EYEWITNESSES TESTIMONIES - A CRITICAL ANALYSIS OF ITS RELIABILITY AND ADMISSIBILITY UNDER THE INDIAN EVIDENCE ACT

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ABSTRACT

More than once, eyewitness testimony, given at the right time and the right place has changed the course of world history. The eyewitness testimonies of the disciples of Jesus who authored the Gospels found their way to the New Testament and helped establish and spread a major world religion. The eyewitness accounts of Holocaust survivors have kept alive the memory of all those who perished in Nazi Germany. At the Nuremberg Trials, eyewitness testimonies of survivor like Marie-Claude Vaillant-Couturier and perpetrators such as Hermann Göring and Otto Ohlendorf were instrumental in shedding light on the Jewish genocide and securing conviction.

However, eyewitness testimonies have come under sharp criticisms in recent times. This paper attempts to examine the reliability and admissibility of eyewitness testimony in India. By studying the common practice of courts, the paper sheds light on numerous problems that arise with respect to the application of and the jurisprudence behind eyewitness testimonies. It is seen that courts in India tend to place unfounded confidence upon eyewitness testimony, often at the cost of examining other more compelling and scientifically sound evidence. This practice has had severely adverse ramifications for the rights of the accused and has on some occasions led to wrongful convictions too. The paper concludes by offering explanations from the field of psychology and neuroscience on why eyewitness accounts are unreliable, and an alternative way forward is suggested.

EYEWITNESS TESTIMONY: ORIGINS, HISTORICAL CONTEXT, AND THE INDIAN EVIDENCE ACT

The law of evidence has ancient roots in India. The Dharma Sastras considered *Sakshi*, or the "witnesses" to be an indispensable agent in unravelling the truth in disputed cases. Yajnavalkya, the 8th BCE philosopher, wrote extensively on means of proof and evidence- both documentary (*lekhya*) and oral (*śabdapramāṇa*). Unlike modern times, strict bars were placed on who could depose in a civil trial. The testimony of children, dependents, lunatics, women, or persons under fear often stood vitiated and high moral qualifications were required from the rest to be able to make their word count.[i] Documentary evidence was widely considered to be superior to oral evidence as it was felt that the latter was open to being manipulated by far easier means.[ii] In fact, a survey of all ancient legislations reveals a trend of deliberate exclusion of witnesses with a view to regulating their competency and barring anyone whose credibility could be legally questioned.[iii] In contrast, the qualifications required for being a witness in a criminal trial were significantly relaxed. It was reasoned that crimes might happen in places where it is difficult to gather sufficient evidence- such as caves, forests and so on- and one has to make do with the witnesses that are available. Thus, went the Latin maxim, "*if a murder happens in a brothel only strumpets can be witnesses*".[iv]

The arrival of the British saw a seismic shift in the conduct of criminal procedure and evidence collection in the Indian subcontinent. In the early years of British rule, evidentiary practices borrowed from common law in England were followed in courts established in the Presidency towns. In other places, a mix of customary law and vestiges of Muslim law were applied. Then, the Indian Evidence Act was enacted in 1872 and remains in force to this day. Chapter IX of the Act (Sections 118 to 134) deals with witnesses. Section 118 allows all competent persons "to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind".[v] It naturally follows that any eyewitness can depose in a trial unless explicitly barred by the court due to the reasons mentioned in Section 118.

Unless it can be convincingly established otherwise, it is generally presumed that the (eye)witness must be speaking the truth since they are under an oath. While this principle may

not do much harm if someone is reporting a yeti or a UFO sighting, when serious crimes are committed- such as murder, arson, or rape- is becomes important that reliable and honest witnesses come forward. The catch is that most witnesses to serious and brutal crimes are usually so shocked and traumatized by their experience that their memories often fail them when recounting the trial. Moreover, most people pay little attention to their surroundings to correctly recall minute details that comprise necessary evidence such as a phone conversation or a face they saw fleetingly before it disappeared from the crime scene. Evidence law jurisprudence in India recognizes this. In fact, the Supreme Court had this to say when adjudicating on a matter concerning presumptions that govern any ordinary (eye)witness:

"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. Ordinarily 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. 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… It is unrealistic to expect a witness to be a human tape recorder… Ordinarily 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."[vi]

On a perusal of the law as it stands today, it can be observed that courts place an unreasonable amount of confidence on eyewitness testimony as proof of a crime. Conviction can be secured on the basis of the testimony of a sole witness if the test of reliability is passed.[vii] If the witness is not *wholly reliable*, or if it is proven that he has an interest in the prosecution, then courts can insist on independent corroboration of his testimony.[viii] Only when the sole witness is found to be *wholly unreliable*, is the testimony discarded in toto.[ix] Furthermore, under the aegis of Section 45 of the Indian Evidence Act, 1872 (hereinafter the "Act") it has been held that courts should not dismiss an eyewitness account on the strength of "an uncanny opinion" expressed by a medical witness.[x] Even if the witness is an expert, using his deposition to checkmate an eyewitness account cannot be acceptable in a criminal trial.[xi] In another case, where a housewife who was a witness to the murder of her husband had wrongly described some aspects

of the environment of the crime scene, the court clarified that the doctrine of "*falsus in uno, falsus in omnibus*" would not apply in eyewitness testimonies.[xii] It was reasoned that while ascertaining the truthfulness of the testimony, minor inadequacies and errors of description which might have been made due to the stress of cross examination must be excused.

