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We would like to thank our Authors who contributed their works and the readers of Lawgic Stratum for their enormous trust and support.



## A CRITICAL OVERVIEW ON CHILD AND DUMB WITNESSES: COMPETENCY AND CREDIBILITY

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### ABSTRACT:

The final decision of the courts is based on the testimony witness. A witness is a person who appears before a court to give evidence and he/she has been considered as a key player in the pursuit of justice delivery and the Court without his assistance could not sum up with a judicious decision. While doing so they sustain lots of grief and pain but never give up. We cannot ignore the service provided by the Witness in the justice administration system. Section 118 of the Indian Evidence Act<sup>3</sup> is the principal legislation that deals with the competency of the witness. As per this section, a child is competent as a witness provided the court should satisfy that the child is capable of understanding the questions put to them and answers to such questions rationally. As per Section 119 of the Indian Evidence Act<sup>4</sup> act, a dumb witness is also a competent witness and his evidence is admissible in a court of law. To make the testimony of a dumb witness competent the court should satisfy that such witness understands the nature of an oath. Apart from the Indian Evidence Act, there are also some other acts that deal with child witnesses such as the Juvenile Justice (Care and Protection of Children) Act, and the Protection of Children from Sexual Offences Act, 2012. This paper discusses the meaning and competency of a witness, meaning of dumb witness, competency and credibility of child and dumb witnesses, child witness under POCSO act, evidence of child witness without oath, corroboration of child witness with the help of case laws.

Keywords: Child witness, Dumb witness, POCSO act

### INTRODUCTION:

Testimony of Witnesses is considered as key evidence in any court proceedings because it helps the court to decide the case. One of such witnesses is a child witness. A child witness is a person who is below the age of

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<sup>3</sup> <http://devgan.in/iea/section/118/>

<sup>4</sup> <https://devgan.in/iea/section/119/>



18 years at the time of giving testimony. The law in India did not mention the age limit to be a child witness. So, any child who satisfies the test of competency i.e., capable of understanding the questions put to them and answers to such questions rationally can be a witness. The juvenile justice act is the primary legislation in India pertaining to children but there are no specific guidelines related to questioning of children as a witness. However, it discusses a child-friendly approach which means police should not be in their uniform while dealing with children, interviews of children by special juvenile police unit who are well trained to deal sensitively with children. The Court should evaluate the evidence of child witnesses more carefully because they are generally prone to tutoring, torturing and coercing, etc. A dumb witness is a witness who is unable to speak. In the olden days, dumb persons are treated like idiots and were not competent to give evidence. But now due to the advancement of science, it is evident that dumb persons are more intelligent than other persons. According to sec 119 of the Indian evidence act<sup>2</sup> a dumb witness i.e. who is unable to speak is competent to give evidence in any other manner in which he or she can make it intelligible as by signs and gestures or by writing if he/she is literate and such evidence is treated as oral evidence.

#### **MEANING AND COMPETENCY OF WITNESS:**

"Competency of the Witness" means the capacity or ability or qualification to give evidence in the Court of Law. A witness is a person who appears before a court to give evidence. The witness is considered as key evidence in any court proceedings because it is through witnessing the evidence is placed before the court to decide the case. So it should be very clear as to certain issues like who is competent as a witness and how the credibility of such a witness is tested. In this regard sec 118 of the Indian evidence<sup>1</sup> act deals with the competency of the witness which is a precondition to be a witness before the Court. A witness is a competent person when he cannot be prevented from appearing in Court and giving evidence. Under this section, all persons are competent to testify provided the court is of opinion that he is able to understand the questions put to him and give a rational answer to those questions. And sec 119<sup>2</sup> deals with persons unable to communicate verbally.

#### **COMPETENCY OF CHILD WITNESS AND DUMB WITNESS:**

A child is allowed to testify if the court is satisfied that the child is capable of understanding the questions put to them and answers to such questions rationally. No absolute age limit is fixed by law because it is not possible to lay down any specific rules regarding the degree of intelligence which will render a child a



competent witness. So it is the discretion of the court to decide whether the child is capable of understanding the question put to him and answers rationally.

In the case *Suresh v. the State of U. P*<sup>5</sup>, it was held in this case that testimony from a 5-year-old child shall also be admissible provided that the child is able to understand the question of the given issue. Hence, it is clear that there is no minimum required age for a child to be competent as a witness in a Court of law. In *NivruttiPandurangKokate v. State of Maharashtra*<sup>6</sup>, the Supreme Court dealing with the child witness has observed that the testimony of a child witness should be highly scrutinized so as to make sure that the child did not give his/her evidence under any situation of undue influence or coercion and should corroborate other given evidence too. In *BabyKandayanathil v. State of Kerala*<sup>7</sup>, the judge has put some preliminary questions to each of the witnesses and being satisfied that they were answering confidently without fear and intelligently, proceeded to record the evidence.

