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Hostility of witness in a criminal trial: Legal discourse

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Abstract

The Code of Criminal Procedure (hereinafter 'CrPC') provides procedure for investigation, inquiry and trial of a criminal case. Section 135 of CrPC provides provisions on examination, cross-examination and re-examination of witnesses. When a witness resiles from the version of the counsel who calls him, section 157 of CrPC provides the safeguard of hostile witness. This paper endeavours to state the provisions for taking evidence of a hostile witness, the effect of hostility of witnesses in a criminal trial, the circumstances which tend to make a witness turn hostile, and the judicial precedents to curb the evil of hostility of witnesses. It further states the significance of section 145 of the Evidence Act and the initiatives taken by the legislature to ensure fair trial.

Keywords: Witness, evidence, criminal trial, Hostile, fair trial

Introduction

Law of Evidence is the machinery to provide best evidence to the Court of law. It provides basic provisions to ascertain and secure evidence, to produce it in the Court and to use it in doing justice to the society. The Indian Evidence Act, 1872 is used to execute the criminal procedure provided in the Code of Criminal Procedure, 1973 and determine the guilt according to the provisions of the Indian Penal Code, 1860.

Concept of Witness

In India, the adversary system of adjudication is followed in which there are two parties who furnish their claims and evidence before the Court and the presiding officer have to give the judgement. Thus this system is also known as *lis inter partes*.

I think "evidence" whether oral or documentary is a means of establishing the claim requisitioned before the Court. However, in a criminal case, the testimony of persons who watched the crime (eye-witnesses) or who heard it or who perceived it by the senses or who holds any opinion about it, constitute oral evidence under Section 60 of the Indian Evidence Act, 1872. The oral evidence is given always by a living person called a WITNESS, subject to certain exceptions. However, the term 'witness' is not defined anywhere in any of the Criminal Major Acts.

Role of Witness

The role of a witness is to deliver truth to the Court by providing best possible evidence either oral or documentary or both.

I think a witness is an independent person who is concerned with truth rather than justice to the litigant; the duty of the prosecution is to establish the case beyond all reasonable doubts whereas the respondents' duty is to cast doubt upon the case of the prosecution. The judge has to extract truth, as far as possible, from the testimony of witnesses of both parties and Advocates/prosecution officers.

However, a witness cannot be compelled to speak truth to the extent it may involve his own prosecution. This rule is contained in article 20(3) of the Constitution of India which states "no person shall be compelled to be a witness against himself". Thus it is true that in this human system, there is no strait-jacket formula to extract truth and use it in doing justice to the parties. But the role of a witness is crucial in the contemporary criminal justice system in India. A witness is said to be the eye, ear and mouth of the Court since he/she is a living person who witnessed the incident.

Concept of hostile witness

The judgment in a criminal case depends on findings of following three stages:

1. Investigation: The term 'investigation' is defined in Section 2(h) of Code of Criminal

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Procedure, 1973. Investigation is conducted solely by the police.

2. **Inquiry:** The term "inquiry" is defined in Section 2(j) of Code of Criminal Procedure, 1973 as "inquiry means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court".
3. **Trial:** The term "trial" is not defined anywhere in any of the Criminal Major Acts. However, the Code of Criminal Procedure, 1973 contains provisions for following types of trials:
 - Trial before a Court of Session, contained in Chapter XVIII;
 - Trial of Warrant-cases by Magistrates, contained in Chapter XIX;
 - Trial of Summons-cases by Magistrates, contained in Chapter XX;
 - Summary Trials, contained in Chapter XXI.

The stage of investigation being pertinent in this paper, has been described below:

Investigation

Section 2(h) of Code of Criminal Procedure, 1973 defines the term 'investigation' as "investigation includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf.

The term "evidence" is interpreted in Section 3 of the Indian Evidence Act, 1872 as:

"Evidence" means and includes

- 1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry, such statements are called oral evidence....

For the collection of evidence, Sections 161 and 162 of the Code of Criminal Procedure, 1973 provides procedure of investigation as under:

Section 161(1): Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

Section 161(2): Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would tend to expose him to a criminal charge or to penalty or forfeiture.

Section 161(3): The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records:

Provided that statement made under this sub-section may also be recorded by audio-video electronic means...

Section 162:

Statements to police not to be signed: Use of statements in evidence-

- 1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall if

reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made..

Evidentiary value of statement recorded under section 161 of Code of Criminal Procedure, 1973.

