

REPORTABLE

IN THE SUPREME COURT OF INDIA CRIMINAL ORIGINAL JURISDICTION WRIT
PETITION (CRIMINAL) NO. 156 OF 2016

MAHENDER CHAWLA & ORS.

PETITIONER(S)

VERSUS

UNION OF INDIA & ORS.

RESPONDENT(S)

J U D G M E N T

A.K. SIKRI. J.

The instant writ petition filed by the petitioners under Article 32 of the Constitution of India raises important issues touching upon the efficacy of the criminal justice system in this country. In an adversarial system, which is prevalent by India, the court is supposed to decide the cases on the basis of evidence produced before it. This evidence can be in the form of documents. It can be oral evidence as well, i.e., the deposition of witnesses. The witnesses, thus, play a vital role in facilitating the court to arrive at correct findings on disputed questions of facts and to find out where the truth lies. They are, therefore, backbone in decision

Signature Not V
Digitally signed by
SUSHIL KUMAR
RAKHHEJA
Date: 2016.11.05
16:10:52 IST
Reason:

making process. Whenever, in a dispute, the two sides come out with conflicting version, the witnesses become important tool to arrive at right conclusions, thereby advancing justice in a matter. This principle applies with more vigor and strength in criminal cases inasmuch as most of such cases are decided on the basis of testimonies of the witnesses, particularly, eye-witnesses, who may have seen actual occurrence/crime. It is for this reason that Bentham stated more than 150 years ago that “witnesses are eyes and ears of justice”.

- 2) Thus, witnesses are important players in the judicial system, who help the judges in arriving at correct factual findings. The instrument of evidence is the medium through which facts, either disputed or required to be proved, are effectively conveyed to the courts. This evidence in the form of documentary and oral is given by the witnesses. A witness may be a partisan or interested witness, i.e., a witness who is in a near relation with the victim of crime or is concerned with conviction of the accused person. Even his testimony is relevant, though, stricter scrutiny is required while adjudging the credence of such a witness. However, apart from these witnesses or the witnesses who may themselves be the victims, other witnesses may not have any personal

interest in the outcome of a case. They still help the judicial

system. In the words of *Whittaker Chambers*, a witness is “a man whose life and faith are so completely one that when the challenge comes to step out and testify for his faith, he does so, disregarding all risks, accepting all consequences¹.”

- 3) The importance of the witness, particularly in a criminal trial is highlighted in a book in the following manner:

"In search of truth, he plays that sacred role of the sun, which eliminates the darkness of ignorance and illuminates the face of justice, encircled by devils of humanity and compassion.

xxx xxx xxx

The value of witnesses can't be denied, keeping in view the dependency of the criminal proceedings on the testimonies and cooperation of witnesses in all the stages of the proceedings, especially in those cases where the prosecution has to establish the guilt with absolute certainty via oral cross-examination of witnesses in hearings open to the world at large. In such cases, the testimony of a witness, even if not as an eye witness, may prove to be crucial in determining the circumstances in which the crime might have been committed...”²

Notwithstanding the same, the conditions of witnesses in Indian Legal System can be termed as ‘pathetic’. There are many threats faced by the witnesses at various stages of an investigation and then during the trial of a case.

Apart from facing

1 Whittaker Chambers, WITNESS QUOTES (January 7, 2014, 10.30 am), <http://www.brainyquote.com/quotes/keywords/witness>.

2 Witness Protection in Criminal Trial in India by Girish Abhyankar & Asawari Abhyankar

life threatening intimidation to himself and to his relatives, he may have to face the trauma of attending the court regularly. Because of the lack of Witness Protection Programme in India and the treatment that is meted out to them, there is a tendency of reluctance in coming forward and making statement during the investigation and/or testify in courts. These witnesses neither have any legal remedy nor do they get suitably treated. The present legal system takes witnesses completely for granted. They are summoned to court regardless of their financial and personal conditions. Many times they are made to appear long after the incident of the alleged crime, which significantly hampers their ability to recall necessary details at the time of actual crime. They are not even suitably remunerated for the loss of time and the expenditure towards conveyance etc.

- 4) In *Swaran Singh vs. State of Punjab*³, this Court speaking through Wadhwa, J. expressed view on conditions of witnesses by stating that:

"The witnesses are harassed a lot. They come from distant places and see the case is adjourned. They have to attend the court many times on their own. It has become routine that case is adjourned till the witness is tired and will stop coming to court. In this process lawyers also play an important role. Sometimes witness is threatened, maimed, or even bribed.

³ (2000) 5 SCC 68 at 678.
Writ Petition (Crl.) No. 156 of 2016

There is no

protection to the witnesses. By adjourning the case the court also becomes a party to such miscarriage of justice. The witness is not given respect by the court. They are pulled out of the court room by the peon. After waiting for the whole day he sees the matter being adjourned. There is no proper place for him to sit and drink a glass of water. When he appears, he is subjected to prolong stretched examinations and cross examinations. For these reasons persons avoid becoming a witness and because of this administration of justice are hampered. The witnesses are not paid money within time. The High Courts must be vigilant in these matters and should avoid harassment in these matters by subordinate staff. The witnesses should be paid immediately irrespective of the fact whether he examines or the matter is adjourned. The time has come now that all courts should be linked with each other through computer. The Bar Council of India has to play important role in this process to put the criminal justice system on track. Though the trial judge is aware that witness is telling lie still he is not ready to file complaint against such witness because he is required to sign the same. There is need to amend section 340(3)(b) of Cr.P.C.”

- 5) It hardly needs to be emphasised that one of the main reasons for witnesses to turn hostile is that they are not accorded appropriate protection by the State. It is a harsh reality, particularly, in those cases where the accused persons/criminals are tried for heinous offences, or where the accused persons are influential persons or in a dominating position that they make attempts to terrorize or intimidate the witnesses because of which these witnesses either avoid coming to courts or refrain from deposing truthfully. This unfortunate situation prevails because of the reason that the State has not undertaken any protective

measure to ensure the safety of these witnesses, commonly known as 'witness protection'.

- 6) Over the last many years criminal justice system in this country has been witness to traumatic experience where witnesses turn hostile. This has been happening very frequently. There may be many causes for this sordid phenomena.
- 7) In *Ramesh and Others vs. State of Haryana*⁴, this Court had indicated some of the reasons which make witnesses turn hostile, as can be discerned from the following discussion.