Pronouncements such as those mentioned above indicate the commitment of Courts in India to enhancing the rights of the victim. It is admirable that courts have developed and shaped criminal procedure to give adequate value to eyewitness accounts but it has often come at the cost of diminishing the rights of the accused despite the fact that Indian procedural law places so much emphasis on the due process model. Every so often, such an approach has acted as a barrier to the dispensation of complete justice and the principle of "innocent until proven guilty" has been thrown out of the window. As is analyzed in the next section, on several occasions, fallacious eyewitness accounts have led to wrongful convictions where the convict had to spend many grueling years languishing in jails before their sentence was overturned. In some cases, the death penalty was handed out and if due to reasons of poverty or by virtue of being from a marginalized community the defendant was unable to muster the resources to prove their innocence, they were condemned to accept their sentence.

EVIDENCE THAT CONVICTS THE INNOCENT: ANALYZING CASE LAW INVOLVING EYEWITNESS ACCOUNTS IN MODERN INDIA

Six death row convicts- Ankush Shinde, Rajya Shinde, Raju Shinde, Ambadas Shinde, Bapu Shinde and Surya had to spend sixteen years in incarceration before the Supreme Court acquitted them.[xiii] Their conviction for murder was upheld by three courts, including the Supreme Court, and it was not until ten year later when the Apex Court decided to re-examine the evidence that the court realized that something was wrong.[xiv] At the heart of this humongous travesty of justice lay the fact that the identification and eyewitness testimony was fabricated. The witnesses who identified the accused picked them out of a police line- up and those were the individuals that were framed in the charge sheet. Two days later, one of the witnesses identified four completely different individuals when shown pictures by the police, but this was overlooked by all the courts. Despite the fact that other evidence from the crime

scene could have been sent for forensic analysis and produced in court, eyewitness testimony was given primacy.

A study found that that in 52 percent of the cases, erroneous and false eyewitness memory or misidentification was the leading cause of wrongful conviction.[xv] The NLU Delhi Death Penalty report found that "'last seen' evidence was mainly invoked in the category of death sentences for murder with rape. Given the nature of the offence, direct eyewitness testimony was rare and 'last seen' evidence was significantly relied upon. It was seen that 'last seen' evidence was used in combination with recovery based on confession of the accused to a police officer. Courts seem to be accepting of this combination to get around the requirement that 'last seen' evidence alone cannot be the basis of the conviction".[xvi] The problem with eyewitness testimony is further illustrated through the arguments made by the counsel of the accused in a case where the eyewitness testimony of a ten year old was used to secure conviction.[xvii] The defendant argued that since the case depended upon the acceptability of child witnesses' evidence, unless the evidence is totally unblemished, corroboration is necessary. This is because there is scope for tutoring. It was pointed out that since the informant was a close relative, and his conduct was not immediately reacting to what her daughter said showed that the prosecution had not come with clean hands. The child witnesses' evidence clearly showed that she was tutored. These concerns were waived aside without much discussion on their merits and the court went on to convict the accused for offence punishable under Section 302 IPC.

FICKLE AND FALSE: THE TESTIMONY OF SCIENCE ON THE RELIABILITY OF EYEWITNESS MEMORY

There is over a century of research by academics, psychologists, and legal professionals to prove that eyewitness testimony is unreliable.[xviii] In the words of Michael R. Leippe, "an eyewitness influences the legal process even before the witness takes the stand in court. If there is an eyewitness, especially one who makes a positive impression, the police and prosecutor's office are more likely to pursue a case. And what the witness reports will influence the course of an investigation. When we add to these facts the research evidence that eyewitness memory

is often inaccurate, we have a real potential for frequent misfires of the justice process, errors that cost money, time, and, in some cases, the freedom of an innocent person."[xix]

Psychologist Hermann Ebbinghaus has demonstrated in his research on the "forgetting curve" that memory changes and warps over time.[xx] People often retain very little of the events that they witness unless they are made to recall it again and again, after which it becomes part of their long-term memory. Therefore, the longer the time between a crime and the time of deposition, the higher the chances that the eyewitness will misidentify the accused. The phrase "Rashomon effect"- based on a film by the same name- is used to describe the unreliability of eyewitnesses. The effect essentially seeks to demonstrate that perception and recollection are subjective and two people who have been witness to an incident may describe it in completely contrasting terms when asked to recount it much later. Academics have defined this as "the naming of an epistemological framework—or ways of thinking, knowing, and remembering—required for understanding complex and ambiguous situations".[xxi]

