the defence may cross-examine a witness called under Section 311, and the court may decide which party will ask questions first, and to what extent. But these tools for ascertaining the truth is rarely used by the proactive trial Magistrate or a Session Judge. Hence, the reality is that Section 311 remains a dead letter.

5.5.3. Contradiction of the witness as envisaged in section 145 of Evidence Act

In order to mitigate the harm done to the case of the prosecution, on account of a hostile witness, a request may be made to the court as laid down by the proviso to sub-section (1) of Section 162, Cr. P. C. to permit the prosecution to contradict the witness with his police statement, in the manner provided by Section 145, Evidence Act. It is desirable that the prosecution makes a proper request, and a proper note of it is made by the court rather than making a loose note about declaring the witness hostile.

5.5.4. Speedy Trials / No Frequent Adjournments

Section 309 of the Cr.P.C. was enacted with the objective of ensuring speedy and expeditious disposal cases and thus to prevent harassment of witnesses. However, the spirit of this beneficial provision has been totally missed by the judiciary and frequent adjournments are granted by courts. Prolonged trial and harassment is one of the main reasons for witnesses falling in side of the defence and retracting their statements. Trial should proceed with as little delay as possible so that there is less chance of the witness being approached and of him/her forgetting the facts. The Public Prosecutor must anticipate that the witness will turn hostile and have with him enough material and have prepared questions to

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77 Section 309 (2) Second Proviso of the Cr.P.C states: “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”
effectively cross-examine such a witness. In Swaran Singh’s case, the Supreme Court observed:

“This 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 State Bar Councils must play their part and lend their support to put the criminal system back on its trial.”

5.5.5. Evidence Recorded U/Section 164(5), Cr.P.C Should Be Given Substantive Value

The provisions in Section 164(5), Cr.P.C. although provide for recording the statements of any person including the witnesses by a Magistrate, the statement so recorded does not have a substantive value. In order to overcome the problem of witness becoming hostile, it should be made mandatory that statement of all material witnesses should be made to be recorded by a Judicial Magistrate immediately during the course of investigation and the statements so recorded have to be given substantive value.

Even if the witnesses turn hostile and retract from their statements made on oath before a Judicial Magistrate the said statements on oath should be permitted to be used as substantive evidence against the accused. However the probative value of the statements should be left to the discretion of the court for evaluation in the light of cross-examination and other materials adduced.

5.5.6. Reforming the process of investigation

The 14th Law Commission Report suggested that the investigation staff should be separated from the law and order police. This will pave the way for a stricter monitoring and control by the Examining Magistrate, and speedy investigations, since the investigating police may be relieved of their law and their duties.

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78 2000 Cr. L. J. 2780 (S.C.)
79 Ram Kishan V. Harmit Kaur A.I.R. 1972 S.C. 468
80 Supra note 74
Furthermore, police officers need to be specially trained for the job of criminal investigation. Prosecuting officers should be of help to the prosecutor, during the trial, cases involving grave offences should be put to trial without any unnecessary postponements, and in no case, before completion of six months from the date of commission of the offence.

5.5.7. Enactment of a Comprehensive Witness Protection Legislation

Any further delay in the enactment of witness protection legislation shall cause more miscarriages of justice in criminal trials. Article 142(2) of the Constitution of India empowers, “the Supreme Court shall as respects the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents or the investigation or punishment of any contempt of itself.”

In *National Human Rights Commission V. State of Gujarat*[^81^], the Supreme Court observed:

> “no law has yet been enacted, not even a scheme has been framed by the Union of India or by the State government for giving protection to the witness.”

It is high time that India should introduce a witness protection programme. The Law Commission of India Consultation Paper on Witness Identity Protection and Witness Protection Programmes laid down that there are two broad aspects to the need for witness protection. Firstly, to ensure that the evidence of witnesses collected during investigation is not allowed to be destroyed by witnesses retracting from their statements, during trial, and secondly, the physical and mental susceptibility of the witness and taking care of his or her welfare, i.e. the physical protection of the witness. The legislation should also necessarily include provisions for treating the witness with dignity and fairness. The protection

[^81^] 2003 (9) SCALE 329
programme cannot afford to cease after the completion of the trial, but should continue thereafter too.

5.6. EVIDENTIARY VALUE OF STATEMENTS GIVEN BY A HOSTILE WITNESS

The law is now well settled that merely because the witness is declared as hostile witness, whole of his evidence is not liable to be thrown away. Reference in this context may be made to the decision of the Supreme Court in State of U.P. V. Ramesh Prasad Mishra and anr. Wherein Supreme Court stated that:

“it is equally settled law that the evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused, but it can subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted”.

Considering the question relating to evidence of hostile witness, the Supreme Court in Satpal v. Delhi Administration observed:

“......even in a criminal prosecution when a witness is cross-examined and contradicted with the leave of the court, by the party calling him, his evidence cannot, as a matter of law, be treated as washed off the record altogether. It is for the judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept in the light of the other evidence on the record, that part of the testimony which he finds to be creditworthy and act upon it. If in a given case, the whole of the testimony of the witness is impugned and in the process, the witness

83 (1996) 10 S.C.C. 360
84 A.I.R. 1976 S.C. 294
stands squarely and totally discredited, the judge should, as a matter of prudence discard his evidence in toto.\textsuperscript{85}

Witness even if declared hostile that by itself cannot wash out his evidence.\textsuperscript{86}

“That the fact that the witness was declared hostile did not completely efface his evidence, it remained admissible in the trial. Since his testimony was corroborated by other evidence, there was no legal bar to base his conviction upon it\textsuperscript{87}.”