"40. In some of the judgments in past few years, this Court has commented upon such peculiar behaviour of witnesses turning hostile and we would like to quote from few such judgments. In *Krishna Mochi v. State of Bihar* [*Krishna Mochi v. State of Bihar*, (2002) 6 SCC 81 : 2002 SCC (Cri) 1220] , this Court observed as under: (SCC p. 104, para 31)

"31. It is a matter of common experience that in recent times there has been a sharp decline of ethical values in public life even in developed countries much less developing one, like ours, where the ratio of decline is higher. Even in ordinary cases, witnesses are not inclined to depose or their evidence is not found to be credible by courts for manifold reasons. One of the reasons may be that they do not have courage to depose against an accused because of threats to their life, more so when the offenders are habitual criminals or high-ups in the Government or close to powers, which may be political, economic or other powers including muscle power."

⁴ (2017) 1 SCC 529
Writ Petition (Crl.) No. 156 of 2016

"41. Likewise, in *Zahira Habibullah Sheikh (5) v. State of Gujarat* [*Zahira Habibullah Sheikh (5) v. State of Gujarat*, (2006) 3 SCC 374 : (2006) 2 SCC (Cri) 8] , this Court highlighted the problem with the following observations: (SCC pp. 396-98, paras 40-41)

"40. "Witnesses" as Bentham said: "are the eyes and ears of justice". Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors, like the witness being not in a position for reasons beyond control to speak the truth in the court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by the court on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle truth and realities coming out to surface.... Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of the State represented by their prosecuting agencies do not suffer.. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that the ultimate truth presented before the court and justice triumphs and that the trial is not reduced to a mockery. ...

41. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who have political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. As a protector of its citizens it has to ensure that during a trial in court the witness could safely depose the truth without any fear of being haunted by those against whom he had deposed. Every State has a constitutional obligation and duty to protect the life and liberty of its citizens. That is the fundamental requirement for observance of the rule of law. There cannot be any deviation from this requirement because of any extraneous factors like caste, creed, religion, political belief or ideology. Every State is supposed to know these fundamental requirements and this needs no retaliation (sic repetition). We can only say this with regard to the criticism levelled against the State of Gujarat. Some legislative enactments like the Terrorist and Disruptive Activities (Prevention) Act, 1987 (in short "the TADA Act") have taken note of the reluctance shown by witnesses to depose against people with muscle power, money power or political power which has become the order of the day. If ultimately truth is to be arrived at, the eyes and ears of justice have to be protected so that the interests of justice do not get incapacitated in the sense of making the proceedings before the courts mere mock trials as are usually seen in movies."

"42. Likewise, in *Sakshi v. Union of India* [*Sakshi v. Union of India*, (2004) 5 SCC 518 : 2004 SCC (Cri) 1645] , the menace of witnesses turning hostile was again described in the following words: (SCC pp. 544-45, para 32)

"32. The mere sight of the accused may induce an element of extreme fear in the mind of the victim or the witnesses or can put them in a state of shock. In such a situation he or she may not be able to give full details of the incident which may result in miscarriage of justice. Therefore, a screen or some such arrangement can be made where the victim or witnesses do not have to undergo the trauma of seeing the body or the face of the accused. Often the questions put in cross-examination are purposely designed to embarrass or confuse the victims of rape and child abuse. The object is that out of the feeling of shame or embarrassment, the victim may not speak out or give details of certain acts committed by the accused. It will, therefore, be better if the questions to be put by the accused in cross-examination are given in writing to the presiding officer of the court, who may put the same to the victim or witnesses in a language which is not embarrassing. There can hardly be any objection to the other suggestion given by the petitioner that whenever a child or victim of rape is required to give testimony, sufficient breaks should be given as and when required. The provisions of sub-section (2) of Section 327 CrPC should also apply in inquiry or trial of offences under Sections 354 and 377 IpC."

43. In *State v. Sanjeev Nanda* [*State v. Sanjeev Nanda*, (2012) 8 SCC 450 : (2012) 4 SCC (Civ) 487 : (2012) 3 SCC (Civ) 899] , the Court felt constrained in reiterating the growing disturbing trend: (SCC pp. 486-87, paras 99101)

"99. Witness turning hostile is a major disturbing factor faced by the criminal courts in India. Reasons are many for the witnesses turning hostile, but of late, we see, especially in high profile cases, there is a regularity in the witnesses turning hostile, either due to monetary consideration or by other tempting offers which undermine the entire criminal justice system and people carry the impression that the mighty and powerful can always get away from the clutches of law, thereby eroding people's faith in the system.

100. This Court in *State of U.P v. Ramesh Prasad Misra* [*State of U.P. v. Ramesh Prasad Misra*, (1996) 10 SCC 360 : 1996 SCC (Cri) 1278] held that it is equally settled law that the evidence of a hostile witness could not be totally rejected, if spoken in favour of the prosecution or the accused, but it can be subjected to closest scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted. In *K Anbazhagan v. Supt. of Police* [*K. Anbazhagan v. Supt. of Police*, (2004) 3 SCC 767 : 2004 SCC (Cri) 882] , this Court held that if a court 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, accept, in the light of the evidence on the record that part of his testimony which it finds to be creditworthy and act upon it. This is exactly what was done in the instant case by both the trial court and the High Court [*Sanjeev Nanda v. State*, 2009 SCC OnLine Del 2039 : (2009) 160 DLT 775] and they found the accused guilty.

101. We cannot, however, close our eyes to the disturbing fact in the instant case where even the injured witness, who was present on the spot, turned hostile. This Court in *Manu Sharma v. State (NCT of Delhi)* [*Manu Sharma v. State (NCT of Delhi)*, (2010) 6 SCC 1 : (2010) 2 SCC (Cri) 1385] and in *Zahira Habibullah Sheikh (5) v. State of Gujarat* [*Zahira Habibullah Sheikh (5) v. State of Gujarat*, (2006) 3 SCC 374 : (2006) 2 SCC (Cri) 8] had highlighted the glaring defects in the system like non-recording of the statements correctly by the police and the

retraction of the statements by the prosecution witness due to intimidation, inducement and other methods of manipulation. Courts, however, cannot shut their eyes to the reality. If a witness becomes hostile to subvert the judicial process, the court shall not stand as a mute spectator and every effort should be made to bring home the truth. Criminal judicial system cannot be overturned by those gullible witnesses who act under pressure, inducement or intimidation. Further, Section 193 IPC imposes punishment for giving false evidence but is seldom invoked."

