

HOSTILE WITNESSES AND EVIDENTIARY VALUE OF THEIR TESTIMONY UNDER THE LAW OF EVIDENCE

*Dr. Shabnam Mahlawat**

Abstract

The antiquated rules of Evidence as inheritance of the British system provides for rules of procedure, whereby discrediting one's own witness, juxtaposed to calling witnesses in ones favor is an unstable scenario for courts and judges to determine the case and its outcomes. The difficulty in the situation arises when ones calling a witness turns hostile and starts to give answers favorable to the opposing party. It is also an onerous task for the courts to rely on such a witness, whose disposition is crucial for dispensing justice in a trial. Although the rules of procedure are followed even in such cases, but the outcomes may vary for want of reliable evidence. The fine lines of determination when the witness turns hostile or only answers certain questions not favorably or is unaware of the effects of answers is a complex question which is to be viewed whether the witness is hostile being the privilege of the judge to accept or reject evidence. The similar scenario arises when witness may turn hostile during various stages of the trial. To seek the able expounding of the law and the situational scenarios which witness deal requiring protectionist measures for which the absence of the Indian law does not account for remains unanswered. This paper while reflecting on the rules of evidence as a part of the procedure, seeks to analyze and assess, the various situations of hostile witnesses, and the probative value of their testimony crucial to the trial to meet the ends of justice.

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I Introduction

Witnesses and their role in determining outcomes of cases are crucial for trials in the courts. A favorable witness in providing favorable testimony works for strengthening the case of the party producing that witness. However this testimony may be discredited by the adverse party while examining the witness. A tough situation arises when the favorable witness turns hostile leading to change in the outcome of a case. Groping with one's own witness for turning the case in one's favor becomes an onerous task. The credibility

and the impeachment of credibility of one's own witness leads to prolonging the trial and in certain cases results in an unjust trial, leaving the court in a frustrating situation in finding the truth in a case. It also depends on whether a witness was a prime witness or one which can be dispensed with for the case of a just and fair trial. If a prime witness turns hostile, it would lead to reconsideration of the court in relying on this testimony and depending on circumstantial evidence more than the witness in determining the outcome of a case. If however, a witness is not a prime witness, the court might arrive at a conclusion that the witness testimony may be dispensed with and it would look for other more reliable solutions. The crucial role which the witness may play in certain cases may have devastating effects if the court in those circumstances has to dispense with the testimony and rely on other evidence. Also, in certain cases where the accused or the aggrieved parties are powerful citizens of a country, the trial may get affected due to certain psychological assumptions relating to their standing which the court should dispense and not allow such assumptions to provide direction in a case.

Hostile Witness

Hostile witness is said to be when a party calls in a witness to depose in its own favor, instead the witness goes against the party calling him. This situation arises in many of the cases where witnesses do not give answers in favor of the party calling the person as a witness. The court has to declare the witness as a hostile one. It is not the option of the party calling the witness to do so. The adverse reference by the witness towards the person who calls him is a manner which helps the court to uphold or reject the statement of witness if crucial to a case and the trial.

II Historical Background

The rule and its originality of non-impeachment of a party of his witnesses find its probable base from trial by compurgation as the roots cannot be determined with certainty.¹ This mode of trial was in vogue during the Middle Ages both on the continent and in England, where it became known as trial by wager of law. ²A party, by taking oath, could establish his plea of defense if compurgators swore that they believed he spoke the truth.³ "As the compurgators testified only to the verity of the party's oath, they were little more than character witnesses. They were selected by the party himself from among his immediate kinsmen in early times and later....." ⁴The credence of the rule is in probability of the ancient times in England, where impeachment of a party's own witness was unheard of on the basis that a party's witness would be giving favorable and truthful statement for the party calling him as a witness. The judge would then decide the credibility of the said witness on the basis of evidence deposed in a case. The Indian Ancient texts provide certain antiquated views prevalent during those times and were applied in the ancient societies. The

* Assistant Professor, Faculty of Law, University of Delhi.

¹ Wigmore, *A Treatise on Law of Evidence* 896 (Little Brown & Company, Boston, 2nd edn. 1923).

² James B. Thayer, *Preliminary Treatise on Evidence*, 24 – 34 (Little Brown & Company, Boston, 1898).

³ Moschizsker, *The Historic Origin of Trial by Jury*, 70 *U.Pa.L.Rev.* 80 (1921).

⁴ *Supra*, note 1 at 1.

