

(2003) 10 DEL CK 0067

In the Delhi High Court

Case No : Criminal Writ Petition: 247 of 2002

Neelam Katara

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 14-10-2003

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161

Citation : (2003) 2 ILR Delhi 377

Hon'ble Judges : Usha Mehra, J; Pradeep Nandrajog, J

Bench : Division Bench

Advocate : Arvind Nigam, for the Appellant; Mukta Gupta for the State, Mr. K.N. Balgopal with Mr. G.K. Bharti, Advocates, for the Respondent

Judgement

Pradeep Nandrajog, J.—The unfortunate mother, Mrs. Neelam Katara filed the present petition pertaining to the tragic homicidal death of her son, Nitish who had gone to attend the marriage of his friend at Diamond Palace, Industrial Area, New Kavi Nagar, Ghaziabad U.P. On the night intervening 16/17th February, 2002. Respondent No. 6, the son of a sitting Member of the Rajaya Sabha came to be a suspect in the homicidal death of Nitish Katra. The petitioner sought various reliefs. From time to time various directions and orders were passed in the present petition resulting in the petition, as far as the petition was concerned as having become infructuous. However, one aspect of the matter of general public importance survives and counsel for the parties stated that in public interest certain directions pertaining to witness protection need to be issued. The edifice of administration of justice is based upon witness coming forward and deposing without fear or favour, without intimidation or allurements in Courts of Law. If witnesses are deposing under fear or intimidation or for favour or allurements, the foundation of administration of justice not only gets weakened, but in cases it may even get obliterated. The dockets in Courts today are overflowing to the brim and especially in criminal delivery system no shorthand essay is possible; the accused must get a fair, proper and just hearing in the adversarial system of Administration of Justice which we have adopted. Delay

results. This leads to the possibility of the witness being harassed or intimidated at the hands of the accused or his accomplices.

2. Has the time ripened to provide for safeguards for the witnesses that they come forwards and depose without fear, without intimidation, without favour or allurements of the accused? Has prevention of accused person from suborning witnesses and turning them hostile to the case of the prosecution become an urgent necessity?

3. Counsel for the petitioner Shri Arvind Nigam contended that there are a large number of reports and in particular the report of the Vohra Committee which have come to a finding that criminalisation has struck at the very foundation of the Indian polity and there is urgent need to deal with this criminalisation on a war footing to prevent the polity from further degenerating. Counsel commended us to take judicial notice that case after case of the prosecution was collapsing, owing to the material witnesses turning hostile to the case of the prosecution. Why was this happening in case after case questioned the counsel? He volunteered the answer himself "fear of the accused person".

4. Counsel for the petitioner drew our attention to the various Reports of the Law Commission of India and in particular the 154th and 178th Reports which dealt with the menace of prosecution witnesses turning hostile.

5. Counsel for the State submitted that these Reports are being processed in consultation with the State Government as Criminal Law and Criminal Procedure are on the concurrent list of 7th Schedule to the Constitution. Counsel for the State informed us that the Government is aware of the plight of the witnesses appearing as prosecution witnesses and the Government intends to frame a Scheme for protection of witnesses as the Government was awake to the reality that in the administration of justice, witness deposition forms an important bedrock. Ms. Mukta Gupta stated that the Government had set up a Committee under the Chairmanship of Justice V.S. Malimath, Former Chief Justice of Karnataka and Kerala High Courts to consider and recommends measures for revamping the Criminal Justice System in the country. She, however, fairly conceded that it was uncertain as to when the suggestions would be incorporated legislatively on the statute book. We are, therefore, of the opinion that since this area is an unoccupied field, till the legislature legislates thereon, it would be appropriate for the Court to lay down guidelines in respect of protection to be granted to the witnesses.

6. The Hon'ble Supreme Court in its judgment reported as Vineet Narain and Others Vs. Union of India (UOI) and Another, had directed that steps should be taken immediately for the constitution of an able and impartial agency comprising persons of unimpeachable integrity to form functions akin to those of the Director of Prosecutions in United Kingdom.

7. In the United Kingdom, the Director of Prosecutions was created in 1879. He is appointed by the Attorney General from amongst the Members of the Bar. He

discharges the functions under the Superintendence of Attorney Generals. The Director of Prosecutions plays a direct role in the prosecution system. He even administers "Witness Protection Programmes". Legislations have been enacted in Australia, Canada and the United States of America.

8. In the United States of America the Witness Protection and Reallocation Programme is regulated by the Attorney General for Protection of Witnesses in the Federal Government or State Government in official proceedings concerning an organised criminal activities or other serious offences. The Attorney General under the Programme is entitled to:-

- (a) provide suitable documents to enable the witness to establish a new identity;
- (b) provide housing for the witness;
- (c) provide transportation to the witness.
- (d) Provide payment to meet basic living expenses;
- (e) Provide help in obtaining employment;
- (f) Provide services necessary to assist the person becoming self-sustaining;
- (g) Regulate the disclosure of the identity of the person, having regard to the danger such a disclosure would pose to the person;
- (h) Protect the confidentiality and identity of the person.