To assume that simply because someone witnessed an incident first- hand, they are in the best position to report and describe it, and therefore give their opinion substantial judicial credence is dangerous. Studies have found that witnesses are susceptible to "Misinformation effect" whereby they may recount an even entirely differently if false information is subconsciously fed to them after the incident has occurred.[xxii] Another study done in the US found that jurors tended to give disproportionate weight to the "confidence" of eyewitnesses and their assessment was found to lack sensitivity to other factors such as the nature of the crime, expert testimony or information provided in judicial instruction.[xxiii]

In a 1980s case where the Supreme Court laid guidelines on presumptions that governed ordinary witnesses, it recognized the importance that psychology played in recounting events and testifying before the court. It said that "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. 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."[xxiv] However, the court did not elaborate further on the matter and left it at that. No other case has dealt with the practical problems that eyewitness testimony poses and the disastrous effect it has had in terms of aiding and abetting the menace of wrongful

conviction. Thus far, Indian judiciary has made little headway in combatting the problem of memory defects, biases and prejudices that afflicts the process of witness identification and eyewitness accounts. It is worrying that no judicial committee or Law Commission report- not even the 69th Law Commission Report that recommended wide- ranging reforms to the Indian Evidence Act- has given any consideration to the matter.

THE WAY FORWARD

At present, the only way forward for the courts in India is to recognize and embrace new developments in forensic technology and psychology. The courts must introspect on their record and recognize that they have often been swayed by the confidence of eyewitnesses and have consequently disregarded other important diagnostic evidence. Initiatives like the Innocence Project in the US have embarked on a path of exonerating those who have been falsely convicted by utilizing post- conviction DNA testing of evidence. During the course of their work, they have found out that a staggering 70% of wrongful convictions resulted from misidentification in the course of an eyewitness testimony. While there is no data in India to back similar claims, but the figures are most likely to be similarly high.

To combat the issue mentioned above, in the US, innovations in the technological sector such as development of ADVOKATE: Advisory System to Assess the Credibility of Eyewitness Testimony are being used to enhance the delivery of justice and ensure the credibility of witnesses. The Indian legal system can also devise a system of compulsory corroboration of evidence or increase the threshold of accepting sole eyewitness testimony when convicting for serious crimes. Most importantly, as was identified by the Royal Commission on Criminal Justice in its 1993 report, a balance will have to be struck between due process and the crime control model to ensure that "the risks of the innocent being convicted and the guilty being acquitted are as low as human fallibility allows".[xxv]

ENDNOTES

[i] Aparna Srinivasan, *A Detailed Study on Eyewitness Testimony In India*, 120 (5) IJPAM 983, 985 (2018).
[ii] *Id* at 984.
[iii] *Id* at 985.
[iv] *Id.*
[v] Indian Evidence Act, 1872, Section 118.
[vi] Bhogin Bhai Kirji v. State of Gujrat AIR 1983 SC 753.
[vii] Anil Phukan v. State of Assam (1993) 3 SCC 282, para 3.
[viii] *Id.*
[ix] *Id.*
[x] State of U.P. v. Harban Sahai (1998) 6 SCC 50.
[xi] *Id.*
[xii] Rajendra Singh v. State of Uttaranchal (2013) 4 SCC 713.
[xiii] Anup Surendranath, *India's Broken Criminal Justice System Cannot Support the Death Penalty,* PROJECT 39A BLOG (13th March 2019), https://www.project39a.com/blog/2019/3/13/indias-broken-criminal-justice-system-cannot-support-the-death-penalty?rq=eyewitness%20; Ankush Maruti Shinde v. State of Maharashtra (2019) 15 SCC 470.
[xiv] *Id.*
[xv] Rattner, Arye. *Convicted but Innocent: Wrongful Conviction and the Criminal Justice System*, 12(3) Law and Human Behavior, 283 (1988).
[xvi] 2 DEATH PENALTY REPORT 47 (National Law University, Delhi) (2016).
[xvii] R.D. Nayak v. State of Gujarat AIR 2004 SC 23.
[xviii] KATHERINE W. ELLISON & ROBERT BUCKHOUT, PSYCHOLOGY AND CRIMINAL JUSTICE 80 (1981).
[xix] Michael R. Leippe, The appraisal of eyewitness testimony, in Adult Eyewitness Testimony: Current Trends and Developments 385–418 (David Frank Ross, J. Don Read, & Michael P. Toglia eds., 1994).
[xx] Chou, Siegen K., What Is the Curve of Forgetting? 45 (2) The American Journal of Psychology 348-50 (1933).
[xxi] Anderson, Robert, *The Rashomon Effect and Communication*, 41 (2) Canadian Journal of Communication, 250–265 (2016).
[xxii] Katherine Puddifoot, *Re-Evaluating the Credibility Of Eyewitness Testimony: The Misinformation Effect And The Overcritical Juror*, 17 Episteme 255–279 (2020).
[xxiii] Brandon L. Garrett, *Factoring the Role of Eyewitness Evidence in the Courtroom*, 17(3) JELS 556 (2020).
[xxiv] Kirji v. State of Gujrat, *supra* note 6.
[xxv] The Royal Commission on Criminal Justice Report ("The Runciman Report") (1993 London : HMSO) Cmnd 2263, 2.