Dharamshastras have condemned false testimony during trial pragmatically binding individuals towards his duty of speaking the truth which bound the society.⁵ "The admonition given by the judge to witnesses is a peculiarity of the Hindu legal system."⁶ They gave a prior warning to the witness of the truthful statement as his dharma and to stand its dignity based on morality prevalent in those societies.⁷ It also infused fear in them by a detailed depiction of the moral consequences of perjury. Equating truth with the goodness and positive forces of nature with merits growing made a witness to speak the truth irrespective of his caste status.⁸ "The axiomatic principle is that giving true evidence is rewarded with an afterlife in the heaven, so the corollary is that perjury leads to hell."⁹

III Witnesses and their examination for Testimony

"Consideration of evidence by way of deposition of witnesses calls for attainment and availability of proof followed by affirmation or denial of the parties. The accuracy of proof is considered in the light of demonstrative availability eliminating errors. Proof of facts is applied to the effect of evidence and is not undertaken in terms of mathematical applicability.¹⁰" For evidence introduced and to be made admissible in courts, requires a degree which should exclude falsity and help expose the correct facts in a trial. Matters of fact cannot be determined with mathematical precision in a trial. What is introduced may not be sufficient to bring out the correct facts for justice to prevail, but nevertheless, the court needs testimony of witnesses to help in clarifying the existing facts and the discover which otherwise may not be present when evidence is submitted. The question is not to determine what facts are false but to determine what the truth in matters submitted before the court is. Chapter X of the Indian Evidence Act, 1872¹¹ deals with the provisions relating to examination of witnesses in court which are rendered competent and devoid of privileges may be compelled to answer questions which are important to throw light upon the case. The presumption which may be taken in respect to witnesses in the current chapter is the witness who are not capable of deposing are rejected by the court and those considered compellable along with their competency may be produced before the court for testimonial acknowledgement. It provides a regulatory framework which has to be followed and cannot be dispensed with by any court.¹² Justice delayed is justice denied, nevertheless, if the trial in courts are fast tracked, then the nature of statements and the falsity or the truth of a witness may become hazy. The precision of screening the statements of persons called as witnesses calls for a scrutiny which may take time when the process of their examination is conducted in the courts. Otherwise, the malignant nature, motives and finally the truth may remain hidden. Rules of procedure require some norms to be followed while the law simultaneously calls for a speedy trial. The observations of the courts are

⁵ Irma Piovano, *Some Reflections about False Witnesses in Ancient Indian Law*, available at: http://www.asiainstitutetorino.it/Indologica/volumes/vol23-24/vol23-24_art40_PIOVANO.pdf. (Last visited on May 05, 2017).

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ P Ramanatha Aiyer, *Cross Examination- Principles & Precedents*, 44 (Wadhwa Book Company, Nagpur, 3rd edn., 2003).

¹¹ The Indian Evidence Act, 1872(Act of 1872), ss.135-166.

¹² *Ibid.*

related to the details of the statements as well as witnesses themselves where they behave or choose to behave in a manner favorable to themselves during the trial. It is the determination of truth in such cases which might prove to be an onerous task for the courts and the judges. The testimony to which a trial relates should not be ambiguous and not carried out in a disorderly fashion. The introduction and the trial when carried out in a systematic manner helps the courts to look into the existing as well as the emerging facts, their correctness and fairness to determine the outcome in a trial. If a trial is carried in a disorderly manner, then the facts are all muddled and clarity cannot emerge from such a situation. While considering the favorable witnesses, a lawyer should also take care that they speak in a manner which befits the trial even though they might be favorable to them. Some may scurry and others may make silly remarks, which could lead to adverse situations being created. The testimony should be such as clarifies the situation while maintaining a favorable attitude towards the side for whom the statement is being given. It might take a little more time but once clarity is brought in, the lengthy trial is worth for justice to prevail. Examination of testimony by the courts, with translucent statements and corroboration or nullifying false statements help in the truth of matter stated to be considered and upheld by the courts.

IV Examination of Witnesses- the regulatory framework

The provisions of law provide that production and examination of witnesses are to be regulated by the law and practice in consonance with the civil and criminal procedure and where these laws do not apply, it will be the discretion of the court to determine the same.¹³ The party who in accordance with the law has the privilege of the right to begin shall produce witnesses for the purpose of examination. The order of production of evidence will be regulated by the criminal code in criminal cases and civil code in several cases. In criminal law, the prosecution shall begin with its case whereas in civil cases, it is the framing of the issues which will decide who has the right to begin. It is then the discretion of that person/party to decide which witnesses are to be produced in his favor and the court examines accordingly and arrive at a decision.