In Canada, the Witness Protection Act, 1996 lays down the factors which the Attorney General has to consider while deciding whether a witness should be admitted to the Program. They are as under:-

- (a) the nature of the risk to the security of the witness;
- (b) the danger to the community if the witness is admitted to the Program;
- (c) the nature of the inquiry, investigation or prosecution involving the witness and the importance of the witness in the matter;
- (d) the value of the information or evidence given or agreed to be given or of the participation by the witness;
- (e) the likelihood of the witness being able to adjust to the Program, having regard to the witness's maturity, judgment and other personal characteristics and the family relationships of the witness;
- (f) the cost of maintaining the witness in the Program;
- (g) alternate methods of protecting the witness without admitting the witness to the Program; and
- (h) such other factors as the Commissioner deems relevant.

9. In Australia, the Witness Protection Act, 1994 was enacted. A Commissioner

was designated to monitor the National Witness Protection Program. The legislative guideline to determine as to which witness should be included in the National Witness Protection Program, is as under:-

Selection for inclusion in the NWPP

(1) The Commissioner has the sole responsibility of deciding whether to include a witness in the NWPP, including cases where an approved authority has requested that a witness be included in the NWPP.

(2) A witness may be included in the NWPP only if:

(a) the Commissioner has decided that the witness be included;

(b) the witness agrees to be included; and

(c) the witness signs a memorandum of understanding in accordance with section 9 or;

(i) if the witness is under 18 years - a parent or guardian of the witness signs such a memorandum; or

(ii) if the witness otherwise lacks legal capacity to sign the memorandum - a guardian or other person who is usually responsible for the care and control of the witness signs such a memorandum.

(2) The Commissioner must, in deciding whether to include a witness in the NWPP, have regard to:

(a) whether the witness has a criminal record-particularly in respect of crimes of violence, and whether that record indicates a risk to the public if the witness is included in the NWPP;

(b) if a psychological or psychiatric examination of the witness has been conducted to determine the witness's suitability for inclusion in the NWPP - that examination or evaluation; and

(c) the seriousness of the offence to which any relevant evidence or statement relates; and

(d) the nature and importance of any relevant evidence or statement; and

(e) the nature of the perceived danger to the witness; and

(f) the nature of the witness's relationship to other witnesses being assessed for inclusion in the NWPP;

(3) May have regard to such other matters as the Commissioner considers relevant.

(a) a parent or guardian of a witness signs a memorandum of understanding because the witness was under 18 years;

(b) the witness is included in the NWPP and remains a participant until after he or she turns 18; the Commissioner may require the participant to sign another memorandum of understanding.

10. The Hon"ble Supreme Court in the judgment Vishaka and others Vs. State of Rajasthan and Others, observed that in the absence of domestic law occupying the field, any international convention not inconsistent with the fundamental rights and the harmony with its spirit may be read into the municipal law.

11. In the judgment reported as Union of India (UOI) Vs. Association for Democratic Reforms and Another, it was observed that if need be, Courts have the necessary power, by issuing directions of fill the vacuum till such time the legislature steps in to cover the gap or the executive discharges its role.

12. Given the financial constraints which we have in this country, it may not be possible to have a Witness Protection Program on the extended scale at which it is being implemented in the United States of America, Canada, Australia or for that matter in the United Kingdom. But, a beginning has to be made.

13. Society has an interest in the administration of justice and it may be true that let a 100 accused escape but let not an innocent be punished, but this cannot be stretched to mean an escape route should be provided to the accused to hijack administration of justice and secures his innocence, not as a result of a fair adversarial litigation but as a result of "might being right". At least, in two categories of cases namely, organised crime and a crime punishable with the capital sentence or imprisonment for life witness protection is required. It has been coming to the notice of this Court that in heinous crimes the witnesses and sometimes the victim turns hostile. There is strong material from which it can be guessed that cause is fear and compulsion.

14. Till a suitable Legislation is brought on the Statute book, we direct that following guidelines shall operate for protection of the witnesses.

15. These guidelines shall be known as "Witness Protection Guidelines"

"Witness" means a person whose statement has been recorded by the Investigating Officer u/s 161 Cr. P. C. pertaining to a crime punishable with death or life imprisonment.

"Accused" means a person charged with or suspected with the commission of a crime punishable with death or life imprisonment.

"Competent Authority" means the Member Secretary, Delhi Legal Services Authority.

ADMISSION TO PROTECTION:

The Competent Authority, on receipt of a request from a witness shall determine whether the witness requires police protection, to what extent and for what duration.

FACTORS TO BE CONSIDERED

In determining whether or not a witness should be provided police protection, Competent Authority shall take into account the following factors:

- (i) The nature of the risk to the security of the witness which may emanate from the accused or his associates.
- (ii) The nature of the investigation or the criminal case.
- (iii) The importance of the witness in the matter and the value of the information or evidence given or agreed to be given by the witness.
- (iv) The cost of providing police protection to the witness.

OBLIGATION OF THE POLICE:

(1) While recording statement of the witness u/s 161 Cr. P.C., it will be the duty of the Investigating Officer to make the witness aware of the "Witness Protection Guidelines" and also the fact that in case of any threat he can approach the Competent Authority. This the Investigating Officer will inform in writing duly witness.

(2) It shall be the duty of the Commissioner of Police to provide security to a witness in respect of whom an order has been passed by the Competent Authority directing police protection.

We further direct that the respondent, State shall give due publicity to the guidelines framed. We make it clear that the guidelines framed by us would not be in derogation of the powers of the concerned criminal court, if it forms an opinion that a witness requires police protection to so direct.