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Competence of Child and Special Ability Witnesses

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Abstract

This research article addresses the legal standing of a child witness or special ability witness. A judicial case dealing with a child or special witness from Pakistan as well as other judicial systems is evaluated in detail to provide a holistic assessment of this issue. A detailed account from Pakistan Penal Code 1860, Majority Act 1875, Indian Evidence Act 1872, Queensland Evidence Act 1977 and Federal Rules of Evidence is provided on how different legal systems view the competence of child and special ability witnesses. The paper summarizes that people with special abilities are competent witnesses, and their testimony is acceptable in court. Therefore, an SOP must be created for treating such witnesses from the beginning of the case at the police station until its conclusion in court. Our procedural laws were created with the average person in mind, but it is necessary to increase their receptivity to the weaker members of society.

Key Words: Child Witness, Special Ability Witness, Pakistan Penal Code 1860, Voire Dire Test, Federal Rules of Evidence

Introduction

Criminals have no ethics and they wreck heaven at every opportunity. Crime has many facets but the most heinous and disgusting of its kind is in the likes of sexual and physical assault, harassment and killings committed against vulnerable segments of society i.e. children, persons suffering from speech and hearing impairment as well as persons suffering from physical and mental disabilities or congenital deformities (hereinafter called Special Ability Witnesses SAW). Crime is perpetuated against them for two reasons; firstly, they are considered soft targets owing to their fragile physical condition as they are not supposed to put any solid resistance. Secondly, it is believed that they may not lodge a complaint at the police station and prosecute the culprits. When we talk of children in the backdrop of the criminal justice system, two terms are used for them; "children in contact with the law" and "children in conflict with the law". The term "children in contact with the law" refers to those children who are either plaintiffs or defendants in a civil, family, guardian or rent petition, or succession petition. They may also be witnesses in a criminal or civil case. Whereas, when we talk of "children in conflict with the law" it refers to those children who are suspected or accused of

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committing an offence. This field of juvenile justice is very sensitive, as child rights violations are numerous. The response in the institutions is not always child-friendly. There is no denial to the fact that a witness plays a key role in the dispensation of justice. Innocence or guilt of an accused completely depends upon the evidence led by the witness in the prosecution of the allegations levelled. Hence, the evidence of a witness is considered the backbone of a criminal case. However, a witness has to cross certain thresholds before acceptance of his evidence. Obviously, relevancy and admissibility are the litmus test of the evaluation of evidence of a witness but they are applied after he has crossed the Rubicon of the test of competency.

Basically, evidence of a witness is filtered through three stages in the course of its appreciation i.e. the competency of a witness; the admissibility of his evidence; and the evidentiary value. These principles further the concept of fair trial and play a distinct role in achieving the goal of just decision in the cases.

Competence to testify addresses the core issue of the ability of the witness to give evidence in court. The object of keeping this check is not to take evidence which cannot be relied upon at the stage of the decision of a case. The competence of a witness is the threshold requirement. Generally speaking, witnesses are supposed to have the competence to testify. However, as regards children and adult special ability witnesses, the party challenging the competence of a witness, after the declaration of the court, may be asked to prove it otherwise.

The rule of admissibility determines what evidence may be received in the court. Evidence may be inadmissible if it falls under an exclusionary rule like hearsay evidence, confessional statement before the police, or privileged communication etc. The evidentiary value of the evidence is to be assessed by the judge. If the witness is competent and the evidence given is admissible, the next thing to be determined by the judge is its evidentiary value. A judge has to weigh the probative force of the evidence while keeping in view demeanour and consistency with other evidence.

In this article, the principles of determination of competence of a witness are discussed in the light of national and international statutes as well as judgments of the superior courts of the national and foreign jurisdictions.

"Disable" or "Differently Able" Societal Aspect

It is observed in common parlance that people, intentionally or unintentionally; degrade persons deprived of any common ability. The words like "Deaf and Dumb", "Blind", "Handicapped" and "Disabled" are often used to address such people, without realizing their bitterness. Such expressions tend to demoralize or even otherwise degrade a person. It is not the appropriate use of words. Seen in the backdrop of the exceptional abilities conferred upon them, they can appropriately be addressed as "special ability persons". The truth of the reality is

that they are "especially able" in a way other human beings are not. If they are deprived of a common ability they may be blessed with other senses sharper than ordinary human beings. As such harsh and bitter expressions like “Deaf and Dumb”, “Blind”, “Handicapped” or “Disabled” can well be substituted by a decent, appropriate and more humane expression like “special ability person/witness”.

Definitions

Definition of Child

Under the United Nations Convention on the Rights of Child (UNCRC), a child means “every human being below the age of 18 years, unless under the law applicable to the child majority is attained earlier”

[2]. Generally speaking, a child acquires the status of an adult upon reaching 18 years of age.

