

## **A STUDY ON ADMISSIBILITY OF CHILD WITNESS IN VIEW OF INDIAN ADMINISTRATION OF JUSTICE SYSTEM**

Written by *Indumathi M J M J\** & *Dr. Rangaswamy D Nayak\*\**

*\* Assistant Professor, Vidyavardhaka Law College, Mysuru*

*\*\* Assistant Professor, Guide, KSLU Navanagar Hubballi*

---

### **ABSTRACT**

Children have increasingly served as witnesses in the criminal, civil and family courts. In this article, ideas for future research on child witnesses are discussed in relation to three themes. Children's ability to provide accurate testimony emotional trauma likely to be experienced by child witnesses, and the perceived credibility of child testimony. The purpose is to provide background information on some legal issues involving children testifying in court including the accuracy and psychological impact of child testimony. The goal is to reduce the secondary traumatization of and long term consequences for children providing testimony about violence they have experienced or witnessed. Even in this article, the criteria employed by the court in assessing a child's competency to testify are discussed. And research into the effect on children's testimony of limitations of memory, and of suggestibility, susceptibility to external influence emotional arousal and long delay.

**Keywords:** Administration of Justice, Child, child Witness, Competency, Credibility and Admissibility

## INTRODUCTION

The witness is a prime source of evidence in judicial proceedings. A witness is a person who gives testimony or evidence before any judicial institution. A child witness is the one who at the time of giving testimony is below the age of eighteen years. The law in India recognizes that the child is a competent witness. A witness is said to be competent when there is nothing in the law that prevents him from appearing in court and giving evidence.

A witness is said to be competent when there is nothing in law to prevent him from being sworn and examined if he wishes to give evidence.<sup>1</sup> The tendency of modern legislative progress, discriminating between competency and credibility has operated to remove former grounds of exclusion, and to admit to the witness box all persons from whom even a grain of truth can be gleaned, leaving it to the court to attach to their demeanor, deportment under cross examination, motives to speak or hide the truth, means of knowledge, power of memory, and other tests, by which the value of their statements can be ascertained.<sup>2</sup>

## INDIAN ADMINISTRATION OF JUSTICE SYSTEM AND CHILD WITNESS

Administration of justice means justice according to law. The function of the judiciary is to protect and enforce the rights of the individuals and to punish wrong-doers. This function is called the administration of justice. To adjudicate the rights and duties of the individuals on the basis of the rule laid down by the state is administration of justice. Salmond defines administration of justice as the maintenance of right within a political community by means of the physical force of the state. But it is not the force of the state alone that secures the obedience to law. In the administration of justice civil-criminal the judge has to enforce the law the function of the judge is to sift the evidence and ascertain the true state of facts and then to determine the rule of law by which those facts are governed.<sup>3</sup>

---

<sup>1</sup> Best 125 and 183: Taylor 1381 Phipson 7<sup>th</sup> Ed. 443

<sup>2</sup> Warren's law studies, vol. II p. 110

<sup>3</sup> Dr. S.R. Myneni Jurisprudence legal theory 1<sup>st</sup> edition 2001 published by Asia Law House

Evaluating evidence and rendering decisions is a great responsibility in criminal cases. The credibility of any witness, who gives evidence as to the facts either for the prosecution or the defense is material to the issue. A party can only prove facts relevant to his case and it is only the party, on whom the burden lies, is bound to prove the facts. Where a special intent is of the essence of the offence, the special intent must be proved so that proof of a different intent will not suffice. Therefore, a witness is a person who has first-hand information about the Happening of an event.<sup>4</sup>

## CONCEPT OF COMPETENT WITNESS

Ascertaining what facts are relevant and are to be proved, and also on whom the burden of proof lies, the next question that arises is how to place this evidence before the court. It is by means of witnesses and documents. Even in the case of documents, except their contents, their genuineness will have to be proved through witnesses.<sup>5</sup> In order to judge the credibility of the witnesses, the court is not confined only to the way in which the witnesses have deposed or to the demeanor of witnesses, but it open to it to look into the surrounding circumstances as well as the probabilities, so that it may be able to form a correct idea of the trustworthiness of the witnesses.<sup>6</sup>

