

## Testimony of child: Position in India

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### Abstract:

*Testimony of a witness is treated as crucial evidence in court proceedings which leads the court to decide the listed matter. But there are some criteria for a witness which is to be fulfilled before giving its testimony (like sane mind etc.) Historically, we have witnessed that admissibility of a child's testimony was not absolute in nature. Under section 118 of Indian Evidence Act, it says that every person is competent to witness unless it is restricted by the court from the questions put to him or from giving reasonable reasons because of instrumentality of age.*

*This article deals with the child giving the testimony and whether that testimony is acceptable or not. The court has to testify the child's statement by putting some additional questions to him also corroborating its statement. Mind of a child is very sensitive and also they are tender in nature therefore their mind can be easily modulated.*

*This article also deals with the question of admissibility, testimony of child, competence of the testimony, Principle of "Voiur dire test" and need for corroboration.*

**Keywords:** Testimony of child

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## INTRODUCTION

Testimony of a witness is treated as crucial evidence in court proceedings which leads the court to decide the listed matter. But there are some criteria for a witness which is to be fulfilled before giving its testimony (like sane mind etc.)

Historically, we have witnessed that admissibility of a child's testimony was not absolute in nature. Under section 118 of Indian Evidence Act, it says that every person is competent to witness unless it is restricted by the court from the questions put to him or from giving reasonable reasons because of instrumentality of age.

## QUESTION OF ADMISSIBILITY

Our judicial system had set down some rules to clinch the competency of a testimony of child witness. The conditions which are to be fulfilled in regards to question of admissibility are:-

- He/she should be competent.
- He should understand the inquiry and interrogation.
- He must tumble and give effective, rational and reasonable answers to the same.

The final decision lies on the discretion of the court whether the testimony is permissible or not, which is determined by court by making out and considering the facts and circumstances of the case. The facts and circumstances should make the testimony meticulous. This restriction is based that children or any person of the tender age is easily tutored and hence can be sometimes treated as a puppet but due to this any particular age can't be fixed as to acceptance of competency and no age is a certain age to attain certain level or degree or intelligence or knowledge.

Therefore, the court has its own discretion and power to restrict anyone from restricting any person from testifying until they fulfill the above conditions. Hence, the testimony of a child is put to questions.

## TESTIMONY OF A CHILD

In India, when a child is born ambience where he lives is directly proportional to the development of mind. The circumstances and situations are the major subjects of the mind and stimulation of the mind depends on this. All socio-economic conditions are also considered. Due to all these factors the mind of the child is influenced. A child's cognitive mind can be doctored through coercion because of their sensitive, tender and fragile nature.

Hence, an apposite question which is asked is-How maturity is defined of an individual specially in case of child?

The appropriate answer to this question should be made according to surroundings, environment and circumstances in which he is born and brought up. It differs from an individual to individual. It can be meticulous by referring to the case of Suresh v. State of U.P.<sup>1</sup>: -it was held that there is no minimum age for admissibility of the testimony of a child but the only point which should be considered is that the child should be able to understand all the questions and points which are made and put forth. The child should be able to look through all the questions.

Section 118 of the Indian Evidence Act clearly stipulates about the competency of a person who can testify; 'All persons shall be competent 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'

Hence, the above provision states that one shall testify in case if a person is competent enough and considered otherwise by the court of law.

**COMPETENCE OF THE TESTIMONY:** The rationale behind the conception of court regarding a child's testimony depends on the various factors, reasons and circumstances in which he is. Children are considered to be fragile, volatile to the circumstances and situations in which they belong and it has a long lasting impact on their memory as they're of tender age. They can be influenced and

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<sup>1</sup> 2 March, 2001

pursued. The child should understand the circumstances which occurred, also what led to such a situation and the consequence of that circumstance. Hence, the court considers all the factors before taking the testimony into the account. The children do not stand on a dominant position but are submissive to the influence, pressure and the tension which in running in the background. The entire scenario can change the proceeding leading to the breakdown and alteration in the testimony. Hence the court should take care of baroque of the case and correlate with testimony.

#### Principle of “Voir dire test”

This phrase is an Anglo-Norman phrase which means ‘Oath to tell the truth’. The word voir in the above mentioned phrase comes from French which means, “that which is true.” The test is used for the determination of deciding the competency of the child witness. Ordinarily, the judge puts up questions to the child who is witness and the child has to look through those questions to verify the facts and in this way the veracity of the child’s testimony is tested.

This test is forego to determine the capacity of the mind whether it is influenced or not, determines the maturity and capability of the child witness to testify its statement and judge can introspect the child by putting through some questions which may or may not be connected to the ongoing case. This process which is undergone is to check the absolute competency of the child witness and his understanding.

If we refer to the case of Rameshwar S/o Kalyan Singh v. The State of Rajasthan<sup>2</sup>, the court held; keeping in mind all the provisions of section 118 of Indian Evidence Act, every person who is incapable of understanding the questions which are put forth to him/her is considered to be incompetent.