44. On the analysis of various cases, the following reasons can be discerned which make witnesses retracting their statements before the court and turning hostile:

- (i) Threat/Intimidation.
- (ii) Inducement by various means.
- (iii) Use of muscle and money power by the accused.
- (iv) Use of stock witnesses.
- (v) Protracted trials.
- (vi) Hassles faced by the witnesses during investigation and trial.
- (vii) Non-existence of any clear-cut legislation to check hostility of witness.

45. Threat and intimidation has been one of the major causes for the hostility of witnesses. Bentham said: "*witnesses are the eyes and ears of justice*". When the witnesses are not able to depose correctly in the court of law, it results in low rate of conviction and many times even hardened criminals escape the conviction. It shakes public confidence in the criminal justice delivery system. It is for this reason there has been a lot of discussion on witness protection and from various quarters demand is made for the State to play a definite role in coming out with witness protection programme, at least in sensitive cases involving those in power, who have political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. A stern and emphatic message to this effect was given in *Zahira Habibullah case [Zahira Habibullah Sheikh (5) v. State of Gujarat, (2006) 3 SCC 374 : (2006) 2 SCC (Cri) 8]* as well.

46. Justifying the measures to be taken for witness protection to enable the witnesses to depose truthfully and without fear, Justice Malimath Committee Report on Reforms of Criminal Justice System, 2003 has remarked as under: "11.3. Another major problem is about safety of witnesses and their family members who face danger at different stages. They are often threatened and the seriousness of the threat depends upon the type of the case and the background of the accused and his family. Many times crucial witnesses are threatened or injured prior to their testifying in the court. If the witness is still not amenable he may even be murdered. In such situations the witness will not come forward to give evidence unless he is assured of protection or is guaranteed anonymity of some form of physical disguise. ... Time has come for a comprehensive law being enacted for protection of the witness and members of his family."

47. Almost to similar effect are the observations of the Law Commission of India in its 198th Report [Report on "witness identity protection and witness protection

programmes".] , as can be seen from the following discussion therein:

"The reason is not far to seek. In the case of victims of terrorism and sexual offences against women and juveniles, we are dealing with a section of society consisting of very vulnerable people, be they victims or witnesses. The victims and witnesses are under fear of or danger to their lives or lives of their relations or to their property. It is obvious that in the case of serious offences under the Indian Penal Code, 1860 and other special enactments, some of which we have referred to above, there are bound to be absolutely similar situations for victims and witnesses. While in the case of certain offences under special statutes such fear or danger to victims and witnesses may be more common and pronounced, in the case of victims and witnesses involved or concerned with some serious offences, fear may be no less important. Obviously, if the trial in the case of special offences is to be fair both to the accused as well as to the victims/witnesses, then there is no reason as to why it should not be equally fair in the case of other general offences of serious nature falling under the Indian Penal Code, 1860. It is the fear or danger or rather the likelihood thereof that is common to both cases. That is why several

general statutes in other countries provide for victim and witness protection."

- 8) All this has created problems of low convictions in India. This has serious repercussions on the criminal justice system itself. Criminal justice is closely associated with human rights. Whereas, on the one hand, it is to be ensured that no innocent person is convicted and thereby deprived of his liberty, it is of equal importance to ensure, on the other hand, that victims of crime get justice by punishing the offender. In this whole process, protection of witnesses assumes significance to enable them to depose fearlessly and truthfully. That would also ensure fair trial as well, which is another concomitant of the rule of law.
- 9) Since this case relates to the issue of protection of witnesses, we are eschewing any further discussion on other miseries faced by the witnesses,

though we emphasise the need for addressing other problems as well, at appropriate level, if the criminal justice system in this country is to succeed. Adverting to the importance of witness protection, we may mention that it has been highlighted and emphasised by the courts in India, including this Court, time and again. Issues of identity protection of identity of witnesses and witness protection programme have been raised in number of judgments like *NHRC vs. State of Gujarat*³, *People's Union for Civil Liberties (PUCL) vs. Union of India*⁴, *Zahira vs. State of Gujarat*⁵, *Sakshi vs. Union of India*⁶ and *Zahira Habibulla Sheikh vs. Gujarat*⁷.

- 10) In *People's Union for Civil Liberties*, wherein constitutionality some of the provisions of the Prevention of Terrorism Act (POTA), 2002, were challenged, the Court carefully analyzed Section 30 of the Act, which had mentioned about the protection of witnesses. This provision provides for the proceedings to be held *in camera* in order to keep the identity of witness confidential. The Court felt the reality that very often witnesses do not come forward to testify before court in serious crimes. Witnesses are not ready to give evidence mainly because their lives might be in danger. In the court's view, Section 30 of the Act maintains a balance between the rights of a witness, the rights of an accused and the interest of the public. However,

3 2003 (9) SCALE 329
4 2003 (10) SCALE 967
5 (2004) 4 SCC 158
6 (2004) 5 SCC 518
7 2006 (3) SCALE 967

secrecy of the witness is an exception and not a rule under this section.

- 11) The protection of a child witness, who may also be a victim,

becomes all the more important. In *Sakshi vs. Union of India*⁸, the Court stressed that there is a dire need to come up with a legislation for the protection of witnesses. The Court also had issued certain guidelines on the procedure of taking of evidence from a child witness. The Court also pointed out the need for special protection to a victim of sexual abuse at the time of recording her statement in court. The petitioner in that case had given certain suggestions for effectively dealing with the special provisions for testimony in child sexual abuse cases, which were as follows:

- a) The judges shall allow the use of a videotaped interview of the testimony of the child in the presence of a child-support person.
- b) A child could be permitted to testify through closed circuit television or from behind a screen to acquire an honest and frank account of the acts complained of without any fear.
- c) Only the judge should be allowed to cross-examine a minor on the basis of the questions given by the defence in writing after the examination of the minor.
- d) During the testimony of the child, sufficient interval should be provided as and when she requires it.