The competency of a person to testify as a witness is a condition precedent to the administration to him of an oath or affirmation. The court is at liberty to test the capacity of a witness to depose by putting proper questions. It has to ascertain in the best way it can whether from the extent of his intellectual capacity and understanding he is able to give a rational account of what he has seen or heard on a particular occasion. If a person of tender years can satisfy those requirements his competency as a witness is established<sup>7</sup>. 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, extreme old age, and disease whether of body and mind, or any other cause of the same kind.<sup>8</sup>

---

<sup>4</sup> V.K Diwan, "Law Relating to Sexual Offence and Rape" p.186 ,( India Law House, New Delhi, 2013

<sup>5</sup> Vepa p sarathi's law of Evidence 7<sup>th</sup> Edition published by Eastern Book co.

<sup>6</sup> C.D Field's Law of Evidence 5<sup>th</sup> volume, Published by law publishes Allahabad.

<sup>7</sup> *Purna Chandra khandra v state* AIR 1959 cal.306at p.308: 1959 C.L.J 142:1959 60 CR.L.J 584

<sup>8</sup> Sec.118 Who may testify- Indian Evidence Act

Admissibility of evidence is not solely dependent on competency of witnesses. A witness may be competent within sec 118 yet his evidence may be inadmissible if he states his opinions or beliefs instead of facts within his knowledge or gives hearsay evidence.<sup>9</sup>

Under of the sec 5 of the Oaths Act all witnesses are to take Oaths or affirmation. The provision added to sec 5 by Act 39 of 1939, says that Sec 5 and 6 the oaths Act shall not apply to a child witness under twelve years of age. Since the insertion of sec 342A in the cr.p.c an

Accused has an option to give evidence for the defense and in such a case he should be given oath.<sup>10</sup>

## **COMPETENCY AND CREDIBILITY OF A CHILD WITNESS**

A more reasonable rule has been adopted and the competency of children is now regulated not by their age, but by the degree of understanding which they appear to possess.<sup>11</sup> A child may be a competent witness to give evidence in court if it appears that she/he can understand the questions put to him/her and give rational answers thereto.<sup>12</sup>

No precise age is fixed by law, within which children are absolutely excluded from giving evidence on the presumption that they have not sufficient understanding. Neither can any precise rule be laid down respecting the degree of intelligence and knowledge which will render a child a competent witness. In all questions of this kind much ever depend upon the good sense and discretion of the Judge.<sup>13</sup>

The important consideration when a Judge has to decide whether a child should properly be sworn, is whether the child has a sufficient appreciation of the solemnity of the accession and the added responsibility to tell the truth which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct.<sup>14</sup>

---

<sup>9</sup> *Magan v R* 1946 N 173

<sup>10</sup> Sec 5 of Oath Act 1939

<sup>11</sup> I. Phill.E 4, 10<sup>th</sup> ed.8 quoted in *Q.E v. Maru* 10a 207,211

<sup>12</sup> *Jalwanti lodhin v. state*, 1953 p.246:32p217:1953 CRLJ 1344.

<sup>13</sup> *R v Braiser* 1779 *Lea* 199 followed in *Kashi nath pandey v E* 1942 c 214

<sup>14</sup> *R v Hayes* (1977) 2 *All. E. R* 288 at p.291

Some cases have held that before a child of tender years is actually examined on any question bearing upon the res gestae, the court must form its opinion as to his or her competency to depose and should therefore test the witness's capacity to understand and give rational and his capacity to understand the difference between truth and falsehood by appropriate questions.<sup>15</sup>

The true rule appears to have been stated in *Wheeler v U S*<sup>16</sup> where Brewer J said:-

“The decision of this question (whether the child witness has sufficient intelligence,) preliminarily rests with the trial judge, who sees the proposed witness, notices his manners, his apparent possession or lack of intelligence and may resort to any examination which will tend to disclose his capacity and intelligence, as well as his understanding of the obligation of Oath. As many of these matters cannot be photographed into record, the decision of the trial judge will be disturbed on review, unless from that which is preserved, it is clear that he was erroneous.”

