CHAPTER XIII

TESTIMONY OF CHILDREN

THE GENERAL rule of competency of children to testify is that they are competent witnesses. The procedural statutes of almost all countries have a provision to this effect. In fact, Hans Gross goes to the extent of saying that in one sense the best witnesses are children between seven and ten years of age.

> Love and hatred, ambition and hypocrisy, considerations of religion and rank, of social position and fortune, are as yet unknown to them; it is impossible for preconceived opinions, nervous irritation or long experience, to lead them to form erroneous impressions; the mind of the child is but a mirror that reflects accurately and clearly what is found before it.[1]

Though, as he says in the above paragraph, children lack motivation to speak lie, yet he cautions against reliance on their testimony because of their lack of understanding and power of perception. Kenny quotes :

> Children are a most untrustworthy class of witnesses, for when of a tender age as our common sense experience teaches us, they often mistake dreams for reality, repeat glibly as of their own knowledge what they heard from others, and are greatly influenced by fear of punishment, by hope of reward and a desire of notoriety.[2]

1. *Criminal Investigation* 54 (1962).
2. K.C. Inderwrick, quoted by Kenny, *Outlines of Criminal Law* 386 (1920).

Similarly, according to Stevenson :

> It is when we make castles in the air and personate the leading character in our romances that we return to the spirit of our first years. In all the child's world of dim sensations, play is all in all. 'Making believe' is the gist of his whole life, and he cannot so much as take a walk except in character...One thing, at least comes very clearly out of all these considerations, that whatever we are to expect at the hands of children, it should not be any peddling exactitude about matters of fact. They walk in a vain show, and among mists and rainbows; they are passionate after dreams and unconcerned about realities; speech is a difficult art not wholly learned; and there is nothing in their own tastes or purposes to teach them what we mean by abstract truthfulness....Show us a miserable unbreeched human entity whose whole profession it is to take a tub for a fortified town and a shaving-brush for the deadly stiletto, and who passes three fourths of his time in a dream and the rest in open self-deception and we expect him to be as nice upon a matter of fact as a scientific expert bearing evidence ! Upon my heart, I think it less than decent.[3]

The law reflects the conflict of factors for and against the testimony of children.

The Indian law on the subject is laid down in section 118 of the Indian Evidence Act, 1872 which says :

> 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 these questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.
>
> 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.

Thus, the only test of competency is that the child should not be prevented from understanding the questions put to him or from giving rational answers to those questions by reason of his tender age. Tender age does not, *ipso facto* render a child incompetent to give testimony. In fact no precise age is fixed by law within which children are absolutely excluded from giving evidence on the presumption that they have not sufficient

3. R.L. Stevenson, 'Child's Play' (in *Virginibus Puerisque*) quoted in II *Wigmore on Evidence* 601 (3rd ed. 1940).

understanding. As observed by the High Court in *Inder Singh* v. *State of Pepsu*:[4]

> The competency of a child to give evidence is not regulated by the age but the degree of understanding he appears to possess, and no fixed rule can be laid down as to the credit that should be assigned to his testimony....[5]

The provisions relating to oath do not apply to a witness who is a child under twelve years of age, and the court or person having authority to examine such witness is of opinion that, though the witness understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation. The absence of an oath or affirmation does not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth.[6]

The position is clear that the age as such does not affect the competency of a child witness or admissibility of the evidence. This is so even though no oath has been administered to the child.[7] In fact, according to section 13 of the Oaths Act, omission to administer any oath even to an adult will not render the evidence inadmissible or affect the obligation of a witness to state the truth.

The difficult questions, however, are with regard to the credibility or weight to be attached to the evidence of a child witness, and corroboration of such a witness. Taking up the question of corroboration first, it was stated by the Privy Council in the *Esa* case[8] that the law does not require corroboration of the testimony of a child. However, the court uttered the following words of caution :

> Once there is admissible evidence a court can act upon it; corroboration, unless required by statute, goes only to the weight and value of the evidence. It is a sound rule in practice not to act on the uncorroborated evidence of a child, whether sworn or unsworn, but this is a rule of prudence and not of law.[9]

The point was elaborated by the Supreme Court in the *Rameshwar* case wherein it was observed :

4. A.I.R. 1953 Pepsu 193.
5. *Ibid.*
6. Proviso to s. 4, Oaths Act, 1969 (corresponding to s. 5 of the 1873 Act).
7. *Rameshwar* v. *State of Rajasthan*, A.I.R. 1952 S.C. 54; *Mohamed Sugal Esa* v. *The King*, A.I.R. 1946 P.C. 3, *S.G. Mohite* v. *Maharashtra*, A.I.R. 1973 S.C. 55.
8. *Supra* note 7.
9. *Id.* at 6.