The term child is widely used in all forms of national legislation, ranging from acts of the parliament regarding child rights, criminal laws and child welfare or child protection laws. The additional terms ‘minor’, ‘youth’, or ‘adolescent’ are not universally defined, and the specific use of the terms may vary by context or different provisions may specify any age limit.

The age of a child is defined in different laws of our country in different ways. There are various federal and provincial statutes that provide protection to children. They have defined children differently; a few of them are as under:

Constitution of the Islamic Republic of Pakistan

The Constitution of the Islamic Republic of Pakistan has not defined the term child but has a few special provisions related to them. Article 11[3] prohibits child labour under 14 years of age, and under Article 25-A[4], children up to the age of 16 years are entitled to free and compulsory education. Furthermore, the constitution while talking about the equality of the people empowered the legislature to enact laws that positively discriminate on the basis of age or gender, to protect the rights of women and children in Article 25(3)[5].

[2] Graham, A., Powell, M.A. and Taylor, N., 2015. Ethical research involving children: Encouraging reflexive engagement in research with children and young people. Children & Society, 29(5), pp.331-343.

[3] Article 11, Constitution of Islamic Republic of Pakistan, 1973

[4] Article 25-A, Constitution of Islam Republic of Pakistan, 1973

[5] Article 25(3), Constitution of Islam Republic of Pakistan, 1973

Pakistan Penal Code 1860

Pakistan Penal Code 1860 (PPC) mentions the minimum age of criminal responsibility as under:

"Sec. 82[6]: Nothing is an offence, which is done by a child under 10 years of age."

Then there is another provision of immunity:

"Sec. 83[7]: Nothing is an offence which is done by a child above 10 years of age and under 14 years, who has not attained sufficient maturity of understanding to judge the nature and consequences of his conduct on that occasion."

There is a provision for immunity to the guardian:

"Sec. 89[8]: Nothing is an offence which is done in good faith for the benefit of a person under 12 years of age by the guardian or another person having lawful charge of that person".

Section 328-A[9] is about cruelty to children but it has not specified the age.

"Section 364-A[10]: kidnapping or abducting a person under the age of 14 years makes the offences punishable in order that such person may be murdered or subjected to the grievous hurt, or slavery, or to the lust of any person or may be so disposed of as to be put in danger of being murdered or subjected to grievous hurt, or slavery, or to the lust of any person."

"Section 366-A[11]: Procuration of a Minor girl. Inducing any minor girl under 18 years of age to go from any place or to do any act with the intent that such minor girl may be or knowing that it is likely that she will be forced or seduced to illicit intercourse, is an offence."

"Section 337(V)[12]: defines rape, as making consent irrelevant when the victim is under 16 years of age."

"Section 377 (A)[13]: Sexual Abuse. Whoever, employs, uses, forces, persuades, induces, entices, or coerces any person to engage in or assist any other person to engage in fondling, stroking, caressing, exhibitionism, voyeurism or any obscene or sexually explicit conduct or simulation of such conduct either independently or in conjunction with other acts, with or without consent, where the age of the person is less than 18 years, is said to commit the offence of sexual abuse."

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[6] Section 82, Pakistan Penal Code,1860

[7] Section 83, Pakistan Penal Code,1860

[8] Section 89, Pakistan Penal Code,1860

[9] Section 328-A, Pakistan Penal Code,1860

[10] Section 364-A, Pakistan Penal Code,1860

[11] Section 366-A, Pakistan Penal Code,1860

[12] Section 337(V), Pakistan Penal Code,1860

[13] Section 337(A), Pakistan Penal Code,1860

Majority Act, 1875

"Section 3 of the Majority Act provides that a person domiciled in Pakistan shall be deemed to have attained his majority when completes his age of 18 years and not before."[14]

Disability

Pakistan announced its first "National Policy on the issue of disability" in 2002 which defined disability as: "A person with disabilities means who, on account of injury, disease, or congenital deformity, is handicapped in undertaking any gainful profession or employment, and includes persons who are visually impaired, hearing impaired, and physically and mentally disabled"[15]

Special Witness

The term special witness is not specifically defined in any substantive or procedural law of the land. However, Queensland, named after Queen Victoria but in fact an Australian state, has an express provision in its Evidence Act to define the term.

"Queensland Evidence Act 1977: *Section 21A of the Queensland Evidence Act provides a definition of the special witness as under:*

Special Witness Means

(a) A child under 16 years; or

(b) A person who, in the court's opinion—

(i) Would, as a result of a mental, intellectual or physical impairment or a relevant matter, be likely to be disadvantaged as a witness; or

(ii) Would be likely to suffer severe emotional trauma; or

(iii) Would be likely to be so intimidated as to be disadvantaged as a witness; if required to give evidence in accordance with the usual rules and practice of the court; or

(c) A person who is to give evidence about the commission of a serious criminal offence committed by a criminal organization or a participant in a criminal organization; or

(d) A person—

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[14] The Majority Act, 1875 (XI of 1875).

