

State v. Rahul (Gita Mittal, J.)

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ILR (2013) III DELHI 1861  
CRL. L.P

A

STATE

....PETITIONER

B

VERSUS

RAHUL

....RESPONDENT

(GITA MITTAL & J.R. MIDHA, JJ.)

C

CRL. L.P. NO. : 250/2012

DATE OF DECISION: 15.04.2013

Code of Criminal Procedure, 1973—Section 378(1)—  
Indian Penal Code, 1860—Sections 376 and 377—Indian  
Evidence Act, 1872—Section 118—Statement of a child  
witness—Manner of conducting competency test—  
Insufficient attention paid; no real assessment of the  
capacity and capabilities children accorded special  
treatment—Extensive guidelines laid down by the  
Supreme Court and the Delhi High Court—  
Pronouncements bind all trial courts in Delhi—Knew  
no exceptions—Adherence is mandatory—Questions  
put should meet the requirements of law having special  
regard to age and circumstances of the person  
required to depose—Questions to be put to child  
witness ought to be sensitively framed—Education,  
socio economic background, age and capacity to be  
kept in mind—Directions issued.

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**Important Issue Involved:** Section 118 of the Indian Evidence Act contains the expression 'competent to testify' as well as 'court considers'. It cites some circumstances which may prevent the child from being able to testify. It is, therefore inherent that before recording the testimony of a person, the court has to be satisfied that the person is not

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prevented from understanding the questions put to them, or from giving rational answers to those questions, on account of tender years, extreme old age, disease, (whether of body or mind), or any other cause of the same kind. There is therefore no prohibition by age or otherwise so far as competency to give evidence is concerned.

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The competency inquiry means the witness ability and willingness to tell the truth and the capacity to perceive, to recollect and to communicate the evidence.

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A common sense approach should be taken when dealing with the testimony of young children and same standards as expected from adults should not be expected from young children.

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Children have been accorded special treatment by the legislature and courts because of their special needs. The court room environment is unfamiliar and would definitely be intimidating to a child who is required to testify as a witness. The trauma if the child witness is a victim is only further aggravated.

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The first and the foremost guideline on the subject of competency testing and mandated in every binding judicial pronouncement on the subject is to maintain anonymity of the identity of the victim on the prime requirement is to ensuring the best interests of the child under all circumstances.

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The questions that the trial judge would be required to put to the witness have to meet the requirements of law as well as the binding principles laid down in several judicial pronouncements and the authoritative texts having special regard to the age and circumstances of the person who is required to depose.

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The judges and magistrates should always record their opinion that the child understands the duty of speaking truth.

Not having taken oath only goes to the creditability and not the competency of the witness.

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While evaluating the testimony of a child (who is a victim as well), the circumstances which would be considered would be the tender age of the child; its demeanor; possibility of tutoring, etc.

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The Court appearances impact children more drastically than they do adults and may bring alive the trauma the child has seen (or may have experienced, if a victim). Which may reduce the child into a state of terrified silence. The judge has to step in to ensure removal of the fear and apprehensions being nursed by the child in the Court.

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The guidelines laid down in judicial precedents know no exceptions and adherence is mandatory. Their application at every stage of the proceedings is essential so as to get the best evidence from the child witness.

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It is the fundamental responsibility of every court to ensure the welfare and best interest of the child which has to remain the paramount consideration under all circumstances.

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The questions which put to the child witness ought to be sensitively framed keeping in mind the socio-economic background of the child, the age as well as the capacity of the child which the trial judge would evaluate when the child is produced before him.

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The trial courts to carefully evaluate the questions which they put to child witnesses as well as compliance with the guidelines to minimize the secondary traumatising of a child witness by the courtroom experience.

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[Vi Gu]

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**APPEARANCES:**

**FOR THE PETITIONER** : Mr. Dayan Krishnan, Additional

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**A** Standing Counsel with Ms. Manvi Priya, Advocate.

**FOR THE RESPONDENT** : None.

**B CASES REFERRED TO:**

1. *Director of Public Prosecutions, Transwal vs. Minister of Justice and Constitutional Development* (2009) 4 SA 222 (CC); (2009) 2 SARC 130 (CC).
- C** 2. *Virender vs. The State of NCT of Delhi* CrI.A.No.121/2008.
3. *Ratansinh Dalsukhbhai Nayak vs. State of Gujarat*, (2004) 1 SCC 64.
- D** 4. *Dattu Ramrao Sakhare vs. State of Maharashtra*, (1997) 5 SCC 341.
5. *Prem Shankar Sachhan vs. State* 20 (1981) DLT 55 (DB).
- E** 6. *Rameshwar vs. The State of Rajasthan* (1952) 1 SCR 377.

**RESULT:** Directions issued.

**GITA MITTAL, J. (Oral)**

- F** 1. By this order we are considering the issue of evaluation of the competency of a child to testify in court proceedings. The instant petition has been filed under Section 378(I) of the Cr.P.C. seeking leave to appeal against the judgment of acquittal dated 20th October, 2011 whereby the
- G** respondents herein was acquitted of the charges punishable under Sections 376 and 377 of the Indian Penal Code by the learned Additional Sessions Judge in the case arising out of FIR No.45/2010, registered by the police station Nabi Karim.
- H** 2. Upon consideration of the leave petition, we had directed issuance of notice for the service of the respondents on the 3rd of September, 2012. However, the notice was not served upon the respondents and, therefore, the notice was again directed to be issued.
- I** 3. Mr. Dayan Krishnan, learned Additional Standing counsel for the State has submitted that quite apart from the challenge on merits, there is a very important aspect of the criminal trials which requires to be

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immediately addressed, especially in the light of the proceedings in the present case. Mr. Dayan Krishnan, Additional Standing Counsel has placed a copy of the statement of the child victim, who was examined as prosecution witness no.6 in the trial on the 21st of April, 2011. He has drawn our attention to the manner in which the learned trial judge has conducted the competency test of the child witness. It is submitted that the matter of conducting the test for competency of a child witness to depose is a critical part of the child testimony and unfortunately insufficient attention is being paid to it. Mr. Dayan Krishnan, Additional Standing Counsel urges that most courts have a set pattern of questions which are put indiscriminately to every child witness. As a result there is no real assessment of the capacity and capabilities of the child, thereby impacting the quality of the child evidence. He impresses upon us that this aspect deserves immediate attention. It is pointed out that so far as consideration of this aspect of the child witness testimony is concerned, no issue arises and it is independent of and does not impact the consideration of the case on merits. The matter has been listed today for this purpose alone.

**Statutory Prescription**

4. Before proceeding to examine this issue, it is necessary to examine the statutory prescription with regard to competency of any person to give evidence in Court. In this regard Section 118 of the Indian Evidence Act provides as follows:

“118. 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. 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.”

**Competency Inquiry – nature of**

5. Section 118 of the Indian Evidence Act contains the expression ‘*competent to testify*’ as well as ‘*court considers*’. It cites some circumstances which may prevent the child from being able to testify. It is, therefore inherent that before recording the testimony of a person, the court has to be satisfied that the person is not prevented from

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**A** understanding the questions put to them, or from giving rational answers to those questions, on account of tender years, extreme old age, disease, (whether of body or mind), or any other cause of the same kind. There is therefore no prohibition by age or otherwise so far as competency to give evidence is concerned.

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**6.** We may first consider the meaning of the expression '*competency to testify*' and the manner in which an examination is to be conducted and conclusion could be reached in this regard. This expression has arisen for consideration not only in this country but internationally. International jurisprudence on this aspect has been placed before us by Mr. Dayan Krishnan, the learned Additional Standing counsel for the State which we note hereafter.

