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Preservation protection and recording of evidence (Statement of Witnesses)

Dr.V.K.Shrama[1]
[1] *Director Principal: Rayat Bahra College of Law HSP*

Abstract
Particularly the statements of witnesses the preservation, protection, and recording of evidence, form a crucial component of the justice system. The reliability of a judicial proceeding depends upon the authenticity and integrity of the evidence presented before the court. Proper preservation ensures that physical, documentary and digital evidence remains untampered and admissible during trial. Equally important is the protection of witnesses who often face intimidation, threats, or coercion, leading to hostile testimonies and miscarriage of justice. The Witness Protection Scheme, 2018, approved by the Supreme Court of India, serves as a landmark step toward safeguarding witnesses through measures like identity protection, relocation, and police security. Moreover, the recording of witness statements under Sections 161 and 164 of the Code of Criminal Procedure, 1973, and through modern technologies such as video conferencing, ensures procedural fairness and transparency. Thus, an efficient system of evidence management—combining preservation, protection, and accurate recording—upholds the constitutional guarantee of a fair trial under Article 21 of the Indian Constitution and strengthens public confidence in the administration of justice.

I. Introduction

It is widely felt that criminal cases in the court fail because statements of witnesses are reneged either out of fear or allurement. To prevent the evil of witnesses turning hostile for either of the aforementioned reason, substantive, consolidated and organized steps need to be taken. When in civil cases, the fate of dispute broadly depends upon documentary evidence, in criminal trial before any court, including Court Martial, the oral statement of witnesses, opinion of experts and medical reports are considered as pivot evidence. When we talk of evidence or witnesses, we envisage the deposition and production of same before the Court of Law. By operation of different piece of legislation, importance is attached to the evidence including statement of witnesses brought on record during proceedings before the Court. The word 'Court' is defined to include all Judges and Magistrates and all persons except arbitrators legally authorized to take evidence. The word 'Evidence' in the popular sense means by which facts are established to the satisfaction of persons enquiring into them- but narrowed down by certain legal rules contrived to secure as far as possible its sufficiency and credibility, that is, facts sufficient generally to satisfy or convince to prudent person of clear understanding may not be sufficient to fulfill the requirement of the law in matter arising for judicial determination. The word 'Evidence' consider in relation to law, includes all the legal means, exclusive of mere argument, which tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation. Broadly speaking, evidence is classified into:-

(1) Direct (Percipient Evidence) and Indirect Evidence
(2) Primary and Secondary Evidence.
(3) Oral and Documentary Evidence
(4) Real Evidence
(5) Original and Hearsay Evidence
(6) Presumptive Evidence

2.When detailed literature including the codified law is available and also followed during investigation, enquiry and trial regarding standard, relevance and admissibility of evidence the important element of creation of effective mechanism for recording of evidence during investigation, enquiry and trial still lapses and leaves a lot wanting. There is a need for evolving an expert system consisting of advanced scientific instrument, psychologist and counsellor besides scribe to compile true corroborative evidence during investigation for being

Director Principal: Rayat Bahra College of Law HSP

produced before the Court during trial. Besides provision for such mechanism, there should be an organized infrastructure to ensure the safety and security of the prosecution witnesses and their family members to enable them to depose during investigation and trial fearlessly. In such process to avoid the possibility of witnesses being influenced or allured, a corpus may be generated and funds may be allocated for extending financial assistance to witnesses and their family members. The recording of statement of a witness by the same Investigating officer, who has responsibility of interrogating the accused gives such an impression to the prosecution witnesses that he is bracketed with the accused. Having such impression, quite often the people do not come forward to participate in the investigation of an offence as witness. Even when at the first instance, someone prepare himself to come forward to discharge his duty as responsible person and contribute in bringing the wrong doers to book, the prevalent system of taking his evidence during investigation and trial on record subjects him to humiliation and discourages his keenness to come forward as witness in any matter. The present system of taking evidence on record only encourages the professional tutored and parrot witnesses to come forward and support the case of applicant. In Criminal Procedure, the evidence is taken on record at the time of investigation, i.e. under Section 161, 162, 164 and during trial.