1. The statements recorded by the police officer under Section 161(1) of Code of Criminal Procedure, 1973 shall not be signed by the person making those statements. Thus, these statements cannot prosecute its maker for perjury under section 191 of the Indian Penal Code, 1860, even though-
 - 'he is bound to answer truly all questions put to him by such officer' under Section 161(2) of Code of Criminal Procedure, 1973;
 - he answers falsely the questions which would not expose him to a criminal charge or to a penalty or forfeiture.
2. In *Tahsildar Singh v. State of U.P.*^[1], Supreme Court observed that "the legislative intent behind this provision (Section 161 of Code of Criminal Procedure, 1973) 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."
3. Section 3 of Indian Evidence Act, 1872 interprets the term 'evidence' as-

Evidence means and includes-...all documents including electronic record, produced for the inspection of the Court, such documents are called documentary evidence.

Section 3 of Indian Evidence Act, 1872 interprets the term 'document' as: "Document" means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

Thus the statements recorded by the police during investigation under Section 161(1) of Code of Criminal Procedure, 1973 are "evidence" according to the interpretation given in section 3 of the Indian Evidence Act, 1872.

This is the reason that prosecution/defence rely upon such statements to the extent it supports their case.

Procedure for examination of witnesses

Chapter X (Sections 135 to 166) of the Indian Evidence Act, 1872 provides the procedure for examination of witnesses. Section 137 explains the following terms in following manner:

Examination-in-chief: The examination of a witness by the party who calls him shall be called his examination-in-chief.

Cross-examination- The examination of a witness by the adverse party shall be called his cross-examination.

Re-examination: The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.

¹ AIR 1959 SC 1012

Section 138 provides the order of examination of witnesses. It states: "Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined."

Relevance of section 161(1) of Code of Criminal Procedure, 1973 in proceeding under Section 154 of Indian Evidence Act, 1872

When the witness called by one of the parties, disaffirms the statements in favour of that party which were made by him before the police officer during investigation under section 161(1) of Code of Criminal Procedure, 1973 and baffles the Court by producing some new facts or by omitting some 'relevant facts' or hides truth from the Court, then the Advocate of the party calling him, can, with permission of the Court, cross-examine his own witness under Section 154 of the Indian Evidence Act, 1872.

The procedure followed is:

If the Court, on asking for, by the Advocate of one of the parties, ascertains that the statements produced by the witness in the examination-in-chief are opposite to those made by the same witness before the police officer during investigation under Section 161(1) of Code of Criminal Procedure, 1973 then it (Court) may declare the witness in question to be Hostile And Thus permit the party calling him to ask questions of "cross-examination nature" from his own witness.

"The main principles which underlie the law of evidence are-

1. Evidence must be confined to the matter in issue;
2. Hearsay evidence must not be admitted; and
3. Best evidence must be given in all cases."^[2]

So, to ensure that best evidence comes to the court, Section 154 of the Indian Evidence Act, 1872 allows the "person" who calls a witness to put any question to him which might be put in cross-examination by the adverse party, with the leave of the Court. Thus, the witness of either party can be declared to be hostile by the Court. However, the term "hostile witness" has not been used anywhere in the Criminal Major Acts.

In *Jatinder Singh Bhatia v. State and others*^[3],

Court held that "declaration of a witness as hostile is to be done immediately at the time of examination of witness and cannot be permitted to be done after witness has been examined".

Section 154(1) of Indian Evidence Act, 1872 stipulates:

Question By Party To His Own Witness

- 1) The court may, in its discretion, permit the person who calls a witness to put any question to him which might be put in cross-examination by the adverse party.
- 2) 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 first part of Section 145 of Indian Evidence Act, 1872 provides the procedure for doing cross-examination. It reads: "A witness may be cross-examined as to previous statements

made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved;..."

The previous statements referred to in section 145 above would include-

- statement under section 161 of Code of Criminal Procedure, 1973;
- statement under Section 164 of Code of Criminal Procedure, 1973.

Principle of Contradiction under Section 145 of Indian Evidence Act, 1872 applies for explaining the terms of cross-examination

When a witness resiles from the statements made by him under Section 161 of Code of Criminal Procedure, 1973 and is declared hostile by the Court, he can be cross-examined by the party calling him. The proviso to Section 162(1) of Code of Criminal Procedure, 1973 provides that "to explain any matter referred to in his cross-examination, such witness can be contradicted in the manner provided in Section 145 of Indian Evidence Act, 1872 and re-examined.

Proviso to section 162(1) reads: Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of Indian Evidence Act, 1872 and when any part of such statement is so used, any part thereof may also be used in the Re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

Section 145 provides procedure for such contradiction:...but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

Exception to the procedure of contradiction

Section 162(2) of CrPC states: "Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of Section 32 of Indian Evidence Act, 1872 or to affect the provisions of section 27 of that Act."

