

## **CONTEMPORARY LEGAL AND SOCIAL ISSUES: THE PSYCHOLOGY OF EYEWITNESS IDENTIFICATION AND IMPACT ON CRIMINAL JUSTICE**

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### **Who is a witness?**

In court of law witness can be defined <sup>1</sup>as a person who testifies under oath in a trial or a deposition, which may be used in a trial. Generally, in most common terms a witness is a person who sees an event and then is called upon in court of law for narration of such event.

While, more refinery approach may be used to describe witness in other brackets as well like a person who observes the signing of a document such as will or a contract and signs as a witness attesting that it was signed in his/her presence.

### **Significance Of Witness:**

Since, time immemorial witness played a significant role in smooth justice delivery system. The role of the third party as onlooker or reporting the crime is one of the major ingredients of criminal justice system. The statement made by witness is believed to be true and pure since it, is given under oath by them In any, judicial system across the world. Thus, it can be clearly stated that the role of witness is of utmost importance under the purview of criminal justice system.

Going back to history of witness under the Indian Judicial system it is not new its traces can be found back even during the time of Mauryan empire when “Arthshastra” was used synonymous to the Indian Constitution. In ancient India, means of proof were classified as divine and human. The human means of proof were divided into:

- Documents
- Possession
- Witness

### **Witnesses Under Indian Evidence Act, 1872**

Chapter IX titled ‘Of Witnesses’ of the Indian Evidence act, 1872 consist of seventeen sections from section 118 to 134, which deals with

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<sup>1</sup> Legal-dictionary.thefreedictionary.com (May, 21 2016, 10:26 AM)

1. Competency
2. Compellability
3. Privileges
4. Quantity of witnesses required for judicial decisions.

Section 118 to 121 and section 133 of the act provides for competency of witnesses. On the other hand Section 121 talks about judges and magistrate and section 132 does not excuse witness from answering on the ground that it will criminate. It is mainly in reference to compellability of the witnesses. Section 122 to 131 talks about the privileges of the witnesses. Section 134, of the Indian evidence act states that In order to proof a fact no particular number of witnesses, are required.

### **Witnesses Under Code Of Criminal Procedure, 1973**

Chapter XXIII talks about Evidence in enquiries and trials. The first part of this chapter that is Part A, deals with mode of taking and recording evidence while the second part that is Part B, deals with Commissions for the examination of witnesses. This chapter spreads from Section 272 to 299 out of which 272 to 283 is in part A and remaining in Part B. Moreover section 230 speaks about date for prosecution of evidence.

### **Classification Of Witnesses**

The Halsbury's laws of India classifies witness into following categories:

- 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 etc.

### What Is Psychology?

Before, discussing about the psychology of eyewitness it is of utmost significance to understand the basic concept of psychology.

Today, most psychologists believe that genetic factors do play important role in deciding behavior of a human being. Thus, psychology is nothing but a genetic based science. This branch of psychology came to be known as <sup>2</sup>‘Evolutionary Psychology’. On a broader basis this branch suggest that human species are subject to biological evolution making humans best survived species on planet.

One of the pillars of psychology is <sup>3</sup>‘Common Sense’. In this respect two major inferences can be drawn. Firstly, Behaviors based on common sense is often contradictory. For example- it is generally believed if two people who love each other and when they are away their love increases but a contradictory statement may be they may begin to forget each other. The second conclusion in this respect is mental error. We use similar situations in number of circumstances to save our mental efforts. For example If A, been witness in two murder cases of similar facts. Probability of A, mixing the facts rises tremendously.