12) In some other judgments, this Court gave some more guidelines, in the following manner:

a) Sections 354 and 377 of the Indian Penal Code should be tried and inquired on the same principles mentioned under subsection (2) of Section 327 Cr.P.C.

b) While holding the trial of rape or child sex abuse, some sort of arrangements like a screen or something like it may be used so as to make sure that victim or witnesses (who are equally vulnerable and need protection like the victim) do not confront the accused;

c) Questions raised during the cross-examination by the counsel of the accused that are directly related to and be reminiscent to the victim or the witnesses of the incident should be written down and given to the presiding officer of the court in advance. The presiding officer must put forth those questions to the victim or witness in simple and clear language and as far as possible without making her uncomfortable;

13) It hardly needs to be emphasised that failure to hear material witness is denial of fair trial. The practice, however, to give protection to the witnesses is based on *ad hocism*, i.e., on case

Writ Petition (Crl.) No. 156 of 2016

Page 15 of 41

to case basis. The Courts have also, in the process, adopted different means to ensure witness protection, which can be stated in brief detail:

- (a) Publication of evidence of the witness only during the course of trial and not after [*Naresh Shridhar Mirajkar and Others vs. State of Maharashtra and Another*; [1966 (3) SCR 744]
- (b) Re-trial allowed due to apprehension and threat to the life of witness [*Sunil Kumar Pal vs. Phota Sheikh and Other*; AIR 1984 SC 1591]
- (c) Necessity of anonymity for victims in cases of rape [*Delhi Domestic Working Women's Forum vs. Union of India*; (1995) 1 SCC 14]
- (d) Discouraging the practice of obtaining adjournments in cases when witness is present and accused is absent. [*State of U.P vs. Shambhu Nath Singh*; (2001) 4 SCC 667]
- (e) Making threatening of witnesses as a ground for cancellation of bail [*Ram Govind Upadhyay v. Sudarshan Singh*; II (2002) SLT 587]
- (f) Cross-examination by video conferencing — This is one of the innovative methods devised, which is specifically helpful to the victims of sexual crimes, particularly, child witnesses who are victims of crime as well.
- 14) In the instant case itself the petitioners have approached this Court with the allegations that in the trials that are going on against Asaram, who is charged with the offence of committing rapes in numerous cases, the witnesses have been frightened with serious consequences in case they depose against Asaram. It is alleged that as many as 10 witnesses have already been attacked and three witnesses have been killed.

15) There are four petitioners in this petition. These petitioners include a witness, father of a murdered witness, father of the child rape victim and a journalist who escaped a murder attempt by goons of godman Asaram and his son Naryana Sai and still faces death threats by a jailed sharpshooter of Asaram and Narayan Sai. It is stated that Petitioner No. 1 Mahender Chawla miraculously survived a murder attempt on his life for daring to testify against so called godman, Asaram Bapu and his son Narayan Sai in horrifying cases of rape of a child and two sisters. Petitioner no. 1 also witnessed Narayan Sai doing Tantrik Practice on a dead body of a child in an Asaram in Madhya Pradesh, in which till date there has not been any investigation due to the influence of Asaram. Petitioner no. 2 Naresh Gupta is the father of a murdered witness, named, Akhil Gupta. Akhil was killed for daring to be a witness against Asaram. Petitioner no. 3 Karamvir Singh is the father of a child, who was raped by Asaram. Petitioner no. 3's son Somvir was threatened by 2 attackers despite having State police security. The attackers were apprehended and released on bail. Shockingly the same attacker, named Narayan Pandey, later killed a rape-case prosecution witness Kripal Singh. The child rape victim's family has been attacked, threatened and lives in constant fear. It is also alleged that despite being threatened, the Uttar Pradesh Police shockingly withdrew half of their security. Petitioner no. 4, Narendra Yadav is a journalist who survived a murder attempt on his life because he dared to

write articles to the dislike of Asaram Bapu and Narayan Sai. He now lives in constant fear of being killed as the Uttar Pradesh Police has given him a solitary security guard for just eight hours a day, leaving him to fend for himself through the remaining 16 hours. It is also averred that the sharp shooter of Asaram, Narayan Pandey, who is in jail for murdering a witness Kripal Singh, writes threatening letters to him from inside the jail.

- 16) The petitioners have prayed for a court monitored SIT or a CBI probe. It is stated by the petitioners that the prevailing feeling of fear amongst witnesses in the country seriously impairs the right of the people of this country to live in a free society governed by rule of law. The right to testify in courts in a free and fair manner without any pressure and threat whatsoever is under serious attack today. If one is unable to testify in courts due to threats or other pressures, then it is a clear violation of Article 21 of the Constitution. The right to life guaranteed to the people of this country also includes in its fold the right to live in a society, which is free from crime and fear and right of witnesses to testify in courts without fear or pressure.
- 17) The petitioners had initially impleaded Union of India as Respondent No. 1 and States of Haryana, Uttar Pradesh, Rajasthan, Gujarat and Madhya Pradesh as Respondent Nos. 2 to 6.
- 18) Appreciating the importance and seriousness of the matter, this Court issued show cause notices in the petition on November 18, 2016. After the

service of the notice when the matter came up for hearing on March 24, 2017, this Court also directed the States of Uttar Pradesh and Haryana to ensure full and proper protection to the petitioners by providing adequate security.

