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RELEVANCY OF DUMB WITNESSES IN ORAL EVIDENCE

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CHAPTER 1: INTRODUCTION TO THE ORAL EVIDENCE

Evidence[2] is defined as all forms of declarations whether by oral or document which the court permits or calls for to be made earlier than it with the aid of witness in terms of under inquiry such statement are known as oral proof. All documents produced for the inspection of the courtroom's such documents are referred to as documentary evidence. Consequently, all neither statistics that are the concern count number of inquiry and are neither admitted nor are a challenge to judicial observe have to be proved by way of the manner of evidence.

Oral Evidence[3]: The meaning of expression "oral evidence" is given in conjunction with the definition of the term "evidence" in Sec 3. This primary a part of the provision which defines evidence cope up with oral evidence it says: - all of the statements which the court allows or calls for to be made before it by using witness in terms of the problem of fact beneath inquiry, such statements are known as oral evidence. Oral evidence is evidence that is confined to phrases spoken by way of the mouth.

The section is not very happily worded. Contents of documents may be proved with the aid of oral evidence under certain situations that is to mention when such proof in their content is admissible as secondary proof. That means it has to be corroborated with circumstantial evidence. The court simply cannot decide on the basis of oral evidence that means it possesses a less evidentiary value.

Its far rule of proof no longer considered one of technically but of substance that, in which written documents exist they will be produced as being the quality proof in their personal contents. Oral evidence can be shown in possession of oral evidence if credible and enough to

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[2] Section 3 of Indian Evidence Act 1872
[3] Section 59 of Indian Evidence Act 1872

prove a name through prescription. Wherein oral evidence is conflicting and where documentary evidence does not help in coming to a decisive end, the duly right direction is to see what are the admitted fact in case then the alleged words, which can be so effortlessly fallacious or misrepresented.

Oral evidence must be direct[4]: First degree of oral proof is that that is best to the thoughts is afforded via our very own sense, this being the direct evidence of the best nature. When a witness declaration is obtainable as a basis of evidence in reference to the truth said, the power of the inference relies upon on the opportunity of a fair accuracy at the a part of the witness. The vicariousness of visual sensation is the most funny and the maximum crucial. All people who has been pushed or crushed and has felt the blow will of different situation permit and the impulse be robust enough be convicted that he has been seen his assaulter and manner of the attack. But if the context or occasions show that the reference the witness is speaking from conjecture, from deduction, or from records concerning what become perceived by way of others, then the proof may be rejected. The testimony of people who noticed the pitiable circumstance of a young female in her in-legal guidelines domestic in which she met her death became held to be applicable. Doctrine of death announcement is enshrined in Sec.32 of the Act is an exception to this rule. As dying declaration is the announcement of someone who can't be referred to as a witness and cannot be cross examined.

All individuals shall be able to testify unless the court considers that they're prevented from knowledge the questions to put to them or from giving rational solutions to those questions via soft years, excessive antique age, sickness, whether or not of frame or mind, or another cause of the same type.

Who is able to be a witness? A capable witness is a person who can supply evidence in court. To put it in s less difficult manner, all man or woman are equipped to be a witness, except the courtroom take into account that they might having trouble of know-how the question given before them, and won't think rationally while answering the query, along with vintage folks, kids who's smooth years, a person who would possibly have intellectual or physical infection or

[4] Section 60 of Indian Evidence Act 1872

ailment so some other which could motive the identical kind which the courtroom assume she or he is not able, they're exceptions to provide proof in court.

However, a lunatic isn't always incompetent to testify, until he's prevented through his lunacy from information the questions placed to him and giving rational answers to them.

Section 118 of Evidence Act 1950, (hereinafter referred as **'the Act'**) stated the general rule that,

> *" all persons shall be competent to testify unless the court considers that they are prevented from understanding the questions to 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"*[5].

All grounds of incompetency have been swept away by using this section, below which competency of witnesses is the guideline and their incompetency is the exception. In civil or criminal complaints the husband or wife of a party is also a competent witness.

The only incompetence that the present Act acknowledges is incompetency from immature or faulty mind which may rise up from- infancy, idiocy, deafness, dumbness, lunacy, contamination, and so on. As to infancy, it is not a lot the age because the potential to recognize which is the determining component. No specific age limit can be given, as persons of the same age range in intellectual boom and their capacity to recognize the question and provide rational answers. The only test whether or not the witness has enough intelligence to depose or whether or not he can own expertise from his birth. Such capacities are everlasting. Deaf or dumb humans are incompetent if they are not able to recognize the question put to them or to speak their thoughts by means of signs or writings. A lunatic is incompetent to testify as a consequence of loss of reason; however, his competency can be restored in the course of a lucid language. A monomaniac might also depose as to other matters store the only. So, a drunkard may also become a capable witness after the disappearance of the outcomes of liquor[6].