3.In the year 2006, it was proposed to amend Sections 161, 162 and 344 of the Code of Criminal Procedure, 1973. Amendments to the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872 by the Criminal Law (Amendment) Act, 2005 provides that (i) statement made to Police by any person during investigation, if reduced to writing, is to be signed and
quickly transmitted to the Magistrate; (ii) recording of evidence of material witness by Magistrate in all offences punishable with death or imprisonment for 7 years or more during investigation; (iii) statement of the witness duly recorded before Magistrate under oath, in the discretion of the court, be treated as evidence; and (iv) summary trial for perjury and enhanced punishment awarded consequent to such summary trial. Said amendment is positive and efficient move highlighting concern regarding role of evidence in administration of justice. However, more organized and concerted attention needs to be paid to said subject.

● History of law of evidence in India

In India there was no uniform law on the subject of evidence prior to the passing of Indian Evidence Act (1 of 1872). Before the advent of the British Rule in India, during the Mohammedan rule, a practice had grown to follow some rules of evidence on te basis of customs and usages of Muslims. For sometime, even after the British started rule in the country, the same rule of Mohammedan Law continued. The British rulers, though had not codified or consolidated law of evidence in their country, or fit to frame some rule to be followed by the courts in India. By that time, the courts in the Presidency towns in India established by the Royal Charter were following the English rules of evidence subject to some modifications made by certain Acts. But in the Muffassil area, the English rules of Evidence did not prevail and the courts were following Mohammedan rules of evidence, especially in criminal cases.

2. For the first time, the Evidence Act II of 1855 prescribed some rules of evidence to be followed in our country, but Section 58 thereof stated that 'nothing in the Act shall be construed as to render inadmissible in any court which, but for the passing of this Act had been admissible in such court. The Act of 1855 did not prohibit the adoption of rules of English system or the rules of Mohammedan Law established by practice or custom that was followed in the courts.

3. After taking note of several comments, a draft bill was prepared and introduced in the Legislative Council by Mr. Maine (Later Sir Henry Summer Maine) who was then the Law Member of the Legislative Council. The draft bill was prepared on the basis of report of Commissioner, which was presented in 1868 to her Majesty, in which it is stated as follows:

"India does not at present possess a uniform law on the subject.

Within the Presidency towns, the, the English Law of Evidence is in force modified by certain Acts of the Indian Legislature, of which Act 2 of 1855 is the most important;

This Act contains many valuable provisions. It extends the range of judicial notice and facilitates the proof of document, foreign system of law and matters of public history…

The Act however bears difference in many cases to the existing law and it appears to have been designed, not as a complete body of rules, but as supplementary to and corrective of the English Law, and also of the customary law of evidence prevailing in those parts of British India, where English Law is not administered.

4. The draft was referred to Select Committee of the Legislative Council. The Select Committee, in its findings stated that it was not sufficiently elementary for the officers for whose use it was designed and that it assumed an acquaintance on their part with the law of England which could scarcely be expected from them. Thus it held the opinion that it was not suitable to the conditions in India.

5. Later, a draft based on two reports submitted by the Select Committee was prepared under the Chairmanship of Mr.Stephen and was introduced by Mr. Stephen who succeeded Mr. Maine in the Legislative Council. In his speech in the proceedings of the Legislative Council on 18th April, 1871 it was stated, "It would be exceedingly difficult to say precisely what, at the present moment, the law upon the subject certainly is. After getting the approval of the Legislative Council and receiving the assent of the Governor General in India on 15th March, 1872, it became law as "The Indian Evidence Act".

● Object and reasons of Indian Evidence Act, 1972

The Law of Evidence is the most important branch of adjectival law. It is to legal practice what logic is to all reasoning. Without it, trials might be infinitely prolonged to the great detriment of the public and the vexation and expense of suitors. It is by this that the Judge separates the wheat from the chaff among the mass of facts that are brought before him, decides upon their just and mutual bearing, learns to draw correct inferences from circumstances, and to weigh the value of direct testimony. It is by this guide that he is able to tread his way with comparative safety among the burning ploughshares of perjury, forgery and fraud that beset his footsteps and to rest his judgment on a basis of probabilities at least comparatively satisfactory to his own mind.