- 19) When the matter was again listed on August 28, 2017, Mr. K.K. Venugopal, learned Attorney General appeared on behalf of the Union of India, along with Ms. Pinky Anand, Additional Solicitor General. It was pointed out that since this Court was primarily dealing with the issue pertaining to witness protection programme, it would be appropriate that other States are also impleaded inasmuch as the issue had PAN India significant and witness protection programme should be available in all the States. The petitioners were, accordingly, directed to implead other States as well and they be served with the notice of this petition. This is how the coverage of the petition has been extended to the entire country, encompassing all the States and Union Territories.
- 20) The petition was amended and all the States and Union Territories have been served and are represented through their respective counsel. When the matter was thereafter taken up for hearing on November 17, 2017 all the respondents were called upon to file their responses indicating as to what steps could be taken to have the witness protection programme in place.
- 21) Mr. Venugopal, learned Attorney General for India was also requested to give suggestions in the form of a draft scheme. It is

heartening to note that Union of India did not take this petition as adversarial and understood the necessity of having such a scheme in the larger public interest. With this sensitivity in mind, Ministry of Home Affairs have prepared a draft witness protection scheme, 2018 and placed the same on record of this case. This was noted in the orders dated April 13, 2018 and the State Governments as well as Union Territories, who had already been supplied with the copy of the draft scheme by the Ministry itself, were asked to furnish their comments by May 31, 2018 to the Ministry of Home Affairs. The Union Government was impressed upon to finalise the scheme after receiving the comments/suggestions from the various Governments. Order dated April 13, 2018, incorporating the aforesaid aspects, is reproduced below:

"We are informed that the Ministry of Home Affairs has prepared a draft Witness Protection Scheme 2018. A copy of the said draft scheme is handed over to us in the court today. Vide letter dated 22nd March, 2018, a copy of the said scheme is also provided to all the State Governments and the Union Territories Administration requesting them to furnish their comments by 9th April, 2018. Thereafter, again by reminder dated 11th April, 2018 all the State Governments and Union Territories were asked to furnish their comments by 31st May, 2018.

We expect all the State Governments as well as the Union Territories to furnish their comments by the aforesaid stipulated date of 31st May, 2018 to the Ministry of Home Affairs. After receiving the comments/suggestions the draft

Witness Protection Scheme 2018 shall be finalized by the Government, Ministry of Home Affairs before the next date.

List the matter in the second week of August, 2018.

Learned amicus curiae is also at liberty to furnish his suggestions.”

- 22) When the matter was taken up on November 19, 2018, the learned Attorney General informed that after taking the inputs from various States and Union Territories, Central Government had finalized the scheme and filed it in this Court on November 06, 2018 supported by its affidavit. He was also candid in his submission that this Court can pass appropriate orders directing all the States to adopt that scheme and provide a witness protection in accordance therewith till the time appropriate legislation in this behalf is passed.
- 23) We may place on record that as per the affidavit of the Central Government, the Witness Protection Scheme, 2018 is based on the inputs received from 18 States/Union Territories, 5 States Legal Services Authorities and open sources including civil society, three High Courts as well as from Police personnel. It is also stated that the scheme has been finalised in consultation with National Legal Services Authority (NALSA). It is mentioned that the aim and objective of the scheme is to ensure that the investigation, prosecution and trial of criminal offences is not prejudiced because witnesses are intimidated or frightened to give evidence without protection from violent or other criminal recrimination. It aims to promote law enforcement by facilitating the protection of persons who are involved directly or indirectly in providing assistance to criminal law enforcement agencies and overall administration of justice.

- 24) The affidavit further emphasises that the witnesses need to be given the confidence to come forward to assist law enforcement and judicial authorities with full assurance of safety and the present Scheme is aimed to identify the series of measures that may be adopted to safeguard witnesses and their family members from intimidate and threats against their lives, reputation and property.
- 25) At this stage, we reproduce Witness Protection Scheme, 2018 as filed, in its entirety:

"Witness Protection Scheme, 2018

PREFACE

Aims & Objective:

The ability of a witness to give testimony in a judicial setting or to cooperate with law enforcement and investigations without fear of intimidation or reprisal is

essential in maintaining the rule of law. The objective of this Scheme is to ensure that the investigation, prosecution and trial of criminal offences is not prejudiced because witnesses are intimidated or frightened to give evidence without protection from violent or other criminal recrimination. It aims to promote law enforcement by facilitating the protection of persons who are involved directly or indirectly in providing assistance to criminal law enforcement agencies and overall administration of Justice. Witnesses need to be given the confidence to come forward to assist law enforcement and Judicial Authorities with full assurance of safety. It is aimed to identify series of measures that may be adopted to safeguard witnesses and their family members from intimidation and threats against their lives, reputation and property.

Need and justification for the scheme:

Jeremy Bentham has said that “Witnesses are the eyes and ears of justice.” In cases involving influential people, witnesses turn hostile because of threat to life and property. Witnesses find that there is no legal obligation by the state for extending any security.

Hon'ble Supreme Court of India also held in *State of Gujrat v. Anirudh Singh* (1997) 6 SCC 514 that: “It is the salutary duty of every witness who has the knowledge of the commission of the crime, to assist the State in giving evidence.” Malimath Committee on Reforms of Criminal Justice System, 2003 said in its report that “By giving evidence relating to the commission of an offence, he performs a sacred duty of assisting the court to discover the truth”. *Zahira Habibulla H. Shiekh and Another v. State of Gujarat* 2004 (4) SCC 158 SC while defining Fair Trial said “If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial”.

First ever reference to Witness Protection in India came in 14th Report of the Law Commission of India in 1958. Further reference on the subject are found in 154th and 178th report of the Law Commission in India. 198th Report of the Law Commission of India titled as “Witness Identity Protection and Witness Protection Programmes, 2006” is dedicated to the subject.

Hon'ble Supreme Court observed in *Zahira case supra*,

Legislature has introduced Section 195A IPC in 2006 making Criminal Intimidation of Witnesses a criminal offence punishable with seven years of imprisonment. Likewise, in statues namely Juvenile Justice (Acre and Protection of Children) Act, 2015, Whistle Blowers Protection Act, 2011, Protection of Children from Sexual Castes and Tribes (Prevention of Atrocities) Act, 1989 also provides for safeguarding witnesses against the threats. However no formal structured programme has been introduced as on date for addressing the issue of witness protection in a holistic manner.

In recent year's extremism, terrorism and organized crimes have grown and are becoming stronger and more diverse. In the investigation becoming and prosecution of such crimes, it is essential that witnesses, have trust in criminal justice system. Witnesses need to have the confidence to come forward to assist law enforcement and prosecuting agencies. They need to be assured that they will receive support and protection from intimidation and the harm that criminal groups might seek to inflict upon them in order to discourage them from co-operating with the law enforcement agencies and deposing before the court of law. Hence, it is high time that a scheme is put in place for addressing the issues of witness protection uniformly in the country.

