

## A DETAILED STUDY ON EYEWITNESS TESTIMONY IN INDIA

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### ABSTRACT:

A witness who gives testimony to facts seen by him is called an eye witness, an eye witness is a person who saw the act, fact or transaction to which he testifies. An eye witness must be competent (legally fit) and qualified to testify in court. A witness who was intoxicated or insane at the time the event occurred will be prevented from testifying, regardless of whether he or she was the only eyewitness to the occurrence. Identification of an accused in Court by an 'Eye witness' is a serious matter and the chances of a false identification are very high. Where a case hangs on the evidence of a single eye witness it may be enough to sustain the conviction given sterling testimony of a competent, honest man although as a rule of prudence courts call for corroboration. "It is a platitude to say that witnesses have to be weighed and not counted since quality matters more than quantity in human affairs.

**Keywords:** Evidence, identification, witness, testimony, corroboration

### INTRODUCTION

Witness, through ages, has been a key player in the pursuit of justice delivery. The fundamentals of justice necessitate that the truth and impartiality must be quintessence of justice. This brings the role of an onlooker or third party as witness to confirm or report to criminal justice agencies the ingredients of the incident. The sanctity of the statements made by the witness is considered to be correct and factual as they are made under oath. Hence the role of witness has been paramount importance in assisting the course of justice.

### AIM AND OBJECTIVES:

1. To critically study the sections relating to eyewitness testimony.

2. To look into the limitation of this provisions
3. To appraise various articles and cases relating to sole witness.

### **HYPOTHESIS:**

A witness should be weighed and not counted because it is the quality and not the quantity which matters.

### **RESEARCH METHODOLOGY:**

This is a doctrinal research and all materials collected are secondary data. Question:

Research question: Can conviction based on a single eye-witness be made reliable?

### **CHAPTER 1: HISTORICAL DEVELOPMENT**

In ancient scriptures various means of proof were classified as human and divine. The human means of proof were subdivided into documents, possession and witnesses. The famous work of Yajnavalkya enumerates three means of proof. It also directs even for the comparison of handwriting . However, in order to understand the role played by the witness in Indian Criminal Justice System we have to trace the history of Law of Evidence in the country. For this we have to study the subject referring to three different periods, namely:-

- a) Witness in Ancient Hindu period
- b) Witness during Muslim Rule

Lekhya (Documentary Evidence)

This *Lekhya* or documentary evidence was further classified into three categories, namely, Rajasaksika, Sasaksika and Asaksika.

#### **i) Rajasaksika**

Rajasaksika is a document which is executed in the King's Court by the King's clerk and attested by the presiding officer affixing the seal which resembles to a modern registered document.

#### **ii) Sasaksika**

Sasaksika is purely a private document written by anyone and in their own hands by witness.

#### **iii) Asaksika**

Asaksika is a document which has been written by the parties itself and hence admissible. Just like present days the Ancient Hindu Law of Evidence also preferred documentary evidence over oral evidence. The Hindu law givers, however, were probably aware of the weaknesses of the documentary evidence as against possible forgery. They have provided elaborate rules to ensure the genuineness of the document. In Ancient Hindu law a document written by the children, dependents, lunatics, women or person under fear was considered as

vitiated. There were also rules for testing the genuineness of document by comparison of handwriting in question, particularly in cases where executants are dead.(Walton)

### **Sakshi (Witnesses)**

The abduction of oral evidence was an important feature of the Hindu Law of Evidence. The Dharma Sastras go into great details as to the time at which and the ways in which witnesses are to be examined and how they are to be tested. The law-givers lay down that, in disputed case, the truth shall be established by means of witnesses. But there was a sharp distinction between the abduction of oral evidence, in civil matters and criminal offences. "Ancient Hindu Law" as pointed out by the late Mr. B. Gururajah Rao in his little booklet "Ancient Hindu judicature"<sup>5</sup> insisted on high moral qualifications in a witness in civil matters and did not permit any one being picked up from streets or from the court premises and made to depose, as is very often done in the modern Indian courts. One common qualification mentioned is that the witnesses should be as many as possible, "faultless as regard performance of their duties, worthy to be trusted by the court and free from affection for or hatred against either party". It was carried to such an extreme limit that witnesses whose credibility alone would, according to modern law, be questioned, were, barred as legally incompetent witnesses. The tendency of ancient legislation in all countries was to regulate the competency of witnesses by artificial rules of exclusion, while the trend of modern jurisprudence is to widen the scope of oral testimony, leaving the determination of the credibility to the discretion of the tribunals. The ancient law-givers wisely relaxed these restrictions in the case of witnesses of criminal offences because they recognized crimes might happen in forests and secluded places and could only be spoken to by witnesses who happened to be there irrespective of their qualifications. The corresponding Latin maxim is that "*if a murder happens in a brothel only strumpets can be witnesses.*"

