

The Precarious position of Child Witnesses in Criminal Proceedings in India

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Abstract: *The research paper aims to highlight the position of a child witness in criminal proceedings in India whether as a victim witness or as a witness in a criminal trial. The research aims to highlight the admissibility and relevance of the testimony of a child witness with the relevant statutory provisions applicable and pertinent case laws. The credibility of child witnesses' deposition and need for corroboration is also discussed. The authors have also highlighted on the issue of the lack of a cogent child witness protection programme. In conclusion the authors have made appropriate suggestions and recommendations.*

Introduction

The word 'child' has been used in law as a term denoting relationship; as a term indicating capacity; and as a term of special protection. These include considering a child a burden, which invokes the right to maintenance and support; regarding children as individuals with temporary disabilities, making for rights to special treatment and special discrimination; treating children as especially vulnerable, to ensure rights to protection; and recognizing children as resources for the country's development, necessitating nurturing and advancement.

Today, nearly all cultures share the view that the younger the child the more vulnerable she/he is physically and psychologically and the less able to fend for herself/himself. Age limits are a formal reflection of society's judgment about the evolution of children's capacities and responsibilities. Almost everywhere, age limits formally regulate children's activities: when they can leave school; when they can marry; when they can vote; when they can be treated as adults by the criminal justice system; when they can join the armed forces; and when they can work. But age limits differ from activity to activity, and from country to country.

Likewise, in any proceeding in Court of law, where child is called as a witness, regard is had as to the competency of that child. A witness is said to be competent if that witness is qualified to testify in court. Such a witness must be physically and intellectually qualified to testify. Black's law dictionary defines competence as "a basic or minimal ability to do something; qualification especially to testify".

1. Competence of a Child Witness

The Indian judicial system has laid down some rules to determine the competence of a child witness, which has also been provided by the Indian Evidence act and other relevant judgments.

The Section 118 of the Indian Evidence Act, 1872 makes all persons as competent to testify the questions put to them or from giving rational answers to those questions (a) by tender years, extreme old age, or (c) disease. Thus understanding is the sole test of competency. The test of competency is the capacity to understand the questions and to give rational answers. The court has to ascertain, in the best way it can, whether from the extent of intellectual capacity and understanding he is able to give a rational account of what he has seen or heard or done on particular occasion.

2. "Voi dire Test"

A concept derived from the Anglo-Norman phrase, which refers to 'Oath to tell the truth'. The word voir (or voire), in this combination, comes from French which states, "That which is true". The test is conducted for the purpose of deciding the competency of a child witness. Usually, the judge puts questions to the child witness to test his

veracity and to verify that the facts build up with the progression of the accompanying facts.

This test is a precursor to determining the maturity and capability of the child to act in the full capacity as a witness to testify in front of the judge, hence, the judge may examine the child by posing certain questions which may not be related to the ongoing case. This is done in order to determine the absolute competency of the child witness, which may be limited in nature otherwise.

In the case, '*Rameshwar S/o Kalyan Singh v. The State of Rajasthan*'¹ the court held that every person is competent to be a witness in the court of law, unless incapable of understanding the question put before him/her, keeping in mind the provisions of Section 118 of the Indian Evidence Act.

Capability to understand at a young age is more likely to be dependent and to be formed at the opinion and perception of what others say and portray, due to which the testimony of a child is more likely to be modified or altered. Hence, dealing with a child witness is of key importance. This was also brought up in the landmark case, '*Nivrutti Pandurang Kokate & Ors. v. The State*

of Maharashtra'², where the Supreme Court held that the testimony of a child witness must be

scrutinized so as to make sure that it was not given under any situation of coercion and undue influence, and must corroborate other given evidence as well.

In *State v Allen*³, it was observed that the burden of proving incompetence is on the party opposing the witness. Courts consider 5 factors when determining competency of a child witness. Absence of any of them renders the child incompetent to testify. They are-

- (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.

3. Credibility of Child Witness

As a matter of prudence courts often show cautiousness while putting absolute reliance on the evidence of a solitary child witness and look for corroboration of the same from the facts and circumstances in the case, the Privy Council decision in *R v. Norbury*⁴, where the evidence of the child witness of 6 years, who herself was the victim of rape, was admitted. Here the court observed that a child may not understand the nature of an oath but if he is otherwise competent to testify and understand the nature of the questions put before him and is able to give rational answers thereto, then the statement of such a child witness would be held to be admitted and no corroborative proof is necessary.

The Supreme Court in *Tahal Singh v. Punjab*⁵, observed: "In our country, particularly in rural areas it is difficult to think of a lad of 13 year as a child. A vast majority of boys around that age go in fields to work. They are certainly capable of understanding the significance of the oath and necessity to speak the truth."