Scope of the Scheme:

Witness Protection may be as simple as providing a police escort to the witness up to the Courtroom or using modern communication technology (such as audio video means) for recording of testimony. In other more complex cases, involving organised criminal group, extraordinary measures are required to ensure the witness's safety viz. anonymity, offering temporary residence in a safe house, giving a new identity, and relocation of the witness at an undisclosed place. However, Witness protection needs of a witness may have to be viewed on case to case basis depending upon their vulnerability and threat perception.

1. SHORT TITLE AND COMMENCEMENT:

- (a) The Scheme shall be called "Witness Protection Scheme, 2018"
- (b) It shall come into force from the date of Notification.

Part I

2. DEFINITIONS:

- (a) "Code" means the Code of Criminal Procedure, 1973 (2 of 1974);
- (b) "Concealment of Identity of Witness" means and includes any condition prohibiting publication or revealing, in any manner, directly or indirectly, of the name, address and other particulars which may lead to the identification of the witness during investigation, trial and post-trial stage;
- (c) "Competent Authority" means a Standing Committee in each District chaired by District and Sessions Judge with Head of the Police in the District as Member and Head of the Prosecution in the District as its Member Secretary.

- (d) "Family Member" includes parents/guardian, spouse, live-in partner, siblings, children, grandchildren of the witness;
- (e) "Form" means "Witness Protection Application Form" appended to this Scheme;
- (f) "In Camera Proceedings" means proceedings wherein the Competent Authority/Court allows only those persons who are necessary to be present while hearing and deciding the witness protection application or deposing in the court;
- (g) "Live Link" means and include a live video link or other such arrangement whereby a witness, while not being physically present in the courtroom for deposing in the matter or interacting with the Competent Authority;
- (h) "Witness Protection Measures" means measures spelt out in Clause 7, Part-III, Part-IV and Part V of the Scheme.
- (i) "Offence" means those offences which are punishable with death or life imprisonment or an imprisonment up to seven years and above and also offences punishable under Section 354, 354A, 354B, 354C, 354D and 509 of IPC.
- (j) "Threat Analysis Report" means a detailed report prepared and submitted by the Head of the Police in the District Investigating the case with regard to the seriousness and credibility of the threat perception to the witness or his family members. It shall contain specific details about the nature of threats by the witness or his family to their life, reputation or property apart from analyzing the extent, the persons making the threat, have the intent, motive and resources to implement the threats.
- It shall also categorize the threat perception apart from suggesting the specific witness protection measures which deserves to be taken in the matter;
- (k) "Witness" means any person, who possesses information or document about any offence;
- (l) "Witness Protection Application" means an application moved by the witness in the prescribed form before a Competent Authority for seeking Witness Protection Order. It can be moved by the witness, his family member, his duly engaged counsel or IO/SHO/SDPO/Prison SP concerned and the same shall preferably be got forwarded through the Prosecutor concerned;
- (m) "Witness Protection Fund" means the fund created for bearing the expenses incurred during the implementation of Witness Protection Order passed by the Competent Authority under this scheme;
- (n) "Witness Protection Order" means an order passed by the Competent Authority detailing the witness protection measures to be taken

(o) "Witness Protection Cell" means a dedicated Cell of State/UT Police or Central Police Agencies assigned the duty to implement the witness protection order.

3. CATEGORIES OF WITNESS AS PER THREAT PERCEPTION:

Category 'A' : Where the threat extends to life of witness or his family members, during investigation/trial or thereafter.

Category 'B' : Where the threat extends to safety, reputation or property of the witness or his family members, during the investigation/trial or thereafter.

Category 'C' : Where the threat is moderate and extends to harassment or intimidation of the witness or his family member's, reputation or property, during the investigation/trial or thereafter.

4. STATE WITNESS PROTECTION FUND:

(a) There shall be a Fund, namely, the Witness Protection Fund from which the expenses incurred during the implementation of Witness Protection Order passed by the Competent Authority and other related expenditure, shall be met.

(b) The Witness Protection Fund shall comprise the following:-

- i. Budgetary allocation made in the Annual Budget by the State Government;
- ii. Receipt of amount of costs imposed/ordered to be deposited by the courts/tribunals in the Witness Protection Fund;
- iii. Donations/contributions from Charitable Institutions/Organizations and individuals permitted by Central/State Governments.
- iv. Funds contributed under Corporate Social Responsibility.

(c) The said Fund shall be operated by the Department/Ministry of Home under State/UT Government.

5. FILING OF APPLICATION BEFORE COMPETENT AUTHORITY:

The application for seeking protection order under this scheme can be filed in the prescribed form before the Competent Authority of the concerned District where the offence is committed, through its Member Secretary along with supporting documents, if any.

6. PROCEDURE FOR PROCESSING THE

APPLICATION:

(a) As and when an application is received by the Member Secretary of the Competent Authority, in the prescribed form, it shall forthwith pass an order for calling for the Threat Analysis Report from the ACP/DSP in charge of the concerned Police Sub-Division.

(b) Depending upon the urgency in the matter owing to imminent threat, the Competent Authority can pass orders for interim protection of the witness or his family members during the pendency of the application.

(c) The Threat Analysis Report shall be prepared expeditiously while maintaining full confidentiality and it shall reach the Competent Authority within five working days of receipt of the order.

(d) The Threat Analysis Report shall categorize the threat perception and also include suggestive protection measures for providing adequate protection to the witness or his family.

(e) While processing the application for witness protection, the Competent Authority shall also interact preferably in person and if not possible through electronic means with the witness and/or his family members/employers or any other person deemed fit so as to ascertain the witness protection needs of the witness.

(f) All the hearings on Witness Protection Application shall be held *in-camera* by the Competent Authority while maintaining full confidentiality.

(g) An application shall be disposed of within five working days of receipt of Threat Analysis Report from the Police authorities.

(h) The Witness Protection Order passed by the Competent Authority shall be implemented by the Witness Protection Cell of the State/UT or the Trial Court, as the case may be. Overall responsibility of implementation of all witness protection orders passed by the Competent Authority shall lie on the Head of the Police in the State/UT.

However the Witness Protection Order passed by the Competent Authority for change of identity and/or relocation shall be implemented by the Department of Home of the concerned State/UT.