The judge shall then decide the admissibility of evidence.¹⁴ The order of examination of witnesses is the party who calls a witness or the plaintiff or the aggrieved party filing the case shall examine his witness and is known as examination-in-chief. The procedural law requires it unless in a case the onus is on the defendant to start proving his claims. The examination of a witness is then examined by the adverse party in dispute and is referred to as cross-examination. The witness subsequently is examined again by the party who called him as his witness and is referred to as re-examination.¹⁵ The procedural law requires questions to be put to the witnesses in the manner as prescribed by the law. They may be asked or they may not be asked or how leading questions are to be made to witnesses are all determined by the law. Questions may be asked to the witness to test the veracity of the witness or to test his statements whether it is truthful or

¹³ *Supra* note 2.

¹⁴ *Supra* note 11.

¹⁵ *Ibid.*

not, and in certain cases witnesses may be compelled to answer the questions put across and in others they have the privilege to deny to answer the questions. The law also provides that questions which are not relevant to a case or are unreasonable may not be asked while examining a witness. Questions which are indecent or scandalous or intended to insult or to annoy may be forbidden by the court, which has the discretion to do so. After a witness has been examined, questions which are corroborating with other relevant facts presented in a case may also be made admissible. Former testimony of a witness may also be used to corroborate with the later testimony with respect to the same facts in a case. In certain cases memory may be refreshed of the witness either by reference to a writing or a statement or any other evidence which may be present. It is finally the judge who after taking into account all evidence present before him shall decide the admissibility of evidence in all forms. The credibility of a witness may be impeached in case in any way it may be shown to the discredit of a person as witness that the reliability is not good enough in a case.¹⁶

Process of examination of witnesses

The procedural law calls for a precise legal and systematic procedure for examination of witnesses. The order of evidence is ruled by criminal and the civil law procedures in criminal and civil cases respectively.¹⁷ It is the judge who shall decide as to the admissibility of evidence as it is put forth by the parties.¹⁸ The order of calling the witnesses for testimony is that there shall be an examination-in-chief, cross examination and a re-examination of the witnesses when the witnesses are called in by parties for examination.¹⁹ Leading questions that is which suggest an answer to the questions asked may be put to witnesses during cross-examination and the court permits this to be done.²⁰ The court decides in most cases when the witnesses may be compelled to answer questions (Sec 148)²¹ and questions which are scandalous, indecent or intended to insult or annoy may be forbidden by the court (Sec 151-152).²² The credit of a witness may be impeached by the adverse party by showing that the witness is unworthy of credit, or showing that witness has been bribed or by proof of former statements contradicted with the current statement (Sec 155)²³. A witness may refresh his or her memory by referring to anything which he feels will help him or her recall the facts (Sec 159).²⁴ The powers of the judge to put questions or to order production of documents helps him to arrive at a judgment based on the facts which are duly proved (Sec 165).²⁵ The process of examination of witnesses provides for character witnesses, calling for persons only to produce documents and not be witnesses, whereby they may be questioned on the facts which they have

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

deposed to. The questions asked may be leading questions or otherwise. Their testimony is subject to the scrutiny of the court where their testimony may be corroborated or rejected, where they may be considered good witnesses or their credibility may be impeached by the said process. The final decision lies with the judge to decide what testimonial statement as evidence is admissible and what need not be considered to help find the truth in the matter submitted.²⁶

V Examination of hostile witnesses (S.154)

The law states that, 'The court may, in its discretion, permit the person who also witness to put any questions to him which might be put in cross-examination by the adverse party'.²⁷ In English law, an advocate who had called a witness who turned out to be hostile was permitted to employ

at least some of the techniques of cross-examination²⁸. Section 154 confers a discretion not limited by the criteria relevant to determining hostility, though in practice similar ideas appear to have been applied, at least in standard cases²⁹. "A majority of American jurisdictions now permit a party to impeach the witness so called, on the ground that a party is not responsible to the court for the testimony merely because the party has called the witness in the hope of supporting his case."³⁰ These jurisdictions provide accordingly that a witness may be impeached by any party, including the party calling him: see, e.g., Federal rules of evidence 607."³¹ It is usually believed that when a party offers to prove evidence by way of witnesses, they might end up calling those persons who actually might be persons having adverse reference for them. These witnesses under the law are said to be 'hostile' witness which the court is required to declare. A party cannot on his own declare a witness hostile, for any reason including that he has answered some questions which might not have gone in his favor in a trial. It does not discredit the witness to be hostile, or reflect upon him an impression of dishonesty, having malice or any adverse feeling. He may otherwise also not recollect the details for which he is called to testify. However where a witness genuinely is malicious and answers adversely to all things questioned, or where it appears that he is maliciously trying to sabotage the case of the party calling him as a witness, he should then be declared a hostile witness by the court. The situational answer in such adverse conditions of a hostile witness is, the repairing the damage caused to the case by such a witness. In other words, the mode of impeaching one's own witness comes by way of cross examining and asking those questions which might be put to him by the opposing party.³² "The answer