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**7.** Our attention has been drawn to the pronouncement of the Supreme Court of Canada reported at (1993) 4 SCR 2231, **R. vs. Marquard** wherein the court interpreted the "competency inquiry" to mean the witness ability and willingness to tell the truth, and the capacity to perceive, to recollect and to communicate the evidence.

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**8.** In yet another pronouncement reported at (1990) 2 SCR 3, **R. vs. B.(G.)**, the Supreme Court of Canada has observed that since children may see the world differently from adults, some details which may appear to be important to adults like time and place may be missing from their recollection. The court suggested that judiciary should take a common sense approach when dealing with the testimony of young children and not expect the same standards from young children as they expect from adults.

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**9.** Valuable light is shed on the impact of a court appearance on a child and the duty of the court towards child witness by a pronouncement of the Constitutional Court of South Africa in the judgment reported at (2009) 4 SA 222 (CC); (2009) 2 SARC 130 (CC) **Director of Public Prosecutions, Transwal v. Minister of Justice and Constitutional Development**. In South Africa, protection is to be given to the child complainants in giving evidence in criminal proceedings involving sexual offences to ensure the foundational constitutional values of human dignity, achievement of equality and advancement of human rights and freedoms under Section 28 (2) of the Constitution which requires that in all matters concerning a child's best interests must be of paramount importance. Further, the Criminal Law (Sexual Offences and Related Matters)

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Amendment Act [which effectuated the amendment to the Criminal Procedure Act (CPA)] was introduced so that protection is given to child complainants when their evidence is being recorded in criminal proceedings involving sexual offences. With regard to administration of justice, the Constitutional Court noted the following questions which arose in this regard:

“5. First, whether the provisions of the CPA that were enacted to protect child complainants from the mental stress and anguish associated with testifying in criminal proceedings are being interpreted and implemented consistently with the Constitution. Second, the duty of all superior courts including this Court (as the upper guardian of all minors) – if any – to investigate any failure to implement these provisions which deny child complainants the protection they constitutionally deserve, once any failure to do so is brought to the Court’s attention.”

10. The Constitutional Court was concerned with two rape cases: the first, involving charge of rape of a 13 year old girl child by one Mr. Phaswane. In the second, charge of rape of an 11 year old girl by one Mr. Mokoena was levelled. In the Phaswane trial, before the witness testified she was questioned by the court in order to determine whether she understood the import of an oath, and if not, whether she understood what it meant to speak the truth. While the court was not satisfied that she understood the import of an oath, it nevertheless concluded that the child understood the difference between truth and falsehood. The child was accordingly admonished to speak the truth.

11. In the Mokoena trial the child complainant was allowed to give evidence with the aid of an intermediary. We find emphasis on consideration of the best interests of the child by Courts in the judgment authored by Nacobo, J placing reliance on the UN Guidelines when he wrote thus:

“78. The Economic and Social Council of the United Nations has developed Guidelines on Justice Matters involving Child Victims and Witnesses of Crime (Guidelines). The main objective of these Guidelines is to ‘set forth good practice on the consensus of contemporary knowledge and relevant international and regional norms, standards and principles’. These Guidelines provide a useful guide to the understanding of the rights of the child to have his or her best interests given primary consideration in all



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**A** matters concerning the child. They provide that child complainants and witnesses should receive special protection and assistance that they need in order to prevent hardship and trauma that may arise from their participation in the criminal justice system. In particular, in the context of the best interests of the child, the

**B** Guidelines set forth the following principle:

**C** “(c) While the rights of accused and convicted offenders should be safeguarded, every child has the right to have his or her best interests given primary consideration. This includes the right to protection and to a chance for harmonious development:

**D** (i) Protection. Every child has the right to life and survival and to be shielded from any form of hardship, abuse or neglect, including physical, psychological, mental and emotional abuse and neglect;

**E** (ii) Harmonious development. Every child has the right to a chance for harmonious development and to a standard of living adequate for physical, mental, spiritual, moral and social growth. In the case of a child who has been traumatized, every step should be taken to enable the child to enjoy healthy development..

**F** 79. It is apparent from the CRC and the Guidelines that courts are required to apply the principle of best interests by considering how the child’s rights and interests are, or will be, affected by their decisions. The best interests of the child demand that children

**G** should be shielded from the trauma that may arise from giving evidence in criminal proceedings. Child complainants and witnesses should testify out of sight of the alleged perpetrator and in a child-friendly atmosphere.<sup>77</sup> This means that, where necessary,

**H** child witnesses should be assisted by professionals in giving their testimony in court. However, each child must be treated as a unique and valuable human being with his or her individual needs, wishes and feelings respected.<sup>78</sup> Children must be treated with dignity and compassion.<sup>79</sup> In my view, these considerations

**I** 77. Para 30(d) and 31(b) of the Guidelines.

78. Para 11 of the Guidelines.

79. Para 10 of the Guidelines.



should also inform the principle that the best interests of the child are of paramount importance in all matters concerning the child as envisaged in section 28(2) of the Constitution.. A

12. The Court noted that Section 170A(1) was introduced into the CPA to prevent a child from undergoing '*undue mental stress or suffering*' by permitting the child to testify through an intermediary; to give evidence shielded from the accused by testifying in another room, electronic devices via CCTV or sitting behind a screen that blocks the child's view of the accused but allows the child to be seen; creating an atmosphere conducive for a child to speak freely about the events relating to the offence. It was reiterated that the statutory provision must be construed to give effect to its object to protect child complainants from exposure to undue mental stress or suffering when they give evidence. B C D

13. The observations of the Constitutional Court on the impact of a Court appearance on a child squarely apply to all children and read thus:

"101. A court operates in an atmosphere which is intended to be imposing. It is an atmosphere which is foreign to a child. The child sits alone in the witness stand, away from supportive relatives such as a parent. The child has to testify in the presence of the alleged abuser and other strangers including the presiding judicial officer, the accused's legal representative, the court orderly, the prosecutor and other court officials. While the child may have met the prosecutor before – at least one assumes that the prosecutor would have interviewed the child in preparing for trial – the conversation now takes place in a context that is probably bewildering and frightening to the child. Unless appropriately adapted to a child, the effect of the courtroom atmosphere on the child may be to reduce the child to a state of terrified silence. Instances of children who have been so frightened by being introduced into the alien atmosphere of the courtroom that they refuse to say anything are not unknown." E F G H

So far as conduct of the competency assessment of the child is concerned, it was held as follows:

"102. The child would be questioned by the judicial officer in order to satisfy himself or herself that the child understands that he or she is under a duty to speak the truth or understands the I

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**A** import of the oath. Regrettably this questioning, although well-meaning, is often theoretical in nature and may increase the child's sense of confusion and terror. The child may wonder why he or she is being subjected to this questioning. That is not all."

**B** 14. This of course is not the end of the matter. There is the added agony of making the statement (i.e. giving evidence) in the presence of the accused. The Constitutional Court has elaborated on this aspect of the Court appearance and also extracted a portion of the child's examination which must be considered by every trial judge:

**D** "103. The child is obliged to give evidence in the presence of the accused. This is what happened in the Phaswane matter. The accused will be a few paces from the child, and will invariably be staring at the child while the child gives evidence. Perhaps the accused will have threatened the child with death or physical harm if he or she should tell anyone about what the accused had done to him or her. At this stage the child may wonder whether he or she will be punished for speaking the truth that the judicial officer had admonished him or her to speak. This may put the child to an unfortunate choice: either testify and risk the accused carrying out his or her threat, or say nothing. In these circumstances, it would not be surprising for the child to refuse to testify.