(i) Upon passing of a Witness Protection Order, the Witness Protection Cell shall file a monthly follow-up report before the Competent Authority.

(j) In case, the Competent Authority finds that there is a need to revise the Witness Protection Order or an application is moved in this regard, and upon completion of trial, a fresh Threat Analysis Report shall be called from the ACP/DSP in charge of the concerned Police SubDivision.

7. TYPES OF PROTECTION MEASURES:

The witness protection measures ordered shall be proportionate to the threat and shall be for a specific duration not exceeding three months at a time. They may include:

- (a) Ensuring that witness and accused do not come face to face during investigation or trial;
- (b) Monitoring of mail and telephone calls;
- (c) Arrangement with the telephone company to change the witness's telephone number or assign him or her an unlisted telephone number;
- (d) Installation of security devices in the witness's home such as security doors, CCTV, alarms, fencing etc;
- (e) Concealment of identity of the witness by referring to him/her with the changed name or alphabet;
- (f) Emergency contact persons for the witness;
- (g) Close protection, regular patrolling around the witness's house;
- (h) Temporary change of residence to a relative's house or a nearby town;
- (i) Escort to and from the court and provision of Government vehicle or a State funded conveyance for the date of hearing;
- (j) Holding of *in-camera* trials;
- (k) Allowing a support person to remain present during recording of statement and deposition;
- (l) Usage of specially designed vulnerable witness court rooms which have special arrangements like live video links, one way

mirrors and screens apart from separate passages for witnesses and accused, with option to modify the image of face of the witness and to modify the audio feed of the witness' voice, so that he/she is not identifiable;

(m) Ensuring expeditious recording of deposition during trial on day to day basis without adjournments;

(n) Awarding time to time periodical financial aids/grants to the witness from Witness Protection Fund for the purpose of re-location, sustenance or starting a new vocation/profession, if desired;

(o) Any other form of protection measures considered necessary.

8. MONITORING AND REVIEW:

Once the protection order is passed, the Competent Authority would monitor its implementation and can review the same in terms of follow-up reports received in the matter. However, the Competent Authority shall review the Witness Protection Order on a quarterly basis based on the monthly follow-up report submitted by the Witness Protection Cell.

9. PROTECTION OF IDENTITY :-

During the course of investigation or trial of any offence, an application for seeking identity protection can be filed in the prescribed form before the Competent Authority through its Member Secretary.

Upon receipt of the application, the Member Secretary of the Competent Authority shall call for the Threat Analysis Report. The Competent Authority shall examine the witness or his family members or any other person it deem fit to ascertain whether there is necessity to pass an identity protection order.

During the course of hearing of the application, the identity of the witness shall not be revealed to any other person, which is likely to lead to the witness identification. The Competent Authority can thereafter, dispose of the application as per material available on record.

Once, an order for protection of identity of witness is passed by the Competent Authority, it shall be the responsibility of Witness Protection Cell to ensure that identity of such witness/his or her family members including name/parentage/occupation/address/digital footprints are fully

protected.

As long as identity of any witness is protected under an order of the Competent Authority, the Witness Protection Cell shall provide details of persons who can be contacted by the witness in case of emergency.

Part IV

10. CHANGE OF IDENTITY:-

In appropriate cases, where there is a request from the witness for change of identity and based on the Threat Analysis Report, a decision can be taken for conferring a new identity to the witness by the Competent Authority.

Conferring new identities includes new name/profession/parentage and providing supporting documents acceptable by the Government Agencies. The new identities should not deprive the witness from existing educational/ professional/property rights.

Part V

11. RELOCATION OF WITNESS:

In appropriate cases, where there is a request from the witness for relocation and based on the Threat Analysis Report, a decision can be taken for relocation of the witness by the Competent Authority.

The Competent Authority may pass an order for witness relocation to a safer place within the State/UT or territory of the Indian Union keeping in view the safety, welfare and wellbeing of the witness. The expenses shall be borne by the Witness Protection Fund.

Part VI

12. WITNESSES TO BE APPRISED OF THE SCHEME:

Every state shall give wide publicity to this Scheme. The IO and the Court shall inform witnesses about the existence of "Witness Protection Scheme" and its salient features.

13. CONFIDENTIALITY AND PRESERVATION OF

RECORDS:

All stakeholders including the Police, the Prosecution Department, Court Staff, Lawyers from both sides shall maintain full confidentiality and shall ensure that under no circumstance, any record, document or information in relation to the proceedings under this scheme shall be shared with any person in any manner except with the Trial Court/Appellate Court and that too, on a written order.

All the records pertaining to proceedings under this scheme shall be preserved till such time the related trial or appeal thereof is pending before a Court of Law. After one year of disposal of the last Court proceedings, the hard copy of the records can be weeded out by the Competent Authority after preserving the scanned soft copies of the same.

In case the witness has lodged a false complaint, the Home Department of the concerned Government can initiate proceedings for recovery of the expenditure incurred from the Witness Protection Fund.

15. REVIEW:

In case the witness or the police authorities are aggrieved by the decisions of the Competent Authority, a review application may be filed within 15 days of passing of the orders by the Competent Authority.

Witness Protection Scheme, 2018
Application under
Witness Protection Scheme, 2018

Before, (To be filed in duplicate)
The Competent Authority,
District

Application for:

1. Witness Protection
2. Witness Identity Protection
3. New Identity
4. Witness Relocation

1.	Particulars of the Witness (Fill in Capital):	
	1) Name	
	2) Age	
	3) Gender (Male/Female/Other)	
	4) Father's/Mother's Name	
	5) Residential Address	
	Name and other details of family members of the witness who are receiving or perceiving threats	
2.	7) Contact details (Mobile/e-mail)	
	Particulars of Criminal matter:	
	1) FIR No.	
	2) Under Section	
	3) Police Station	

- (in case FIR not yet (in
- 4) District
 - 5) D.D. case of private
 - No. registered)
 - 6) Cr.Case Accused (if
 - No complaint)
 - Particulars of the
 - available/known):
 - 1) Name
 - 2) Address
 - 3) Phone No.
 - 4) Email id
3. Name & other particulars of the person giving/suspected of giving threats
 4. Name & other particulars of the person giving/suspected of giving threats
 5. Nature of threat perception. Please give brief details of threat received in the matter with specific date, place, mode and words used
 6. Type of witness protection measures prayed by/for the witness
 7. Details of Interim / urgent Witness Protection needs, if required
 - Applicant/witness can use extra sheets for giving additional information.

