

**PROTECTION OF VICTIMS OF CRIME AND WITNESSES: A CONTEMPORANEOUS APPLICATION
OF LAWS**

Swasha Fernando

Attorney-at-Law,
LL.B(Hons)(University of London)

And

Sajith Bandara

Attorney-at-Law,
LL.B(Hons)(University of Colombo)

1. INTRODUCTION

The Protection of Victims and Witnesses, although crystalized into existence by the Assistance to and Protection of Victims of Crime and Witnesses Act No. 4 of 2015 ('the 2015 Act'), was a mechanism that operated implicitly in Sri Lanka through a plethora of laws and procedures. Sri Lankan laws have sought to protect victims of crime ("victims") and witnesses through, *inter alia*, the Penal Code¹, the Evidence Ordinance² ("EO") and the Code of Criminal Procedure Act³ ("CCPA").

This paper will first consider how, in the absence of a specific act, provision for the protection of victims and witnesses were considered in criminal legislation, prior to 2015. It will then proceed to

consider the protections afforded by way of the 2015 Act and thereafter analyse how a contemporaneous application of the said Act together with the other existing laws would further strengthen and enhance the protective mechanisms afforded by law.

2. THE NEED TO AFFORD PROTECTION TO VICTIMS AND WITNESSES

The success and comprehensive operation of the justice system of any state is largely dependent of the willingness of victims to come forward, and the availability of witnesses to testify in an impartial manner. Recognizing the integrity of the roles played by both victims and witnesses, many countries have adopted procedures, plans and programmes to encourage and afford protection to victims of crime and

¹ Penal Code, No. 02 of 1883 (as amended)

² Evidence Ordinance (EO), No. 14 of 1895 (as amended)

³ Code of Criminal Procedure Act (CCPA), No. 15 of 1979 (as amended)

witnesses⁴.

Inarguably, the responsibility of affording protection to victims and witnesses' rests on the State. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

(d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation."⁵

Recognizing the importance of affording protection to victims and witnesses, the law in Sri Lanka has sought to statutorily provide for the same through numerous enactments.

3. PROTECTION OF VICTIMS AND WITNESSES PRIOR TO THE 2015 ACT

The legal protection afforded to victims and witnesses prior to the 2015 Act was scattered across many legislations.

adopted by the United Nations General Assembly (UNGA) in 1985 states that:

"The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by...

While the consideration of the laws below is not exhaustive, it provides an understanding of the legal structures and schemes in place to secure the rights of victims and witnesses by acknowledging the vulnerabilities faced by them.

Being cognizant of the above, legislation has sought to address these vulnerabilities at different junctures. In the pendency of the trial, the CCPA addresses the requirement of making financial arrangements to facilitate witnesses in court, where the expenses incurred by them are to be reimbursed by the State⁶. Financial arrangements are to be made not only to facilitate the presence of witnesses in court, but also for the "expense, trouble or loss of time properly incurred in, or

⁴ Crime Victims' Rights Act of 2004, 18 US Code 3771; Domestic Violence, Crime and Victims Act 2004 (UK), 2018 c 28

⁵ United Nations ('PJVC') (1985) The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, resolution GA/RES/40/34 of the General Assembly; 29 Nov 1985. See also UN

General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 2, 6 and 9

⁶ CCPA, §243

incidental to, giving evidence in a trial”⁷. At the end of a trial, the CCPA further empowers the court to demand from the Accused a sum to be paid in compensation to ‘any person’ affected by the offence⁸. Thus, affording protection not only to a victim, but “any person” the court determines as deserving of compensation.

In addressing women and children as victims and witnesses, legislation has addressed the difficulties they may face in providing protection to them. Subsequent to the Evidence (Special Provisions) Act, No. 32 of 1999, trial courts permit the evidence of children in cases of child abuse to be elicited in a video recording. To require children to testify in open court is likely to create psychological implications of having to re-live a crime; in light of the same, the EO has statutorily recognized this right available to child victims of an offence⁹.

The National Child Protection Authority (NCPA) is empowered to search and inspect premises where there is reason to suspect child abuse¹⁰. It is further

empowered to search and inspect any premises providing child care services in order to safeguard children entering the foster care system pursuant to being victims of crime¹¹. This is a poignant example of how ‘protection’ was not confined to protection consequent to trial, even prior to the 2015 Act.

