Child Witness

(By Justice (R) Shabbir Ahmed)

A child as a witness has been looked upon, with different viewpoints. One has to see its place in a judicial proceeding. Dr. Hans Gross, who has been described by many as the father of criminal research, has set out in his book, criminal investigation, 1934 Ed. Pages 61-62, the nature and character of evidence given by children. He has said that 'in one sense the best witnesses are children of seven to ten years of age as at that time love and hatred, ambitious and hypocrisy, consideration of religion, rank, etc. are yet unknown to them. He has, however, pointed out the great drawbacks which have made men distrustful of the capacity of children. They are apt to say much more from imagination than they actually known. To quote his words, "the child, as yet devoid of principles, places great faith in the words of grown up people; so, if, a grown up person brings influence to bear on it, especially some times after the occurrence, the child will imagine it has really seen what it has been led to believe'.

Determination of a right or a liability is the subject-matter of a judicial inquiry, and ascertainment of a fact is an essential element of a right or a liability, which is regulated by a set of rules called the Qanun-e-Shahadat. The search of truth is not the main matter before a judge, imparting justice is the primary thing. Hence legal rules of judicial investigation though based on ordinary rules of reasoning, put limitations on the free process of reasoning. The object of the Qanun-e-Shahadat is to provide rules for regulating an inquiry into disputed questions of facts. Is this true? And if it is so, what then? These are the two questions of belief and inference, which haunt the mind of a Judge in deciding the questions of facts. The Qanun-e-Shahadat, however good it

may be, is not the best guide to find out the truth. The best guide of a Judge are his natural sagacity, common sense and knowledge of the human world.

The Qanun-e-Shahadat, no where uses the term “Child Witness”. It is a synonymous term for a witness of tender age. But the case law and the common language seem to be agreed on the equivalent use of both the terms. There is no special provision for a “child witness” in the Qanun-e-Shahadat. The subject has been included as a species of the general provision of “the competency of witnesses”. Article 3 of Qanun-e-Shahadat defines the competency of a witness and deals with as to “who may testify”. The article clearly and unequivocally lays down that all persons shall be competent to testify excepting those, whom the court considers that they are prevented from understanding the questions put to them or from giving rational answers to them by tender years, etc. Thus there is a limited incompetency in case of children incapable of giving evidence. Every witness is to be judged from two points: his competency and credibility. The same rule applies to a child witness. If you look at the wording of the article it is evident that as all persons of tender years are also competent to testify unless the court considers them to be incompetent owing to the want of the power of understanding the questions put to them or giving rational answers to them. There is no legal presumption as regards the incompetency of a child witness. It is also clear from this provision of the article that the question of competency of a child has been wholly left to the consideration of a presiding judge. Though the law does not prohibit the right of objection, still the final verdict as regards the competency of a child witness rests with the judge and not with the parties. The competency of a child witness depends upon its intellectual capacity and his rational mode of giving his testimony. If the judge is satisfied on these points he can consider him to be a competent witness.

Then comes the question of the test of a child witness. The law does not lay down any specific procedure for the test. It is a collateral question of fact, dependent upon the consideration of a judge. This collateral question may be solved by a preliminary examination of the child and by recording the finding by the judge. The case law is not unanimous on these issues. The question of the "test" involves two issues, first the compulsion or non-compulsion of the preliminary inquiry and secondly the recording of the same. The Qanun-e-Shahadat does not specifically provide for any preliminary test or its procedure. However, there is diverse view, one that during the actual examination if the court finds the evidence of a child witness to be unintelligible it can dispense with its testimony for want of competency. The second view is that the judge should make a preliminary inquiry by putting some questions to the child and should also make a record of that and if satisfied as regards its competency then start with the actual examination. But in view of the provision of Article 3 there is no legal binding on the presiding judge either to make any preliminary enquiry or to record it. It has been laid down that though it is not a legal binding still it should be followed as a rule of prudence, and that seems to be the correct view. Mere tender years or age is not at all a disqualifying factor for a child witness. It is the power of understanding the question and its rational way of answering which decides the competency of a child. If the court is not satisfied as to the child's capacity to depose it should decline to examine him.