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ J D Hayden, The Origins of the Indian Evidence Act, 10 *Oxford U. Commw. L.J.* 1 2010; Taylor (n 178) Vol 2 [1282]-[1284], [1370]; Criminal Procedure Act 1865 (Imp) s 3 (28& 29) Vic c 18; Taylor (n 178) Vol 2 [1282]-[1284], [1370]; Criminal Procedure Act 1865 (Imp) s 3 (28& 29) Vic c 18.

²⁹ *Supra* note 10, MC Sarkar et. Al. (eds), *Sarkar's Law of Evidence* (16th edn Wadhwar and Company, Nagpur 2007) vol 2, 2416(Sarkar (n. 69) vol.2, 2416-33) cited in J D Hayden, The Origins of the Indian Evidence Act.

³⁰ *Supra* note 28.

³¹ G. Richard and M. Peter, *Murphy on Evidence*, 612-614(Oxford University Press, pg. 612-614, 3rd edn., 2013).

³² Section 154, Indian Evidence Act, 1872.

involves consideration of two possible remedies, which are: (a) the acceptance of the evidence, combined with calling other evidence in favor of the parties case; and (b) direct discrediting of the witness by reference to previous statements made by him inconsistent with his evidence."³³ In a trial, in an adversarial system it is often that parties produce the witnesses who would depose evidence in their favor and hence bring the outcome as a favorable one to establish their rights or deny their responsibilities. A witness who, at the time of the trial does not speak in favor of the person or the party in whose favor he has to depose does not do the same is usually regarded as a hostile witness. "Any party to litigation is entitled to call all admissible evidence at his disposal which may assist him in proving his case. This principle is not affected by the fact that part of that evidence turns out to be unfavorable or insufficiently favourable. Consequently, the mere fact that a witness proves unfavorable does not prevent the calling of any other available evidence dealing with the matters which the witness was supposed to prove."³⁴

Witness does not answer some questions favourably

In the normal course of a trial, a witness may or may not answer certain questions which may be considered not a complete version of what he saw or heard. Or he may say at any stage of testimony when called upon to give in a trial, only a half hearted version either during cross examination or examination-in-chief. The other scenario is his statements could be self contradictory at these stages. It does not ipso facto make him a 'hostile witness'. The dilemma of the court arises in the admissibility or non admissibility of relying on such testimony. The witness is declared hostile only if he suppresses the truth and causes harm to the party's disadvantage.³⁵ A witness, who had been treated as hostile witness, cannot be treated as such at once and cross-examined by the prosecution without being examined in chief. The practice of this court is to contradict a witness with the earlier statement and parts thereof, after declaring him hostile and then to use the record of the earlier statement as substantive evidence.³⁶

B- CROSS EXAMINATION OF ONE'S OWN WITNESS

The rules of procedure require that one should as a matter of precaution cross examine one's own witness. It may lead to an unfavorable situation adversely affecting the party in question. It is only done when it is required to be proved before the court that a witness has turned hostile. It is when declared by the court of the witness to be hostile, that a party may question and cross examine his own witness. When questions are asked, the purpose is to know the strengths and weakness not only of the witness to depose in such a manner, but also may throw reflections of the attitude of the opposite party. The witness may have turned hostile under threat or intimidation by the opposite party. It further helps a party's case by cross

³³Greenleaf Simon, Wigmore et al, *A Treatise on the Law of Evidence*, (3)614(Little Brown, Boston, 16th edn.,1899)

³⁴ *Id.*, *Ewer v. Ambrose* (1825) 3 B&C 746- the defendant had the misfortune to call a witness who proved exactly the opposite of the proposition for which he had been called to support. But where a witness insists that he does not remember anything or is unable or unwilling to assist, the judge-made rule that he should not be called, and may hold a trial within a trial to determine whether this would be the proper course (*Honeyghon* [1999] *Criminal Law Review* 221).

³⁵ *Luchiram Motilal Boird v. Radha Charan Poddar*, AIR 1922 Cal 276; *Panchanan Gogai v. Emperor*, AIR 1930 Cal 276.