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**G** 104. If the child decides to speak, then the prosecutor will take him or her through his or her evidence. The questioning of a child requires special skills, similar to those required to run day care centres or to teach younger children. Questioning a child in court is no exception: it requires a skill. Regrettably, not all of our prosecutors are adequately trained in this area, although quite a few have developed the necessary understanding and skill to question children in the court room environment. If the questioning by the prosecutor is not skilled, the result is what happened in the Phaswane matter. The following exchange between the prosecutor and the interpreter illustrates the point:

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**I** "PROSECUTOR: What did you mean when you said that he had slept with you?"

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– He had raped me. What do you mean with rape, we must know what you understand under rape? **A**

– Yes I personally do not know what rape is, I heard from people who say that there is a thing called rape. **B**

Okay but we need to know what happened, you were tripped and then you fell on the ground and he took out a condom. We must know why do you say you have been raped, what did he do to you? **C**

– Rape is sexual intercourse.

What is sexual intercourse?

– Sexual intercourse is when one person has sex with another person. **D**

But we do not know what that means, we need to know what you think what happened, not what you think. You must tells us why do you say that you have been raped and why did you say that the accused had sexual intercourse with you. What did he do, did he take his finger and scratch you on your ear or what did he do, why do you say it is sexual intercourse? **E**

INTERPRETER: I think with the permission of the court of course, I do understand what the state wants to elicit from the witness, it is just that the Prosecutor does not have proper words which can be cut down to the level of the understanding of this. All the question the words that come, I saw a pitch high. The state does not have proper words which are curtailed to the level of the understanding of this, and I do understand what she is saying but I am just afraid to say what she did not say, because I end up being testifying.” **F**

**15.** The ordeal of the cross examination and its purpose was highlighted in para 105 which reads as follows: **G**

“105. The child is then cross-examined with the sole purpose of discrediting the child. If the accused is not legally represented, the accused may conduct the cross-examination. The effect of this on the child can be terrifying especially where the accused is an adult relative of the child. The child may agree with questions **I**

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**A** put by the accused for fear of punishment if he or she disagrees. If the cross-examination is conducted by the legal representative, the child will be taken through his or her evidence in the most minute detail. The cross-examination may bring out facts that  
**B** were so grotesque that the child could never have imagined being forced to recount them. The child will be taken to task for placing events, often months after they had occurred, out of sequence and for not being able to remember important details  
**C** concerning the events. In this intimidating and bewildering atmosphere, the child complainant is required to relive and reveal sordid details of the horror that he or she went through.”

**D** 16. And the impact of having to repeat the same story to different persons takes its toll child as this noted in para 106 and 107:

**E** “106. And moreover, the child has been telling the same story to several adults by now, most of whom are strangers: first, to a relative to whom the report was first made; then to a mother; then to a social worker, if she or he has been lucky to have been referred to one; then to a district surgeon or a medical practitioner – this time, the story-telling is accompanied by physical examination; then to a police officer at the charge office where the offence is reported; then to the investigating officer who will  
**F** now be in charge of the case, where more details are now required; and then perhaps to the public prosecutor for a pre-trial interview, if the child is lucky to have one or if the public prosecutor has the time to conduct one. At times, the abuse may  
**G** have been discovered by a caring teacher at a day-care centre or at school, and this adds to the list of people to whom the story is told. Then to the court, before an audience of strangers and in the atmosphere described above.

**H** 107. Those who know more about child behaviour from a professional point of view tell us that children are reluctant to relate their sad and often sordid experiences to several different people. As a result, repetition tends to heighten their sense of shame and guilt at what happened to them.”  
**I**

17. The Constitutional Court has succinctly summed up the impact of the Court appearance on the child witness finally in the following terms:

“108. A child complainant who relates in open court in graphic detail the abusive acts perpetrated upon him or her and in the presence of the alleged perpetrator, will in most cases experience undue stress or suffering. This experience will be exacerbated when the child is subjected to intensive and at times protracted and aggressive cross-examination by the alleged perpetrator or legal representative. Cumulatively, these experiences will often be as traumatic and as damaging to the emotional and psychological well-being of the child complainant as the original abusive act was. Indeed, High Courts have come to accept that the giving of evidence in cases involving sexual offences exposes complainants to further trauma possibly as severe as the trauma caused by the crime. It is precisely this secondary trauma that section 170A(1) seeks to prevent.”

18. The Court then clearly pronounced that use of the measures which protects the child from secondary traumatising has the following valuable impact on the testimony of the child:

“116. Following the approach outlined here not only protects child complainants from unnecessary trauma, it helps to ensure that the trial court receives evidence that is more freely presented, more likely to be true and better understood by the court. Given the special vulnerability of the child witness, the fairness of the trial accordingly stands to be enhanced rather than impeded by the use of these procedures. In my view, these special procedures should not be seen as justifiable limitations on the right to a fair trial, but as measures conducive to a trial that is fair to all.” (Emphasis supplied)

19. So far as the approach of court and exercise of judicial discretion is concerned, the Constitutional Court of South Africa ruled thus:

“123. What must be stressed here is that every child is unique and has his or her own individual dignity, special needs and interests. And a child has a right to be treated with dignity and compassion.<sup>109</sup> This means that the child must ‘be treated in a caring and sensitive manner’.<sup>110</sup> This requires “taking into account

109. Paras 10-4 of the Guidelines.

110. Para 10 of the Guidelines.

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- A [the child's] personal situation, and immediate needs, age, gender, disability and level of maturity".<sup>111</sup> In short, "[e]very child should be treated as an individual with his or her own individual needs, wishes and feelings".<sup>112</sup> Sensitivity requires the child's individual needs and views to be taken into account.<sup>113</sup> The exercise of judicial discretion in the appointment of an intermediary allows a judicial officer to assess "the individual needs, wishes and feelings" of each child. This, in my view, conforms to the principle that the best interests of the child must be of paramount importance in matters concerning the child."
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- C

(underlining by us)

20. It is trite that children have been accorded special treatment by the legislature and courts because of their special needs. The court room environment is unfamiliar and would definitely be intimidating to a child who is required to testify as a witness. The trauma if the child witness is a victim as well is only further aggravated. This important subject has received attention of the United Nations as well which has framed the "United Nations Guidelines on Justice in matters involving Child Victims and Witnesses of Crime 2005. which recognize that children are particularly vulnerable and need special protection, assistance and support appropriate to their age, level of maturity and unique needs in order to prevent further hardship and trauma that may result from their participation in the criminal justice process. The UN Guidelines further state that girls are particularly vulnerable and may face discrimination at all stages of the justice system. The UN Guidelines stress the importance of ensuring dignity, including physical, mental and moral integrity of the child witness; the justice process should be sensitive to the child's age, wishes, understanding, gender, sexual orientation, ethic, cultural, religious, linguistic and social background, caste, socio-economic condition, as well as special needs of the child including health, ability and capacities.
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21. The present case is concerned with the alleged commission of offence of rape. So far as examination of the testimony of witnesses, including child witnesses, in cases involving sexual offences are concerned,

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111. Id.
112. Para 11 of the Guidelines.
113. Para 9(d) of the Guidelines.