[5] Section 118 of Indian Evidence Act 1872
[6] Banks v. Goodfellow, LR 5 QB 549; R. Hill, 2 Den 254

Where a person is suffering from incapacity, the judge may in a proper case postpone the hearing till its removal.[7] "The general rule is that the capacity of the person offered as a witness is presumed, i.e., to exclude a witness on the ground of mental or moral incapacity the existence of the incapacity must be made to appear. The sole test is whether the witness has sufficient intelligence to depose or whether he can appreciate the duty of speaking truth. Under Section 118, a child is competent to testify, if it can understand the questions put to it, and give rational answers thereto.[8]

A child of tender age can also be allowed to testify if he has intellectual capacity to understand the questions and give rational answers thereto.[9] Evidence of girl aged 8 years victim of rape was held liable; accused was convicted under sec. 376 of Indian Penal Code.[10]

A child witness having power to comprehend and understanding not being a lunatic is a competent witness.[11]

When the witness is not only teenager but also eye witness, his evidence has to be scrutinized with care and caution.[12]

Other kinds of parties to testify or to give oral evidence as witness are as follows:-

a) **Partisan Witness**: The evidence of partisan witness, who were out to entrap the accused but were not willing and guilty participators in the crime, would not be tainted, but it would be interested evidence which would require independent corroboration before acceptance. To convict an accused upon the uncorroborated evidence of such a person at whose instance a trap is laid by police is neither illegal nor imprudent, but inadvisable.

   In State v. Ram Chand Tolaram[13], the panchas whom the police take with themselves before going for a raid are not members of raiding party and therefore, their evidence does not require corroboration before acceptance. Merely because there is no compelling reason for a

[7] R v. Wade, 1 Moo CC 86.
[8] Dhani v. State 1999 CrLJ 2712 Orissa
[9] Madan Kumar v. State of Assam, 2009 CrLJ 1367 (1373
[10] Mohd. Basharat V. State, 2009 CrLJ 3626 (3632)
[11] Raj Ambarish Sen v. State of W.B., 2002 (4) CHN 444 Cal
[12] Shivji v. State , AIR 1973
[13] 1956 58 Bom LR 90

chance witness to be present at the time of the occurrence, that by itself need not necessarily mean that his evidence has to be rejected.[14]

b) **When accused a competent witness**: An accused person is competent to testify within this section, but before the amendment of the Code of Criminal Procedure in 1956 he was incompetent to be a witness, for an oath couldn't be administered to him, and without, it no witness can lawfully be examined, or give evidence, by or before a court.[15] However, where there are two accused a Magistrate cannot convert of them into a witness against the other except when a pardon has lawfully granted.[16]

c) **Relative or interested witness:** An interested witness means a person who wants to see the accused convicted. The fact that a witness is related to one of the parties cannot by itself be considered sufficient to warrant discarding of his evidence in Toto and hence should be scrutinized carefully by the police officer and cannot be rejected in an arbitrary manner.[17]

d) **Unchaste Woman:** The Supreme Court held in the case of State of Maharshtra v. Madhulkar N. Mardikar[18] that even the woman of easy virtue is entitled to have a right to privacy and personal liberty. She is equally entitled to have equal protection of law. She was honest to accept the darkest side of her life.

[14] Kuzhiyaramadiyil Madhavan v. State 1994 Cr LJ 450 Ker
[15] King emperor v. Nga Po Min , 1932 10 Ran 511 FB
[16] Reg. v. Hanmanna (1877 1 Bom 610
[17] Chhotia v. State , 1952 Raj. 258
[18] AIR 1991 SC 2078

CHAPTER 2: COMPETENCY AND COMPELLABILITY OF DUMB WITNESSES- COMPARATIVE ANALYSIS BETWEEN ENGLISH AND INDIAN LAW

Everyone is not entitled or competent to give evidence as witness before a court unless he/she fulfils the requirements of the qualifications envisaged in S. 118 of the Evidence Act.[19] Competency to give evidence should be distinguished from compellability to give evidence. Generally all witnesses competent to depose are compellable to give evidence but there are exceptions. Even if a witness is willing to depose about certain things, the court will not allow disclosure in some cases. Section 118, 119 and 120 deal with competency of person to become witnesses and Section 121 to 132 deals with matters which the law says shall not be the subject of evidence in a court of justice; that is, the law excludes and dispenses with some kinds of evidence on grounds of public policy. In other words Section 121-132 exempt witnesses from the obligation to answer particular questions on the ground of public policy.