This brings the basic concepts of Psychology to three most subtle tendencies of human beings. The first being, the tendencies to confirm once own views i.e. human beings generally like to speak or give such views which is commonly acceptable by all. Secondly, as discussed earlier whatever comes to mind first without making too much, efforts is more considerable and is believed by the individual to be true and authentic. In this reference an example can be quoted wherein A, witness in a murder case called upon for narration of the criminal act after a year of the happening of the act. In such a case although may be one act leads to the other which finally compelled the accused to kill the victim but since the witness can remember only common overt acts of the accused

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<sup>2</sup> Robert A Baron Psychology 15 fifth edition

<sup>3</sup> Robert A Baron Psychology 22 fifth edition

leading to change in the direction of whole case resulting in decision, declaring accused guilty. Thus, since long time duration been the cause A can only remember what his memory serves him and in short which is coming in his mind with minimal effort.

The last concept is about 'Gut level' thinking. Gut feeling is most common form of error among human being. In this reference the same example as discussed above can be used wherein, slight change in circumstances is that it was dark and A, the witness was at the distance so irrespective of the fact, that the accused was in spat with the victim killing him unintentionally, the witness based on his gut feeling will conclude the result as the accused must have killed him with mens rea.

### **Psychological Influence On Witness Testimony**

When it comes to the impact of psychology on witness testimony certain broad factors are considered under the purview of the said subject. The first is the <sup>4</sup>'Memory'. Psychology divides memory into two parts. One is substantially an, <sup>5</sup>'episodic memory' where the factual information acquired at a specific time is stored while the other is <sup>6</sup>'semantic memory' wherein general abstract knowledge about the world is stored. This, information is remembered by individuals through chain of things set up like a pattern in the brain.

As, far as this first influential branch of psychology is concerned both episodic and semantic memory plays a predominant role when it comes to testimony of the witness. Firstly, discussing about the Semantic memory for which a hypothetical example can be taken wherein, a witness in rape trial of women who has been raped by one of her relatives for 3 months may find difficulty in testimonial part of trial as keeping in mind each and every particular incidence happened during the course of 3 months is difficult for him based on common semantic memory. For this psychologists suggest breaking of the long session in the language of psychology into small parts and then remembering it. This clearly reveals how semantic memory affects testimony. On the other hand, episodic memory helps in remembering as discussed earlier fact based information. When it comes to establishing the relation of this part with testimony of witness, knowledge of

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<sup>4</sup> Robert A Baron Psychology 208 5<sup>th</sup> edition

<sup>5</sup> Robert A Baron Psychology 219 5<sup>th</sup> edition

<sup>6</sup> Robert A Baron Psychology 221 5<sup>th</sup> edition

witness plays a predominant role. A hypothetical instance can be quoted wherein, after committing a crime the accused climbed the wall and ran away.

In the mean time police arrived on the spot asking the location of the accused from the prime witness. The place of murder has two paths, one, which leads to open crowded road and the other, is wall, which is merely five ft. tall. The witness has not seen the accused direction of running although he is the first person to be at the murder spot. A witness of basic knowledge based on his episodic memory which he has learned throughout his life can easily guess the direction of running of accused and can help police but a witness with lack of knowledge or poor episodic memory will change the direction of the initial investigation itself.

<sup>7</sup>“Forgetting as a result of interference” is one of the, other aspect of psychology which can be considered while examining the psychology of eyewitness. There are two kinds of interference in remembering the happening of something, firstly is ‘retroactive interference’ which is currently being learned creates perplexing thoughts in the mind of the person with the thoughts and learning exist in the mind of the person, secondly ‘proactive interference’ which is interference in reference to current learning clashes with long term information which is stored in the mind of a person. Conclusively, both the sub-parts are directed to give birth to the confusion in the mind of person while learning something new.

As, various ladders of psychological phenomenon is already been discussed another most significant aspect of psychology is <sup>8</sup>‘Memory construction.’ This means fabricating some parts in the happening of some, event which in reality never existed. Certain parts of this phenomenon consist of ‘Suggestibility’, which is creating such questions before eyewitness by the defense lawyer that he become, confused and even gives statement in contradiction to the F.I.R. Furthermore, ‘Source Monitoring’ means remembering through wrong source. For instance sometimes they identify a suspect in a police line up as a person who committed a crime because they have seen that person somewhere before. The third, aspect under this is ‘ Illusion of out group homogeneity’ which is about the people who are outside our own group and seem similar in

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<sup>7</sup> Robert A Baron Psychology 225 5<sup>th</sup> edition

<sup>8</sup> Robert A Baron Psychology 228 5<sup>th</sup> edition

appearance. The above instance of police line up fits in this aspect with respect to Asian people of Chinese or Japanese origin.