³⁶ *Periyasami v. State of Madras*, AIR 1967 SC 1027.

examination to negate the adverse testimony of the hostile witness by the party calling him on their behalf. It is a kind of waiver of protection to the witness by the side of the party calling him as a witness.³⁷

Witness turning hostile at various stages of the trial

A witness may turn hostile at any stage during the trial, which may be the initial stage, or during examination-in-chief or during cross examination. In certain cases, where the witness even if turns hostile and is declared under section 154 as a hostile witness, the testimony will not be discarded from consideration altogether, simply because the witness is hostile. The court will look into the testimony, if it could be corroborated with any other facts or reliable evidence, for the truth to prevail in a matter submitted.³⁸ In certain cases witness have answered questions adversely to the opposite party does not absolutely discredit them, but their testimony may not be relied upon by the court if shown to be biased and not reflecting the truthful facts in the case sought to be submitted. They can also be subject to cross examination to nullify their testimony in the courts.³⁹ The implication of witnesses turning hostile at any stage is not struck down absolutely as they might look for corroborative evidence or corroborate or discredit the other evidence available on records.⁴⁰ It would depend on each circumstances based on the evidence at hand before the courts to decide whether testimony of a hostile witness should be relied upon or not. It may be admissible or if other evidence is available then regard may not be given to the testimony of a hostile witness.⁴¹

Kinds of hostile witnesses

The persons who may be called in witnesses as per the law are those who are major and of a sound mind and attained the age of maturity to testify. However the courts do consider evidence given by children or those who have not attained the age of maturity. With children a twist in the situation is they are not subject to testimony under oath. Those who are persons with disabilities also may testify in a manner in which they communicate and otherwise testify relatable facts. A person of unsound mind may testify during the period he may be declared sound and then relapses into unsoundness. The testimony of such people is also treated in the same manner by the courts in case they are declared hostile as that of other witnesses.⁴²

VI Probative Force of Testimony of Hostile Witness

The courts through various judgments has held that declaration of a witness to be hostile does not *ipso facto* reject the evidence. The precedence of cases reflects it to be a well settled that the portion of evidence,

³⁷ *Central Industrial Security Force & Others v. Abrar Ali*, 2016 (12) SCALE 853; *Sakshi v. Union of India*, (2004) 5 SCC 518; *Kushal Rao v. State of Bombay*, 1958 SCR 552.

³⁸ *Krishan Chander v. State of Delhi*, AIR 2016 SC 298.

³⁹ *Amritlal Hazara v. Emperor*, AIR 1916 Cal 188; *Dayabhai Chahaganbhai v. State of Gujarat*, AIR 1964 SC 1963 at p. 1569; (1965) 2 SCJ 53.1.

⁴⁰ *Chhotu Ram v. State of Rajasthan*, 1995 Cr LJ 819 (Raj.).

⁴¹ *Chandrika v. Rajaram*, 1995 Cr LJ 2587 (MP).

⁴² *Debiprasad Padhi v. State*, 1982 Cr LJ 2214 (Orissa).

which besides being advantageous to both the parties and helps the courts in arriving at a judgment, may be upheld and made admissible. It though has to be subject to all scrutiny and have to be extremely cautious in such acceptance. The decision made by the apex court,⁴³ that “it is equally settled law that the evidence of a hostile witness would not be totally rejected if spoken in favor of the prosecution or the accused but it can be subjected to closer scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defense may be accepted.” In another case the court held, “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 other evidence on the record, that part of his testimony which he finds to be creditworthy and act upon it.”⁴⁴ This is exactly what was done in the instant case by both the trial court and the High Court and they found the accused guilty in the trial. The courts however frown upon such testimony where the witness turn hostile as the judgments declare that they would not be treated as mute spectators and would still conduct a detailed scrutiny of the facts and testimony to bring out the truth in the case. Examples are considered of the cases of injured witness present on the place of murder turning hostile as the Court in *Sidhartha Vashisht*⁴⁵ 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. The court held, “If a witness becomes hostile to subvert the judicial process, the Courts 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 of the IPC imposes punishment for giving false evidence but is seldom invoked.” In other case of *Raja v. State of Karnataka*,⁴⁶ the Hon’ble Supreme Court has held as under:-

“That the evidence of a hostile witness in all eventualities ought not stand effaced altogether and that the same can be accepted to the extent found dependable on a careful scrutiny.”⁴⁷

Further in *Koli Lakhman Bhai Chanabhai*,⁴⁸ it was held that the evidence of a hostile witness remains admissible and is open for a Court to rely on the dependable part thereof as found acceptable and duly corroborated by other reliable evidence available on record. Yet in other cases the court did not reject the testimony only because the prosecution found their witness to be hostile and cross examined the witness.⁴⁹ The testimony of a hostile witness subject to scrutiny may be relied or nullified would depend on circumstances of each case. It could be used for corroboration or be corroborated and relied upon or

⁴³ *State of U.P. v. Ramesh Mishra*, AIR 1996 SC 2766.