### **BRITISH PERIOD**

Before the introduction of Indian Evidence Act, there was no systematic enactment on this subject. The English rules of evidence were always followed in the courts established by the royal charter in the presidency towns of Calcutta, Madras and Bombay. "Such of these rules, as were contained in the Common Law and the Statutory Law, which prevailed in England before 1726, were introduced in Presidency towns by the Charter". Outside the presidency towns there were no fixed rules of evidence. The law was vague and indefinite and had no greater authority than the use of custom. However, a practice had grown to

follow. Some rules of evidence on the basis of customs and usages of Muslims.

The British rulers, though they do not have any codified or consolidated law of evidence in their country, thought fit to frame some rules to be followed by the courts in India. During the period of 1835 to 1853 A.D., a series of Act were passed by the Indian legislature introducing some reforms of these Acts which superficially dealt with the law relating to the witness are summarized as follows:(Anand et al.)

- (i) Lord Denman's Act provides that no witness should be schedule from giving evidence either in person or by deposition by reason of "incapacity for crime interest".
- (ii) The same Act declares that the parties to the proceedings their wives or husband and all other person capable of understanding the nature of oath and the duty to speak truth, as competent witnesses in the country courts.
- (iii) Lord Broughams Act declared that the parties and the person on whose behalf any suit, action or proceeding may be brought or defended, are competent as well as compellable to give evidence in any court of justice.
- (iv) Lord Broughams Act of 1853 made the husbands and wives of the parties to the records competent and compellable witnesses.
- (v) Act XIX of 1834 abolished the incompetence of the witness by reason of a correction for criminal offences.

#### **ADMISSIBILITY OF WITNESS**

The Halsbury's Laws of India classified witnesses into different categories viz;

- Eye witnesses,
- Natural witnesses,
- Chance witnesses,
- Official witnesses,
- Sole witnesses,
- Injured witnesses,
- Independent witnesses,
- Interested, related and partisan witnesses,
- Inimical witnesses,
- Trap witnesses,
- Rustic witnesses,

- Child witnesses,
- Hostile witnesses,
- Approver, accomplice etc.

### **WITNESS UNDER INDIAN EVIDENCE ACT, 1872**

Chapter IX titled “OF WITNESSES” of the Indian Evidence Act, 1872 consists of seventeen Sections spreading from Sections 118 to 134 deals with

- i. Competency;
- ii. Compellability;
- iii. Privileges; and
- iv. Quantity of Witnesses required for judicial decisions

Sections 118 to 121 and Section 133 of this Act provide for competency of witnesses whereas Section 121 (Judges and Magistrates) and Section 132 (Witness not excused from answering on the ground that answer will criminate) refers to the compellability of the witnesses. Privileges of the various witnesses find place in various forms in Section 122 to 131 of this Act. Section 134 of the Indian Evidence Act 1872 envisages that no particular number of witnesses is required for proof of any fact. The last Section 134 of the Chapter IX enshrines the well-recognized maxim that *Evidence has to be weighed and not counted*.

### **Distinction between Competency and Compellability**

Competency of a witness may be distinguished from his compellability and from privilege. A witness is said to be competent when there is nothing in law to prevent him from being sworn and examined if he wishes to give evidence. Though the general rule is that a witness who is competent is all compellable, yet there are cases where a witness is competent but not compellable to give evidence as for example sovereigns and ambassadors of foreign states. (Section 125 and 133)(Anand et al.; Kumar)

Further a witness though compellable to give evidence may be privileged or protected from answering certain questions. Even if witness be willing to depose about certain things, the court will not allow disclosure in some cases. The Legislature has consciously made a broad distinction between compellability to be sworn or affirmed and compellability, when sworn to answer specific question. Thus a witness though compellable to give evidence may

be privileged or protected under Section 122,124,125 and 128 Evidence Act from answering certain question. Similarly even if a witness be willing to depose about certain things, the court will not allow disclosure in some cases keeping in view the provisions of Section 123, 126 and 127 Evidence Act.