### **Intelligence:**

Intelligence not directly but through various aspects plays a predominant role in influencing the psychology of eyewitness. In psychology intelligence is been defined as individuals abilities to understand complex ideas, to adapt effectively to the environment, to learn from experience, to engage in various forms of reasoning and to overcome obstacles by careful thoughts. Various theories have been developed such as <sup>9</sup>GARDNER'S THEORY OF MULTIPLE INTELLIGENCES, STERNBERG'S TRIARCHIC THEORY etc. The extension of Gardner's theory is Sternberg Triarchic theory. Both the theory basically elaborates the measures to check intelligent level among individuals. Eyewitness who is intelligent enough to tackle the questions of attorney with clear understanding of where he wants to drag him and avoiding/dodging such questions will surely affect the direction in which the trials will proceed.

### **The Psychoanalytic Approach To Personality**

Personality often plays predominant role in affecting the psychology not only in case of eyewitness but for common man as well. 'Freud is called as the founder of Personality theory'. He believed that the human mind has three distinct levels, which are conscious, pre conscious and unconscious. He further believed that personality involves three basic structures, which are <sup>10</sup>id, ego and superego that correspond roughly to desire, reason and conscience. Id, consist of all primitive, innate urges. Ego while on the other hand is based on external factors, which is taken into consideration for the purpose of fulfilling the id needs. Freud gave a line in the form Pleasure Principle that includes fulfillment of; sexual desire apart from id needs comprising primitive urges. Now the question arises how does these principles of Freud affects witnesses?

The answer to this is the personal needs of witnesses in various circumstances. Instance of this can be a Case wherein, X a witness in murder case of a husband by wife protects her because he hopes that saving her would develop a good relationship between them which will take the shape

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<sup>9</sup> Robert A Baron Psychology 5<sup>th</sup> edition

<sup>10</sup> Robert A Baron Psychology 5<sup>th</sup> edition

of intimacy some day. Herein, two factors of psychology comes into picture firstly, pro optimistic approach as part of human nature and secondly, Freud principle of pleasure.

### **Competency And Compellability Of Witnesses**

Section 118, of Indian evidence act speaks about the competency of the witness. This section states that all persons are capable to be witness provided that they should able to understand the question and should give rational answers. In this context the exceptions as per the act are tender years i.e. child of such age who can, not give rational answer or may not be able to understand the questions.

<sup>11</sup>No minimum age limit for children in this context is laid down provided they should have intellectual understanding for questions asked. Other exception is extreme old age, disease whether of body or of mind. Even the lunatic person is capable of being a witness as decided in the case of R. vs. Hill.

Section 119, of the act further speaks about the dumb witnesses if they are unable to speak then writing, signs, are acceptable only if they are open in court and it will be called as oral evidence.

<sup>12</sup>Where a rape victim was not examined by the prosecution on the ground that she was deaf and dumb and mentally retarded, her non production deprived the defense, from cross examining the material witness unless there is a record to indicate that the victim of the rape could make herself understood through intelligible signs.

<sup>13</sup>Where the procedure under section 119 is not followed the evidence is not admissible.

Thus, the relevancy of both these sections from the psychological aspect to be a witness is crystal clear. Even the law laid down certain grounds based on which testimony admissibility by the witness is examined. The intellectual understanding and rationality plays a pre dominant role in this. But, once again as discussed earlier the question in relation to understanding and rationality i.e. factors affecting it remains unanswered.