2. One great object of the Evidence Act was to prevent laxity in the admissibility of evidence, and to produce a correct and uniform rule of practice that was previously in vogue. The Evidence Act is not intended to do more than prescribe rules for the admissibility or otherwise of evidence on the issues as to which the Courts have to record findings. The main principles which underline the law of evidence are:

(1) evidence must be confined to the matters in issue;
(2) hearsay evidence must not be admitted; and
(3) the best evidence must be given in all cases.

In **Zahira Habibulla H.Sheih** V **State of Gujarat** (2004) 4 SCC 158, Hon'ble Supreme Court held the principle of a fair trial manifests itself in virtually every aspect of our practice and procedure, including the law of evidence.

● The Witness for the Prosecution

A solicitor, Mr. Mayherne, interviews his latest client in the office: Leonard Vole is a young man who has been arrested under the capital charge of the murder of an old lady, Miss Emily French. Vole tells how he met Miss French when he helped her to pick up some parcels she dropped in Oxford Street and, by coincidence, he met her again that night at a party in Cricklewood. She asked him to call at her house and he was ribbed by his friends who joked that he had made a conquest of a rich, lonely old lady.

He did call and struck up a friendship with Miss French and started to see her on many other occasions at a time when he himself was in low water financially. Vole's story is that Miss French asked him for financial advice despite the testimony of both her maid, Janet Mackenzie, and Miss French's bankers that the old lady was astute enough herself on these matters. He protests that he never swindled her of a single penny and, if he had been, surely her death would have frustrated his plans? Vole is then staggered when Mayherne tells him that he is the principle beneficiary of Miss French's will and that Janet Mackenzie swears that her mistress told her that Vole was informed of this change in his fortunes.

The facts of the murder are that Janet Mackenzie, on her night off, returned to Miss French's house briefly at half-past-nine and heard voices in the sitting-room. One was Miss French and the other was a man's. The next morning, the body of Miss French was found, killed by a crowbar with several items taken from the house. Burglary was at first suspected but Miss Mackenzie's suspicions of Vole pointed the police in his direction and led eventually to his arrest. Vole though is delighted to hear of Miss Mackenzie's testimony about the visitor at nine-thirty as he was with his wife, Romaine, at the time and she can provide him with an alibi.

Mayherne has already wired Mrs Vole to return from a trip to Scotland to see him and he goes to her house to interview her. He is surprised to find that she is foreign and he is staggered when she cries out her hatred of her Vole and that he is not her husband she was an actress in Vienna and her real husband is still living

there but in an asylum. She alleges that Vole returned from Miss French's an hour later than he claims and, not being her lawful husband, she can testify against him in court.

Romaine Heilger does indeed appear as a witness for the prosecution at the committal hearing and Vole is sent for trial. In the intervening period, Mayherne tries to find evidence that will discredit Romaine but he is unsuccessful until he receives a scrawled and badly spelt letter which directs him to call at an address in Stepney and ask for Miss Mogson if he wants evidence against the "painted foreign hussy". He does so and in a reeking tenement slum meets a bent middle-aged crone of a woman with terrible scars on her face caused by the throwing of sulfuric acid. This attack was carried out by a man by the name of Max who Romaine Heilger is now having an affair with. Miss Mogson herself was involved with Max herself many years before but Romaine took him away from her. Meyherne is passed a series of letters written by Romaine to Max, all dated, which prove that Vole is innocent and that Romaine is lying to be rid of him. Mayherne pays the crone twenty pounds for the letters which are then read out at the trial. The case against Vole collapses and he is declared "Not Guilty". Mayherne is delighted at his success but is suddenly stopped in his tracks when he remembers a curious habit of Romaine's in the witness box when she clenched and unclenched her right hand a habit shared by Miss Mogson in Stepney.