### **Classification of Witnesses and their reliability**

“I suppose” said Archbishop Whately "it will not be divide that the three following are among the most important ports to be ascertained in deciding credibility of witnesses. First whether they have the means of gaining correct information; secondly, whether they have any interest in concealing truth; thirdly whether they agree in their testimony." <sup>23</sup> The first two of these tests are applicable to the witness individually; the third to the whole of the testimony taken together. Generally speaking oral testimony of a witness may be classified into three categories: namely-

- i) Wholly reliable
- ii) Wholly unreliable
- iii) Neither wholly reliable nor wholly unreliable <sup>24</sup>.

In the first category of proof, the court should have no difficulty in coming to its conclusion either way; it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and to look for corroboration in material particulars by reliable testimony, direct or circumstantial.

There are four ways by which a trial can hold a witness unworthy of belief:

1. The witness statement is inherently improbable or contrary to the course of nature e.g. he says that he identified the accused by face in pitch darkness, or that he recognized his voice from a mile away or that he saw the accused killing the deceased with a lathi whereas medical evidence proves he died of a bullet wound;
2. The witness deposition contains mutually contradictory or inconsistent passage e.g. at one place he says 'A' was the murderer but at another that it was 'B'.

3. The witness is found to be a bitter enemy of the opposite party and therefore, possesses ample motive for wishing him harm;
4. The witness demeanour whilst under examination is found abnormal or unsatisfactory.

The evidence of a witness has to be judged mainly and broadly on the strength of the nature of the evidence he has given in a case and not on so much as to how he has been able to impress the court while in the witness box.

The ordinary presumption is that a witness speaking under an oath is truthful unless and until he is shown to be untruthful or unreliable in any particular respect. Witnesses solemnly deposing on oath in the witness box during a trial upon a grave charge of murder must be presumed to act with a full sense of responsibility of the consequences of what they state. It may be that what they say is so very unlikely or unnatural or unreasonable that it is safer not to act upon it or even to disbelieve it. It should not be assumed that witnesses are untruthful unless it is proved that they are telling the truth.

There is presumption in law of absolute truthfulness of prosecution witness. The evidence of witnesses in trial whether they depose for the prosecution or defense is to be judged by the courts with the same standard of the test of reliability. The defense evidence should not be by passed or overlooked by the courts simply because the witness had deposed in favour of accused. The trial has to give cogent and convincing reasons for discarding the defence evidence.

In this country it is rare to come across the testimony of a witness which does not have a fringe or embroidery of untruth, court should separate the grain from the chaff and accept what appears to be true and reject the rest. It is only where the testimony of witness is tainted to the core, the falsehood and the truth inextricably intertwined that the court should discard his evidence in toto.

Where a person gives evidence on oath the presumption is that he has spoken the truth and the burden lies on him that challenges the veracity of that statement. Throwing overboard a sworn testimony merely by using phrases like statement does not ring true or does not carry conviction is highly undesirable. The law does not demand that one should act upon

certainties alone

A witness is not like a tape recorder when he is giving evidence more than a year later about what happened a year earlier his memory may not serve him completely right. He may not be able to report the exact words used on the occasion, or all the words. Allowance must be made for these factors. ([India et al. 1969](#))

The Hon'ble Supreme Court in *Bhogin Bhat Kirji v. State of Gujarat* observed about certain presumptions regarding an ordinary witness.