### **Trial Proceedings And Examination Of Witnesses**

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<sup>11</sup> Virendra vs. state of U.P (2008) 16 SCC 582

<sup>12</sup> Suresh vs. State, 2004 (2) Crimes 329 (Bom)

<sup>13</sup> Dilwar Sahab alias Ali sahib Jakati vs. State, 2005 (4) Crimes 382 (Kan.)

Section 135, of Indian Evidence act for the purpose from section 225 to 237 i.e. trial under criminal procedure code laid down the two principle for the examination of the witness. <sup>14</sup>Firstly, as per the law related in Civil and Criminal procedure and secondly, in absence of any such law its upon the discretion of the court. Furthermore, under the process of trial in criminal procedure code section 136, speaks about discretion of judge as to admissibility of evidence.

When the question comes for the examination of witness by the party who calls him shall be called examination in chief as per section 137 Indian Evidence act. Further, the examination of the witness by the adverse party is called as cross-examination. Re-examination is subsequent examination by the party who called him. Section 138 talks about order of examination. For the purpose of examination of witness <sup>15</sup>Paul Brown's Golden Rule principles is believed to be quite authentic which is again based on number of basic aspects of psychology. Therefore, playing with psychology of eyewitnesses to extract true facts from them is what been suggested by Paul brown' principle but the impact on testimony due to number of factors such as cognitive abilities, memory interference etc. are not considered under law only resultant is what considered as significant.

However, under the trial for the purpose of protecting eyewitnesses testimony and to ensure its authenticity <sup>16</sup>Section 148 of Indian Evidence Act which is about the power of court as when decide what questions can be answered by witness. Similarly Section 149 is the extension of Section 148, which laid down the provision of reasonable grounds for asking questions to the witnesses. Section 150 provides for the complaint to the High court or bar council against lawyer, barrister or attorney who has asked the question harming the character of eyewitness without reasonable grounds. The last section in this line is section 150, which prohibits the relevant parties to ask such, indecent and scandalous questions, if not establishing any relation with the facts in issue then is barred from being raised in the court of law.

Therefore it can clearly be concluded that although the efforts, been made by the judiciary to protect interest of eyewitnesses so that their mental status permits them to provide them authentic

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<sup>14</sup> Dr. V.Krishnamachari Law of evidence 616 6<sup>th</sup> edition S Gogia and company

<sup>15</sup> Dr. V.Krishnamachari Law of evidence 625 6<sup>th</sup> edition S Gogia and company

<sup>16</sup> Dr. V.Krishnamachari Law of evidence 628 6<sup>th</sup> edition S Gogia and company

information but genetic traits and environmental and cultural factors in consonance with psychology affects the testimony of eye witnesses invariably.

### **Protection Of Witness: Problems Faced And Urgent Requirement For A Protection Programme In India:**

In any of the criminal as well as the civil case, the witness plays an important role in arriving to the conclusion. Due to this, the parties often threaten the witness, turning them hostile and interfering with the fair administration of justice. Hence, it becomes very difficult to protect the witnesses so that they do not get intimidated or fear revealing the truth before the court. A large number of witness protection programs in many countries all over the world is been working. Sadly, India lacks a well functioning witness protection program, despite various attempts to improve it, the implementation and the infrastructure continue to be poor and there are still a vast number of cases where the witnesses turn hostile.

In most of the cases before the court, involving influential people, it has been a regular practice for witnesses to retract from their original statements or to go into hiding because of fear and threat to life and destruction of property. The situation gets further aggravated when he realizes that there is no legal obligation by the state for extending any security, if any need arises. India needs at present is a witness protection program that can guarantee to the witnesses that they will not be harmed at all in any way ensuring that justice and truth would prevail above all.

