



Session 12: Appreciation of Evidence: Legal Principles

4-Day Judicial Training Program on Child Forensics and Implementation of POCSO (Sikkim Judicial Academy)

SAMVAD

Support, Advocacy & Mental health interventions for children in Vulnerable circumstances And Distress

(A National Initiative & Integrated Resource for Child Protection, Mental Health, & Psychosocial Care)

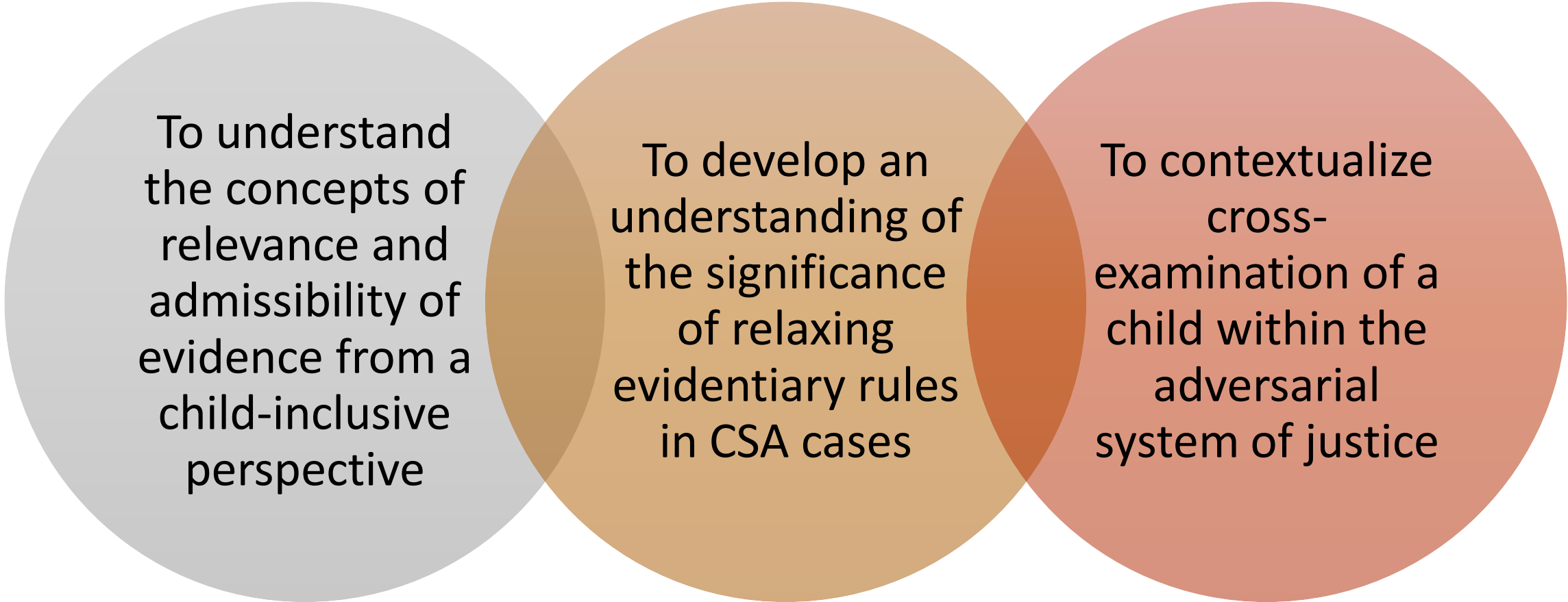
Dept. of Child and Adolescent Psychiatry

National Institute of Mental Health & Neurosciences

(NIMHANS), Bangalore

Supported by the Ministry of Women and Child Development, Govt. of India

Learning Objectives



To understand the concepts of relevance and admissibility of evidence from a child-inclusive perspective

To develop an understanding of the significance of relaxing evidentiary rules in CSA cases

To contextualize cross-examination of a child within the adversarial system of justice

Types of Evidence

- Evidence includes:

1) **Oral Evidence** - statements which are made before the Court by witnesses in relation to the facts which are under inquiry. In most cases, oral evidence must be primary or direct, which means that the witness who has personally seen, heard or perceived the fact must give their evidence before the Court. Oral evidence is collected primarily during: ***a) examination-in-chief, b) cross examination & c) re-examination.***

2) **Documentary evidence** – All documents which are brought before the Court, including electronic documents. Documentary evidence may be primary - showing original documents, or secondary, which is producing copies of documents (permitted under certain circumstances).

Procedure for Witness Examination

Sl. No.	Examination-in-chief	Cross-Examination	Re-examination
1	The examination of witness by the party who calls him	The examination of a witness by the adverse party	The examination of a witness, after the cross-examination , by the party who initially called him
2	To provide material facts supporting the party's narrative.	To cross-question the witness on statements made during chief examination.	To clarify any ambiguity or discrepancy after the cross-examination; to explain any point referred to in cross; elicit new information if relevant (with permission of the Court)
3	First in the order of witness examination	Second in the order of witness examination	Last in the order of witness examination
4	No leading questions	Leading questions can be freely asked	No leading questions

Types of Evidence

- ***Direct Evidence*** directly proves or disproves a fact. Direct evidence relates to the very issue in question, and can prove the fact in question without needing any help from supporting evidence. (for e.g.: **Eyewitness Testimony**)
- ***Indirect Evidence*** proves facts in question by giving other facts which are related to the main issue. A deduction must be drawn from the evidence by connecting it to allegations before the Court. Indirect Evidence includes:
 - a. **hearsay evidence**
 - b. **circumstantial evidence**

Indirect/ Circumstantial Evidence

Circumstantial evidence does not prove the issue in question but it ascertains the point through inference or reasoning.