⁴⁴ *Anbazhagan v. Superintendent of Police*, AIR 2004 SC 524.

⁴⁵ *Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi)*, (2010) 6 SCC 1; *Zahira Habibullah Shaikh v. State of Gujarat*, AIR 2006 SC 1367,

⁴⁶ *Raja v. State of Karnataka*, 2016 (9) SCALE 627, *Kulwinder Singh v. State of Punjab*(2015) 6 SCC 674 the Supreme Court held-“... when the evidence of the official witness is trustworthy and credible, there is no reason not to rest the conviction on the basis of their evidence”.(para 23)

⁴⁷ *Khujii v. State of M.P.* (1991) 3 SCC 627.

⁴⁸ *Koli Lakhman Bhai Chanabhai v. State of Gujarat*, (1999) 8 SCC 624.

⁴⁹ *Noorahammad v. State of Karnataka*, AIR 2016 SC 679; *Rameshbhai Mohanbhai Koli v. State of Gujarat*, (2011) 11 SCC 111.

nullified for availability of better evidence.⁵⁰ The correct rule is that either side may rely on his evidence and the whole of the evidence must be considered for what it is worth.⁵¹

In other cases, the witnesses when testified and are not found to be truthful,⁵² their testimony can be used to impeach their credibility as witness.⁵³ Under section 154, the court may allow a person to put to his own witness, similar questions as might be put in cross-examination by the adverse party. But the grant of such permission does not mean that the witness is a 'hostile' or 'unfavorable' or 'adverse' witness and, therefore, a liar. The court will have to assess his evidence as any other witness's evidence.⁵⁴ In *Administrator, Municipal Board, Gangapur City* case it was held that a witness, who goes against his earlier version and decides to support the accused, betraying truth and respect for oath, is not to be treated as a truthful witness.⁵⁵

Permission under section 154 of the Evidence Act is discretionary and power to authorize cross-examination after declaring a witness hostile is unqualified and unfettered. The power is exercised to extract the truth.⁵⁶ Section 155 lists various methods by which a witness may be discredited by the adverse party as of right (for example, witnesses to credit, proof of a bribe, or proof of a prior inconsistent statement).

The Hon'ble Supreme court in *Krishan Chander v. State of Delhi*⁵⁷ held that,

" the mere fact that a witness is declared hostile by the party calling him and allowed to be cross-examined does not make him an unreliable witness so as to exclude his evidence from consideration altogether."

And in the same judgment further held:

"the court cannot *suo motu* make use of statements to police not proved and ask questions with reference to them which are inconsistent with the testimony of the witness in the court. The words in section 162 CrPC "if duly proved" clearly show that the record of the statement of witnesses cannot be admitted in evidence straightaway nor can be looked into but they must be duly proved for the purpose of contradiction by eliciting admission from the witness during cross-examination and also during the cross- examination of the investigating officer. The statement before the investigating officer can be used for contradiction but

⁵⁰ *Koli Lakhmanbhai Chanabai v. State of Gujarat*, *supra* note 48.

⁵¹ *Emperor v. Haradhan*, AIR 1933 Pat 517; *Profulla Kumar Sarkar v. Emperor*, AIR 1959 Cal 401; *Purusotam Naik v. Chakradhar Das*, 1959 Orissa 19 at.20.

⁵² *Sarjug Prasad v. State*, AIR 1959 Pat 65 at 68.

⁵³ *Bhawan Singh v. State of Punjab*, AIR 1952 SC 214 at p.217.

⁵⁴ *Janardhan v. State of Kerala*, (1979) Mad LJ (Cr) 49.

⁵⁵ *Administrator, Municipal Board, Gangapur City v. Om Prakash*, 1982 Cr LJ 1399 (Raj).