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the same has been the subject matter for consideration before the Supreme Court of India as well as this court in several cases. Extensive guidelines have been laid down by the Supreme Court as well as the Delhi High Court in several judgments with regard to every stage of a criminal investigation as well as trials. These guidelines in cases regarding sexual offences laid down in judicial precedents as well as additional guidelines have been compiled in the decision dated 29th September, 2009 authored by one of us (Gita Mittal, J.) in Crl.A.No.121/2008, **Virender vs. The State of NCT of Delhi** (reported at 2009 (4) JCC 2721).

22. So far as the manner in which the statement of the child witness is to be examined is concerned, we may usefully reproduce hereunder para 83(iv) of the above judgment mentioned above wherein the guidelines relating to the cases involving sexual offences are set out. The same reads thus:

“83. xxx

I. xxx

II. xxx

III. xxx

IV COURT

(i) To create a child friendly environment separate rooms be provided within the Court precincts where the statement of the child victim can be recorded.(Ref : Court On Its Own Motion vs. State & Anr)

(ii) In case of any disability of the victim or witness involving or impairing communication skills, assistance of an independent person who is in a position to relate to and communicate with such disability requires to be taken.

(iii) The trials into allegations of commission of rape must invariably be “in camera”. No request in this behalf is necessary. (Ref : **State of Punjab vs. Gurmit Singh**)

(iv) The Committal Court shall commit such cases to the Court of Sessions preferably within fifteen days after the filing of the chargesheet. (Ref: (2007 (4) JCC 2680 Court On Its Own Motion vs. State & Anr.)



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- A** (v) The child witness should be permitted to testify from a place in the courtroom which is other than the one normally reserved for other witnesses.
- B** (vi) To minimise the trauma of a child victim or witness the testimony may be recorded through video conferencing or by way of a close circuit television. If this is not possible, a screen or some arrangement be made so that the victims or the child witness do not have to undergo seeing the body or face of the accused. The screen which should be used for the examination of the child witness or a victim should be effective and installed in such manner that the witness is visible to the trial judge to notice the demeanour of the witness. Single visibility mirrors may be utilised which while protecting the sensibilities of the child, shall ensure that the defendant's right to cross examination is not impaired. (Ref : **Sakshi vs UOI**).
- C**
- D**
- E** (vii) Competency of the child witness should be evaluated and order be recorded thereon.
- F** (viii) The trial court is required to be also satisfied and ought to record its satisfaction that the child witness understands the obligation to speak the truth in the witness box. In addition to the above, the court is required to be satisfied about the mental capacity of the child at the time of the occurrence concerning which he or she is to testify as well as an ability to receive an accurate impression thereof. The court must be satisfied that the child witness has sufficient memory to retain an independent recollection of the occurrence and a capacity to express in words or otherwise his or her memory of the same. The court has to be satisfied that the child witness has the capacity to understand simple questions which are put to it about the occurrence.
- G**
- H** There can be no manner of doubt that record of the evidence of the child witness must contain such satisfaction of the court.
- I** (ix) As far as possible avoid disclosing the name of the prosecutrix in the court orders to save further embarrassment to the victim of the crime; anonymity of the victim of the crime must be maintained as far as possible throughout.
- (x) The statement of the child victim shall be recorded promptly

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and at the earliest by the concerned Magistrate and any adjournment shall be avoided and in case the same is unavoidable, reasons to be recorded in writing. (Ref : Court On Its Own Motion vs. State of N.C.T. Of Delhi) **A**

(xi) The court should be satisfied that the victim is not scared and is able to reveal what has happened to her when she is subjected to examination during the recording of her evidence. The court must ensure that the child is not concealing portions of the evidence for the reason that she has bashful or ashamed of what has happened to her. **B**

(xii) It should be ensured that the victim who is appearing as a witness is at ease so as to improve upon the quality of her evidence and enable her to shed hesitancy to depose frankly so that the truth is not camouflaged on account of embarrassment at detailing the occurrence and the shame being felt by the victim. **C**

(xiii) Questions should be put to a victim or to the child witness which are not connected to case to make him/her comfortable and to depose without any fear or pressure; **D**

(xiv) The trial judge may permit, if deemed desirable to have a social worker or other friendly, independent or neutral adult in whom the child has confidence to accompany the child who is testifying (Ref Sudesh Jakhu vs. K.C.J. & Ors). **E**

This may include an expert supportive of the victim or child witness in whom the witness is able to develop confidence should be permitted to be present and accessible to the child at all times during his/her testimony. Care should be taken that such person does not influence the child's testimony. **F**

(xv) Persons not necessary for proceedings including extra court staff be excluded from the courtroom during the hearing. **G**

(xvi) Unless absolutely imperative, repeated appearance of the child witness should be prevented. **H**

(xvii) It should be ensured that questions which are put in cross examination are not designed to embarrass or confuse victims of rape and sexual abuse (Ref : Sakshi vs UOI). **I**

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- A** (xviii) Questions to be put in cross examination on behalf of the accused, in so far as they relate directly to the offence, should be given in writing to the presiding officer of the court who may put them to the victim or witnesses in a language which is clear and is not embarrassing. (Ref : Sakshi vs. UOI)
- B** (xix) The examination and cross examination of a child witness should be carefully monitored by the presiding judge to avoid any attempt to harass or intimidate the child witness.
- C** (xx) It is the duty of the court to arrive at the truth and subserve the ends of justice. The courts have to take a participatory role in the trial and not act as mere tape recorders to record whatever is being stated by the witnesses. The judge has to monitor the proceedings in aid of justice in a manner that something, which is not relevant, is not unnecessarily brought into record. Even if the prosecutor is remiss in some ways, the court can control the proceedings effectively so that the ultimate objective that is the truth is arrived at. The court must be conscious of serious pitfalls and dereliction of duty on the part of the prosecuting agency. Upon failure of the prosecuting agency showing indifference or adopting an attitude of aloofness, the judge must exercise the vast powers conferred under section 165 of the Evidence Act and section 311 of the CrPC to elicit all necessary materials by playing an active role in the evidence collecting process. (Ref : Zahira Habibulla H. Sheikh & Anr. vs. State of Gujarat & Ors.)
- G** (xxi) The judge is expected to actively participate in the trial, elicit necessary materials from the witnesses at the appropriate context which he feels necessary for reaching the correct conclusion. The judge has uninhibited power to put questions to the witness either during chief examination or cross examination or even during re-examination for this purpose. If a judge feels that a witness has committed an error or slip, it is the duty of the judge to ascertain whether it was so, for , to err is human and the chances of erring may accelerate under stress of nervousness during cross examination. (Ref: AIR 1997 SC 1023 (para 12) State of Rajasthan vs. Ani alias Hanif & Ors.)
- I** (xxii) The court should ensure that the embarrassment and

reservations of all those concerned with the proceedings which includes the prosecutrix, witnesses, counsels may result in camouflage of the ingredients of the offence. The judge has to be conscious of these factors and rise above any such reservations on account of embarrassment to ensure that they do not cloud the truth and the real actions which are attributable to the accused persons.

(xxiii) The court should ascertain the spoken language of the witness as well as range of vocabulary before recording the deposition. In making the record of the evidence court should avoid use of innuendos or such expressions which may be variably construed. For instance 'gandi harkatein' or 'batamezein' have no definite meaning. Therefore, even if it is necessary to record the words of the prosecutrix, it is essential that what those words mean to her and what is intended to be conveyed are sensitively brought out.