In *RatansinhDalsukhbhaiNayak v State of Gujarat*<sup>8</sup>, the Supreme Court, in this case, has observed that the decision on the question that whether the child witness can understand the question is primarily rests with the trial Judge who notices the child's behavior and said Judge can resort to any test which helps him to disclose the capacity and intelligence and understanding of the obligation of an oath. In *HimmatSukhadeoWahurwagh v. State of Maharashtra*<sup>9</sup>, the Supreme Court held that it must be revealed from the evidence of the child that he/she was able to discern between right and wrong. The court may ascertain the competency of the child as a witness by asking questions and if for any other reasons no such questions had been put, it may be gathered from his evidence that he fully understood what he was saying and whether he stood discredited in facing a stiff cross-examination. The dumb witness is competent as a witness provided they must be able to understand the nature of the act and the court should satisfy that oath can be administered to them and should be done so. The Court while dealing with dumb witness should take the assistance of a special educator or interpretation in recording such statements and should be video graphed. In a case, *State of Rajasthan v. Darshan Singh*<sup>10</sup>, Darshan murdered Kaku Singh. Geeta wife of Kaku who is deaf and dumb was the witness and on her testimony, Darshan was sentenced to life imprisonment and it was held that the dumb person is also a competent witness. The Court should satisfy that oath can be administered to them and should be done and is

<sup>5</sup>Suresh v. the State of U.P , 1981 AIR 1122

<sup>6</sup>NivruttiPandurangKokate v. State of Maharashtra ,AIR 2008 SC 1460

<sup>7</sup> Baby Kandayanathil v. State of Kerala ,AIR 1992 SC 2275

<sup>8</sup>RatansinhDalsukhbhaiNayak v State of Gujarat,(2004) 1 SCC 64

<sup>9</sup> HimmatSukhadeoWahurwagh v. State of Maharashtra,(2009) 6 SCC 712).

<sup>10</sup>State of Rajasthan v. DarshanSingh(2012(4) Supreme 72)



competent to give evidence in any other manner in which he or she can make it intelligible as by signs and gestures or by writing if he/she is literate and such evidence is treated as oral evidence. The Court can take the assistance of an interpreter. If an interpreter is provided, he should be administered on oath and should be a person of the same surrounding who has no interest in that case.

#### **VOIR DIRE TEST:**

The word 'voir dire' derived from the Anglo-Norman phrase that refers to 'Oath to tell the truth'

VOIR DIRE TEST means a preliminary examination that determines the competency of a witness. Under this test, in order to know the competency of the child witness, the court puts certain questions before the child which have no connection with the case for example their name, father's name, school name, etc. If it appears to the court that the child is not being able to understand the basic questions like his/her name, age, about his school, then he /she cannot be subjected to further examination because the testimony of an incompetent witness holds no legal value.

#### **CHILD WITNESS UNDER POCSO ACT:**

The Protection of Children from Sexual Offences (POCSO) Act, 2012 has laid down specific guidelines regarding interviewing children as witnesses. Some of the few important guidelines are as follows:

1. All children should be approached with extreme sensitivity and in a friendly manner.
2. Try to build a rapport with the child by ensuring that you are a helping person who could be trained in counseling, to be present with the child to reduce stress and trauma.
3. Maintain a relaxed, safe, neutral, child-friendly environment, including allowing for them to be done at home. Do not express disbelief, disgust, surprise, or other emotional reactions to descriptions of the abuse.
4. Avoid touching the child and respect the child's personal space.
5. Avoid asking the child a direct question.

The SC recently emphasized the need of having special public prosecutors in dealing with the cases registered under the POCSO Act, 2012. The Hon'ble Court observed that to deal with child witness in sexual harassment cases prosecutors must be well trained



### EVIDENCE OF CHILD WITNESS WITHOUT OATH:

According to section 4 of the Oaths Act, 1969<sup>11</sup> all witnesses should take oaths or affirmation provided in sections 4 and Section 5 of the above-mentioned act<sup>12</sup> of the Act shall not apply to a child witness who is under twelve years of age. The proviso to section 4 of the Oaths Act, 1969 must be read along with section 118 of the Indian Evidence Act and section 7 of the Oaths Act<sup>13</sup>. An omission to administer an oath, even to an adult, goes only to the credibility of the witness and not his competency. Section 118 of the Indian evidence act<sup>1</sup> is the principal legislation that deals with the competency of the witness. Every witness is competent unless the court considers he is prevented from understanding the questions put to him, or from giving rational answers, because of tender years, extreme old age, and disease whether of body or mind or any other cause of the same kind. Therefore, unless the Oaths Act adds additional grounds of incompetency, it is evident that section 118 of the Evidence Act must prevail. The Oaths Act does not deal with competency.