In this regard a very important observation has been made in *Jarina Khatun v. State of Assam*⁶, that the Trial Court is the best judge in the matter of deciding the competency of such a witness as there, the child himself appears before the court. Therefore it has an opportunity to see him, notice his demeanors, record his evidence and thereafter on scrutiny accepted his testimony.

The Supreme Court, in *State of Madhya Pradesh v. Ramesh & Anr.*⁷, has examined the law relating to deposition by Child Witnesses. While examining the law on the aspect the Court has observed that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the Court and there is no embellishment or improvement therein, the Court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the Court can reject his statement partly or fully. However, an inference as to whether the child has been tutored or not, can be drawn from the contents of his deposition.

In the 90's a trend emerged where the Courts started recording their opinions that child witnesses had understood their duty of telling the truth to

lend credibility to any evidence collected thereof. The Supreme Court has also commended this practice. If the court is satisfied, it may convict a person without looking for collaboration of the child's witness. It has been stated many a times that support of a child's evidence should be a rule of prudence and is very desirable.

4. Need for Corroboration

Though **Section 114 of the Indian Evidence Act, 1872**, requires that every statement of compliance must be corroborated, but a vast majority of cases show that it is not a very hard and fast rule, especially in cases which involve children of tender age. There is difference between "what the rule is" and "what has been hardened into a rule of law". In such cases the judge must give some indication that he has had this rule of caution in mind and should proceed to give reasons for considering it unnecessary to require corroboration on the facts of the particular case before him and show why he considers it safe to convict without corroboration in that particular case.

In *Panchhi & Ors. v. State of Uttar Pradesh*⁸, the Court while placing reliance upon a large number of its earlier judgments observed that the testimony of a child witness must find adequate corroboration before it is relied on. However, it is more a rule of practical wisdom than of law. It cannot be held that "the evidence of a child witness would always stand irretrievably stigmatized. It is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring."

In *State of Uttar Pradesh. v. Krishna Master & Ors.*⁹, held that there is no principle of law that it is inconceivable that a child of tender age would 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 the future. In case the child explains the relevant events of the crime without improvements or embellishments, and the same inspire confidence of the Court, his deposition

does not require any corroboration whatsoever. The child at a tender age is incapable of having any malice or ill will against any person. Therefore, there must be something on record to satisfy the Court that something had gone wrong between the date of incident and recording evidence of the child witness due to which the witness wanted to implicate the accused falsely in a case of a serious nature.

In *Mangoo & Anr. v. State of Madhya Pradesh*¹⁰, the Apex Court while dealing with the evidence of a child witness observed that there was always scope to tutor the child, however, it cannot alone be a ground to come to the conclusion that the child witness must have been tutored. The Court must determine as to whether the child has been tutored or not. It can be ascertained by examining the evidence and from the contents thereof as to whether there are any traces of tutoring.

Part of the statement of a child witness, even if tutored, can be relied upon, if the tutored part can be separated from untutored part, in case such remaining untutored part inspires confidence. In such an eventuality the untutored part can be believed or at least taken into consideration for the purpose of corroboration as in the case of a hostile witness.

Furthermore, in *State of Madhya Pradesh. v. Ramesh & Anr*¹¹, the Supreme Court 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....."

Lastly, in accordance to the principles of the *voir dire test*, a judge must ascertain and verify the competency of the child to testify in the court of law. What must be understood is that children of such young and tender age must be dealt with extreme care and sensitivity, which might not be the expertise of the judge handling the case.

5. Protection of Child Witness

The legal system has traditionally given little support and preparation to child witnesses. Within the courtroom children are often subject to harassing, intimidating, confusing and misleading questioning. In addition, court buildings do not provide privacy for the child or promote the safety of the child outside the courtroom. The abuse many children suffer is compounded by the abuse perpetrated by the legal system itself.

The Economic and Social Council of the United Nations has developed Guidelines on Justice Matters involving Child Victims and Witnesses of Crime (Guidelines). The main objective of these Guidelines is to set forth good practice on the consensus of contemporary knowledge and relevant international and regional norms, standards and principles. These Guidelines provide a useful guide to the understanding of the rights of the child to have his or her best interests given primary consideration in all matters concerning the child. They provide that child complainants and witnesses should receive special protection and assistance that they need in order to prevent hardship and trauma that may arise from their participation in the criminal justice system. In particular, in the context of the best interests of the child, the Guidelines set forth the following principle:

While the rights of accused and convicted offenders should be safeguarded, every child has the right to have his or her best interests given primary consideration. This includes the right to protection and to a chance for harmonious development:

(i) Protection. Every child has the right to life and survival and to be shielded from any form of hardship, abuse or neglect, including physical, psychological, mental and emotional abuse and neglect;

(ii) Harmonious development. Every child has the right to a chance for harmonious development and to a standard of living adequate for physical, mental, spiritual, moral and social growth. In the case of a child who has been traumatized, every step should be taken to enable the child to enjoy healthy development.¹²

In this context keeping the guidelines above in mind it can be said that the protection of Child witness is far from being satisfactory.

