

Witness Protection

## **Rights, needs and benefits required to ensure effective victim testimony**

**By Justice M. Jagannadha Rao**

The victim of a crime is an important player in the administration of justice both as a complainant/informant and as a witness for the prosecution/state. His or her role is vital both at the stage of investigation and at the trial stage. Without the victim's active support, the investigation of a crime may not come to a logical end. At the same time, the victim's testimony in court, especially if the crime is a violent one, can be said to be the best piece of evidence that can be used against the accused. But despite being an important component of the criminal justice system, much attention has not been paid to the rights of victims.

The word 'victim' has not been defined either in the Indian Penal Code (IPC) or in the Code of Criminal Procedure, 1973 (CrPC). The General Assembly of the United Nations in its 96th plenary meeting on November 29, 1985 made a Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. The declaration defines victims as "persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are violations of criminal laws operative within member states, including those laws prescribing criminal abuse of power".

We can say that the word 'victim' means the person or persons who have suffered physical, financial, social or psychological harm as a result of an offence and in some cases it includes an appropriate member of the immediate family of such a person.

The UN General Assembly affirmed the necessity of adopting national and international norms in order to secure universal and effective recognition of and respect for the rights of victims of crimes and victims of abuse of power. It was also declared that offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependents. This declaration has been described as a "kind of Magna Carta of the rights of victims" worldwide. The declaration recognised the following rights of victims of crime:

(i) Access to justice and fair treatment – This right includes the mechanisms of justice and to prompt redress, right to be informed of victim's rights, right to proper assistance throughout the legal process and right to protection of privacy and safety.

(ii) Restitution – This right includes return of property for the harm or loss suffered; where public officials or other agents have violated criminal laws, the victims should receive restitution from the state.

(iii) Compensation – When compensation is not fully available from the offender or other sources, the state should provide financial compensation, at least in violent crimes which result in bodily injury, for which national funds should be established.

(iv) Assistance – Victims should receive necessary material, medical, psychological and social assistance through governmental, voluntary and community-based means. Police, justice, health and social service personnel should receive training in this regard.

In Europe, the Convention on the Compensation of Victims of Violent Crimes incorporates the essential rights of victims as stipulated in the UN declaration. The Council of Europe has recommended the revamping of criminal justice incorporating victim's rights in every stage of criminal proceedings. Following this recommendation, many states in Europe and elsewhere enacted laws aimed at providing increased participation and more substantive rights to victims of crime. For example, the Criminal Injuries Compensation Act, 1995 of the UK, the Victims of Crime Assistance Act, 1996 of Victoria, the Victim and Witness Protection Act, 1982 of the USA, the Victims' Rights and Restitution Act, 1990 of the USA, are in this category.

In an informative report on "Criminal Justice: The Way Ahead" presented to the British Parliament (February 2001) the UK home department made the following recommendation for criminal justice reform:

"We will put the needs of victims and witnesses at the heart of the criminal justice system and ensure they see justice done more often and more quickly. We will support and inform them, and empower them to give them best evidence in the most secure environment possible".

The Supreme Court of India in *Zahira Habibulla Sheikh vs State of Gujarat*, 2004 (4 SCC 158) has stated the importance of victims in the following words:

"Right from the inception of (the) judicial system it has been accepted that discovery, vindication and establishment of truth is the main accepted underlying existence of courts of justice. The operating principles for a fair trial permeate the common law in both civil and criminal contexts. Application of these principles involves a delicate judicial balancing of competing interests in a criminal trial, the interests of the accused and the public *and to a great extent that of (the) victim* have to be weighed not losing sight of the public interest involved in the prosecution of persons who commit offences".

(This) conference is mainly focused on victim/witness protection and on the care and support for victims of trafficking and other forms of violence. The term 'trafficking' is used to describe activities in which women and children are forced into exploitative situations. In the USA, the Trafficking Victims Protection Act came into force in October 2000, which provides the tools to combat trafficking in persons both worldwide and within the country.

The Supreme Court of India in *Gaurav Jain vs Union of India* (AIR 1997 SC 3021) gave various directions for the rehabilitation and other welfare of victims of such crimes. The Court said that three C's, viz. counseling by persuasion and coercion as the last resort are necessary for effective enforcement of rescue and rehabilitation of the victims of such trafficking. The Immoral Traffic (Prevention) Act, 1956 and the Juvenile Justice (Care and Protection of Children) Act, 2000 deal with these aspects. The apex court in *Vishal Jeet vs Union of India* (AIR 1990 SC 1412) had also issued directions on the subject.

However, though these victims are more vulnerable, I would like to speak about victim protection generally.

As stated earlier, every victim is an important witness. "Witnesses," as Bentham said, "are the eyes and ears of justice." If a witness/victim himself is incapacitated from acting as the eyes and ears of justice, the trial gets putrefied and paralysed, and can no longer constitute a fair trial. The incapacitation may be due to several factors, such as the witness/victim not being in a position to speak the truth in court for reasons beyond the control of the witness/victim or due to negligence or ignorance or some corrupt collusion.