*Bhagwania v. State of Rajasthan, in this case, the court*<sup>14</sup> held that an omission to administer an oath under the Oaths Act, 1969 does not affect the admissibility of evidence unless the judge considers the witness to be otherwise incompetent. Further in *Ghewar Ram v. State of Rajasthan*,<sup>15</sup> it was held that once the child witness is found competent, his inability to take or understand oath or omission in administering it neither invalidates the proceedings nor renders his evidence inadmissible.

### CREDIBILITY AND ADMISSIBILITY OF CHILD WITNESS AND DUMB WITNESS:

The credibility of child witnesses has been questioned in various instances. The credibility of a child witness depends on the facts and circumstances of each case. In most cases, the child witness is admissible as evidence in the court, especially in criminal cases. In the case, *Panchhi v. State of U.P.*<sup>16</sup>, the Supreme Court held that the evidence of a child witness would always stand irretrievably stigmatized. No law says that even if it is found that the evidence of a child witness is reliable, it should be rejected but the law says it should be done more carefully and with greater circumspection, while evaluating that evidence of a child witness. It is because a child is an easy prey to tutoring. In the case *Mangoo v. State of M.P.*<sup>17</sup>, the Supreme Court while dealing with the evidence of a child observed that for sure there will be scope to tutor the child but only on that ground we

<sup>11</sup><https://indiankanoon.org/doc/224196/>

<sup>12</sup><https://indiankanoon.org/doc/1109814/>

<sup>13</sup><https://indiankanoon.org/doc/141027/>

<sup>14</sup>*Bhagwania v. State of Rajasthan* 2001 CriLJ 3719

<sup>15</sup>*Ghewar Ram v. State of Rajasthan* 2001 Cr.L.J. 4460

<sup>16</sup>*Panchhi v. State of U.P.* 1998 SCC (Cri) 1561]

<sup>17</sup>*Mangoo v. State of M.P.* (2008) 8 SCC 283





should not conclude that the child witness must have been tutored. The court must determine carefully whether the child has been tutored or not. It can be identified by examining the evidence and from the contents thereof as to whether there are any chances of being tutored.

In the case *Assam v. Mafzuddin Ahmed*<sup>18</sup>, it was held by the Supreme Court that it is dangerous to rely on the sole testimony of the child witness as it is not available immediately after the occurrence of the incident before there was any possibility of coaching and tutoring him. In many cases, it was held that evidence by a dumb witness is credible and admissible in a court of law. In the case *Lakhan vs. emperor*<sup>19</sup>, where the witness had taken a religious vow of silence, and the magistrate took his evidence in writing in open Court when he could not get it in any other way without forcing the witness to break his religious vow, it was held that the witness should be deemed unable to speak within the meaning of this section and the course adopted by the magistrate was correct.

#### **NEED FOR CORROBORATION:**

Despite affirmations by the Supreme Court in various cases and instances, the terms of section 114 of the Indian Evidence Act<sup>20</sup> demand a certain amount of corroboration of witness testimonies

Children are the most dangerous witnesses because due to tender age they often imagine things and mistake dreams for reality. They are well capable of cramming things very easily and reproducing them. They repeat what they have heard from others as to their knowledge. They are generally influenced by the hope of reward, fear of punishment and by the desire for notoriety. So it is unsafe to rely on the uncorroborated testimony of a child.

In the case *GaganKanojia v. State of Punjab*<sup>21</sup>, the Supreme Court held that if the tutored part can be separated from the untutored part then in such a case, the remaining untutored part is valuable and valid. For corroboration, the untutored part can be taken into consideration in the case of a hostile witness. In *Arbind Singh v. State of Bihar*<sup>22</sup>, The Supreme Court observed that it is well settled that a child witness is prone to tutoring and hence the court should look for corroboration particularly when the evidence betrays traces of tutoring

<sup>18</sup> Assam v. Mafzuddin Ahmed 1983 AIR 275

<sup>19</sup> Lakhan vs. emperor AIR 1936 All 788

<sup>20</sup> <https://indiankanoon.org/doc/731516/>

<sup>21</sup> GaganKanojia v. State of Punjab (2006) 13 SCC 516

<sup>22</sup> Arbind Singh v. State of Bihar 1994 SCC (Cri) 1418



**CONCLUSION:**

Just like any other witness, a child witness and dumb witness are also a witness. The law in India did not mention any age limit to be a child witness. Repeatedly various courts in India have reaffirmed that child witness testimonies are also valid evidence and the same is admissible in a Court of law. The question on which his competency depends is whether he can understand the question rationally that are put to him. The evidence of the child is required to be evaluated carefully because they are generally prone to tutoring, torturing and coercing, etc. So, without corroboration, it will be dangerous to rely on the testimony of the child witness. Various courts in India have held that dumb witness testimonies are also valid evidence and the same is admissible in a Court of law.