Section 32(1) of CrPC deals with "cases in which statement of relevant fact by person who is dead or cannot be found, etc. is relevant- when it relates to cause of death".

Section 27 of Evidence Act explains "how much of information received from accused may be proved".

Grounds to declare a witness as 'Hostile'

A witness may be declared to be hostile by the Court-

- if he resiles from the statements made by him before the police officer under section 161(1) of Code of Criminal Procedure, 1973 and
- "the permission under the section cannot and should not be granted at the mere asking of the part calling the witness^[4]."
- In *Phanindra Nath v. Bholanath Banerjee*^[5], Court held "the witness must appear to be not desirous of telling the truth and it is necessary to regard him hostile for eliciting the truth."

²B.M. Prasad and Manish Mohan, Ratanlal and Dhirajlal The Law of Evidence,1 (LexisNexis, Haryana, 2013)

³ 153 (2008)nDLT 633

⁴ Gura Singh v. State of Rajasthan, 2001 Cri LJ 487 (SC)

⁵ AQIR 1982 Cal 397

Effect of testimony of a hostile witness

The effect of testimony of a hostile witness is explained by following judicial precedents:

1. In *Gura Singh v. State of Rajasthan* ^[6], Court held, "the testimony of a witness who has turned hostile is not to be excluded entirely or rendered unworthy of consideration".
2. In *Anil Rai v. State of Bihar* ^[7], Court held "his testimony remains admissible. A conviction can be based on it if it finds some corroboration".
3. In *Luchiram Mootilal Boid v. Radha Charan Poddar* ^[8], Court held " a witness who is unfavourable is not necessarily hostile"
4. In *Bikram Ali Pramanik v. Emperor* ^[9], Court held "...the section does not say that a person who calls a witness may cross-examine him in certain circumstances, but he might put questions to him which may be put in cross-examination by the adverse party. That is not the same as cross-examination."

The witness may be asked leading questions under Section 143; or questions as to his previous statements in writing under section 145; or any questions under section 146 or his credit may be impeached under section 155." ^[10]

5. In *Atul Bora v. Akan Bora* ^[11], Court held "...The right to cross-examine one's own witness is not necessarily confined only to the situation where the witness exhibits hostility or is resiles from his earlier statement. Such cross-examination may be permitted to retract truth if the Court finds that the witness is withholding the truth. Permission can be granted at any stage of trial since the power of the court under Section 1254 is not fettered by sections 137 or 138."

Factors that make a witness 'Hostile'

It is worth to contemplate that why a person who revealed a story about a particular crime to the police officer, being a witness to such crime, resiles from his previous statements or retracts from them before the Court of law?

"It is generally felt that the main cause for the high acquittal rate in our criminal justice system is the witness turning hostile ^[12]."

The factors that may make a witness hostile are

1. "The witness is afraid of facing the wrath of convicts who may be well connected;
 2. the absence of protection to the witnesses during and after the trial;
 3. "...in the olden days, it was pretty rare to see prosecution witness going hostile. It is 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 Station House Officer (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" ^[13].
4. Protracted trials: In *Swaran Singh v. State of Punjab* ^[14]
 5. , Court held "...in adjourning a 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."
 6. Defaults in payments of allowances: I think this provision is of great significance for witnesses who survive on daily wages.
 7. Lack of adequate facilities in Courts;
 8. Use of money power by the accused." ^[15]

Initiatives taken by the legislature to ensure fair trial: recommendations of law commission of India

Initiative taken by the Legislature to ensure fair trial is

Amendment of Section 309 of the Code of Criminal procedure, 1973 in 2013 as: "In every inquiry or trial the proceedings shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded.

Provided that when the inquiry or trial relates to an offence under Sections 376- 376D, of the Indian Penal Code, 1860, the inquiry or trial shall, as far as possible be completed within the period of two months from the date of filing of chargesheet."