6. Conclusion

Children present a special challenge when they become participants in the legal system. The child witness presents a double truss for those conducting a forensic interview. In the authors' opinion young children provide a higher percentage of accurate and relevant information in a free recall situation in which they are merely asked to express in their words everything they remember, without prompts, cues, or suggestions. But young children are gullible and vulnerable to making serious errors in their court testimony. When children are questioned skillfully and appropriately and supported and encouraged to tell their story in their own words, they can provide accurate and forensically useful information. But when questioners use suggestive, leading, specific, and coercive questioning to get the child to confirm pre-existing biases about abuse, there is a risk of eliciting false statements from the child.

A Judge may not be competent or have any expertise in dealing with children of tender years, herein would come the role of child welfare expert, social workers, psychologists and counselors. Therefore it is suggested that trained personnel's and counsellors must work with the court, who can deal with the child in a prescribed manner to ensure that the child's testimony is not doctored in any way. The courts should take into account the expert opinion of various professionals and analyze them accordingly. The court must also take into account the testimony given by a person on behalf of the child and to what extent it can be held valid, in case a child is not competent enough to testify and understand what he/she went through.

Several factors influence children's memory capacity, including the child's age, psychological development and intellectual ability, the complexity of the event, their familiarity with the event and the delay between the event and the time at which the event is recalled. Children could be easily tutored and therefore can be made a puppet in the hands of the elders.

Though a child may be competent witness, a closer scrutiny of the evidence should be done before it is accepted. The competency of a child witness at times may not be consistent and his statement probably may be drawn upon his imagination sometimes. So the deposition of a child witness may require corroboration, but in case if the deposition inspires the confidence of the court and there is no embellishment or

improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the Court should reject his statement partly or fully. However, an inference as to whether a child has been tutored or not, can be drawn from the contents of his deposition. Thus it can be concluded that a child witness is a privileged witness and their competency and credibility is to be decided by the court which may differ from case to case.

On the other hand the protection of Child witnesses is of great importance. In cases where a child appears as a witness when he is the victim or otherwise, the role of Child Courts can never be overemphasized considering the fact that welfare of the child should always be of paramount consideration. Chandigarh has got a new child witness court at Sector 43 Judicial Complex which is second such court room in entire India .The first special child witness court of India came up in New Delhi. Such court rooms are a common thing in developed countries like the USA, Canada and other European countries. However, after New Delhi, Chandigarh has got the second child witness court in India and more such improvements in the judicial system are expected all over India .Child Witness Courts are special court rooms that are designed and set up in a way that a child likes the area and feels comfortable while being a witness on the day of hearing. It is suggested that more such Child Witness Courts be established in India. The following practices are recommended in the best interest of Child witness in India:

- Prosecutors or legal representatives of parties presenting the child witness should always meet the child prior to the court appearance and should attempt to establish a comfort level. Wherever possible the same prosecution team should conduct the case at committal and trial in a way that minimizes the number of people involved in the process of preparing and presenting the child witness.
- Child witnesses should be provided with the right to assistance, support and preparation for the experience of giving evidence.
- Age appropriate literature and other forms of information should be developed for all child witnesses to

explain various proceedings, possible parties to the proceedings, the roles of each person involved in the process, the types of questions that may be encountered and the reasons for them and the meaning of common terms, legal and otherwise, that may be encountered by the child while giving evidence

- Children should be allowed to choose at least one person who may accompany them in the courtroom while giving evidence. This person should be permitted to sit next to the child while the child gives evidence.
- Guidelines and training programs should be developed to assist judges and magistrates in dealing with child witnesses.
- All prosecution staff who has contact with child witnesses should receive training in the use of age appropriate language for child witnesses, children's developmental stages and the possible adverse effects of giving evidence on children of various ages.

The advocacy and professional conduct rules incorporated in the Advocates Act 1961, Bar Council of India rules, State Bar Council Rules should specifically proscribe intimidating and harassing questioning of child witnesses. Lawyers should be encouraged to use age appropriate language when questioning child witnesses.

- Child witnesses should be provided with appropriate waiting facilities in all court buildings where they are likely to appear as witnesses. These should ensure privacy and separation from the public and in particular from a defendant or hostile opposing party, that party's counsel and the media.
- Upon the application of a party or on its own motion, a court should have the discretion to
- Modify the seating arrangements during the proceedings
- Require the removal of gown exclude from the court any or all members of the public.
- If necessary to prevent undue distress to a child witness.

"Children are likely to live up to what you believe of them."

*-Lady Bird Johnson, Former First lady of
United states*

7. References

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- [12] State vs Rahul on 15 April, 2013, Delhi High Court, CRL.L.P. 250/2012 Decided on 15th April 2013