(xxiv) The court should ensure that there is no use of aggressive, sarcastic language or a gruelling or sexually explicit examination or cross examination of the victim or child witness. The court should come down with heavily to discourage efforts to promote specifics and/or illustration by any of the means offending acts which would traumatise the victim or child witness and effect their testimony. The court to ensure that no element of vulgarity is introduced into the court room by any person or the record of the proceedings.

(xxv) In order to elicit complete evidence, a child witness may use gestures. The courts must carefully translate such explanation or description into written record. (xxvi) The victim of child abuse or rape or a child witness, while giving testimony in court should be allowed sufficient breaks as and when required. (Ref : Sakshi vs. UOI)

(xxvii) Cases of sexual assaults on females be placed before lady judges wherever available. (Ref: State of Punjab vs. Gurmit Singh)  
To the extent possible, efforts be made that the staff in the courtroom concerned with such cases is also of the same gender.

(xxviii) The judge should be balanced, humane and ensure

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**A** protection of the dignity of the vulnerable victim. There should be no expression of gender bias in the proceedings. No humiliation of the witness should be permitted either in the examination in chief or the cross examination.

**B** (xxix) A case involving a child victim or child witness should be prioritised and appropriate action taken to ensure a speedy trial to minimise the length of the time for which the child must endure the stress of involvement in a court proceeding. While considering any request for an adjournment, it is imperative that the court considers and give weight to any adverse impact which the delay or the adjournment or continuance of the trial would have on the welfare of the child.”

**D** **23.** In addition, certain general guidelines have been mandated in this pronouncement which reads as follows:-

“V GENERAL

**E** (i) Effort should be made to ensure that there is continuity of persons who are handling all aspects of the case involving a child victim or witness including such proceedings which may be out of criminal justice system. This may involve all steps commencing from the investigation to the prosecutor to whom the case is assigned as well as the judge who is to conduct the trial.

**G** (ii) The police and the judge must ascertain the language with which the child is conversant and make every effort to put questions in such language. If the language is not known to the court, efforts to join an independent translator in the proceedings, especially at the stage of deposition, should be made.

**H** (iii) It must be ensured that the number of times that a child victim or witness is required to recount the occurrence is minimised to the absolutely essential. For this purpose, right at the inception, a multidisciplinary team involving the investigating officer and the police; social services resource personnel as well as the prosecutor should be created and utilised in the investigation and prosecution of such cases involving a child either as a victim or a witness. This would create and inspire a feeling of confidence and trust in the child.

**I**

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(iv) The child victim shall not be separated from his/her parents/ guardians nor taken out from his/her environment on the ground of "Ascertaining voluntary nature of statement" unless the parents/ guardian is reported to be abusive or the Magistrate thinks it appropriate in the interest of justice. (Ref : Court On Its Own Motion vs. State of N.C.T. Of Delhi) **A**  
**B**

(v) Courts in foreign countries have evolved several tools including anatomically correct illustrations and figures (as dolls). No instance of such assistance has been pointed out in this court. Extensive literature with regard to such aids being used by foreign courts is available. Subject to assistance from experts, it requires to be scrutinised whether such tools can be utilised in this country during the recording of the testimony of a child victim witness so as to accommodate the difficulty and diffidence faced. This aspect deserves serious attention of all concerned as the same may be a valuable tool in the proceedings to ensure that the complete truth is brought out. **C**  
**D**

(vi) No court shall detain a child in an institution meant for adults. (Ref : Court On Its Own Motion vs. State of N.C.T. of Delhi). This would apply to investigating agencies as well. **E**

(vii) The judge should ensure that there is no media reporting of the camera proceedings. In any case, sensationalisation of such cases should not be permitted.. **F**

**24.** This pronouncement binds all trial courts in Delhi. It certainly bound the trial judge who was seized of the trial arising out of FIR 45/ 2010 in the instant case. **G**

**25.** It is essential to note that all these concerns apply to all stages of a child witnesses court appearance including the competency examination of the child and evaluation of her/his response thereto. We cannot emphasise enough that the legislation, the statutory requirements as well as the jurisprudence on the subject have kept the best interest of the child as the complete focus of every action, especially Court proceedings and the decision. This aspect cannot be compromised in any manner. The matter assumes even greater importance in cases involving the sexual offences and abuse of the child as in the present case. **H**  
**I**



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**A** 26. In this regard, the protocol captioned as “*Guidelines for Recording of Evidence of Vulnerable Witnesses in Criminal Matters*” is in vogue for the operationalization of the Child Victim Court Room in the District Courts in Delhi\*. Currently, these guidelines are being applied in the Child Witnesses Court Room in the District Courts at Karkardooma.

**B** These Guidelines only reinforce the principles and the jurisprudence that has been referred to above.

**C** 27. In the United States Federal Court and the majority of state courts children are presumed competent to testify (US Code 18 USCS § 3509(c), 2004) unless a legal challenge is raised about the witness’ competency. Compelling reasons other than age must exist for a Court to order a competency evaluation of the child witness (US Code 18 USCS § 3509(c), 2004). To raise the issue of competency of a child witness an understanding of abilities and skills needed to be competent to testify is essential. The enumeration by Sherrie Bourg Carter (Psychologist) in her Article “Child Witness Competency : when Should the Issue be Raised?”\*\* of the standards which courts would apply is thus:-

**D**

**E**

- Adequate intelligence and memory to store information.
- The ability to observe, recall, and communicate information.
- An awareness of the difference between truth and a lie.
- An appreciation of the meaning of an oath to tell the truth.
- An understanding of the potential consequences of not telling the truth.

**F**

**G** 28. Ms. Carter further elaborates that when a challenge is formally raised, the burden falls upon the Court to make a determination as to whether the child is competent to testify. The courts in the USA usually adopt one or a combination of the following methods:

- H**
- Assessment by a court appointed expert in forensic child psychology or psychiatry.
  - The child witness is brought to the courtroom and

**I**

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\* [http://delhihighcourt.nic.in/writerwaddata/upload/NotificationFile\\_LCWCD2x4.PDF](http://delhihighcourt.nic.in/writerwaddata/upload/NotificationFile_LCWCD2x4.PDF).

\*\* [http://www.forensic-experts.net/general.php?category=Publications%2FNewsletters&headline=Articles of the Institute of Behavioural Science and the Law \(IBSL\) retrieved](http://www.forensic-experts.net/general.php?category=Publications%2FNewsletters&headline=Articles of the Institute of Behavioural Science and the Law (IBSL) retrieved)



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questioned by the attorneys and/or the judge about competency-related matters. **A**

- The judge reviews the child's sworn statement and/or deposition. **B**
- Testimony is taken from those who are familiar with the child's abilities or those who interviewed the child about the alleged incident. **B**

After this the court may hold another hearing where both sides file motions, examine witnesses including expert witnesses, cite case law. The Court then makes a ruling as to whether the child is competent to testify. **C**

29. Guidance on the nature of questions which could facilitate a fair evaluation of the child's competency is also found in this writing. Some questions which have been suggested by Sherrie Bourg Carter for enabling the judges to determine the competency of the child include the following:- **D**

I. **For determining Intelligence and Memory** – For a young child, questions about family, school, counting, and knowledge of the alphabet and colors can provide sense of the child's intelligence and memory. With older children, more difficult intellectual skills determining their literacy level would provide information about their intelligence and memory. **E**

II. **Ability to Observe, Recall and Communicate** - Examples of recent experiences about which child can be questioned should include what the child ate or who the child saw that day. An example of the distant past events should include what happened say on the child's birthday or memorable holiday or a field trip or a vacation. Further questioning could be about attended, and what gifts were received. (Of course, these questions are required to be put keeping in view the socio-economic background and literacy of the child, especially in our country). III. **Understanding of Truth and Lie** – To assess a child's understanding of these concepts, questions about right and wrong, real and make-believe, truth and lie typically are asked. **F**