Recommendations of law Commission of India

1. With reference to the evidentiary value of statement recorded under Section 161 of Code of Criminal Procedure, 1973: the 178th Report of Law Commission of India 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." ^[16]
2. The Law Commission of India has recommended in its 14th report that "the investigation staff should be separated from the laws 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 order maintaining duties." ^[17]

On issue of "witness protection", Supreme Court in *National Human Rights Commission v. State of Gujarat* ^[18], observed

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http://shodhganga.inflibnet.ac.in/bitstream/10603/8788/14/14_chapter%205.pdf p. 151

¹⁴ 2000 Cri LJ 2780 (SC)

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http://shodhganga.inflibnet.ac.in/bitstream/10603/8788/14/14_chapter%205.pdf p. 151

¹⁶<http://lawcommissionofindia.nic.in/reports/rep198.pdf>

¹⁷ <http://lawcommissionofindia.nic.in/1-50/Report14vol1.pdf>

¹⁸ 2003 (9) SCALE 329

⁶ 2001 Cri LJ 487 (SC)

⁷ 2001 Cri LJ 3969 (SC)

⁸ (1921) 40 Cal 93

⁹ (1929) 57 Cal 801

¹⁰ B.M. Prasad and Manish Mohan, Ratanlal and Dhirajlal The Law of Evidence, 777 (LexisNexis, Haryana, 2013)

¹¹ AIR 2007 Gau 51

¹²http://shodhganga.inflibnet.ac.in/bitstream/10603/8788/14/14_chapter%205.pdf p. 151

that " 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."

Conclusion

The object of law under Section 154 of the Indian Evidence Act, 1872 is only to ensure that the witness supports the version of the Counsel who calls him to testify in his favour. So, it does not use words like "hostile" or "unreliable witness".

I think to increase the evidentiary value of statements recorded under Section 161(1) of Code of Criminal Procedure, 1973 and reduce the factors that make a witness hostile-

1. For abrogation of any harm to the witness from the police, as is explained by Supreme Court in Tahsildar Singh's case, the witness must be at liberty to put charges of coercion or undue influence or misrepresentation on the police official, in the same manner, as these elements are applied in the Law of Contract provided, the witness would also be required to prove above allegations before the Court in terms of Section 3 of Indian Evidence Act, 1872.
2. The recommendation made by Law Commission of India in its 14th report should be implemented to increase the efficiency of investigation machinery.

I conclude that the tool of hostile witness is a mechanism to ensure that a criminal trial is not vitiated due to coercion or undue influence or threat or intimidation on the part of the party in opposition and thus to ensure fair trial.

References

1. Friedmann W. Legal Theory. 5th edn. London: Stevens and Sons; c1967. p. 21.
2. Langan PSJ. Maxwell on The Interpretation Of Statutes. 12th edn. Sweet and Maxwell Limited; c1969. p. 105-106.
3. Paton GW. A Text-Book of Jurisprudence. 3rd ed. English Language Book Society and Oxford University Press; 1964. p. 4.
4. Dicey. An Introduction to the Study of the Law of the Constitution. 1st edn. English Language Book Society and Macmillan and Co Ltd; 1968. p. xxxv.
5. Corwin ES. The Constitution and What It Means Today. First Indian Edition 1966. Sterling Publishers (P) Ltd. Jullundhur, Delhi.
6. Basu DD. Introduction to the Constitution of India. 20th edn. Reprint; c2012. Lexis Nexis Butterworths Wadhwa Nagpur.
7. Agrawal HO. Human Rights. 15th edn. Central Law Publications, Allahabad; c2014.
8. Indian Institute of Legal Education. Golden Rule of interpretation. <https://www.iilsindia.com/blogs/golden-rule-of-interpretation/>. Retrieved 31.10.2022.
9. Justice VR Krishna Iyer Committee Report on Processual Justice to the People, dated May 1973, page 8. <http://reports.mca.gov.in/Reports/15-Iyer%20committee%20report%20of%20the%20expert%20committee%20in%20legal%20aid,%201973.pdf>. Retrieved 12.03.2017.
10. Jain MP. Outlines of Indian Legal And Constitutional History. 6th edn. Reprint; c2009.
11. BR Manohar (ed). Ratanlal and Dhirajal The Code of

- Criminal Procedure. 19th edn. Lexis Nexis, Gurgaon; c2013.
12. Dr KI Vibhute, PSA Pillai's Criminal Law 51. 11th edn; c2012.
13. Prasad BM, Mohan M. Ratanlal and Dhirajlal The Law of Evidence. LexisNexis, Haryana; c2013.
14. Brian Miller. Freedom v. Liberty: How subtle differences between these two big ideas changed our World. 25.10.2020. <https://ammo.com/articles/freedom-liberty-difference-understanding-negative-vs-positive-rights>.
15. http://shodhganga.inflibnet.ac.in/bitstream/10603/8788/14/14_chapter%205.pdf
16. <http://lawcommissionofindia.nic.in/reports/rep198.pdf>
17. <http://lawcommissionofindia.nic.in/1-50/Report14vol1.pdf>
18. Code of Criminal Procedure, 1973
19. Indian Evidence Act, 1872
20. Indian Penal Code, 1860