The Prevention of Domestic Violence Act, No 34 of 2004 (“PDVA”) provided for interim orders¹² and protection orders¹³ to be issued against the respondent in a case of domestic violence, ensuring the protection of a battered victim during legal proceedings. The Act further criminalizes the publishing of any matter apart from the judgement in such cases¹⁴. The same is protected by way of the Penal Code, where publication of ‘certain matters’ in respect of specific provisions mentioned therein would be subject to penal sanctions¹⁵. While there is no specification on what amounts to ‘certain matters’, it may be inferred that the discretion to determine the same is vested with the court. The aforementioned

⁷ *ibid*, §243(1)(a)

⁸ CCPA, §17(4)

⁹ EO, §163A

¹⁰ NCPA, §33

¹¹ NCPA, §§34

¹² *ibid*, §5

¹³ *ibid*, §10

¹⁴ *ibid*, §20

¹⁵ Penal Code, §365C

provisions secure the anonymity of persons involved, shielding them from potential reprisals and social stigma.

The practice of taking evidence of witnesses *'in camera'*¹⁶ is another protection afforded to witnesses under specific legislation¹⁷. As a matter of practice, courts have extended this right to victims of rape to generate a sense of security in the courthouse.

Additionally, there are mechanisms enforced by legislation to ensure that there is no interference with victims and witnesses. In this light, the offence of 'criminal intimidation'¹⁸ as provided in the Penal Code, criminalizes any act done to threaten another with injury in order to prevent such person from doing something he is legally entitled to do. Therefore, where a witness is so intimidated, he may make a complaint to the police, thus instigating investigations under this offence and protecting him, both as a victim and witness.

The Bail Act No. 30 of 1997 affords similar protection in providing that

“interference with witnesses or the evidence against him or otherwise obstruct the course of justice” is a ground for refusal of bail or cancellation of the bail by a court¹⁹.

Similarly, the Bribery Act No. 11 of 1954 (as amended) has specifically criminalized the interference with witnesses. According to the relevant section a person who *'interferes, induces, threatens, injures or compels any witness to not give evidence or deter him from giving accurate evidence'* shall be liable to a penal sanction²⁰.

While the vulnerabilities of victims and witnesses were address in legislation prior to 2015, there was no recognition of their rights and entitlements that demanded that such protection be afforded to them.

4. PROTECTION OF VICTIMS AND WITNESSES VIS-À-VIS THE 2015 ACT

By way of the 2015 Act, victims were endowed with express rights²¹ and entitlements²². The Act considers both the

¹⁶ In Private, to the exclusion of the public

¹⁷ Bribery Act §78(3); Children and Young Persons Ordinance, No. 48 of 1939; Human Right Commission of Sri Lanka, No. 21 of 1996 §16(3)

¹⁸ Penal Code, §483

¹⁹ Bail Act, §14(1)(a)(ii)

²⁰ Bribery Act, §73

²¹ The 2015 Act, §3

²² *ibid*, §4

physical and psychological protection of a victim and has guaranteed State obligations towards them²³. Witnesses too, have express entitlements²⁴ where they are protected against *real* or *possible* harm, threat, intimidation, reprisal or retaliation resulting from him being a witness in a court of law or a commission. The sanctity of these rights and entitlements are acknowledged under Part III of the Act, which criminalizes a plethora of acts, which amount to ‘offences against victims and witness’²⁵. Such offences are categorized as cognizable and non-bailable²⁶, thus emphasizing the gravity and severity of such offences.

The Act further expanded the category of persons to whom these protections were afforded; persons who have assisted the process of justice by providing information, lodging a complaint or making statements to a court or a commission pertaining to the commission of an offence, an infringement of a fundamental right or a violation of a

human right, were also guaranteed protection under the Act²⁷.

Part IV of the 2015 Act establishes the National Authority for the Protection of Victims and Witnesses (“NAPVW”). This Authority is vested with a myriad of duties and functions²⁸ including the positive power to ‘investigate, inquire and inform about an alleged or imminent infringement’²⁹; to provide assistance by way of medical treatment, reparation, restitution and rehabilitation³⁰ and to make an award for the payment of compensation³¹.

The 2015 Act introduced centralized agencies such as the NAPVW and the Police Protection Division. The primary mandate of these bodies is the effective protection of victims and witnesses. Further, under Section 21 of the Act, victims and witnesses are able to seek enhanced and extended protection from the numerous institutions specified therein³².