[15] Ahmed, M., & Khan, A. B. (2011). The Policies of United Nations and their Implementation: A comparative study of policy implementation in Pakistan. Journal of Political Studies. https://link.gale.com/apps/doc/A260588581/AONE?u=anon~2bff0868&sid=googleScholar&xid=444096ae

(i) Against whom domestic violence has been or is alleged to have been committed by another person; and

(ii) Who is to give evidence about the commission of an offence by the other person?

This definition is exhaustive and encompasses the term 'Special Witness'."

Competence of a Witness

Article 3 of the Qunan-e-Shahat 1984[16] relates to the competence of a witness, It reads as under:

"Who may 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, extreme old age, disease, whether of body or mind or any other cause of the same kind."

If the above definition of a competent witness is minutely seen, it sets prerequisites for any person to be a witness in the court. There is no exclusion clause, so any person who may be a child, an old and fragile person, or a sick person, bodily or mentally, if qualifies above conditions can be a witness in the court. It provides that "a person suffering from physical or mental illness, or of extremely old age, or of tender years, if capable of understanding the questions put to him, and giving rational answers thereto, is a competent witness."

Indian Evidence Act 1872[17]

Like Qanoon-e-Shahadat Order 1984, this act also doesn't define specifically a special witness, but it lays down general qualifications for a witness as are laid down in QSO 1984.

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Explanation – A lunatic is not incompetent to testify unless he is prevented by his Lunacy from understanding the questions put to him and giving rational answers to them."

The Indian Law of Evidence shares much in common with the Qanoon-e-Shahadat Order 1984 of Pakistan, especially in terms of underlying assumptions, basic concepts and terminology. So one can find somewhat similar definitions in them.

[16] Chapter II, Article 3, Qanoon-e-Shahadat Order 1984.

[17] Sec.118 Indian Evidence Act 1872

Federal Rules of Evidence[18]

The Federal Rules of Evidence govern the introduction and presentation of evidence at civil and criminal trials in United States federal trial courts. It also doesn't specifically define the term but lays down general guidelines about the criteria and competency of a witness. Rules 601 and 602 are relevant.

"Rule 601: Competency to Testify in General[19]

Every person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law governs the witness's competency regarding a claim or defence for which state law supplies the rule of decision."

"Rule 602: Need for Personal Knowledge[20]

A witness may testify to a matter only if the evidence is introduced sufficiently to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703."

Status of a Child and Special Ability Witness through the Prism of History

The status of a child and special ability witness underwent a huge transition with the afflux of time. Historically evidence of children and special ability witnesses used to be received with suspicion.[21] In the old days, the justice system used to be stringent and it would not accept evidence of children below a certain age because it was believed that they generally lacked comprehension of a reasonable grown-

[18] Federal Rules of Evidence 2021 Edition

[19] Article VI – Witnesses, Federal Rules of Evidence 2021 Edition

[20] Article VI – Witnesses, Federal Rules of Evidence 2021 Edition

[21] 1 Myers, supra note 50, 2.2, at 65

up man.[22] The witnesses whose physical disabilities seriously interfered with their communication skills were ruled incompetent to testify at common law.[23]

Blackstone had said, "*A man who is born deaf, dumb, and blind, is looked upon by the law in the same state with an idiot; he being supposed incapable of any understanding, as wanting all those senses which furnish the human mind with ideas."*[24]

Ramsfield said, *"The testimony of a witness deaf from childhood, and unable to understand, or express herself intelligibly, has been rejected."*[25]

Similarly, an accused who was suffering from hearing and speech impairment by birth was presumed to be an "idiot" and thus incompetent to stand trial unless he demonstrated"[26] use of understanding.[27]

Greenleaf[28] had stated more than 150 years ago: "A deaf-and-dumb person, in the times of less accurate knowledge, was treated as presumably an imbecile and therefore as incompetent unless shown to be sufficiently intelligent."

However, courts in England, more than two hundred years ago, declared that there is no age below which a person should be deemed incompetent to testify,[29]

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[22] The point at which a child's communication becomes "reliable" is greatly debated. Some researchers suggest that very young children can be misled more easily than older children and therefore claim the testimony of very young children is inherently unreliable. See Stephen J. Ceci & Maggie Bruck, Suggestibility of the Child Witness: A Historical Review and Synthesis, 113 Psychol. Bull. 403 (1993)(collecting research on the suggestibility of child witnesses). On the other hand, a considerable body of research demonstrates children have a remarkable degree of resistance to suggestion. See, e.g., Gail S. Goodman & Allison Clarke-Stewart, Suggestibility in Children's Testimony: Implications for Sexual Abuse Investigations, in The Suggestibility of Children's Recollections 92 (John Doris ed., 1990). Other studies provide techniques for improving accurate recall in children's testimony. See Karen J. Saywitz et al., Effects of Cognitive Interviewing and Practice on Children's Recall Performance, 77 J. Applied Psychol. 744 (1992).