In respect of rights that are required to ensure effective victim testimony, there are two important aspects. The first is to ensure that evidence or the statement of a victim that has already been recorded at the stage of investigation is not allowed to be destroyed by the victim resiling from his or her statement while deposing on oath before a court. This phenomenon, of victims turning 'hostile' on account of the failure to protect the victim, is one aspect of the problem. It requires that the identity of the victim in some cases be kept secret and anonymity be given. The second aspect is the physical and mental vulnerability of the victim and taking care of his or her welfare in various respects, which call for physical protection of the victim at all stages of the criminal justice process till the conclusion of the case.

A Victims' Identity Protection and Victims' Protection Programme are the need of the hour. In order to provide effective Witness Identity Protection and Witness Protection Programmes, the Law Commission of India has circulated an exhaustive consultation paper on the subject including a questionnaire. I am very happy to inform you that this consultation paper has been appreciated not only in India but abroad as well. The commission has received a large number of responses from a cross section of society, viz. judges of the higher and subordinate judiciary, state governments, director generals and inspector generals of police, lawyers, various international and national organisations and individuals.

As I stated earlier, since the testimony of the victim is a very important piece of evidence in the criminal trial, it is essential that the victim should be able to give his or her testimony in court freely and without any fear or pressure. In many cases victims even turn hostile due to threats or pressure from the offender or his associates. In certain cases the victim feels uncomfortable about giving answers in the immediate presence of the offender. In order to facilitate the victim giving his or her testimony in court freely and without any fear or pressure, it is necessary that the victim is provided certain protections and rights. These may include the following:

(i) *Anonymity of victim* – Names and addresses of victims may be kept secret in criminal proceedings. Even in supplying copies of charge sheets to the accused, the identity of victims may be withheld. The Supreme Court in *State of Punjab vs Gurmit Singh*, 1996 (2 SCC 384) while dealing with a case of rape has said, "The courts should, as far as possible, avoid disclosing the name of the prosecutrix in their orders to save further embarrassment to the victim of (a) sex crime. The anonymity of the victim of the crime must be maintained, as far as possible, throughout". Though in some cases the identity of the victim is known to the accused, this is not so in all cases. Where the identity and all details of the victim are not known to the accused, maintaining anonymity would be quite helpful.

In *Delhi Domestic Working Women's Forum vs Union of India*, 1995 (1 SCC 14), the Supreme Court while indicating the broad parameters that can assist the victims of rape, emphasised that in all rape trials 'anonymity' of the victims must be maintained as far as necessary so that the name is shielded from the media and public. The court also observed that the victims invariably find the trial of an offence of rape a traumatic experience. The experience of giving evidence in court has been negative and destructive and the victims often expressed that they considered the ordeal of facing cross-examination in the criminal trial to be even worse than the rape itself.

Section 13 of TADA, the Terrorist and Disruptive Activities (Prevention) Act, 1987 and Section 30 of POTA, the Prevention of Terrorism Act, 2002 (now repealed) provides that the court may take such measures as it deems fit to keep the identity and address of witnesses secret.

The New Zealand Evidence Act of 1908 contains detailed provisions regarding the maintenance of anonymity of victims and witnesses.

In the UK, the power of the court to withhold the name of the victim/witness in a criminal trial is treated as inherent in the court. Section 11 of the UK Contempt of Court Act, 1981 provides that the court may give directions to prohibit the publication of names or other matter in connection with the proceedings. In *R. vs Murphy*, 1989 it was held that the identity of the witness should be kept secret not only from the accused but also from the defence lawyer.

In Canada, anonymity of witnesses/victims is treated as a privilege granted under common law. The European Court of Human Rights has in *Kostovski* (1990), *Doorson* (1996), *Fitt* (2000) and *Visser* (2002) recognised the need to protect the identity of witnesses/victims.

(ii) *Trial of sexual offences in camera* – Section 327 of the CrPC provides that the trial of certain sexual offences shall be conducted in camera. If a trial is conducted in camera, it would help the victim to give her testimony comfortably. The presence of the public and the media produces a sense of shyness in the mind of the victim and she may not give testimony freely. The Supreme Court in the *Gurmit Singh* case said that if the witness or victim is protected it "would enable the victims of crimes to be a little comfortable and answer the questions with greater ease in not too familiar surroundings. Trial in camera would not only be in keeping with the self-respect of the victim of (the) crime and in tune with legislative intent but is also likely to improve the quality of evidence of a prosecutrix because she would not be so hesitant or bashful to depose frankly as she may be in open court, under the gaze of (the) public. The improved quality of her evidence would assist the courts in arriving at the truth and sifting truth from falsehood". In view of Section 327 of the CrPC and the direction of the apex court, a victim of a sexual offence has a right that trial be held in camera.

Section 13 of TADA and Section 30 of POTA provide that proceedings under these Acts shall be held in camera.

Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms speaks not only of the right to 'open justice' but also of the need for exceptions in the interests of morals, public order, national security and protecting the privacy of juveniles and others where publicity could otherwise prejudice the interests of justice.