Although a preliminary examination is not obligatory for the purpose of ascertaining the child's capacity to understand and give rational answers, the court should always question the witness whenever it seems desirable that it should be done. The mere fact that the court did not interrogate the witness before his examination does not invalidate the trial.<sup>17</sup> The great importance of such preliminary examination to test the intelligence of a child witness and the desirability of recording that such a test had in fact been made have been emphasized in a few cases. It may turn out in the course of examination that the test has been fallacious and in such a case it is always open to the judge to say that he cannot accept the evidence. There is no obligation to make on the record any endorsement as to the child's capacity.<sup>18</sup> It is now well settled that the decision on the question whether the child witness has sufficient intelligence primarily rests with the Trial Judge.<sup>19</sup>

---

<sup>15</sup> *Shk Fakir v. R* 11 CWN 51:4 CrLJ 412

<sup>16</sup> *Wheeler v U S* 159 US 523

<sup>17</sup> *R v Krishna A* 1940 c 182

<sup>18</sup> *Panchu v. R* 66 IC 73 : 3 PLT 649

<sup>19</sup> *Santosh Mandal v. state* 1983 Cr. L J 773 at p. 776 (cal)

## **CONCEPT OF VOIRE DIRE**

An infant may be sworn in a criminal prosecution provided such infant appears on strict examination by the court to possess a sufficient knowledge of the nature and consequences of an oath, in other words a court has to ascertain from the answers to the questions propounded to such a witness whether he appreciates the danger and impiety of falsehood.<sup>20</sup> The only cases in which Oath or affirmation should not be administered are cases in which it clearly appears that the witness does not understand the moral obligation of an Oath or affirmation or the consequences of giving false evidence. If the judge deliberately refrains from administering affirmation on the ground that the child cannot understand its nature, the deposition will be admissible.<sup>21</sup>

## **EFFECTS OF OMISSION TO ADMINISTER OATH OR AFFIRMATION**

Judicial opinion was not unanimous as to whether 13 sec Oaths Act which cures the omission to administer oath or affirmation applies only to cases of omission due to accident or negligence, or also to deliberate omission. Cases of deliberate omission generally arise when a judge is of opinion that a child of tender years or a witness belonging to a backward community although capable of understanding the duty of speaking the truth does not appreciate the religious or moral obligation of an Oath. In some cases it was held that omission includes both deliberate and accidental.<sup>22</sup> On the other hand, it has been held in some other decisions that the competency of a witness under sec 118 of the Evidence Act and his capacity to understand the obligation of an Oath may not be and are not co-extensive<sup>23</sup>

## **CONCLUSION**

It is necessary to show a clear distinction between competence and compellability, It has been established that every person is a competent witness in any judicial proceeding and it is shown clearly that every compellable witness is a competent witness to give evidence. On the other

---

<sup>20</sup> *Nafar v. R* 18 CWN 147

<sup>21</sup> *R v. Campbell* 1956 2 All ER 27

<sup>22</sup> *Rameshwar v s A*1952 SC 54

<sup>23</sup> *Kusha Yamaji Sutar v E* 5 Bom LR 551



hand, it has been established that it is not every competent witness that is compellable. A compellable witness is consequently not at liberty to refuse to attend court or judicial proceedings merely because the evidence he is expected to give is privileged.

He must attend the proceedings and claim his privilege there. It is only when the court or the tribunal upholds the privilege that his presence in court may be excused or he may be allowed not to give particular evidence or not to tender a document. In a criminal trial, a child will be competent provided he or she can understand the question he's asked and can give understandable answers to them.

## REFERENCE

1. Chief Justice M.Monir's Principles and Digest of the law of Evidence New Edition 2 Volumes. Published by The University Book Agency Allahabad.
2. Sarkar's law of Evidence 12<sup>th</sup> Edition Published by S.C Sarkar and sons (pvt) ltd.
3. C.D Field's law of Evidence 11<sup>th</sup> Edition Published by Law Publishers Allahabad.
4. Phipson on Evidence 13<sup>th</sup> Edition Published by Sweet and Maxwell
5. Vepa.P. Sarthi's law of Evidence 4<sup>th</sup> Edition Published by Eastern Book co.
6. Dr. S. R Myneni Jurisprudence (legal Theory) 1<sup>st</sup> Edition 2001 Published by Asia law House Hyderabad.