A child of tender age can be allowed to testify if he or she has intellectual capacity to understand questions and give rational answers thereto. The evidence of a child witness is not required to be rejected per se, but the Court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon[20]. In the instant case testimony of girl aged 14 years, daughter of the deceased was found reliable and as such believed.[21]

Admissibility of evidence is not solely dependent on competency of witnesses. A witness may be competent within Section 118, yet his evidence may be inadmissible if he states his opinions or beliefs instead of facts within his knowledge (ante) or gives hearsay evidence[22]. Competency depends upon child's understanding and not upon his age.[23] Testimonial compulsion is the very foundation of the Law of Evidence for without such compulsion every refusal to give evidence

[19] Bhimappa v. Allisab, AIR 2006 Kant 231 (235).
[20] Virendra v. State of (J.P., (2008) 16 SCC 582 (589)
[21] ibid
[22] Magan v. R, A 1946 N 1731
[23] Sidek Bin Ludan v. Public Prosecutor, (1995) 3 Malayan LJ 178 (Johor Bahru HC) J.

will render administration of justice impossible. It is not legal fetish. It is a necessity and also the general rule.[24]

It has been said that when once competency has been determined and examination has began, the court ought not to reverse its former decision[25], but it is submitted that this rule cannot be adhered to rigidly, for the incompetency (e.g. in the case of an dumb child) may come out and become more pronounced after he has been examined for some time. The proper time to object to the competency of a witness is when he is tendered for examination but, this does not mean that objection cannot be raised during argument.[26]

Competency and reliability.—Competency of a person to be a witness is quite different from reliability of the witness unless a child is found competent to be a witness his statement only is his not admissible statement is as admissible evidence. Thus thereafter, a child has the admissibility to be a competent of the witness child then witness has to be considered for reliability on scrutiny of his evidence, if the child is to be reliable then only the child may be taken as a reliable witness. Otherwise rule of prudence which has been christened as a rule of law is that generally it is unsafe to rely upon statement of a child witness as children are easily tutored or threatened or persuaded to speak in the way as told by others. Hence the statement of the child witness has to be examined carefully to see that he was not been tutored.[27]

Testimony of Prosecutrix- Where prosecutrix was adult and of full understanding, conviction on the basis of her sole testimony is proper unless her evidence is shown to be infirm and not trustworthy[28].

Prosecutrix cannot be put on par with an accomplice.[29] It is a trite law that a woman, who is the victim of sexual assault, is not an accomplice to the crime but is a victim of another lust. The prosecutrix stands at a higher pedestal than an injured witness as she suffers from emotional injury. Therefore, her evidence need not be tested with the same amount of suspicion as that of

[24] Kanakapudi Bharathy v. Authority under A.P.S.E. Act-cum-Labour Officer, 2000 AIHC 87 (88) (AP)).
[25] Rampadarath v. R, A 1941 P 5131
[26] R v. Har PCI, 45 A 226 : 21 Al-J 421.
[27] Jharna Debnath v. State of Tripura, (2000) I Gauhati Law Reports 421 (Gau)).
[28] N. Saha v. State of Tripura, AIR 2005 SC 1452 (1453) , Crimes 50 : (2004) 7 SCC 775).
[29] Sri Narayan Saha v State of Tripura, AIR 2005 SC 1452 ; (2004) 7 SCC 7751

an accomplice suspicion as that of an accomplice. She is undoubtedly a competent witness and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of evidence as in the case of an injured complainant or witness and no more[30].

Comparison Between English and Indian Law—Under this section a dumb witness is competent to testify, if it can understand the question put to it, and give rational answers thereto. If he is under twelve years of age, he need not be sworn. In England, a child, to be a competent witness, must believe in punishment in a future state for lying[31]. The court will ascertain by examination whether the infant understands the nature of an oath or the consequences of falsehood[32].

The requirement of corroboration of the testimony of a dumb witness has been abolished in England by S. 34(2) of the Criminal Justice Act, 1988. Hence the testimony of a child can be taken into account without corroboration.[33].