At times the competency is mingled with the question of oath. It has been held in several cases that administration of oath or its non-administration effects the credibility of a witness and not his competency. An omission to administer an oath, even to an adult goes only to credibility of the witness and not to his competency. The question of competency is dealt with in Article 3 of Qanun-e-Shahadat. The Oath Act

does not deal with competency and under Section 13 of that Act "omission to take oath does not affect the admissibility of the evidence". As regards the administration of an oath to a cild Sections 5, 6 & 13 of Oaths Act are noteworthy. Several questions of dispute and differences have been set at rest owing to the proviso to Section 5 of the Oaths Act. To administer oath to a child witness depends upon its power of understanding the sanctity of an oath and the spiritual or temporal consequences of speaking a lie. The proviso to Section 5 of the Oaths Act exempts a child witness below 12 from the provisions of that Act. If it does not understand the nature of an oath or affirmation. Section 13 of the Oaths Act provides that proceedings are not invalidated nor evidence is made inadmissible, by omission of oath or irregularity. A child may not understand the nature of an oath and its consequences still it is a competent witness if it satisfies the pre-requisites mentioned in Article 3 of Qanun-eShahadat and its evidence is admissible in law. After dealing with the question of competency of a child witness we may turn to its credibility. There is no fixed rule as to the credit to be assigned to an evidence of a child. Children have good memories but no conscience. Mistakes and discrepancies are ascribed to their innocence and failure to understand and undue importance is given at times to well-taught lessons. Every child witness can not be discredited as untrustworthy, for each case depends upon its particular facts and circumstances. The real tests for either accepting or rejecting the testimony of a child witness are: how consistent the story related by him is with itself, how it stands the test of cross-examination and how far it fits in with the rest of evidence and circumstances of the case. It has been held there that "evidence substantially true not infrequently assumes too perfect a form and children not infrequently get a story by heart, which is none the less a true story".

The author of Sarkar's Law of Evidence (15th Edition, 1999) has cautioned the court while accepting the testimony of a child witness "that court should examine the evidence of child witness with care and caution bearing in mind the susceptibility and possible immaturity of the child. A child witness may or may not be fully matured".

A passage may also be quoted from Dr. Kenny, "the outlines of criminal law," P. 386, Downing professor of the laws of England, Cambridge University: "children are most untrustworthy class of witnesses, for, when of a tender age, as our common experience teaches us, they often mistake dreams for reality, repeat glibly as of their own knowledge what they have heard from others, and are greatly influenced by fear of punishment, by hope of reward, and desire of notoriety.

There is no more dangerous witness than young children. Any mistake or discrepancies in their statements are ascribed to innocence or failure to understand, and undue weight is often given to what is merely a well taught lesson. Children have good memories and no conscience. They are easily taught stories and live in a world of make believe so that they often become convinced that they have really seen the imaginary incident which they have been taught to relate (Manni Vs. Emperor AIR 1930 Oudh 406).

The evidence of children is notoriously dangerous unless immediately available and received before any possibility of coaching. There should be closer scrutiny of the evidence of child witnesses before the same is accepted by a court of law. (Jalwanti Lothin Vs. State AIR 1953 Patna 246) The rational for this is that it is common experience that a child witness is most susceptible to tutoring. Both on account of fear and inducement, he can be made to depose about a thing which he has not seen and once having been tutored, he goes on repeating in a parrot like manner, which he has been tutored to state. (Muhammad Feroze Vs. The State SBLR 2002 Sindh 781).

Competency is a question regulated by the rules of the evidence. It is in the decision of the credibility of a child witness that the natural sagacity and experience of human life of a judge are put to a test. It has been rightly said that “the best shoes in the world will not make a man walk, nor the best glasses make him see; in just the same way the best rules of evidence will not help a judge to find out the truth”. A child is a thing of beauty but in the domain of judicial proceedings it is not always a source of joy.

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