[23] 1 Simon Greenleaf, A Treatise on the Law of Evidence 370c (John Wigmore ed., 16th ed., Little Brown 1899) (1842)

[24] 1 Blackstone, Commentaries on the Laws of England 304 (David S. Berkowitz & Samuel E. Thorne eds., 1978) (1769).

[25] Sidney Phipson, Phipson on Evidence 1515, at 582 (Michael Argyle ed., 10th ed. 1963)

[26] State v. Butler, 138 N.W. 383, 384 (Iowa 1912)(hearing and speech impaired witness with "sufficient mental capacity to be able to communicate his ideas by signs or in writing" is competent); State v. Howard, 24 S.W. 41, 45 (Mo. 1893)(presumption that "a person deaf and dumb from birth should be deemed an idiot" is not the "modern" practice).

[27] 1 M. Hale, Pleas of the Crown 34 (P.R. Glazebrook ed., 1971) (1736). It is important to note that even when courts were disposed to exclude the testimony of disabled witnesses, they recognized that a witness who could show an ability to communicate would be allowed to testify. Id. However, the burden was on the proponent of the testimony to overcome the presumption of incompetence.

[28] 1 Greenleaf, supra note 37, 370c, at 511

[29] Rex v. Brasier, 1 Leach 199, 168 Eng. Rep. 202 (1770). Professor Myers cites Rex v. Brasier as the first case to create a presumption of competency for child witnesses. 1 Myers, supra note 50, 2.2, at 67. More than 100 years ago, the United States Supreme Court abolished the presumption of

and even if a child who has comprehension to understand and testify, should be permitted to be examined in the court.[30] Thus, it transformed a view rendering testimony of the child witnesses as permissible subject to the touchstone of probative value attached to it.[31] Similarly, special ability witnesses are declared competent on account of their comprehension and ability to communicate.

"The ancient presumption of incompetence for hearing and speech impaired witnesses has long been abolished. Courts now treat hearing and speech impaired witnesses as they do any other witness, allowing them to testify and requiring competence to be demonstrated only when there is at least prima facie evidence of incompetence."[32]

The situation has changed as no such ouster exists today. Laws and rules of procedure are amended and made flexible to admit evidence of the child and vulnerable witnesses. The doctrine prevalent during the Blackstone days is generally relaxed and such witnesses are now considered competent to testify. No court in the US prohibits evidence of a child or a deaf and dumb witness provided he has sufficient understanding to comprehend the question put to him and give a rationale answer thereto.[33] The court in "Kley v. Abell"[34] stated succinctly: "Those cases dealing with the testimony of witnesses unable to speak or hear have uniformly held that they are not thereby deemed incompetent merely because of that disability". An explanation of the modern test for determining competency was given in "Bugg v. Town" of Hulka.[35]

The doctrine pronounced in the days of Blackstone has been relaxed and special persons, suffering from hearing and speech impairment, are accepted as competent witnesses. The admissibility of testimony of witnesses with mental or

incompetency, upholding the testimonial competence of a five-year-old. Wheeler v. United States, 159 U.S. 523 (1895). See also People v. Draper, 389 N.W.2d 89 (Mich. Ct. App. 1986)(three-year-old victim competent to testify). For a list of cases in which very young children have been found competent to testify, see 1 Myers, supra note 50, 2.1, at 60 n.2.

[30] For example, Federal Rules of Evidence Rule 601 creates a presumption that all witnesses are competent. Based on a literal reading of this rule, some courts allow all witnesses to testify as long as the testimony is relevant and not unduly prejudicial

[31] See State v. Dwyer, 440 N.W.2d 344 (Wis. 1989), cited in 1 Myers, supra note 50, 2.4, at 70 n.48

[32] 2 John H. Wigmore, Evidence in Trials at Common Law 498, at 706 (Chadbourn rev. 1979).