Earlier to this Act, in a case involving indecent assault on an eleven year old boy, the evidence of the victim was supported by his 12 year old brother and a 16 year old youth, the judge emphasised the need for corroboration but did not interfere in the conviction because there had been no miscarriage of justice[34]. A 12-year-old boy was convicted of indecently assaulting a four-year old girl contrary to the Sexual Offences Act 1956 (UK). On his appeal against conviction, it fell to be determined whether the evidence of the girl, who was by then aged five, was admissible The court refused to view video tapes which had been made of interviews between the girl and the police, and decided that, by virtue of her age alone, the girl was not a witness on whom it could rely and therefore ruled that her evidence was inadmissible. It was held while assessing whether the girl was capable of giving intelligible testimony, they ought to have watched any videotape interviews that were available and general questions of the girl to ascertain if she was able to understand questions to answer them in coherent and comprehensible

[30] Mohd. Khan v. State Government (NCT of Delhi), (2011) 10 SCC 192 : 2012 Cr LJ 6931.
[31] Whitely Stokes Vol Il p. 831)
[32] R v. Brasier, 1799, 1 Leach 199 : 168 ER 8021
[33] R v. Pryce, 1991 CrLJ 379 CA, See also [Garvock v. HM Advocate, 1981 SC CR 5931
[34] R v. Morgan, (1978) 3 All ER 13 CAI

manner.[35] The court considered Associated Provincial Picture Houses Ltd. v. Wednesday Corpn[36], in which the court has to have regard to the welfare of the child or young person and also, in proper ease, to take steps for removing him from undesirable surroundings, particularly in criminal proceeding between the child's parents. No summons would be issued if the effect on the child was likely to be oppressive.

CHAPTER 3: INCLUSION OF GESTURES OR SIGNS IN ORAL EVIDENCE- JUDICIAL PRONOUNCEMENTS

'Oral' means via words. It is not essential that the dying declaration will be in a written form or a question solution shape. In which the statement is oral, the exact phrases stated by the deceased to the witness are of extreme significance. To be able to be acted upon, the proof with regard to an oral dying statement should be subjected to the strictest and closest occasions. Where the oral dying declaration is true and receives corroboration from material particulars to be had on the document it may lead to the basis of conviction of an accused.

Section 119 of Indian Evidence Act 1872 says *"a witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as, for example, by writing or by signs; but the writing must be written and the signs made in open court. Evidence so given shall be deemed to be oral evidence[37]."*

Provided that if the witness is unable to communicate verbally, the court shall take the assistance of an interpreter or a special educator in recording the statement and such statement shall be video graphed.

The aforesaid section has been amended vide the Criminal Law (Amendment) Act, 2013 on the basis of recommendations given by Justice J.S. Verma Committee, constituted in the aftermath of December 2012, Nirbhaya rape incident[38]. The title of this section has been changed by this amendment, so as to enable the courts to take resort of the modalities during the course of

[35] M. (1977) 2 All ER 749 (QBD)I
[36] (1947) 2 All ER 680 CA
[37] The Indian Evidence Act, 1872
[38] Sarkar Sudipto, Law of Evidence, Volume 2, 8th Edition

recording of evidence, prescribed in this section, to not merely the dumb witnesses, but to all those witnesses who are unable to communicate verbally.[39]

The effect of this section is that all such victims of sexual offences or any other offence that are having problems in communicating verbally, can be a witness and the court can record their statements during trail. A proviso has also been added to this section whereby the court has been obligated to take the assistance of an interpreter or a special educator in recording

Section 119[40] requires that a witness who is unable to speak and give her/his evidence in any other manner in which she/he make it intelligible, as by writing or by signs; but such writing must be written and the signs must be made in open court.[41] This was set around the Full Bench of the Allahabad High Court in Queen- Empress v. Abdullah[42] where the throat of the deceased young lady was sliced and she being not able to talk demonstrated the name of the accused by the signs for her hand that was held to be a valid dying declaration. In the aforesaid case, where a man was booked for the murder of a lady, the deceased was put forth questions by a medical specialist, police constable and judge; however, the deceased was not able to speak due to a wound in her throat was cut down and she was capable of making gestures and signs. Those movements of gestures and signs or motions were held to be admissible and could be considered as verbal statements and regarded to be as verbal articulation within the purview of Section 32(1) of the Indian Evidence Act, 1872.

