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THE PROTOCOL REGARDING CHILD WITNESS IN INDIA**Abstract**

It is well founded and a well-established fact that witnesses are the principal root of all evidence during an investigation and within a judicial proceeding. A witness is a person who testifies before a court and must produce the testimony with rationality and truth. Proceeding with this, a child witness is a person who gives witness and at that time is below 18 years. In India there is no specific age for a person to give witness and hence the testimony as promulgated by a child should be given credence to as long as it satisfies the required parameters to determine its rationality and truth. In addition to these parameters, it is most important to that that there are also very important laws to protect child witnesses from intimidation and other forms of staining the evidence which they are to provide to the court in a case.

Aims the article wishes to achieve

- To understand the admissibility of child witnesses.
- To appreciate the laws and guidelines regarding witness statements given by children.
- To generate reforms and solutions for any issues relating to child witnesses.

Analysis**To understand the admissibility of child witnesses**

In accordance to Section 118 of the Indian Evidence Act, all persons, including a child or an aged except a tender year, extreme old age, disease-whether of body or mind- or other similar causes, are competent to be considered as a witness in the court of law if they are capable of understanding

the questions put to them, or to give rational answers to those questions¹. This goes to show that any person as long as they can understand the questions put forth to them and can frame the answers, can be chosen as witnesses in a trial.

In order to determine the suitability of the child to give evidence, the court conducts a special test known as the Voir Dire test which simply speaking means to say what is true and what is accurate and honest in content. The conduct of this test includes the judge asking certain questions to child which is not related to the case with the objective of determining the competency of the child to give witness in the case. The questions may be related to asking their name, father's name or their place of residence².

The concept of the Voir Dire test is to determine the competency of the child to comprehend the questions and to understand the truth and display the testimony before the judge. In the landmark case of Suresh v. State of UP³ a five-year-old child's testimony was allowed on account of the child being able to comprehend the questions upon the given issue. It also included the declaration that there is no minimum age limit for witnesses to give testimony in a trial.

With regards to the test, in the case of Jarina Khatun v. State of Assam⁴, where it was held that trial court is the best judge to decide the competency of the witness as the judge gets to observe the witness, determine his demeanour and listen to his evidence. This all helps in determining the validity of the testimony of the child. To further this point, in a landmark judgement, Nivrutti Pandurang Kokate & Ors. v. The State of Maharashtra⁵, the Court held that the trial court judge notices the manner, possession and intelligence and the trial judge may resort to any tests to determine the same. The credibility of the child differs from case to case and it will depend on the facts and circumstances in each case.

Furthermore, the court may consider to test the validity of the witness given by a child on the basis of five factors as given in an American case Sate v. Allen⁶. The failure to fulfil any of these factors

¹ The Indian Evidence Act, 1872, § 118, No. 01, Acts of Parliament, 1872 (India)

² Evidence produced by Child Witness and the need for Reform, <http://www.legalservicesindia.com/article/424/Evidence-produced-by-Child-Witness-and-the-need-for-Reforms.html> (last visited July 2nd 2021)

³ Suresh v. State of UP 1981 AIR 1122, 1981 SCR (3) 259

⁴ Jarina Khatun v/s. State of Assam 1992 Cr LJ 733,

⁵ Nivrutti Pandurang Kokate & Ors. v. State of Maharashtra AIR 2008 SC 1460

⁶ State v. Allen 70 Wn.2d 690 (1967)

will lead to immediate disqualification of the child from being a witness. The factors are stated below.

1. An understanding of the obligation to speak the truth on the witness stand.
2. The mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it.
3. A memory sufficient to retain an independent recollection of the occurrence.
4. The capacity to express in words his memory of the occurrence; and,
5. The capacity to understand simply questions about it.

It must be mentioned here that in the case of *R v. Norbury*⁷, the competency of the child to give witness must not rest with the ability to understand the oath but to understand the nature of questioning and give rational answers to the questions put forth, thus the witness borne by the child would be admitted and no corroborative proof is required.

In addition to the above points, simply because the witness in the case is a child, it does not mean that the witness is unreliable and testimony should be discarded. This was held in the case of *State v/s. Yenkappa*⁸. Indeed, there is always a wavering suspicion in the minds of all parties as to whether the child has been tutored to provide testimony away from the truth and the court must exercise caution in this regard. To decipher this conundrum, the court must examine the circumstances of the case where the child is giving testimony. In the above stated case, the accused murdered his wife in the house and was convicted of the same on the basis of the evidence of the children. The court held that the presence of the witnesses in the house is of a normal nature and them witnessing the incident cannot be held as unusual or unnatural. As held in the case of *Satish Kumar Gupta and etc. v/s. State of Haryana and Ors*⁹, the Apex Court held that if the child witness inspires confidence, then reliance can be given to convict the accused.

It is therefore certainly transparent and well understood that the witness of children is to be taken in full confidence contingent upon the conditions of fulfilment of the *Voir Dire* test and the five factors as state in the *Allen* case¹⁰.