As this issue is of extreme importance in our context, the view of the author may be considered in extenso and reads thus:- **G**

**H**

**I**

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- A** “...it is important to recognize that some types of questions are more developmentally appropriate than others. For example, when assessing children’s understanding of these dichotomies, interviewers routinely ask children if they know the *difference*
- B** between them. However, asking children to explain the difference between two concepts is a more developmentally difficult task than asking what each concept means. In other words, questions such as, “*What does it mean to tell the truth?*” and “*What does it mean to tell a lie?*” are more developmentally appropriate for
- C** young children than asking, “*What is the difference between the truth and a lie?*”
- It also is important to recognize that very young children often are unable to answer even these easier questions in a narrative form due to their underdeveloped language skills. In one study, researchers found that none of the four-year-olds in their sample were able to define either truth or lie whereas 87.5% of the eight-year-olds were able to define both concepts (Michelle Aldridge & Joanne Wood, *Interviewing Children: A Guide for Child Care and Forensic Practitioners*, 1998). This does not necessarily mean that four-year-olds do not understand the meaning of truth and lies. It also does not mean that the open-ended questions should not be asked. Some developmentally advanced children may be able to answer in a narrative form, but if not, there are acceptable alternative questions to help determine if and how much a child understands these concepts.
- D**
- E**
- F**
- G** For example, young children usually have an easier time answering multiple-choice questions, such as *.If I said my hair is brown, is that the truth or a lie?*” In fact, it is quite common for interviewers or legal professionals to ask several of these basic questions. While there is nothing wrong with doing this, such questions really are not sufficient for several reasons. First, although most children can correctly answer these types of basic questions, they do not provide an answer to the real question of whether the child understands what it means to tell the truth and what it means to tell a lie. While they may be appropriate preliminary questions, the standard “*If I said my hair is brown* .... type of questions mostly establishes whether a child knows his or her colors and can provide a correct or incorrect answer.
- H**
- I**

Secondly, such questions do not place children in scenarios similar to what judges are ultimately considering when determining witness competency. The pertinent question is whether a child who is placed in a particular situation (the courtroom) and asked questions about an event they either witnessed or experienced (the alleged incident) can distinguish what is the truth and what is a lie. Therefore, in addition to the relatively simple questions, more situationally relevant questions should be asked when assessing a child's competency to testify, such as:

◆ If I told your mom that you just yelled at me, would that be the truth or a lie?

◆ If you told your mom that I hit you, would that be the truth or a lie?

◆ If you told your teacher that something bad happened to you, but it really didn't happen – you were making it up - would you be telling the truth or a lie?

Competent children should be able to consistently provide correct answers to these multiple-choice questions”.

IV. Meaning of Taking an Oath – Here also, the observations of the author shed valuable light and reads as follows:-

“Children usually are not familiar with the word, oath, but most recognize the word, promise. Because taking an oath and making a promise are similar concepts, it is more developmentally appropriate and more productive to ask children if they know what it means to make a promise. Furthermore, substituting the word, promise, for the word, oath, when swearing in child witnesses has become increasingly more common and accepted throughout the legal system (Task Force on Child Witnesses, American Bar Association Criminal Justice Section, The Child Witness in Legal Cases, 2002).

Still, as with other open-ended, definition-type questions, young children may not be able to readily answer the question, .What does it mean to make a promise?. If this is the case, follow-up questions also should be asked to better assess the child's appreciation, such as:

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- A** ♦ If you promise your mom that you are going to eat your lunch, what should you do? 'and' Why?. 'If you promise to tell the truth today, what should you do? 'and' Why?.
- B** Children also should be asked what might happen, both to the child and the person being lied about, if they said something happened to them and it was not true. Examples of such questions are:
- ♦ When you get caught telling a lie, what usually happens to you?
- C** ♦ If you said that your classmate hit you and it was not true – you were making it up – what could happen to you for lying?
- D** ♦ If you said that your sister hit you and it really didn't happen, but your dad believed you, what could happen to your sister?

**E** In cases where a child witness struggles with responding appropriately to questions about promising, the issue of competency may need to be raised.”

**F** 30. The author further notes that while judges and attorneys believe that a child who can correctly answer questions such as, “*If I said my hair is green, is that the truth or a lie?*” understands the difference between the truth and a lie and is, therefore, competent to testify, a review of the legal standards for competency to testify throughout the majority of states shows that the standard is not that simple to meet.

**G** Legal standards for competency to testify generally require witnesses to not only understand the concepts of truth and lie, but also to appreciate the meaning of an oath to tell the truth and an understanding of the potential consequences of not telling the truth as well as abilities to observe, recall, and communicate information.

**H**

**I** 31. The importance of the evaluation is underlined by the author who states that as a pre-trial challenge to the competency of a child witness is crucial for the outcome of the case, the competency requirements must be well understood by attorneys and judges.

32. The Judge thus evaluates the child's intelligence and capacity as a competent witness or to ascertain whether she understands the

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meaning of oath. This is also the mandate of Section 118 of the Indian Evidence Act. **A**

**What may the trial judge ask?**

33. We are deeply concerned with the manner in which any child in the court system is treated. The issue of not only the manner in which children are treated in the court system, but the nature and propriety of questions which would be appropriate for them. Judges are not trained in child psychology and may also have had very little experience and interaction with children. Just as adults, it is impossible to fathom what goes through a child's mind or predict as to how a particular experience or question may impact them. Some insight into the manner a competence examination ought to be conducted by the Court is to be found in the paper **Child Witnesses: the Judicial Role (2007) 8 (2) The Judicial Review 281-294 by Dr. Judy Cashmore, Associate Professor, Sydney Law School (former Member, the Judicial Commission of New South Wales, Australia)**. In view of the significance of the issue, the relevant extract of the paper on this aspect is extracted below: **B**

**“Competence testing**

Children are presumed to be competent and can give unsworn evidence if the court is satisfied they understand the difference between the truth and a lie. This presumption is reasonable given the research findings on children's understanding of truth and lies, and promises. Children as young as four or five recognise deliberately false statements as lies but tend to be over-inclusive and more stringent than older children and adults because they tend to include incorrect guesses and exaggerations as lies. They also expect to be caught out and to be punished if they lie. **C**

Despite the presumption of competence, some children are still subjected to inappropriate questioning about their understanding of truth and lies. Several children and a parent/carer in the child sexual assault specialist jurisdiction evaluation study commented on the confusing nature of the questions about truth-telling. One 15-year-old with a learning difficulty said, for example: **D**

*“He made me confused. He asked me what the truth was, and I was thinking about it and he said =Did you listen to me, young* **E**

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**A** *man?’ and he just kept asking the same thing”.*

His foster mother also commented on his difficulty:

**B** *“His speech goes when he is really nervous, and he was struggling to talk. That was hard for him because the judge did not give him time to answer. He said =Are you listening, can you understand what I’m saying’ and that just flustered him more and he could not get his answers out. And when that happens, he just clams up, and he just says ‘yep’, ‘nup’.”*

**C** It is very difficult, even for adults, to respond to abstract questions asking them to explain the conceptual difference between the truth and a lie. Attempts to ask more concrete questions may, however, raise other difficulties. For example:

**D**

- *Would it be the truth or a lie if I said (if asked by a judge/magistrate)?* There are two problems with this question. First, it asks the child to call the judge/magistrate a liar. Secondly, asking children whether a given statement matches reality (for example, colour of clothing) does not indicate whether they know the difference between a truth and a lie. A lie requires the intention to deceive or mislead.