Following the ruling of the European Court of Human Rights in *Chahal vs UK*, the Special Immigration Appeals Commission Act, 1997 and the Northern Ireland Act, 1998 have been enacted which provide for courts to sit in camera where it was necessary on national security grounds and for appointing special counsel to represent individuals in those proceedings. Section 153 of the South African Code of Criminal Procedure permits criminal proceedings to be held in camera to protect privacy of witnesses.

(iii) *Use of screen while recording of statement of victim* – In many cases, especially cases relating to women and children, victims are hesitant to speak freely in the presence of offenders. Section 273 of the CrPC provides that trials should be conducted in the presence of the accused. In this regard the Law Commission in its 172nd Report (2000) has recommended the insertion of a proviso below Section 273 to the effect that where the evidence of a person below 16 years who is alleged to have been subjected to sexual assault is to be recorded, the court may take appropriate measures to ensure that such a person is not confronted by the accused. Recently the Supreme Court of India considered the abovementioned recommendation of the Law Commission in *Sakshi vs Union of India*, 2004 (6 SCALE 15). The observations that the Supreme Court made in this case are worth recalling. The court observed:

"The whole inquiry before a Court being to elicit the truth, it is absolutely necessary that the victim or the witnesses are able to depose about the entire incident in a free atmosphere without any embarrassment... The mere sight of the accused may induce an element of extreme fear in the mind of the victim or the witnesses or can put them in a state of shock. In such a situation he or she may not be able to give full details of the incident which may result in miscarriage of justice. *Therefore, a screen or some such arrangement can be made where the victim or witness do not have to undergo the trauma of seeing the body or face of the accused*" (emphasis supplied).

The use of a screen as suggested by the Law Commission and also recommended by the Supreme Court would make it comfortable to the victim to testify in court where he or she may not confront the accused directly.

It is proper practice in criminal trials in the UK where children give evidence about sexual abuse to allow a screen to be erected between the witness and the defendant. If a defendant in person seeks to dominate, intimidate or humiliate a complainant, or should it be reasonably apprehended that he will do so, a screen can be erected.

Sections 16 to 33 of the Youth Justice and Criminal Evidence Act, 1999 require the court to consider special Measures of various kinds for protection of vulnerable and intimidated witnesses.

(iv) *Recording of statement through video conferencing* – There is another method by which a victim may avoid direct confrontation with the accused while giving testimony. That is recording through video conferencing. Recording of evidence by way of video conferencing has been held to be permissible in a recent decision of the Supreme Court in *State of Maharashtra vs Dr Praful B. Desai*, 2003 (4 SCC 601). When a statement is recorded through this method, the victim would feel more comfortable and will give answers without any fear or pressure. Portuguese legislation (Act No. 93/99) of July 14, 1999 contains very exhaustive provisions regarding this aspect.

In the UK, video recorded evidence is admissible in certain cases: (a) an offence which involves an assault on or injury or threat of injury to a person (b) an offence of cruelty to persons under the age of 16 years (c) offences under the Sexual Offences Act, 1956 and 1967, Indecency with Children Act, 1960, Protection of Children Act, 1978, etc.

(v) *Cross-examination through questions handed over by the defence to the judge* – Victims often feel embarrassment due to the questions put by the defence counsel during cross-examination. A suggestion has been made that in some cases, instead of directly putting questions to the witness by the defence counsel, a set of questions may be handed over to the judge by the defence in advance. And the judge may ask these

questions to the victim or other witnesses. The Supreme Court in the Sakshi case has stated, "often the questions put in cross-examination are purposely designed to embarrass or confuse the victim of rape and child abuse. The object is that out of the feeling of shame or embarrassment, the victim may not speak out or give details of certain acts committed by the accused. It will therefore be better if the questions to be put by accused in cross-examination are given in writing to the presiding officer of the court, who may put the same to the victim or witnesses in a language which is not embarrassing". The Law Commission in its questionnaire has posed a question as to whether it be kept in mind that the right of the accused to cross-examine a witness effectively will not be jeopardised, as this is part of a "fair trial" as guaranteed and recognised under Article 21 of the Constitution.

(vi) *Change in venue of trial* – In certain circumstances, the venue of the trial may be shifted if the witnesses or victims are not in a position to depose freely due to various reasons. The Supreme Court in Zahira Sheikh's case ordered a shift in the venue of the trial from Gujarat to Maharashtra. There are other instances as well. The Code of Criminal Procedure, 1973 contains provisions (Section 406, 407) in respect of transfer of cases. It has been done in cases in the UK and Northern Ireland also.

(vii) *Providing physical and other protection to victims/witnesses* – If required, victims/witnesses may be provided with physical and other protection. To provide such protection, witness/victim protection programmes may be established. Under such a programme, various protections such as police protection to victims and family members, providing new places for residence, monetary support, transport facilities and other facilities may be provided. The Law Commission in its consultation paper has discussed this aspect in detail, along with the schemes prevalent in various countries.