[33] For a list of cases, see 2 Wigmore, supra note 42, 498, at 706; Jay M. Zitter, Annotation, Deaf-Mute As Witness, 50 A.L.R. 4th 1188 (1986)(citing cases). 30 483 S.W. 2d 625. 627 (Mo. Ct. App. 197

[34] 483 S.W. 2d 625. 627 (Mo. Ct. App. 1972)

[35] 84 SO. 387 (Miss. 1920).

developmental disabilities[36] has been similarly analyzed by creating a presumption of competence.[37]

The rationale for permitting special ability witnesses i.e. persons suffering from speech and hearing impairment as well as those suffering from physical and mental disabilities is bluntly explained by Wigmore:[38] "Here is a person on the

[36] The medical definition of a developmental disability is "a category of cognitive, emotional, or physical handicapping conditions that appear in infancy or childhood and are related directly to abnormal sensory or motor development, maturation or function; the resultant impairment involves a failure or delays in progressing through the normal developmental milestones of childhood." Stedman's Medical Dictionary 442 (25th ed. 1990). Autism, cerebral palsy, and mental retardation are examples of developmental disabilities. Children with Autism 278 (Michael D. Powers ed., 1989). Developmental disability is defined in the Americans with Disabilities Act as a "severe, chronic disability resulting from an impairment which occurred before the individual reached the age of 22 and which significantly limits the person's functional ability." 42 U.S.C. 6001 (Supp. 1994).

[37] As explained by Wigmore: In earlier times, all persons afflicted with marks of feeble-mindedness ("idiots"), or natal mental defects, and even deaf-mutes or the mutes, were presumed to be incapable of testifying, until the contrary was shown. Today this presumption has disappeared. 2 Wigmore, supra note 42, 498, at 706 (footnotes omitted). The Federal Rules of Evidence follow Wigmore's view, eliminating the common law rule of presumed incompetency of disabled witnesses and creating a presumption of competency for all witnesses. Fed. R. Evid. 601. See McCormick on Evidence 62, at 156-57 (Edward W. Cleary ed., 3d ed., 1984). Many states have adopted some version of this rule. See United States v. Gutman, 725 F.2d 417, 420 (7th Cir. 1984)(undisputed findings that a person had serious mental illness for one year prior to trial was not in itself sufficient to require a competency hearing when the trial court concluded the witness was able to tell the truth and understand the oath); State v. Watkins, 857 P.2d 300 (Wash. Ct. App. 1993)(trial court not required to make sua sponte competency determination of developmentally disabled witness); People v. Davis, 585 N.E.2d 214, 222 (Ill. App. Ct. 1992)(Down's Syndrome does not disqualify a witness); People v. Alexander, 724 P.2d 1304 (Colo. 1986)(slightly retarded hearing and speech impaired witness presumed competent); Ingram v. State, 463 N.E.2d 483 (Ind. Ct. App. 1984)(court not required to assess sua sponte competency of mentally retarded witness); People v. Spencer, 457 N.E.2d 473 (Ill. App. Ct. 1983)(witnesses with mental impairments benefit from a presumption of competence which the opponent must rebut); Mickens v. State, 428 So. 2d 202 (Ala. Crim. App. 1983)(court may swear witness if no objection). Cf. Sizemore v. State, 416 S.E.2d 500 (Ga. 1992)(mentally retarded children not exempted from competency challenge because child competency statute applies only to children who do not understand an oath); State v. Kinney, 519 N.E.2d 1386 (Ohio Ct. App. 1987)(court required to test competency when it was called into question); Darnell v. Commonwealth, 558 S.W.2d 590 (Ky. 1977)(trial court may have to conduct an inquiry on its own if there are "manifest" signs of incompetence).

[38] 2 Wigmore, supra note 42, 501, at 709. See also 1 John E.B. Myers, Evidence in Child Abuse and Neglect Cases 2.3, at 69 (1992). A small minority of states maintain a presumption that persons of unsound minds are incompetent to testify. See, e.g., State v. Dighera, 617 S.W.2d 524, 526 (Mo. Ct. App. 1981) ("a person confined to a mental institution under lawful process or adjudicated as mentally ill is absolutely incompetent as a witness"). In such cases, the burden of overcoming this presumption is placed on the proponent of the witness. Id. In Dighera, the witness was visually impaired as well as hearing and speech impaired. She communicated by finger-spelling through a translator. The court determined through examination of her records at the institution that she was admitted to the institution for shelter, not for treatment of a mental illness. Because she was able to

stand; perhaps he is a total imbecile, in manner, but perhaps also there will be a gleam of sense here and there in his story. The jury had better be given the opportunity of disregarding the evident nonsense and of accepting such sense as may appear. There is usually abundant evidence ready at hand to discredit him when he is truly an imbecile or suffers from a dangerous delusion. It is simpler and safer to let the jury perform the process of measuring the impeached testimony and of sifting out whatever traces of truth may seem to be contained in it."

Succinctly, speaking laws and rules have been made humane over the passage of time and the gradual civilization of the human race. Those segments of society considered unacceptable in the justice system at a certain point in time are now being heard and considered seriously. As the awareness grows man is making space for others. Better sense is prevailing and things are being judged in their true perspective rather than with a biased approach and jaundiced eye. Laws are generally amended and "special ability" as well as "vulnerable witnesses" are included in the justice system and afforded audience in the courts.