⁷ *R v. Norbury* (1978) Crim. LR 435

⁸ *State v/s. Yenkappa* (2003) CRI LJ 3558

⁹ *Satish Kumar Gupta and etc. v/s. State of Haryana and Ors* Criminal Appeal 757 – 758 of 2016

¹⁰ *Allen*, *supra* note 6

To appreciate the laws and guidelines regarding witness statements given by children

In lieu of the easy manipulation, victimization of the sensitive nature of children, multiple legislations have been enrolled to protect the sanctity of evidence and witness borne by child witnesses. These legislations include certain mentions in the Juvenile Justice Act 2015 (JJ Act) as well as Protection of Children from Sexual Offences Act 2012 (POCSO Act) have specific guidelines on the procedure to deal with child witnesses. The JJ Act has no particular method on how to deal with child witnesses however it does indicate the following-

- Police officers must not wear their uniforms while interviewing child witnesses.
- Such interviews must be done by the Special Juvenile Police Unit as they are well trained in how to deal with children.
- Child Welfare Committees must take cognisance of any violations done by the authorities.

The POCSO Act also specifies certain guidelines for the treatment of child witnesses.

- All interviews are to be conducted in a safe and child friendly atmosphere.
- The child should not be made to recount the same incident relentlessly
- A person well versed in counselling must be present to reduce possible trauma or stress that might set into the child while producing the evidence.

In addition to these legislations, the Delhi High Court in the case of State v. Rahul¹¹ produced a set of guidelines known as the, 'Guidelines for Recording the Evidence of Vulnerable Witnesses in Criminal Matters'¹² which details out how to record evidence when a child is one of the witnesses in the case. It has 39 sections and is detailed to protect the children from any possible identification as well as various other protections distributed to child witnesses. Reinforcing this decision and lauding the Delhi High Court's efforts, a Supreme Court bench consisting of Justices A.K. Goel and U.U Lalit ordered centres for examination for vulnerable witnesses to be set up in all High Court jurisdictions¹³. This was further backed up by the Supreme Court in the case of

¹¹ State vs Rahul CRL.A. 496/2015

¹² Available at: http://delhihighcourt.nic.in/writereaddata/upload/notification/notificationfile_lcwcd2x4.pdf (last visited July 9, 2021)

¹³ Available at: [The Hindu, https://www.thehindu.com/news/national/set-up-centres-for-vulnerable-victims-under-all-high-courts-sc/article19944728.ece](https://www.thehindu.com/news/national/set-up-centres-for-vulnerable-victims-under-all-high-courts-sc/article19944728.ece), (last visited July 4, 2021)

Mahender Chawla vs Union of India Ministry of Home Affairs¹⁴ directed all the High Courts to set up special centres for examination of vulnerable witnesses in criminal cases.

To generate reforms and solutions for any issues relating to child witnesses.

In all simplicity it is well founded to say that there seem to be sufficient legislation to combat any possible snag in the question of child witnesses from perspectives of interrogation done by law enforcement authorities and on the other hand protection of the value of evidence which would be produced by child witnesses. However, the scope of child witness's safety as well as their capacity to understand the questioning in court should be well protected otherwise the evidence which they will provide before the court will be distorted. It is also paramount to note that most of the laws pertaining to the safety and security of child witnesses are very old and the need for new legislation is welcome in these times. There should be various situations that the court and the judge must be prepared for to face as well as allowing considerations to be provided to the child at the time of the hearings.

It would be prudent and immensely helpful if the court procedures and protocol were to be altered to suit the needs of the comfort of the child witness in the courtroom. They may be stated as follows:

- In the event of the judge suspecting the reliability of the child providing witness, the court must make an individual evaluation of the competency of the child and must not arrive at hasty conclusions as to which age is permissible to provide evidence.
- Cross examination of the child witness should be subject and under the control of the court and be carefully monitored by the judge so as to avoid confusion and fear in the child.
- If the need arises, the child maybe allowed to testify from any place which is not usually reserved for the witnesses.
- A person supportive of the child witness must be present provided that they do not influence the testimony in any way.

¹⁴ Mahender Chawla vs Union of India and Ors. WRIT PETITION (CRIMINAL) NO. 156 OF 2016

- The child must have access to dolls and drawings so as to make the testimony easier to understand and comprehend.
- Upon the request of the child, persons not necessary to the proceedings in the trial must be excluded from the courtroom so as to avoid intimidation or distraction of the witness.
- When necessary, the court may allow the child to give their testimony for the pre-trial hearing via video-taped deposition.

Furthermore, in trials where the witness is a child, the court should take action so as to have a speedy trial in order to minimize the potential stress and worry the child has to go through while giving witness and also having a part in the proceedings. In the event of any request being made for a delay in the proceedings then the presiding judge must take into consideration the mental wellbeing of the child as well as the stress factor that the child will have to go through if there is any delay in the proceedings.

Moreover, to take the matter away from the courts and into the hands of the legislature who also have a role to play in this matter, it will suffice to say that where necessary the relevant parts of legislature must be enacted in crimes where children are the witnesses and also the victims where the child is giving testimony in their own case. The legislature may examine the above-mentioned measures to make them permanent.

Furthermore, to put the onus on the media to play its part in cases where there are child witnesses, it is apt to put forward that the media must show restraint in covering such news and should not reveal the name or names of the child witnesses or victims of the case. This is mainly because it is illegal to reveal the names of the victims and witnesses as well as it is morally wrong to do so without specific instructions from the judge to do so.

Conclusion

In conclusion it can be said that presently there is effective legislation to proceed further in the future years for child witnesses and to help them, take care of them and to protect the sanctity of the evidence that they provide in a case. The case for sufficient legislation is not really made because there is always a gamut for improvement of the current laws and the laws regarding child witnesses are no different. If the legislature were to consider the above reforms, then it would be most helpful for the procedure of child witnesses in future.



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