Referring to its earlier decision\textsuperscript{88} the Apex Court in \textit{Balu Sonba Shinde v. State of Maharashtra}\textsuperscript{89} held that while it is true that declaration of a witness to be hostile does not ipso facto reject the evidence – and it is now well settled that the portion of evidence being advantageous to the parties may be taken advantage of – but the court before whom such a reliance is placed shall have to be extremely cautious and circumspect in such acceptance. The Supreme Court has manifestly made it clear that evidence of a witness cannot be discarded merely because he is declared hostile\textsuperscript{90}. Part of a hostile witness’s evidence which is cogent and credible can be acted upon\textsuperscript{91}; such evidence does not get wiped out in toto\textsuperscript{92}, or gets automatically rejected\textsuperscript{93}. However, the fact that a witness has resiled from the earlier statement made in the course of investigation puts the court on guard and cautions the court against acceptance of such evidence without satisfactory corroboration\textsuperscript{94}. And such a testimony should be scrutinized closely and accepted to the extent


\textsuperscript{86} Mallappa Siddappa Alakanur & Ors. V. State of Karnataka 2009 (3) Criminal Court Cases 376 (S.C)

\textsuperscript{87} Bhagwan Singh V. State of Haryana 1976 (1) S.C.C. 389

\textsuperscript{88} State of U.P. V. Ramesh Prasad Misra (1996) 10 S.C.C. 360

\textsuperscript{89} (2002) 7 S.C.C. 543

\textsuperscript{90} Ram Swaroop V. State of Rajasthan A.I.R. 2004 S.C. 2943


\textsuperscript{92} Leela Srinivasa Rao V. State of A.P. A.I.R 2004 S.C. 1720

\textsuperscript{93} R. Prakash V. State of Karnataka A.I.R. 2004 S.C. 1812

\textsuperscript{94} Ram Swaroop V. State of Rajasthan A.I.R. 2004 S.C. 2943.
consistent with the case of the prosecution or defence. In *Krishan and others V. State of Haryana* case Division Bench of Punjab and Haryana High Court held:

“When a witness resiles from his previous statement made in the court, the only requirement of law is that the witness is to be confronted with his previous statement made before the court as provided in Section 145 of the Indian Evidence Act, 1872.”

In this case the show cause notice was also issued to the witness to explain why a complaint be not lodged against him for committing the offence of perjury. In *Amrik Singh V. State of Haryana* Punjab and Haryana High court held:

“It is trite law that evidence of a hostile witness also can be relied upon to the extent to which it supports the prosecution version. Evidence of such a witness cannot be treated as washed off the record. It remains admissible.”

On a combined reading of the aforesaid decisions of the Supreme Court, it emerges clearly that even in criminal proceedings when a witness is cross examined and contradicted with the leave of the court, by the party calling him, his evidence cannot, as a matter of law be treated as washed off the record altogether. It is for the judge to consider in each case whether as a result of cross examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the judge finds that in the process, credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due regard, that part of his testimony which he finds to be creditworthy and act upon it.

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95 State of Rajasthan v. Teg Bahadur, 2005 S.C.C. (Cri) 218  
96 2005 (2) RCR (Criminal) 109  
97 2009 (3) RCR (Criminal) 308 (P&H)(DB)
5.7. ADVANCES IN LAW RELATING TO WITNESS PROTECTION

The legislature has taken a significant step to prevent the evil of witnesses turning hostile, by enacting Criminal Law (Amendment) Act, 2005. There has been inserted section 195-A in the Indian Penal Code. It provides:

“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 extended 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”.

The new provision provides for deterrent punishment for threatening any person to give false evidence. Similarly, in the Indian Evidence Act, 1872, by the same Amendment Act, Sub-section (2) has been inserted in section 154 which states:

“Nothing in this section shall disentitle the person so permitted under sub-section (1) to rely on any part of the evidence of such witness”.

The time has come that the malaise of ‘hostile witnesses’ is to be taken seriously and redressed immediately. The only solution to the problem of hostile witness is to bring the proposed changes in the existing laws (as discussed above) and to enact a special legislation to protect the rights of witnesses so that they may depose freely and without intimidation. Punitive and deterrent actions are required to weed out the menace of hostility of the witnesses which has become common these days as there is no fear of punishment. Appropriate measures must be taken for the protection of witnesses who appear before the courts to testify so as to render a helping hand in dispensation of justice. Dearth of funds should never be an excuse, if our society fails to be alive to the reality, the plight of an honest
witness will be catastrophic and calamitous. The Indian Parliament should take a note of the current scenario and implement a *Witness Protection Program* in the country. Protection to the witnesses in all aspects, especially in sensitive cases would, to a great extent, be effective in preventing them from turning hostile. Legislative measures in this regard have become the inevitable need of the hour to maintain and improve the effectiveness of the criminal justice delivery system.