Testimonial Competence: A Threshold Requirement

A witness appearing in court must be a competent witness. Competency is the condition precedent to the administration of the oath. It is sine-qua-non for the court to issue a certificate of competency in favour of such a witness before recording his statement. The court has to ascertain whether, from the witness's intellectual capacity, he is capable of understanding the questions put to him and giving a rational and intelligent account of what he has seen, heard or done at a particular moment.

The general rule to determine the competency of a witness is prescribed in Article 3 of QSO, 1984[39] which narrates that *"all persons are competent to record their evidence unless the court considers that they are prevented from understanding the questions, and giving rational answers thereto."* Similar provisions exist in Indian Evidence Act.[40] So it is all about understanding and comprehension of the question and then communication of the answer by the witness which makes him or her competent to testify. However, there is an exception through which a person otherwise qualifying above prerequisites can still be declared as not competent,[41] i.e if he has been convicted by a court for perjury or giving false evidence. The object of the law is not to disqualify a person but rather to allow him to testify as a witness. Resultantly, a person though

"notice, recollect and communicate" the necessary events, she was found competent to testify. Id. at 527

[39] Article 3, Qanoon-e-Shahadat Order, 1984.

[40] Sec.118 Indian Evidence Act 1872.

[41] Proviso to Article 3, Qanoon-e-Shahadat Order, 1984.

otherwise convicted for perjury or giving false evidence can still be recorded as a witness if he has satisfied the court that he has repented and mended his ways.

Another check for the competency of a witness through article 3 ibid is *"qualifications prescribed by the injunctions of Islam as laid down in the Holy Quran and Sunnah i.e."Tazkiya-tul-Shahood"*[42]*. It is a word of wider and broader import, but in order to understand its meaning with reference to the topic under discussion, it can be said that a person who abstains from major sins all through his life is said to fulfil the requirements of "Tazkiya-tul-Shahood".* It is very hard to pass such a declaration in favour of any person and the court may face serious challenges in this regard. Being cognizant of serious challenges faced by the court, in finding such a person, the legislature has made it easy that if no such witness is available the court shall record evidence of any witness who is aware of the facts of the case and capable of communicating it to the court.

Supreme Court of Pakistan in *"Abdullah Shah Case"*[43] held that a child is a competent witness if the court had passed a declaration in his favour that he understood questions put to him and then gave rational answers there too.

In another case titled *"State v. Farman Hussain"*[44] Supreme Court of Pakistan held that a child is a competent witness provided the trial court is satisfied with his competency to testify. It was further held that the quality of the evidence weighs heavy over the number of witnesses brought to the court.

Supreme Court of Pakistan in "Muhammad Mansha's Case"[45] held that evidence of a special ability witness can be relied upon and conviction can be warranted provided the trial court has determined the comprehension of the witness through a preliminary examination. It was further held to be a prerequisite for recording evidence of a special ability witness. The trial court was directed to also determine the competence of the interpreter before assigning him the responsibility of interpretation. Moreover, the record of the proceedings was also required to reflect the inquiry conducted by the court.

Lahore High Court, Lahore in *"Muhammad Darvaish's Case"*[46] held that "all the witnesses were competent to testify unless the court considered that they were prevented from understanding the questions put to them and giving their rational answers." A person could be held incompetent to testify only if the court arrived at a definite conclusion that he could neither understand a question nor could give its rational answer.

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[42] Ibid 40

[43] Abdullah Shah v. State, reported in 1986 SCMIR 852.

[44] Farman Hussain v. State reported in PLD 1995 SC 1, 21.

[45] Muhammad Mansha v. State, reported in 2019 SCMR 64.

[46] Muhammad Darvaish & Others v The State reported in 2019 PCr. LJ 1086.

However, the court must record its findings of satisfaction of competency of the witness before proceeding further in the matter. The court must declare unequivocal terms that the witness possesses the requisite amount of intelligence to understand the questions put to him and has the ability to communicate his answers to the court.[47]

The Canada Evidence Act[48] provides that*: "if the mental capacity of a proposed witness, aged 14 years or older, was challenged, the court had to conduct an inquiry to determine whether the person understood the nature of an oath or a solemn affirmation and whether the person was able to communicate the evidence. Section 16(3) of that Act provided that such a person who did not understand the nature of an oath or a solemn affirmation but who was able to communicate the evidence could, notwithstanding any statutory requirement for an oath or solemn affirmation, testify on promising to tell the truth."*

There was a time in Canada when a child witness or an adult suffering from a mental ailment, not understanding the oath and obligation to speak the truth, was not permitted to give evidence. However, with amendments and insertion of Section 16(3)[49] provided for competence based simply on the ability to communicate the evidence and a promise, to tell the truth.