In the landmark case of Nirvrtti Pandurang Kokate & Ors. v The State of Maharashtra<sup>3</sup> Supreme Court held that testimony of child witness should be examined so as to ensure that the testimony is not under any influenced and coerced, also it should be corroborated with other evidence as well.

Hence, the ability to understand at this tender age is quite likely to be dependent and can be formed on others mind, influence and perception. They can portray such a picture which is likely to be influenced by others.

#### CHILD’S TESTIMONY IN CASES OF SEXUAL ABUSE AND MOLESTATION

In the recent scenario, especially in past years the cases of child sexual abuse and child molestation have been in highlights. A survey of 2007 which was done by Ministry of Women and Child Development exhibited that 53% of the children in India were sexually abused which leads to another question that whether the child can testify his own sexual abuse or molestation?

Victims of the sexual abuse and molestation especially children are generally scared of disclosing the truth to their family and elders. Due to all these recent activities POSCO Act was established. It was passed by both the houses of Parliament on May 22, 2012. It came into being on Nov 14, 2012, yet its effect and applicability was not up to the mark as children neither know through what abuse they went through nor were they acknowledged and equipped about it. Therefore its applicability remained in a slippery slope.

The Supreme Court of the United States of America in the landmark case of Ohio v. Clark, the court allowed prosecutors to bring teachers to the court by which the matter was immediately reported in the child abuse case. There was no needed to bringing young children to testify. In this particular case, the boy (Ohio) was just 3½-year-old whose wounds were very much visible to the teachers. The unanimous judgment came in which boy was too young to testify therefore teachers were allowed on his behalf.

The veracity if given by the child should be verified through other evidences, external factors, internal factors with all care and caution. Therefore all the other devices should be used to testify the statements.

Now we will discuss the process of it.

<sup>2</sup> 1952 AIR 54

<sup>3</sup> 19 February, 2008

What happens in court?

If the accused pleads “not guilty” then the child’s evidence is required on the proceedings. The testimony of child may be used as the main evidence in the trial but the only requirement is that he should be able to answer some additional questions during the trial.

Mostly in this kind of case where the child is required to give testimony it is taken in a separate room and uses closed-circuit television. It is taken in a remote room so that he can’t see the accused person and can’t be influenced. Neither he is allowed to speak to the child nor can he ask any questions to him.

This brings us to the next question i.e. How will the child give evidence?

Child can give its testimony in both ways i.e. closed circuit television or open court. It was depends on the age of child and also their role in the trial.

**Need for Corroboration: Section 114 of Indian Evidence Act, 1872, a statement which is made by any person should be corroborated with the circumstances and other chain of events but it is not such a hard and fast rule in case of children specially of tender age. The judge can ask some additional questions to them keeping the rule of caution in mind and if he is convicting him without corroboration he has to give its own reason for doing so.**

In *Panchhi & Ors. v. State of Uttar Pradesh*<sup>4</sup>, the court observed the precedents which says that the testimony of the child must find sufficient corroboration but it is accepted. The law does not says that the testimony of the child shall be rejected but it says that it should be scrutinized and evaluated carefully as the child can be easily tutored.

In *Mangoo & Anr. v. State of Madhya Pradesh*<sup>5</sup>, the court said that dealing with the child witness probably brings a scope of the child being tutored. The solution to this problem is that the court should determine whether the child is tutored or not. It can be said that child is tutored by examining the evidence and then from the contents thereby it can be

determined whether there are any traces of tutoring. Even if there is some part of the testimony which is been tutored then it can be rejected and rest can be used at least for corroboration.

In the recent case of *State of Madhya Pradesh. v. Ramesh & Anr*<sup>6</sup>, where the trial court gave its decision i.e. conviction on the basis of the evidence which was given by an eight-year-old daughter of a murdered man. In this case the Supreme Court had stated that:

“There is no principle of law that it is inconceivable that a child of tender age will not be able to recapitulate the facts in his memory A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child may be able to recapitulate carefully and exactly when asked about the same in future In case a child explains relevant events at the crime (scene) without improvement or embellishment, and the same inspire the confidence of the court, his deposition does not require corroboration whatsoever. The child at tender age is incapable of having any malice or ill-will against any person”

**CONCLUSION:** As per the principles of the phrase *Voir Dire Test*, jury must verify, corroborate and ascertain the testimony and competency of the child in the court of law. One thing is meticulous in the above mentioned essay that children who are of young and tender age should be dealt with extreme care and caution. There are trained personnel, counselors and professionals who should work in the court; some child welfare committee keep such counselors for children who of young age so that they are not doctored in young age. It takes into opinion of the above mentioned people and analyzes them accordingly. Also, there is need of such law which must be gender neutral in nature.

The court also takes into the account the testimony given by somebody else on behalf of the child, if the child is incompetent to testify and understand the abuse through which he/she went through.

<sup>4</sup> 19 August, 1998

<sup>5</sup> 2004 (1) MPHT 138

<sup>6</sup> 18 March, 2011