**E**

- *If I said there were eight people in the room, and if there were only ...?* This question requires the child to keep in mind two conditional or hypothetical statements, in addition to the problem alluded to above.

**F**

- *Have you ever told a lie? No.* Children are likely to be very uncomfortable admitting that they have lied, especially in court to a judge or lawyer.

**G**

- *What would happen to you if you told a lie here today?* A child who answers by saying ‘nothing’ may be seen as not understanding the consequences of lying but some children do not accept the premise of the question - they have no intention of lying - so they may say “nothing”.

**H**

- For example, one exchange between an adult and a child:  
*If you tell a lie, will you get into trouble? No.*

**I** You won’t get into trouble? No ... **But I am not going to tell a lie.**

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Since some children may not elaborate and give a reason for their answer, it would therefore be better to ask - .If your brother/sister/friend broke a plate and said you broke it to save getting into trouble, would that be the truth or a lie?" **A**

34. We may note that we have hardly come across a case where the question as to whether the child witness understands the meaning of truth, lie and oath is not a standard. **B**

35. The importance of judicial leadership in cases involving children is expressed by L. Sas in "The Interaction Between Children's Development Capabilities and the Courtroom Environment: The Impact on Testimonial Competency, Research Report (RR02-6e)"\*\*\*, [November 2002, Department of Justice, Canada], when she stated thus: **C**

"Children's feelings of goodwill and their high expectations of the adults in court are especially extended towards the judiciary. Children cannot understand how a judge will not believe them when they are telling the truth. Many children have unrealistic expectations of the judge, seeing the judge as someone who will right all the wrongs that have been committed by the accused. It is not surprising that explanations of how a judge arrives at a decision employing a standard of beyond a reasonable doubt is so hard for child witnesses to comprehend. They expect the judge to see the events from their perspective. This is one of the reasons why court preparation is so important for child witnesses.. **D**  
**E**  
**F**

**Competency testing in the present case** **G**

36. Before coming to the actual statement, we may refer to some essential facts some of which were before the trial judge in the challan. In the present case, the alleged incident took place in public toilet in the Multani Danda, Pahar Ganj area. The child victim/ witness was one of the four sisters who did not appear to be having the care of their parents and was living with their aunt (described by the child as Bua). So far as the victim is concerned, she appeared to be under the guardianship of her maternal aunt. **H**  
**I**

\*\*\* <http://canada.justice.gc.ca/en/ps/rs/rep/2002/interaction/inter.pdf> (retrieved on 24 January 2007).



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**A** 37. The child victim was examined by the trial judge on the 21st of April, 2011. The statement has been annexed with the paper book placed before us.

**B** 38. The first and foremost guideline mandated in every binding judicial pronouncement on the subject is to maintain anonymity of the identity of the victim. The several judicial pronouncements and guidelines noted above are based on the prime requirement of ensuring the best interests of the child under all circumstances. We are constrained to note that the trial Court has completely ignored this guideline and has recorded the full particulars, including the name of the child, before recording the statement.

**C** 39. We may now extract the examination by the trial judge in the present case to ascertain this very aspect of the matter:

“Q. What is your age?

Ans. My aunt Baby knows it.

**E** Q. For how many years you are going to school?

Ans. For the last one year.

Q. Do you know how to read Hindi or English?

Ans. I know to read Hindi only.

**F** Q. Whether one should speak truth or false?

Ans. Truth.

Q. Why one should speak truth or false?

**G** Ans. Silence, as she does not reply.

Q. Whether one should speak truth in the court or not?

Ans. Yes, one should speak truth.

Q. Do you watch T.V.?

**H** Ans. No, we do not have T.V.

Q. Do you know who is prime minister of India?

Ans. No.

**I** Q. Who are your family members?

Ans. We are four sisters living with our Bua as our mother had already expired and my father is missing for long time.”

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40. After putting the above questions and a consideration of the witnesses answers noted above, the learned trial judge held that the witness did not understand the meaning of the oath and therefore her statement was recorded without oath. **A**

41. Mr. Dayan Krishnan, learned Additional Standing Counsel for the State points out that from the very case of the prosecution, the learned trial judge was conscious of the socio-economic status of the child and consequently most of the questions put to the child were completely unfair and unmerited. **B**

42. We find from the questions put to the child that the learned trial judge was well aware of the fact that she was one of the four sisters who were being looked after by their Bua for the reason that their mother had expired and father was missing for the long time. The child was not going to school. The incident had taken place in public toilet and the child appeared to be coming from a household with little economic means. **C**

43. In this background, the questions put to the child as to whether she watches television and her disclosing that she does not have television was certainly not circumstance appropriate. Given the level of her education as well as her background, the further question as to who was the Prime Minister of India was wholly unwarranted. **D**

44. The questions that the trial judge would be required to put to the witness have necessarily to meet the requirements of law as well as the binding principles laid down in the several judicial pronouncements and the authoritative texts noted by us having special regard to the age and circumstances of the person who is required to depose. **E**

**Importance of Child testimony**

45. So far as the parameters within which the inquiry by the court shall be conducted are concerned, in the judgment reported at (1952) 1 SCR 377 **Rameshwar vs. The State of Rajasthan** (at page 382), the Supreme Court held that "*it is desirable that judges and magistrates should always record their opinion that the child understands the duty of speaking truth*" In this precedent the court had recorded that the child did not understand the nature of the oath, however continued to record the child's evidence which circumstance by itself was construed as the record of competence. It was also held that not having taken oath only **F**

**H**  
**I**

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- A** goes to the credibility, and not the competency of the witness. The court relied upon the testimony of the prosecutrix who was eight years old and upheld the conviction of the accused for the offence of rape. The court had observed that while evaluating the testimony of such child, the circumstances which would be considered would be the tender years of the child; its demeanor; possibility of tutoring, etc.

- C** **46.** In (2004) 1 SCC 64, Ratansinh Dalsukhbhai Nayak vs. State of Gujarat, the Supreme Court upheld the conviction of the appellants under Section 302 IPC relying upon the evidence of a ten years old child. The court prescribed the requirements, which the court would meet before recording the evidence of a child witness in para 7 in the following terms:-

- D** “The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial judge who notices her manners, her apparent possession or lack of intelligence, and said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as her understanding of the obligations of an oath.”