Supreme Court of Canada in the case "R v DAI"[50] further clarified the implications of the above provisions by observing that sec.16(3) of the Canada Evidence Act RSC 1985 imposed two conditions for the testimonial competence of adults with mental disabilities. Firstly, the ability of the witness to communicate the evidence; and secondly, his promise to tell the truth. Inquiries into the witness's understanding of the nature of the obligation, that the promise imposed, was neither necessary nor appropriate. The court had further observed that "it was appropriate to question the witness on her ability, to tell the truth in concrete factual circumstances, in order to determine if she could communicate the evidence. It was also appropriate to ask the witness whether she in fact promised to tell the truth. However, Sec.16(3) did not require that an adult with mental disabilities demonstrate an understanding of the nature of the truth in abstract or an appreciation of the moral and religious concepts associated with truth-telling."

The Canadian Parliament enacted Sec. 16(3) to lower the standard of competency set prior to 1987 for children and adults with mental disabilities, who can otherwise communicate their evidence. In another historical case "R v Bannerman"[51] the practice of examining child witnesses on their religious beliefs

[47] Darshan Singh v State of Rajasthan 2006 Cr.LJ 3008.
[48] Section 16(1) of the Canada Evidence Act RSC 1985
[49] Section 16(3) of the Canada Evidence Act RSC 1985.
[50] R v DAI [2012] 2 LRC 633.
[51] R v Bannerman (1966) 48 CR 110.

and philosophical meaning of truth was rejected. As awareness of sexual abuse of children and adults with disabilities grew it was believed that if strict interpretations and rules are not relaxed a huge number of such cases shall not be prosecuted and criminals would go scot-free, as most of such witnesses would not qualify for stringent litmus test set as a pre-requisition to be a competent witness.

The above discussion, in the light of substantive laws as well as judgments of the superior courts, has made it abundantly clear that a child witness and a special-ability person are competent witnesses. They can give evidence in court. However, prior to their examination, the court has to conduct its competency test. Such competency of a witness is determined through the "voir dire test".

Voir Dire Test

Before recording evidence of a witness the court is to issue a competency certificate. There is a competency test to be performed by the court exclusively on its own. He or she is not a witness of either of the parties till the certificate of competency is issued by the court. Such a certificate is issued by the court through "voir dire test" which means *"preliminary examination to determine the competency of a witness or juror."*[52]

It is a formal expression of a prospective juror under oath to determine suitability for jury service or of a prospective witness under oath to determine competence to give testimony.[53]

The history and etymology of the word suggest its Anglo-French origin, which literally means *'to speak the truth'. "The process through which potential jurors from the venire are questioned by either the judge or a lawyer to determine their suitability for jury service. Also, the preliminary questioning of witnesses (especially experts) to determine their competence to testify."*

There was a time in France when judges would start court proceedings after a solemn affirmation called 'voir dire'. A judge would affirm that he would transact his judicial business honestly, impartially and in a fair manner.

In the case of a special ability witness, a minor or a person suffering from delirium or any other mental ailment has to undergo a preliminary test. The court is to ask simple questions concerning the ordinary life of such a minor or his family members to judge his or her comprehension and ability to answer. It is pertinent to mention that no question regarding the facts of the case could be put to a witness at this stage. 'Voir dire test' can be conducted in the form of simple and general questions put to a witness about his everyday routine. It is to judge the comprehension and memory of a witness, who is even otherwise minor or suffering

[52] Merriam Webster Dictionary

[53] "voir dire". American Heritage Dictionary of the English Language (5th ed.). Houghton Mifflin Harcourt. 2019. Retrieved January 8, 2019. Anglo-Norman, to speak the truth.

from any mental ailment. The power of communication is another aspect to be looked into by the court. Propriety and prudence demand the inclusion of a willing person as a witness in the process of justice rather than excluding him. The court should not refuse a fitness certificate to a witness unless he is absolutely unable to understand the questions put to him and give rational answers, thereto. The special ability of a person can be examined with the help of a number of facilitation techniques frequently applied by developed jurisdictions across the globe.

The court has to judge the mental capacity of a witness, minor or a person suffering from a mental ailment, at the time of occurrence, as well as at the time of deposition in the court. So to achieve this objective, questions asked during 'voir dire test' must relate to the age of the witness at the relevant time of the occurrence. However, no question regarding the disputed matter or occurrence can be asked from a witness at this stage. For if the witness is going to be examined with regard to an occurrence taken place two years prior to the date of examination in the court, the judge during "voir dire test" must ask general and simple questions relating to his everyday life of two years before. For example, if it is a case of a child witness of 10 years of age appearing in the court to give evidence of an occurrence which had taken place two years before, he can be asked any of the following questions.