²³ *ibid*, §3(e)

²⁴ *ibid*, §5

²⁵ *ibid*, §§8 and 9

²⁶ *ibid*, §10

²⁷ *ibid*, §6

²⁸ *ibid*, §13

²⁹ *ibid*, §13(d)

³⁰ *ibid*, §13(e)

³¹ *ibid*, §13(f)

³² The National Authority for the Protection of Victims and Witnesses; the Victims and Witnesses Assistance and Protection Division of the Sri Lanka Police Department; in a Court of Law during the pendency of a trial or even after. Additionally, protection may be sought from subject specific institutions such as the Commission to Investigate Allegations of Bribery and Corruption (CIABOC), the

It is important to note that the 2015 Act introduced specific protective measures that may be adopted in the protection of victims and witnesses. This provided for the lacuna in the law prior to the Act, where the determination of protective measures were left to the creativity of court³³. However, the Act does not require the courts to be confined to the measures set out in this Section. Furthermore, Section 25(3) of the 2015 Act includes *inter alia* the codification of the practice of holding *in camera* legal proceedings; provision for the adoption of special measures to ensure the best interest of a child victim or witness during a legal proceeding; and provision to take steps to ensure anonymity of the witnesses. Such considerations have sought to enhance and guarantee the security of victims and witnesses.

While compensation is already addressed by the Judicature Act and the CCPA, the 2015 Act provides a structured guideline concerning the computation of compensation³⁴. Prior to ordering the

same, the court is empowered to call for, examine and consider *inter alia*, all relevant information relating to the victim of crime³⁵. The 2015 Act affords victims "a formal opportunity to say how a crime has affected them"³⁶ by way of what is termed as a 'Victim Impact Statement'.

5. CONTEMPORANEOUS APPLICATION OF THE LAWS THAT EXISTED PRIOR TO THE 2015 ACT AND THE PROVISIONS OF THE 2015 ACT

While the 2015 Act has centralized the provisions for the protection of victims and witnesses, it does not seek to override the protections afforded by other legislation. This section argues for a contemporaneous reading of laws. This is to mean that the protections safeguarded in the laws that existed prior to the 2015 Act, may be considered along with the 2015 Act in order to enhance the protective mechanisms that are available to victims and witnesses. Where such laws are applied contemporaneously, it would enable the law enforcement agencies to afford the maximum protection to victims and witnesses. This section of the paper

Human Rights Commission (HRC), a Commission of Inquiry, or a Special Presidential Commission of Inquiry.

³³ §22 discusses the provision of security to person and property; provision of temporary or permanent relocation; temporary or permanent employment and provision for re-identification.

³⁴ The 2015 Act, §28(1)(a),(b)

³⁵ *ibid*, §28(2)(a) and §28(2)(b); See also *ibid*, §3(o)

³⁶ Archbold (2012), *Criminal Pleading, Evidence and Practice*, 585; See also, *Rathnasiri Silva Kaluperuma v The State*, CA 248/13.

will consider three areas of such contemporaneous application of laws in order to illustrate how the effect of the 2015 Act may be enhanced.

5.1. CONTEMPORANEOUS APPLICATION OF SECTION 163A OF THE EO AND SECTION 22(1)(F) AND 25(1) OF THE 2015 ACT

As discussed earlier in this Paper, Section 163A of the EO provides for the admission of a video recording of a victim's testimony in a case of child abuse as evidence in a court of law. This section also stipulates two caveats to counter-balance the interest of the victim with the rights of the accused person: (a) the child must be available for cross examination; and (b) "the rules of court requiring the disclosure of the circumstances in which the video recording was made" must be complied with. The inherent limitation of this section is that it only permits the admission of a video recording of a victim of child abuse; to date the courts have failed to provide the same privilege to other identified vulnerable categories of persons due to the lack of a legal provision.

With the introduction of the 2015 Act, the courts and other law enforcement

authorities are now empowered to take 'any [...] measure which the authority shall consider necessary³⁷' and 'all necessary steps that a court or commission deems necessary³⁸' to assist and protect victims or witnesses. A purposive interpretation of this section would enable courts to allow *inter alia* video evidence of a broad category of persons as opposed to being limited to victims of child abuse cases. By way of a contemporaneous application of the aforementioned provisions, when extending the protections in the 2015 Act to enable admission of video recordings of a broader category of persons, court may adopt the caveats introduced in Section 163A of the EO. This will ensure that such purposive interpretation of the 2015 Act also meets the necessary standards of law that guarantee a fair trial to the Accused.