- F** **47.** On the weight to be attached to child testimony, in para 5 of the case reported at (1997) 5 SCC 341, Dattu Ramrao Sakhare vs. State of Maharashtra, the Supreme Court has made the following valuable observations:-

- G** “A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored. There is no rule or practice that in every case the evidence of such a witness be corroborated before a conviction can be allowed to stand but, however as a rule of prudence the court always finds it desirable to have the

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corroboration to such evidence from other dependable evidence on record.” **A**

48. Such being the weight which may be attached to a child witness testimony, a fair trial would mandate that the best child testimony is ensured. **B**

**Impact of a court appearance on the child**

49. It needs no elaboration that Court appearances impact children more drastically than they do adults. The foreboding and austere Court rooms; people in black and white uniforms; the presence of the offender against whom the child has to testify may bring alive the trauma the child has seen (or may have experienced, if a victim). All of this may reduce the child into a state of terrified silence. This is where the judge has to step in to ensure removal of the fear and apprehensions being nursed by the child in the Court. **C**  
**D**

50. The following courtroom experiences of child witness recorded by Dr. Judy Cashmore, in (Child Witnesses: The Judicial Role [(2007) 8(2) The Judicial Review 281-294) as to why they could not give a full and proper account of their evidence shed valuable light on the present issue as well: **E**

“There were several reasons children felt they could not give a full and proper account of their evidence. First, they were constrained by the questions and by the directions they were given about how they could answer. Several children were upset that they could not tell the truth, the whole truth, and nothing but the truth., because they were told by either the judge or the lawyer, to “just answer the question that was asked”. They also reported being cut off or interrupted by the lawyer. For example: **F**

“It was very hard because he [lawyer] would not let me speak. He would ask me a question and he would not let me respond to it. He’d just cut me off.. (15-year-old complainant) **G**  
**H**

“Like I’d go to tell him what happened and he’d just say, ‘No, just answer the question’. Like, you want to tell them the whole story, and they say, ‘No, you can’t say that. If you don’t say it this way, you can’t say it at all’.. Who was saying that? The other guy, the defence guy. (11-year-old complainant) **I**

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- A** Second, some felt constrained by admissibility issues and by having to carefully edit their 'stories' to suit. For example, Alice, a 16-year-old, was giving evidence in relation to a series of sexual assaults against her in one trial, and in relation to assaults against several other complainants in two other separate trials.
- B** She spoke of her difficulty in trying to answer questions 'out of context' - without referring to the other complainants - and her consequent discomfort at appearing hesitant and unreliable before the jury.
- C** "No, I had been told that I could not mention any other cases but some questions that they asked, you couldn't answer without mentioning the other people because that's how it worked, that's how it happened. So I was thinking, 'Am I going to look like I am lying because I am hesitating? - because I didn't know how to answer without mentioning them. I feel negative about the court experience now because there are just so many things you can't say which makes it very hard for the jury to understand a lot of other things you know are connected to them'. (15-year-old complainant)
- D**
- E**
- Third, some children had difficulty in understanding the questions, consistent with the findings of numerous other studies on the difficulty of 'legal language' 8 For example:
- F** *"It was quite hard ... and a bit annoying. They were speaking mumbo jumbo. Words I could not understand. (15-year-old complainant)*
- G**
- Finally, some child witnesses were clearly frustrated by what they saw as unnecessary questioning about irrelevant details by the defence lawyer and dissatisfied that their attempts to give honest answers were used to make them appear to be an unreliable witness. For example: There were so many questions that you cannot possibly remember the details over two years. He asked questions about things that were really irrelevant, like how long did Petra stay for, so he got me saying a number of times 'I don't really remember'. And it worked; so then he could say to the jury that she doesn't remember.. (16-year-old complainant.
- H**
- I**

51. We may point out even at the cost of repetition that the directions

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by the courts noted above, made with the best interests of the child at the center, take care of all these issues. **A**

52. Our attention has been drawn to the Division Bench pronouncement reported at 20 (1981) DLT 55 (DB), **Prem Shankar Sachhan vs. State** wherein in para 22, the court observed that the testimony of a child witness can be "*spontaneous and unsparing, once the child is enabled to overcome the initial shock and awe, and ensured protection, security, compassion, and given confidence to come out with what was seen*". It was thereafter held as follows:- **B**

"The merit of evidence has to be judged on the touchstone of its own inherent intrinsic worth. Courts should also while permitting full scope for cross-examination of such witnesses be careful to see that they are not subjected to unnecessary confusion, harassment or unduly made conscious of the awe of formal court atmosphere and the public gaze.. **C**

53. The guidelines noticed above in para 83(iv), have factored in avoidance of interface with the accused; use of screens/video links; avoidance of multiple court appearances; sensitive questioning and cross examination of the child and ensuring minimization of secondary transaction of the child witness (who may be a victim). **D**

**Duty of the court** **E**

54. What needs emphasis, however, is that the guidelines laid down in judicial precedents know no exceptions and adherence is mandatory. Their application at every stage of the proceedings is most essential so as to get the best evidence from the child witness, necessary for conviction of the guilty as well as for preventing the innocent from punishment. We repeat that these principles have to be followed at the stage of conducting the competency examination of the child witness as well. **F**

55. Even more important is the fundamental responsibility of every court to ensure the welfare and best interests of the child which has to remain the paramount consideration under all circumstances. Unfortunately, this aspect during the trial is more often a casualty than not. Regrettably the trial court without realizing, are thereby violating with impunity binding judgments of the Supreme Court and this Court. Important statutory provisions are being ignored impacting not only the quality of important child witnesses but the result of the trial. The inevitable consequence is that best interest of the child suffer as well. **G**

**H**  
**I**

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**A** Conclusions

**56.** We are presently considering the matter of a competency examination by a trial judge.

**B** **57.** To say the least in the instant case, the trial judge has completely ignored the best interest of the child witness who testified before him. He has also ignored the mandate of law as well as the several judicial pronouncements which have been mentioned hereinbefore.

**C** **58.** The questions which were put to the child witness ought to have been sensitively framed keeping in mind the socio-economic background of the child, education of the child, the age as well as the capacity of the child which the trial judge would evaluate when the child is produced before him.

**D** **59.** It is not for us to frame a template with regard to the questions which may be appropriate in a particular case. Some examples suggested by experts have been noted herein. The discussion suggests propriety of some questions which could be put to the child. However, the questions which have been put in the instant case were certainly inappropriate, were insensitive and violated the basic human rights of the child witness.

**E** **60.** The trial courts would be well advised to pay heed to the several cautions by the experts and carefully evaluate the questions which they put to child witnesses as well as compliance with the guidelines to minimize the secondary traumatising of a child witness by the courtroom experience.

**F** **61.** We are concerned only with the violation of the guidelines noted in para 14 and the nature of questions framed and put by the learned trial judge for as the competency examination. Given the importance of the issue, this matter cannot be ignored by us. We make it clear that nothing above in this order is an expression of opinion on either the statement of the child or on the merits of the judgment against which the present leave petition has been filed by the State. The impugned judgment does not reflect any challenge by the defence to the competency of the child to give evidence in the present case. We have examined herein only the general principles which would govern a competency examination of the child witness before the court and the propriety of the questions framed by the learned trial judge.



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In view of the above discussion, we direct that a copy of this order A  
be sent to the Principal, District and Sessions Judge who shall circulate  
this order to all judges in the District Courts who shall ensure compliance  
of the judicial precedents and guidelines laid therein.

List the petition on 27th May, 2013, the date already fixed. B

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W.P.(C) C

PANCHAM SINGH ...PETITIONER D

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS E

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. (C) NO. : 337/1998 DATE OF DECISION: 17.04.2013

Border Security Force Act, 1968—Section 11—Border  
Security Force Rules, 1969—Rule 22—Sector HQs  
Hospital, Amritsar referred petitioner to Base Hospital,  
Jalandhar for further treatment—Petitioner neither G  
reported in that hospital nor informed respondents  
and went to his home town, Moradabad—As petitioner's  
period of absence exceeded 30 days, a Court of  
Inquiry was conducted—Show cause was also H  
dispatched to petitioner informing that it was tentatively  
proposed to terminate his services by way of order of  
dismissal—Petitioner failed to respond to respondents  
and vide impugned orders, petitioner dismissed from I  
service and appeal of petitioner also rejected—Orders  
challenged before HC—Plea taken, petitioner was  
unwell and was taking treatment for tuberculosis and  
for this reason has failed to report at place of duty—