(Full Name with signature)

Date:

Place:

UNDERTAKING

1. I undertake that I shall fully cooperate with the competent authority and the Department of Home of the State and Witness Protection Cell.
2. I certify that the information provided by me in this application is true and correct to my best knowledge and belief.

3. I understand that in case, information given by me in this application is found to be false, competent authority under the scheme reserves the right to recover the expenses incurred on me from out of the Witness Protection Fund.

(Full Name with signature)

Date:

Place: ”

- 26) As is clear from its reading, the essential features of the Witness Protection Scheme, 2018 include identifying categories of threat perceptions, preparation of a “Threat Analysis Report” by the Head of the Police, types of protection measures like ensuring that the witness and accused do not come face to face during investigation etc. protection of identity, change of identity, relocation of witness, witnesses to be apprised of the scheme, confidentiality and preservation of records, recovery of expenses etc.
- 27) Since it is beneficial and benevolent scheme which is aimed at strengthening the criminal justice system in this country, which shall in turn ensure not only access to justice but also advance the cause the justice itself, all the States and Union Territories also accepted that suitable directions can be passed by the court to enforce the said Scheme as a mandate of the court till the enactment of a statute by the Legislatures.
- 28) It is clear from the aforesaid events that the Scheme is the outcome of the efforts put in by the Central Government with due assistance not only from

the State Governments as well as Union Territories but other stakeholders including Police personnel, NALSA and State Legal Services Authorities, High Courts and even civil society. There is no reason not to accede to the aforesaid submission of the learned Attorney General and other respondents.

- 29) As pointed out above, in *Sakshi's* case, the Court had insisted about the need to come up with a legislation for the protection of witnesses. It had even requested the Law Commission to examine certain aspects, which resulted to 172nd review of rape laws by the Law Commission. However, the Court specifically rejected the suggestion of the Law Commission regarding examination of vulnerable witnesses in the absence of accused. Having regard to the provisions of Section 273 of the Code of Criminal Procedure, which is based on the tenets of principle of natural justice, that the witness must be examined in the presence of the accused, such a principle cannot be sacrificed in trials and in inquiries regarding sexual offences. In such a scenario examination of these witnesses through video conferencing provides the solution which balances the interest of the accused as well as vulnerable witnesses.
- 30) Part 11(7)(L) of the Witness Protection Scheme, 2018 provides for usage of specially designed court room having special arrangements like live links,

one way mirrors, and screens apart from separate passages for witnesses and accused with the option to modify the image of the face of the witness and to modify the audio feed of the witness's voice, so that he/she is not identified.

- 31) In consonance with the same, the Delhi Judiciary has already established four Vulnerable Witness Deposition Complexes in the National Capital Territory, the latest one being at the Dwarka District Court, which was established in February, 2017. This complex provides facilities like separate witness room, separate accused room, play area for the child witnesses, pantry, separate toilet and an exclusive & comfortable waiting area and is equipped with all facilities of audio-visual exchange for a free interface between the presiding Judge, the witness and the accused without witness facing the accused. The complex has a separate entry for vulnerable witnesses, so that they do not come in direct contact with accused at any point of time. There are provisions for support persons, pre-trial court visit and facilities for pick and drop of the witnesses from their residence. In this way, all possible efforts have been made for providing comfortable environment to vulnerable witnesses at this complex in order to enable them to give their best evidence in criminal proceedings.
- 32) One of the main reasons behind establishing these Vulnerable Witness Deposition Complexes was that a large percentage of acquittals in criminal

cases is due to witnesses turning hostile and giving false testimonies, mostly due to lack of protection for them and their families, especially in case of women and children.

- 33) In fact, the Supreme Court too, in *The State of Maharashtra v. Bandu @ Daulat* (Order dt. 24.20.2017 in CrI. Appeal No. 1820/2017) has directed as follows:

"10. ... there should be special centres for examination of vulnerable witnesses in criminal cases in the interest of conducive environment in Court so as to encourage a vulnerable victim to make a statement. Such centres ought to be set up with all necessary safeguards. Our attention has been drawn to guidelines issued by the Delhi High Court for recording evidence of vulnerable witnesses in criminal matters and also the fact that four special centres have been set up at Delhi for the purpose.

12. The directions of Delhi High Court and setting up of special centres for vulnerable witnesses as noted above are consistent with the decision of this Court and supplement the same. We are of the view that all High Courts can adopt such guidelines if the same have not yet been adopted with such modifications as may be deemed necessary. Setting up of one center for vulnerable witnesses may be perhaps required almost in every district in the country. All the High Courts may take appropriate steps in this direction in due course in phases. At least two such centres in the jurisdiction of each High Court may be set up within three months from today. Thereafter, more such centres may be set up as per decision of the High Courts."

- 34) One thing which emerges from the aforesaid discussion is that there is a paramount need to have witness protection regime, in a statutory form, which all the stakeholders and all the players in the criminal justice system

concede. At the same time no such legislation has been brought about. These are the considerations which had influenced this Court to have a holistic regime of witness protection which should be considered as law under Article 141 of the Constitution till a suitable law is framed.

35) We, accordingly, direct that :

(i) This Court has given its imprimatur to the Scheme prepared by respondent No.1 which is approved hereby. It comes into effect forthwith.

(ii) The Union of India as well as States and Union Territories shall enforce the Witness Protection Scheme, 2018 in letter and spirit.

(iii) It shall be the 'law' under Article 141/142 of the Constitution, till the enactment of suitable Parliamentary and/or State Legislations on the subject.

(iv) In line with the aforesaid provisions contained in the Scheme, in all the district courts in India, vulnerable witness deposition complexes shall be set up by the States and Union Territories. This should be achieved within a period of one year, i.e., by the end of the year 2019. The Central Government should also support this endeavour of the States/Union Territories by

helping them financially and otherwise.

36) Writ petition stands disposed of in the aforesaid terms.

.....J.
(A.K. SIKRI)

.....J.
(S. ABDUL NAZEER)

NEW DELHI;
DECEMBER 05, 2018.