⁵⁶ *Ibid.*

⁵⁷ *Krishan Chander v. State of Delhi*, *supra* note 38.

only after strict compliance with section 145 of the Evidence Act i.e. by drawing attention to the parts intended for contradiction."⁵⁸

VII Criminal Consequences of Hostile Witnesses-the regulatory framework

The consequential result of a false testimony of a hostile witness is endangering himself to perjury whereby punishment may be invoked against him. All cases are based on the edifice of relevant evidence admissible by way of the sanctity of the law. The Penal code comes into play where a witness furnishes false evidence. Furnishing of adverse evidence, when true, does not invoke criminal consequences. One can only be discredited for being a hostile witness by the party and be subject to cross examination. If one furnishes wrong evidence then he is liable under the penal code for the same. This is covered by Chapter XI of the Indian Penal Code, 1860:

Whoever, being legally bound by an oath or by an express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, is said to give false evidence.⁵⁹

The statement may be made in any manner verbal or written and should have the effect of being relevant and admissible under the law. The provisions under Indian Penal Code cover those persons also who fabricate evidence whether it is a false entry in any book or record, or electronic record or makes any document or electronic record and these entries are relevant under any legal, judicial or arbitration proceedings. These entries help the adjudicating authority to arrive at a judgment or base their opinion on the same which is erroneous under the law, is stated to be furnishing false evidence.⁶⁰ A person is liable to be punished under the law where upon proof, it is proved that fabricated and false evidence has been submitted, such a person is an offender under the law and attracts punishment prescribed by the law.⁶¹ The law imposes liability in a similar manner if such a person corruptly uses or attempts to use as true or genuine evidence any evidence which he knows to be false or fabricated.⁶² The testimony of witness is further covered under the penal provisions where if a false declaration to any legal proceedings is made and is receivable as evidence 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.⁶³ The other penal provisions invoked are where criminal intimidation is made to a person or his property⁶⁴ by threatening with an intention to cause harm to such a person commits the offence of criminal intimidation. Such acts to prevent witnesses from deposing correctly before the court or creating circumstances where they turn

⁵⁸ *Ibid.*

⁵⁹ Indian Penal Code, 1860, s. 191.

⁶⁰ *Ibid.* s.192

⁶¹ *Ibid.* s.193

⁶² *Ibid.* s.196.

⁶³ *Ibid.* s.199.

⁶⁴ *Ibid.* s.503.

hostile for evidence purposes are punishable under the penal law.⁶⁵ The intimidation caused may be to a person's life, property or even the chastity of a woman attracts punishment under the law. Cases where witnesses have turned hostile due to intimidation and either have been struck down as not credible or false testimony are taken into account by the courts.

VIII Rights, Problems and Victimization of Hostile Witnesses

The compellability of the witness to answer does not encroach upon the fundamental rights of the witnesses when asked to depose on oath. The provisions of evidence law⁶⁶ empower the court to compel a witness to answer in case it is imperative to do so in matters in question before the court. A refusal to answer to a public servant authorized to ask questions in a case makes a person punishable under the law.⁶⁷ He however cannot be compelled to answer where it subjects him to be arrested or prosecuted in a criminal proceeding.⁶⁸ If however, he submits false evidence he is liable under the penal provisions. The reflections of the court in relation to prosecution witness turning hostile needs to be inquired into which depicts a trend that where there are high profile cases or cases with criminality of persons involved, the witness tends to turn hostile. There are reasons for the same and for such reasons certain proposed measures need to be taken by the courts and the legislature for witness protection. "We find that it is becoming a common phenomenon, almost a regular feature that in criminal cases witnesses turn hostile. There could be various reasons for this behavior or attitude of the witnesses. It is possible that when the statements of such witnesses were recorded under section 161 of the Code of Criminal Procedure, 1973 by the police during investigation, the Investigating Officer forced them to make such statements and, therefore, they resiled there from while deposing in the Court and justifiably so. However, this is no longer the reason in most of the cases. This trend of witnesses turning hostile is due to various other factors. It may be fear of deposing against the accused/delinquent or political pressure or pressure of other family members or other such sociological factors. It is also possible that witnesses are corrupted with monetary considerations."⁶⁹ An analysis of cases reflects reasons as, threats or intimidation, Inducement by various means, use of muscle and money power, use of stock witnesses, protracted trials, hassles faced by witnesses during investigation and trial, lack of legislation for witness protection and their fear of perjury for deposing false evidence for turning hostile in several cases. In a leading case the court stated, "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

⁶⁵ *Ibid.* s.506.

⁶⁶ Indian Evidence Act, 1872, ss. 147 and 132

⁶⁷ Indian Penal Code, 1860, s.179

⁶⁸ Indian Evidence Act, 1872, s. 132

⁶⁹ *Ramesh v. State of Haryana*, 2016 (12) SCALE 246.