Some time later he confronts Romaine with the accusation that she, a former actress, was Miss Mogson and that the letters were fakes. Romaine confesses: she loves Vole passionately and knew that her evidence would not have been enough to save him she had to provoke an emotional reaction in the court in favour of the accused man. Mayherne is unhappy, protesting that he could have succeeded in saving an innocent man by more conventional means but Romaine tells him she couldn't have risked it especially as she knew full well that Vole *was* guilty all along of the murder!

From the aforementioned story it can be gathered how crucial and important role evidence has to play in administration of justice. The credibility, quality, trustworthiness and dependability of witnesses of the evidence depends upon the safety and security provided to witnesses and those concerned with witnesses and a full mechanism of recording the evidence.

● Key witness in case was not Credible

A juror in the Roger Clemens perjury trial says he and his fellow jurors didn't find the key prosecution witness in the case credible.
The witness, Clemens' longtime strength coach Brian McNamee, testified that he injected the star baseball pitcher with steroids and human growth hormone. But McNamee's physical evidence was kept in a beer can and his story changed over time. Clemens was acquitted last Month of charges that he lied to Congress in 2008 when he denied using steroids or HGH.
"Brian McNamee was not a strong enough witness to render a verdict of guilty against Roger Clemens,'' juror Bradford Weaver told The Associated Press. He said that McNamee wasn't credible for the jury because of a lack of "truthfulness.''
"The witnesses for the prosecution were, how does one put it, kind of wanting, if you will. It was quite lacking. If that's what they were going to go with, then they should probably not have pursued the case in the first place if that's all they had, you know.''

● Rendel in Character Witness in 'Bonusgate'
Prosecution

In the ongoing game of Decade-long Horrible that is the Bonusgate case, it's now being reported that former Gov. Ed Rendell testified as a character witness for former House Legislator and Department of Revenue Secretary Rep. Steve Stetler.

Stetler is being charged with and pleaded not guilty to theft, conspiracy and conflict of interest in actions related to Bonusgate. And like all alleged Bonusgate crimes, Stetler's is full of oft-shadiness stemming from one dumb vote.
During Rendell's testimony, he noted there were few people he'd make a character witness trip for. Mostly because he's "never found a person who has a bad thing to say about him" and thinks the prosecution was a mistake. Rendell said it was a mistake for reals. Which is a little tough to buy.
An up-and-coming lawmaker from York, Stetler spent 16 years in the state House, and once even named a possible successor to onetime Minority Leader Bill DeWeese (by PoliticsPA, in 2003). He was elected to the

House Democratic Policy Committee in 2003, and later the House Democratic Campaign Committee. In 2005, he voted for the infamous General Assembly pay increase (a vote which took place at 2 a.m. during the summer) and was so heavily criticized for his vote, he resigned his seat in 2006.
No matter, though, because in November 2008, he was made Secretary of the Dept. of Revenue and served for 11 months. He resigned in December 15, 2009, just hours before being indicted. With both the highest sense of irony and, perhaps, AG Corbett's agenda in mind, the then top Pennsylvania prosecutor announced Stetler's and House Democratic leader H. William DeWeese's charges the same day. DeWeese is currently in prison.
Like most political indictments related to Bonusgate investigations, the Grand Jury report which led to Stetler's indictment paints a picture of Stetler using several young, just out of college legislative staffers to conduct opposition research against candidates while he was a leader of the House Democratic Campaign Committee, essentially grooming them toward a culture of corruption which seemed to exist in the Pennsylvania Legislature and that's not cool.