1. Hello, how are you?
2. What is your favourite sport?
3. What does your father/mother do?
4. How many brothers/sisters do you have?
5. Who is your best friend?
6. Do you go to school?
7. In which school were you studying two years before?
8. In which class were you at that time?
9. Who was your class teacher /best friend then?
10. What is your favourite subject?

If from the above template questions 2/3 questions are answered by a child, it is a good case of passing a positive declaration of competency in his/her favour. There is absolutely no need to go on to conduct an inquiry in ascertaining the truth or falsehood of the answers given by the witness. The only thing to be seen is the witness's ability to comprehend general questions and then communicate the answers. There is a slight memory test also involved to adjudge whether the child remembers anything else at the time of the occurrence. Having said it, the principle of inclusion should rule the roost and the permission to be examined should be the order of the day unless and until it is a case of absolutely no comprehension and no communication. A special ability witness, if required, must be supported during "Voir Dire Test" as well as while evidence recording through modern facilitation techniques.

It is also the duty of the court to ascertain whether the witness understands the nature of the oath and the obligation to speak the truth. If a witness understands the obligation to speak the truth, it is sufficient for the court to declare him fit for recording his evidence. The questions put to the witness and the answers given shall be part of the file, followed by a brief order from a judge in the form of a declaration of competency as a witness. It is important to mention that the "Voir Dire Test" is to be conducted without any oath or affirmation. Moreover, no parties or their counsels can be given access to the witness at this stage. Voir dire test is to be conducted independently by the judge.

No cross-examination by the defence counsel is permitted during the "voir dire test". The witness cannot be exposed to the opposing counsel during the preliminary examination by the court. It is an exclusive interview of the witness conducted by the court. Such an interview must be in the form of simple questions about the daily life of the witness. No question concerning occurrence can be asked at this stage.

Supreme Court of Canada in the case "R v DAI"[54] passed certain guidelines which are very important for a court conducting a voir dire test. These guidelines are equally useful for the courts dealing with special-ability persons in this part of the world.

"The following observations may be useful while applying the voir dire test:

First, the voir dire on the competence of a proposed witness is an independent inquiry: it may not be combined with a voir dire on other issues, such as the admissibility of the proposed witness's out-of-court statements.

Second, although the voir dire should be brief, it is preferable to hear all available relevant evidence that can be reasonably considered before preventing a witness to testify. A witness should not be found incompetent too hastily.

Third, the primary source of evidence for a witness's competence is the witness herself. Her examination should be permitted. Questioning an adult with mental disabilities requires consideration and accommodation for her particular needs; questions should be phrased patiently in a clear, simple manner.

Fourth, the members of the proposed witness's surroundings who are personally familiar with her are those who best understand her everyday situation. They may be called fact witnesses to provide evidence of her development.

Fifth, expert evidence may be adduced if it meets the criteria for admissibility, but preference should always be given to expert witnesses who have had personal and regular contact with the proposed witness.

[54] R v DAI [2012] 2 LRC 633.

Sixth, the trial judge must make two inquiries during the voir dire on competence: (a) does the proposed witness understands the nature of an oath or affirmation and (b) can she communicate the evidence?

Seventh, the second inquiry into the witness's ability to communicate the evidence requires the trial judge to explore in a general way whether she can relate concrete events by understanding and responding to questions. It may be useful to ask if she can differentiate between true and false everyday factual statements.

Finally, the witness testifies under oath or affirmation if she passes both parts of the test and on promising to tell the truth if she passes the second part only."

Recording evidence of a special witness is a subject of extreme, care, caution and personal attention of the court. Recording evidence of such a witness, while fulfilling the prerequisites of procedural law necessitates the actual involvement of the court.

Conclusion

Rule of law is quintessential for an orderly progressive human society. Seeds of patriotism and loyalty are sown in those societies where there is equality before the law. Nobody is allowed to usurp or snatch. The state acts as a guardian and protector of the rights and liberties of the masses. The state stands with the poor and oppressed. It shields and shelters its people against any design or intent of violence, crime or cruelty. It protects rights and liberties. It is the responsibility of the state to provide protection to the victim and witness. If vulnerable segments of society find it hard to survive and find themselves stranded in the hapless condition in case of any unfortunate eventuality then their trust and confidence, in the state and its institutions, is badly shaken. There is a dire need to establish a victim-centric response system at all levels. From the victim's first interaction with the police to the prosecution and the legal setup, all must be sensitive to their needs and requirements. No child or special ability witness must shy away from the court or the police station fearing he may not be heard or taken seriously. Special-ability persons are competent witnesses and their evidence is admissible under the law. However, there is a need to develop an SOP for handling such witnesses from the inception of the proceedings at the police station till its culmination at the court. Our procedural laws are drafted keeping in view a normal human being there is a need to make them more responsive to the vulnerable segments of society.