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's* case as well.”⁷⁰ An analysis of the Indian law provides that where a witness is harassed or tortured, is it likely to consider them in the category of a 'victim' envisaged under the provisions of international law. The U.N. Declaration of Basic Principle for Victims of Crime and Abuse of Power, 1985⁷¹ defines 'victims' as-

“Victims” means persons who, individually or collectively have suffered a harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights through acts or omissions that are in violation of criminal laws

Further the term “victim” also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.”⁷²

The need to propose the invoking of the definition is for reasons which are covered for witnesses who turn hostile under testimonial obligations. A proposal under such scenario calls for witness protection, where hostility is reduced and where justice could hope to prevail for future references.

IX Other Safeguards for Witness-the regulatory framework

The legislative provisions provide protection to certain witnesses. These witnesses are said to be privileged where they may not be compelled to give answers, if covered under the legality of the law. A bifocal situation where on one hand they are required to give appropriate answers where can be compelled by the court if crucial for the case, on the other hand cannot be compelled to answer where if covered under certain situations.⁷³ This includes judges and magistrates who may not be compelled to answer any questions in relation to a case which they have tried, in any superior or other courts. Communications between husband and wife are said to be privileged and cannot be compelled to disclose those at any time either by the husband or wife. Those who are officers of the State are also protected and cannot be compelled to give answers which are related to the affairs of the State or official communications for purposes of security. Professional communications between a lawyer and his client are protected unless it can be projected that the communication was made for an illegal purpose. These specific situations require

⁷⁰ *Zahira Habibullah Shaikh v. State of Gujarat*, supra note 45, *Govindaraju @ Govinda v. State by Srirampuram Police Station*, (2012) 4 SCC 722; *Jai Karan v. State of N.C.T., Delhi*, (1999) 8 SCC 161; *K. Anbazhagan v. Superintendent of Police*, supra note 43; *Krishna Mochi v. State of Bihar*, (2002) 6 SCC 81; *Kushal Rao v. State of Bombay*, supra note 37; *Rambai v. State of Chhatisgarh*, (2002) 8 SCC 83 ; *Sakshi v. Union of India*, supra note 37 ; *Sanwat Singh v. State of Rajasthan*, 1961 SCR (3) 120; *Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi)*, supra note 45; *State of U.P. v. Ramesh Mishra*, supra note 43; *State v. Sanjeev Nanda*, (2012) 8 SCC 450 ; *Vikas v. State of Maharashtra*, (2008) 2 SCC 516.

⁷¹ General Assembly Resolution 40/34, annex(A/RES/40/34 Dated November 29,1985).

⁷² *Ibid.*

⁷³ Indian Evidence Act, 1872, ss.121-129.

the persons as witnesses to be protected and their right not to be compelled to provide answers in response to questions put to them for the purpose of a trial.

X Conclusion

A cursory glance at the testimonial witness law makes it apparent that witness law guided by the legal principles calls for activism on the legislature and the judiciary to provide for adequate measures to protect witnesses from turning hostile. A competent and satisfactory evidence can only be procured where a trial calls for the same to throw light on the facts of a case. The circumstances qualifying to provide the appropriate proof, needs to be acquired in a safe environment. The test is of the authorities and the legal system to satisfy the ordinary people testifying in extraordinary circumstances to offer truthful testimony for justice to prevail. It is not difficult to perceive by the legal minds why testimonial failure takes place in most of the cases. The testimony of such witnesses is not subtle nuances to be overlooked by the adjudicators. The testimony offered, poses the danger of erroneous judgments and hence failure of justice in the criminal trial. The err of testimony, adverse judgment and failure of trial, advocates measures where caution and safety help in minimizing the same. A remedy is called for, where a room for errors gets eliminated, and the legal procedure is carried out with clarity in a safe environment for witnesses to depose their testimony. It is imperative in a trial for the courts and judges to know the truthful facts from both the sides. Only a thorough knowledge by both the prosecution and the defense can provide the same in which evidence needs to be examined in a trial. This knowledge if based on a prominent witness but is too scared to depose, hence turning hostile defeats the ends of justice. The need felt by a party to impeach its own witness reflects not only on the witness but also on the system, where lack of adequate legislative and adjudicatory measures are responsible for the same.⁷⁴ It tends the party to save its own back to discredit a witness which otherwise by truthful testimony would have resulted in a speedy trial. It warrants the onset of repeated occurrences of a system leading to judicial failures. Corruption and bias with onset of nullifying effects of testimony creates a chaos where systematic legal trials turn towards those measures which ordinarily were not contemplated by the legal system.

⁷⁴ Mason Ladd, Impeachment of One's Own Witness: New Developments, 4(1) *The University of Chicago Law Review* 69 (1936).