> The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge, and in jury cases, must find place in the charge, before a conviction without corroboration can be sustained. The tender years of the child, coupled with other circumstances appearing in the case, such, for example, as its demeanour, unlikelihood of tutoring and so forth, may render corroboration unnecessary but that is question of fact in every case. The only rule of law is that this rule of prudence must be present to the mind of the judge or the jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand.[10]

What the Supreme Court says in the above quoted paragraph also applies to credibility or weight to be attached to the testimony of a child. This depends upon such factors as tender years, consistency of the evidence, the demeanour of the witness, likelihood of bias, *etc.* The Privy Council stated in *Bhojraj* v. *Sitaram*:[11]

> Evidence substantially true not infrequently assumes too perfect a form and witnesses, such as children, not infrequently get a story by heart which is nonetheless a true story. The real tests are how consistent the story is with itself, how it stands the test of cross-examination, how far it fits in with the rest of evidence and the circumstances of the case.[12]

In *Inder Singh* v. *State of Pepsu*[13] the High Court observed :

> Obviously the question depends upon a number of circumstances, such as the possibility of tutoring, the consistency of the evidence, how far it stood the test of cross-examination and how far it fits in with the rest of the evidence.[14]

A few illustrative cases may be given here. In the *Inder Singh* case, a man was convicted under section 302 of the I.P.C. for murder of brother's wife on the testimony of two children aged 12 and 7 who were eye witnesses. The judge held that they were natural witnesses of the

10. *Id.* at 57.
11. A.I.R. 1936 P.C. 60.
12. *Id.* at 62.
13. *Supra* note 4.
14. *Id.* at 194.

occurrence and were not tutored. Also, they successfully stood the test of cross-examination. Similarly, in *Mohan Singh* v. *State of Punjab*[15] the evidence of eye witnesses to a murder, who were unsophisticated children aged between 10 and 14 at the time of the occurrence and who had no enmity with the accused, was considered to be sufficiently impressive to justify and support a conviction for murder.

In *Mst. Dato* v. *State*[16] the accused threw her two step daughters into the well, one being only three years of age got drowned and the other was taken out by persons who reached the place in good time. As soon as the child was taken out of the well and her shivering had stopped, she made a statement that she had been thrown into the well by her step-mother, the accused, and the fact was deposed by four independent witnesses, against whose testimony there was nothing to show that they were in any way inimical towards the accused or had made this statement falsely. It was held that the statement of the child witness could be rightly believed.

In *S.G. Mohite* v. *Maharashtra*[17] the only witness to the murder was a girl of 12 years of age. The trial judge had not considered it expedient to give her the oath, since according to him, she was not mature enough to understand the significance of the oath. Her evidence was, however, corroborated by others. Further, the High Court had found that her testimony was "natural and free from any material blemish in spite of a long, and...a gruelling cross-examination". The Supreme Court upheld the conviction of the accused in such circumstances.

A few cases on the other side are as follows. Where the witness, a boy of ten, had not told anyone of his experience until the morning following the night of the murder, when he talked to his father, little credit was attached to his statement.[18] Similarly, where conviction of the accused under section 302 I.P.C. was based on the sole evidence of a child eye witness of tender age and it appeared that the child did not disclose the identity of the accused soon enough till she was examined by police many days after the occurrence though she had many opportunities and besides, there were infirmities in her evidence, which was uncorroborated as regards the identification of the accused, it was held that it was unsafe to convict the accused.[19] In *Amar Singh* v.

15. A.I.R. 1965 Punj. 291.
16. A.I.R. 1955 N.U.C. (Punj.) 1048.
17. A.I.R. 1973 S.C. 55.
18. *Darpan Potdarin* v. *Emperor*, A.I.R. 1938 Pat. 153.
19. *Ghasi Ram Behra* v. *State*, (1962) I.L.R. Cut, 505.

The State,[20] the evidence of a boy four years and three months old was rejected by the court for want of corroboration since the child witness was prevented from understanding the questions put to him and the likelihood of tutoring him was not eliminated either.

The position with regard to the testimony of the children is substantially the same in England and the United States.

20. A.I.R. 1954 Punj. 282.