Similar to the task entrusted to the NCPA to record video evidence of a victim of a child abuse and submit the same to the court, it could be mooted that the NAPVW may be empowered, by the above-cited sections, to do the same in the case of victims and witnesses. Such a

³⁷ The 2015 Act, §22(1)(f)

³⁸ The 2015 Act, §25(1)

contemporaneous application of these sections would assist the court with the necessary legislative backing to better protect victims and witnesses.

5.2. ADEQUATE COMPENSATION OF VICTIMS

At the commencement of trial, if it so transpires that the Accused is willing to tender a plea of guilt, it has become a common practice in Courts to summon the victim in order to determine the impact caused to him as a result of the offence. Similarly, after a guilty verdict has been entered into, the prosecution submits to the court the position of the victim, and the consequent grievances and difficulties faced by him. The judges have adopted these procedures to determine the quantum of compensation that may be awarded pursuant to section 17(4) of the CCPA, as discussed in the preceding sections of this paper. However, there were no specific codified guidelines or factors that the court ought to have taken cognizance of when deciding on the quantum of compensation.

Section 28 of the 2015 Act has attempted to address this lacuna by introducing basic guidelines in relation to the awarding of compensation. It mandates that *inter alia* the court can call

for all relevant information relating to the victim of crime, including the report of the Government Medical Officer who has examined the victim when determining compensation. A contemporaneous reading of the guidelines under Section 28 of the 2015 Act read with Section 17(4) of the CCPA (which gives court a broad discretion) will enable court to ensure that the maximum compensation is awarded to a victim.

5.3. NATIONAL AUTHORITY FOR THE PROTECTION OF VICTIMS OF CRIME AND WITNESSES TO BE AIDED BY LAWS OUTSIDE THE 2015 ACT

It is important to note that the protective mechanisms listed in the 2015 Act are non-exhaustive. The Act empowers the Authority to take “any other measure” which the Authority considers necessary when providing protection. In this process, the Authority could be vastly assisted by protective mechanisms introduced by other subject specific legislations to provide the maximum protection to victims of crime and witnesses.

In a circumstance where an issue relating to a child victim or witness arises, the Authority may resort to the assistance of the officers of the NCPA. This would

allow the Authority to go beyond the protective mechanisms introduced in the 2015 Act while still acting within the legal procedures in the NCPA.

Another Act that may aid the Authority in exercising its powers is the PDVA. Section 11 of the PDVA lists out prohibitions that a protection order may contain in order to safeguard the victim. The NAPVW in exercising its powers under Section 14(1)(a)(vii) is also empowered to “make appropriate orders” and therefore could seek the assistance of the aforementioned section in the PDVA to operate as a guideline when doing so. A contemporaneous application of this nature will enable protection to be provided not only in the case of ‘real’ harm but also ‘possible’ harm³⁹.

Moreover, another key right vested with victims and witnesses by way of the 2015 Act, is the right to make a written or oral complaint in respect of a real or possible harm⁴⁰. However the Act is silent on the manner in which such a complaint may be entertained. In the face of this lacuna, the Authority may seek to be

guided by the Office of Missing Persons Act No 14 of 2016, a subsequent act, which enables confidentiality to be maintained when a complaint is made to the office of missing persons.⁴¹ Similarly, the NAPVW may take cognizance of the necessity to ensure confidentiality by way of the contemporaneous application of these laws to ensure the identities of victims and witnesses are secured.

While specific guidelines and mechanisms are provided for in the subject specific legislation discussed above, it is proposed that the NAPVW may rely on the contemporaneous application of these laws and the 2015 Act in order to frame and formulate the most appropriate protective mechanisms.

6. CONCLUSION

As discussed above, it is important to acknowledge the plethora of laws that provided for the protection of victims and witnesses prior to the 2015 Act. With the introduction of the 2015 Act, the rights and entitlements of victims and witnesses and the protective measures available to them have received specific acknowledgement.

³⁹ The 2015 Act, §3(d) and §5(3)

⁴⁰ The 2015 Act, §3(g) and §5(3)

⁴¹ The 2015 Act, §12(c)(4)

Therefore, in light of the considerations above, this paper proposed a contemporaneous application of different legislation, which provides for victim and witness protection along with the Assistance to and Protection of Victims of Crime and Witnesses Act No. 4 of 2015. Having considered three areas of such contemporaneous application, it may be suggested that such an approach would assist the purposive interpretation of the 2015 Act in order to expand and strengthen the framework of protective mechanisms afforded by law.