Where the session judge was satisfied that deaf-mute could not understand the questions that were put to him and for the most part could not make his meaning intelligible, it was held that he was not competent witness.[43] Where a witness is so deaf and dumb that it is impossible to make him understand the question put to him in cross-examination, he cannot be a competent witness and his evidence if taken ought to be struck off.[44]

[39] Ibid
[40] Supra note 37
[41] Vinod v. State of M.P., 2010 (88) AIC 672 (675) (M.P.)
[42] I.L.R. (1185) 7 All.385
[43] 5 OC 240
[44] Venkata v. R., 1912 MWN 100: 14 IC 655

Assuming that a body corporate, being 'unable to speak' may be branded as a dumb witness for the purpose of Section 119 who can give evidence 'by writing', the evidence so given', even though in writng, 'shall be deemed to be oral' evidence.[45]

A witness without suffering the consequences for his non-examination cannot be kept away from the witness box by a party to the suit by merely alleging that he is stone deaf. Such witness who is said to be stone deaf should be brought to Court to enable the Court to find out if he can give evidence or not, after understanding the questions put to him, as it is for the Court, but not for a party to decide if a witness is capable of giving evidence or not.[46]

However the court while recording the evidence of dumb witness must record both signs as well as the interpretations of the interpreter and then only it becomes admissible under the Indian Evidence Act.[47]

Where the witness was not dumb and deaf, but had become paralytic due to injuries, and had lost the power of speech, was educated man, though could not speak but could understand the question, gave answers in writing to the question put to him which were placed on record by the trial court, held no infirmity was committed by the trail Judge in recording the replies in questions answer from which could be read in evidence under Section 119.[48]

Dying declaration recorded on the premise of nods and gestures is not best admissible however possesses evidentiary value. However although the gestures can be admissible, it has been held that the opinion of witnesses as to the means of the gestures isn't always. It's far for the court to decide what they suggest. In Mockabee v. Com[49] , Hines, J., said that dying declarations are not always either written or spoken. Any method of communication among thoughts and thoughts can be followed with a view to expand the thought, as the stress of the hand, a nod of the top or a glance of the eye. Hence answering through nodding the head, pointing with a finger are admitted through the courtroom as loss of life declarations. In Chandrasekhara v. R[50] , it was stated that a nod of assent in solution to a question whether or not a positive individual had

[45] Godrej Soup Ltd. v. State, 1991 CrLJ 828, 831 (Cal)
[46] Sajana Granities v, manduva Srnivasa Rao, 2002 (1) Andh LJ 466 (AP)
[47] D.A. Jakati v. State of Karnataka, 2005 CrLJ 2687 (Kant)
[48] Rajesh Kumar v. State of H.P. 2007 CrLJ 3029 (3035) H.P.
[49] 78 Ky 382 (Am)
[50] AIR 1937 PC 24

inflicted the deadly cut made by a person unable to speak but completely conscious and capable of apprehend what turned into stated, sincerely constitutes a verbal statement. This example closely resembles the case of someone who's dumb and is capable of communicate with the aid of a finger alphabet.. Evidence of signs and symptoms of an ambiguous person ought no longer to be admitted in any respect and in many cases is admissible notion it is probably of little weight.

If a man is under a vow of silence, he is "unable to speak" and his evidence maybe had in writing without forcing him to break his religious vow.[51] The most neutral and fluent mode of communication by deaf person is signs. It has been held in America that a deaf mute is taught to give ideas by signs which must be translated by an interpreter skilled and sworn.[52] A deaf and dumb witness should be examined only with the help of an expert or a person familiar with his mode of conveying ideas to others in day to day life.[53]

CHAPTER 4: CONCLUSION

Oral evidence should also be considered less evidentiary in compare to the documentary evidence. It is necessary to be pointed out that the statements and declarations made by the dumb witnesses through any signs or gestures are not relevant in most of the cases and hence, they are required to be proven through circumstantial and corroborative evidence. In Nirbhaya's case, the deceased was not in a position to make dying declaration in any form and her condition was too severe to react on any question by the authorities. But she was able to show gestures and signs or conduct which shows the importance of oral evidences through signs and gestures in contemporary scenario. Though, there is difference between English and Indian Law in case of dumb witnesses which shows there are separate measures to determine their relevancy. However, the court can also decide through its own discretion in order to delivering up the valid judgment on the grounds of inquisitorial justice system based upon the series of transactions and occurrences take place in a particular event.

[51] Lakhan v. R., 20 P 898: A 1942 P 183.
[52] Cowley v. People, 83 NY 478
[53] Kadungothi Alavi v. State of Kerala, 1982 CrLJ 94, 99: 1982 Ker LT 287 (Ker)