● Nitish Kataria Murders: Vishal urges HC to reject statement of key prosecution witness.
Vishal Yadav, undergoing life term along with cousin Vikas for killing MBA graduate Nitish Katara in 2002,
contended before the Delhi High Court that Ajay Kataria, a key prosecution witness, should be prosecuted for "perjury" for speaking "falsehood" before the court.
Appearing for Vishal before the bench of Justice Gita Mittal and Justice JR Midha, senior advocate Ram Jethmalani sought the court to reject his testimony and said" He (Ajay Kataria) should be tried for perjury as the story given by him before the trial court is wholly false.
Referring to the testimony of Ajay Kataria, the star prosecution witness, Jethmalani sought the court to reject the last-seen theory that Kataria had seen the victim (Nitish Kataria) in the company of Vikas and Vishal on the intervening night of February 16-17, 2002.
The court should demolish his story because it does not speak truth. It creates serious doubts," Jethmalani argued questioning Katara's statement that he had seen the deceased sitting with Vishal in the car Vikas was driving before the murder.
The Yadavs were convicted in 2008 by the trial court for kidnapping and later murdering Nitish Katara, son of an IAS officer, as they were against his affair with their sister Bharati Yadav.
The duo killed Katara on the intervening night 16-17 February, 2002, after abducting him from a marriage party in Uttar Pradesh's Ghaziabad.
As per Ajay Katara's testimony, on February 16, 2002, night he was returning from Ghaziabad to his home in Delhi when his scooter had broken down and he was looking for some help when Vikas stopped his car.
He had claimed in the testimony that Vikas had asked him to remove his scooter from the road and also used some "uncivilized language" against him for being in middle of the road.
Katara further claimed in his statement that while taking down the car number he had seen a man (victim) in red 'Kurta', who was sitting with Vishal in the car driven by Vikas.
Countering Katara's claim, the noted lawyer argued the prosecution witness had given his statement after seeing the victim's photograph which was flashed on television channels and he was also tutored by the prosecution.
"This statement was not enough to prove that the deceased was in the car. The theory against Vishal was also not true. It was a case of no evidence," Jethmalani said claiming his client (Vishal) was not inside the car.
Alleging that the trial court had failed to ask the accused about the uncivilized languages, the senior counsel submitted the court also did not consider the defence argument that the witness had got the Tata Safari car number from the investigating officer.
The lawyer, who sought the court to pass the order for re-trial saying that the trial court judge did not follow the proper procedure during the trial, would continue his argument tomorrow.
The court was hearing appeals of Vishal and Vikas Yadav, son of former MP DP Yadav, and hired killer Sukhdev Pehalwan, who are serving life term in Tihar.
Earlier the counsel for Vikas had completed his final arguments on the appeal.

● Deutsche Bank gets prosecution witness status inrate probe

FRANKFURT (Reuters) - Deutsche Bank was expected to escape with a lighter penalty than other banks in Europe if investigators impose fines in the wake of an interest rate-rigging scandal, two sources familiar with the bank told Reuters on Sunday.

They said Deutsche Bank has applied to cooperate with authorities in their investigation under the leniency programmes of the European Union and in Switzerland, but that it did not mean the bank was admitting any guilt.

"The bank last year obtained the status of being a witness for the prosecution in the EU and in Switzerland," one source said.

"As a result of that, the bank could get a lighter penalty if a punishment is imposed," another said.

German weekly magazine Der Spiegel reported on Sunday that Deutsche Bank's application under the leniency programme had been approved.

Deutsche Bank declined comment to Reuters.

Under the leniency programmes of the EU, companies may get total immunity from fines or a reduction of fines which the anti-trust authorities would have otherwise imposed on them if they hand over evidence on anti-competitive agreements or those involved in a concerted practice.
A global investigation into manipulation of interbank lending rates widened two weeks ago with Britain's fraud squad taking up the case and sources telling Reuters that Germany's markets regulator had launched a probe into Deutsche Bank.
Sources told Reuters early this month that Germany's BaFin regulator had initiated a "special investigation" into Deutsche Bank, a process which is more severe than a routine investigation initiated by a third party.

BaFin had previously declined to comment specifically on whether it was probing Deutsche Bank but said it was in looking into suspected manipulation of Libor rates by banks.

Deutsche Bank said earlier this year it was cooperating with authorities investigating accusations of manipulation of Libor, the only German bank to make such a disclosure so far. These inquiries relate to periods between 2005 and 2011.