### **Challenges Towards Witness Protection In India:**

There are several problems like cost of its implementation. When talked about the bodyguards, security, relocation to another area etc., the costs that are involved are very huge. The major problem is that of corruption in the administration and judiciary. The first step in developing a witness protection law is to acknowledge that witness protection is a duty of States. Other problem is whether the statements or evidences by witness should be recorded by a state Judicial Magistrate. It is practically not viable in the present set up with the low number of Courts and staff deficient Judiciary. Right now in India even the expert witnesses of the various disciplines do not have a proper protection.

### **Importance Of Witness And Their Protection:**

The Holy Bible teaches us: ‘ *thou shall do no murder, thou shalt not commit adultery, thou shall not steal, and thou shalt not bear false witness* ’

The Hon’ble Supreme Court Of India also held in *State Of Gujrat V Anirudh Singh*<sup>17</sup> that: ‘ It is the salutary duty of every witness who has the knowledge of the commission of the crime, to assist the state in giving evidence’. Committee on Reforms of Criminal Justice System said in its report that “ By giving evidence relating to the commission of an offence, he performs a sacred duty of assisting the court to discover the truth”

In *Zahira Habibulla H. Sheikh* case the definition for a fair trial was given as one “In which bias or prejudice for or against accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial.

The irony is that while offenders have a range of rights, the victims and more particularly, witnesses have a limited range of rights. Thus, the unequal distribution of rights results in a situation where witnesses are rendered helpless as they lack sufficient rights to protect themselves and thereby compelling them to turn hostile.

### **Conclusion To The Discussion**

Two major questions arises when it comes to psychology of eyewitnesses affecting criminal justice:

1. Magnitude of role played by psychological aspect in their testimony?
  2. Is law providing sufficient provisions to make sure the authenticity of testimony is preserved?
- As far as the answer to the first question is concerned although there is no relevant research in this direction but rationally speaking the factors of psychology, which is been discussed in this paper, are broad enough to affect the testimony of common eyewitness. Memory, cognitive skills,

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<sup>17</sup> AIR 1997 SC 2780

intelligence, thought process, are all basic but very complex parts of mind which in one or other way affects the testimony. So it can be concluded that the magnitude of psychological aspect in testimony is substantially significant. There is currently no check and balance system in law as to this question, although tender age, lunatic, idiots are been defined broadly and utmost care is taken during there testimony, but for a person of rational thinking no such scale or guidelines is been provided. It is been recommended that a case-by-case analysis to determine authenticity, reliability of the testimony of eyewitnesses needs to be determined by the legislative as well as judicial authorities. As each witness has his own and different mindset from the other, which needs to be considered during proceedings. Specific focus during the investigation needs to be given to this aspect as well, so that the Courts can rely on testimony without, any second thought.

The second question is still waiting, for its answer, as although there are provisions in law for protecting the interest of witness but all provisions concentrates only on extraction of information, there authenticity is never been considered holistically. Lawmakers need to have a broad outlook to cover such a basic aspect that is yet to be touched by the provisions among various laws.

### **Suggestions For Improving Witness Protection:**

Protection may be given before, during and/or after the judicial proceedings depending on the type of the witness or the degree of co-operation. Effective witness protection legislation, should ideally involve all the three concerned agencies- police, Government and Judiciary. The government should display a political will to implement necessary Acts, the judiciary can look into the legal aspects and the execution may be entrusted to the police.

An independent witness protection cell should be constituted and it must arrange for the provision of false identities, relocation and follow up. The witnesses should be treated with fairness, respect and dignity and to be free from intimation, harassment or abuse throughout the criminal justice process. They should have access to information of the status of the investigation and prosecution of crime. Medical facilities, social services, state compensation, counseling, treatment and other support may be provided. Right to a speedy trial, prompt and final conclusion of the case after the conviction and sentence must be ensured. If any violation found to exist on part of witnesses enrolled in this program, they should be penalized.



The police should be given the freedom to take basic measures to protect witness like Surveillance, escorting witness to work and court, assisting with emergency relocations. The use and practice such as video conferencing, teleconferencing voice and face distortion and other similar techniques must be encouraged as well as allowing witnesses to conceal their address or occupation.



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