- i. By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.
- ii. Ordinary it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so after has a statement of surprise. The mental faculties therefore, cannot be expected to be attuned to absorb the details.
- iii. The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.
- iv. By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.
- v. In regard to exact time of an incident, or the time duration of an occurrence usually, people make their estimates by guess work on spur of the moment at the time of interrogation and one cannot expect people to make very precise or reliable estimates in such matters. Again it depends on the time sense individuals which vary from person to person.
- vi. Ordinary a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused or mixed up when interrogated later on. ([India and Agarwal 1961](#))



- vii. A witness though wholly truthful, is liable to be overawed by the court atmosphere and piercing cross -examination made by counsel and out of nervousness mixes up facts gets confused regarding sequence of events. Or fills up details from image on the spur of moment. The subconscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witness by him perhaps it is a sort of psychological defense mechanism activated on the spur of the moment. People react to situations not always in a uniform way. An educated, an illiterate a city dweller, a villager or an adivasi will react differently according to the degree of their sophistication. Moreover even in the case of the same class, the reaction would vary with the physical courage, mental equipment and social awareness of the individual.

Every person who witnesses a murder reacts in his own way. Some are stunned, some become speechless and some stand rooted to the spot. Some become hysteric and start walling, some start shouting for help. Those others who run away to keep themselves as far removed from the spot as possible are not necessary incredible yet others rush to the rescue of the victim even going to the extent of counter attacking the assailants. Every one reacts the evidence of witnesses on the ground that they did not react in a particular manner is to appreciate the evidence in a wholly unrealistic unimaginative way.

Different persons admittedly seeing an event give varying accounts of the same. That is because that perceptiveness varies and a recount of the same incident is usually at variance to a considerable extent.

#### **WITNESSES EMERGING PERSPECTIVES**

The present judicial system has taken the witnesses completely for granted. Witnesses are summoned to the court regardless of the fact that they have no money, or that they cannot leave their family, children, business etc. and appear before the Court. But that's not all. On reaching the Court, some are told that the case has been adjourned (for reasons that may turn into infinity) and the respective lawyer politely gives them a further date for their next appearance. The plight of a witness, who comes forward to depose before a court with full sense of conviction, can be seen by the criticism from the Supreme Court in the case of *State of Uttar Pradesh v. Shambhu Nath Singh*

*“Witnesses tremble on getting summons from Courts, in India, not*

*because they fear examination or cross-examination in Courts but because of the fear that they might not be examined at all for several days and on all such days they would be nailed to the precincts of the Courts awaiting their chance of being examined.*

This criticism from the Supreme Court of India pithily sums up the problem facing witnesses. In the case of *Swaran Singh v. State of Punjab*, Wadhwa J. while delivering the judgment expressed his opinion about the conditions of witnesses in the following words:

*“the witnesses ...are a harassed lot. A witness in a criminal trial may come from a far-off place to find the case adjourned. He has to come to the Court many times and at what cost to his own-self and his family is not difficult to fathom. It has become more or less a fashion to have a criminal case adjourned again and again till the witness tires and he gives up. It is the game of unscrupulous lawyers to get adjournments for one excuse or the other till a witness is won over or is tired. Not only that a witness is threatened; he is abducted; he is maimed; he is done away with; or even bribed. There is no protection for him. In adjourning the matter without any valid cause a Court unwittingly becomes party to miscarriage of justice. A witness is then not treated with respect in the Court. He is pushed out from the crowded courtroom by the peon. He waits for the whole day and then he finds that the matter adjourned. He has no place to sit and no place even to have a glass of water. And when he does appear in Court, he is subjected to unchecked and prolonged examination and cross-examination and finds himself in a hapless situation.*

The witnesses, who are considered to play a vital role in the proceedings, have to face a lot of hurdles during the administration of the criminal justice system. Some of them are mentioned below:-([Monir](#))

- a. First of all, when a witness is called to a court, to give statements, they sometimes have to come all the way from their remote town or village where they reside. He is

not at all paid for his traveling expenditure. If a witness is from the poor strata of society or say of the labour class, then he has to sacrifice his one day work and has to come to the court just to answer a few questions. Even in this case he is neither compensated nor does the court reimburses his travel expenditure.

- b. When he somehow reaches the court, he is not at all treated in a proper manner. The Mallimath Committee has expressed its opinion about such witnesses by saying, "*The witness should be treated with* "

### **CONCLUSION:**

Not only this, in order to get rid of this cross examination as early as possible, either he will give false statements or to make the matter worse, he will turn hostile i.e. he will retract from his previous statement. Mr. Soli Sorabjee, the former Attorney General has rightly said, "*Nothing shakes public confidence in the criminal justice delivery system more than the collapse of the prosecution owing to witnesses turning hostile and retracting their previous statements.*"

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