(Reporting By Philip Halstrick; Additional Reporting by Stefanie Huber; Writing by Marilyn Gerlach; Editing by Stephen Powell)

● Anil Kumar, Star Prosecution Witness

Anil Kumar, a former senior partner at McKinsey & Co., earlier this Month received unusual praise from federal prosecutors in the U.S.
In a letter to a Manhattan federal court, they described Mr. Kumar's cooperation in their crackdown on insider trading as "nothing short of extraordinary."
"Kumar's cooperation with the Government was absolutely essential in two of the most important securities fraud trials in history," the letter said, with references to the trials of former hedge-fund manager Raj Rajaratnam and Rajat Gupta, a former director at Goldman Sachs Group Inc. and McKinsey. Both were found guilty.
On Thursday, the court was to hand down a sentence to Mr. Kumar, who has pleaded guilty to charges of securities fraud. He faces up to 20 years in prison but his extensive cooperation with the U.S. government means his sentence will likely be significantly lighter.
Mr. Kumar, who is of Indian origin, has emerged as the key witness in the insider trading trials of Messrs. Rajaratnam and Gupta. Mr. Rajaratnam last year was sentenced to 11 years in prison and is appealing the verdict. Last month, Mr. Gupta was found guilty and is scheduled to be sentenced in October. He is expected to appeal his conviction.
The Wall Street Journal reported that Mr. Gupta, who is Indian-born, was "motivated not by quick profits but rather a lifestyle where inside tips are the currency of friendships and elite business relationships."
This is the kind of world Mr. Kumar also came from, court documents reveal. At McKinsey, Mr. Kumar was a protégé of Mr. Gupta. Together, they co-founded Hyderabad's Indian School of Business in the mid-1990s.
Mr. Kumar's ties with Mr. Rajaratnam go back to the early 1980s. After graduating from the Indian Institute of Technology, Bombay, Mr. Kumar went to the University of Pennsylvania's Wharton School of business, where he met Mr. Rajaratnam.
In 2004, Mr. Kumar started as a paid consultant to Mr. Rajaratnam, violating McKinsey rules. Later, he also started leaking confidential information on McKinsey clients to Mr. Rajaratnam, according to prosecutors.
Overall, prosecutors estimate Mr. Kumar received $1.7 million in illicit payments from Mr. Rajaratnam.
What has puzzled prosecutors is what pushed Mr. Kumar and others to leak confidential information to Mr. Rajaratnam and risk prison time for it.

"This case presents the baffling question of why an incredibly bright, highly accomplished, professional consultant, and senior partner at arguably the world's leading consulting firm, who contributed considerable time to start the Indian School of Business and to other charities, would betray his profession's core values, the confidences of his clients, and the trust of his McKinsey colleagues," prosecutors said of Mr. Kumar in the letter.

"There is no easy answer," they added.

They found that greed was only part of it. Wanting to obtain "praise and admiration", as well as a desire to "impress Rajaratnam with his expertise" and to honor their friendship, they say, also explains his motives.

When, in October 2009, the Federal Bureau of Investigation informed Mr. Kumar he was under arrest, he fainted. He started cooperating with prosecutors immediately after that.

Prosecutors praised Mr. Kumar for offering them information about crimes he committed but for which he wasn't originally charged, including sharing illegal tips on a confidential venture between Advanced Micro Devices Inc. and ATI Technologies Inc. with Mr. Rajaratnam.

They also said Mr. Kumar provided critical testimony on Mr. Gupta's close personal and business ties to Mr. Rajaratnam.

Overall, prosecutors described him as "one of the best and most important witnesses" they had worked with in cases of securities fraud.

Mr. Kumar's decision to cooperate with the U.S. government stood out as an exception, prosecutors noted, saying that "in the world of Rajaratnam and his co-conspirators, cooperation was sadly viewed as a fundamental breach of trust."

By comparison, "Kumar repeatedly met with the Government prior to the criminal trials of Rajaratnam and Gupta without complaint and fully interested in doing everything he could to answer the Government's questions truthfully, review documents, transcribe recordings, and provide information."

From the aforementioned reported incidents, it can be effectively gathered that how important the role of witness is there in administration of justice and resolution of dispute. Thus, the efforts need to be made to bring on record the importance of witnesses in the process of trial before the Court. Care and caution needs to be taken to ensure free and fearless atmosphere for recording the evidence not only during trial but also in investigation.

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