When there is insufficient direct evidence to prove any fact in issue then the court can make an assumption on the availability of existing evidence and construct a link between the existing evidence and the inference.

For example: At the time of the rape, the accused was seen going to the victim's house, and shortly afterwards, screams were heard from the victim's house. This is indirect or circumstantial evidence.

Hearsay Evidence- Hearsay evidence is when a person narrates facts which were told to them by the actual witness of the incident. The witness before the Court is reporting **not** what they themselves saw or heard, but facts which were told to them by someone else. **It is typically considered weak evidence, or no evidence at all.**

Types of Evidence

- **Substantive Evidence**

Substantive evidence is the evidence on the basis of which a fact is proved and which requires no corroboration. (E.g.: **Eyewitness Testimony**)

- **Corroborative Evidence**

Corroborative evidence is the evidence used to make substantive evidence more concrete. If there is no substantive evidence, corroborative evidence loses its significance. (E.g.: **Medical Evidence**)

Both the evidence are either direct or circumstantial or both i.e., these concepts are fundamentally interrelated but distinct.

Imperatives & Issues in Children's testimony

- There are developmental differences between adults and children's memory, but children also have the ability to provide accurate and meaningful information. For example, the ability to narrate past events, may be loosely organized according to children's developmentally immature views of the world.
- Legalese in the Courtroom during **examination** and **cross examination**:
 - Common courtroom questions may be misunderstood by children, **especially given their developmental immaturity**
 - When children are asked questions they cannot understand, miscommunication is inevitable
- Therefore, there is an imperative to relax some of the strict rules of admissibility and appreciation of evidence of child witnesses...

Case Study - Rinku v. State (NCT of Delhi) 2019 (Cross Examination and Semantics)

Q. You had earlier told your mother it was a tall boy who lives in your area?

Ans. Yes.

Q. Did you tell mummy that Jaanu's uncle took you to the forest?

Ans. Yes. I told her.

Q. Beta, did the police come to meet you in the hospital?

Ans. Yes.

Q. When did they come to meet you...same day or next day?

(question disallowed considering the age of victim)

Q. Was mummy in the hospital with you all night that day?

Ans. Yes.

.....**(Contd.)**.....

Q. Do you know any girl by the name N?

Ans. No.

Q. Do you know any girl by the name Z?

Ans. No.

Q. Beta, did your mummy ask you to say what you said in court today?

Ans. Yes.

Court question: Beta, whatever you have said today happened to you or are you saying it at the behest of your mother?

Ans. It happened to me."

Appreciating Child Witness Testimony: Precautionary Approach

- Sec.118 of the Evidence Act states that a child is also competent to give evidence and the evidence of a child is admissible. Therefore, a young child can be allowed to testify if he or she has the capacity to understand questions and give rational answers thereto.
- *The only caution to the court is that the evidence of a child must be scrutinized with care and caution, **and where possible**, be supported by corroboratory evidence.*

Relaxing Rules of Admissibility: Scope of the hearsay exception in India

- In CSA Cases, there are typically two witnesses...the perpetrator & the victim. Given the many rules on admissibility of evidence, proving CSA becomes difficult.
- Therefore, in light of the unique context of CSA, there are certain relaxations in the law...
- Section 6 read with Section 157 of the Evidence Act allows for admission of ***hearsay evidence***, as corroborative evidence, subject to certain conditions of **contemporaneity** and **spontaneity of disclosure**.

Hearsay exception

Certain kinds of statements may be made naturally, spontaneously, and without deliberation soon after an incident.

They typically do not leave much room for misunderstanding or misinterpretation, when someone else hears them, and hence carry a high degree of credibility. **Hearsay** evidence includes:

1. Words or phrases that either form part of, or explain, a physical act,
2. Exclamations that are so spontaneous as to belie concoction, and
3. Statements that are evidence of someone's state of mind.

Hearsay exception and CSA cases

- The hearsay exception is of special significance in child sexual abuse cases as the child victim-witness, in many cases, discloses abuse to the parent/caregiver after the incident.
- The testimony of the parents or caregivers is hence vital corroborative evidence, especially in the absence of physical or medical evidence.

Let's analyze a few cases

Questions to consider:

1. What are the requirements for the Hearsay exception to apply?
What do these requirements mean?
2. What evidentiary value does hearsay have in CSA cases? Does the dynamics of disclosure in CSA cases have an impact on application of the hearsay exception?

Manish v. State of Maharashtra (2019 Bombay HC)

- “The evidence of PW 2 and PW 7 as regards the disclosure made by the child victim though hearsay is admissible in view of the provisions of section 6 of the Indian Evidence Act...”
- “...Section 6 is an **exception to the rule of evidence that hearsay evidence is not admissible**. The statement must relate to the fact in issue or relevant thereto and must be substantially contemporaneous with the fact. Such statement, though not evidence of the truth of the matters stated, are of corroborative value...provided such evidence is almost contemporaneous with the fact/s excluding the possibility of fabrication.”

State of T.N v. Suresh and Anr (1998 SC)

- We think that the expression "**at or about the time when the fact took place**" in Section 157 of the Evidence Act should be understood in the context according to the facts and circumstances of each case. The mere fact that there was an intervening period of a few days, in a given case, may not be sufficient to exclude the statement...The test to be adopted, therefore, is this; **Did the witness have the opportunity to concoct or to have been tutored?**
- "There can be **no hard and fast rule** about the 'at or about the' condition in Section 157. The main test is whether the statement was made as early as can reasonably be expected in the circumstances of the case and before there was opportunity for tutoring or concoction".

Sole Testimony of the victim-witness

- A conviction can be made on the sole testimony of the victim, without any corroborative evidence. ***State of Maharashtra v. Babu Meenu (2013)***

- Conditions for conviction:

"In a cases of this nature, we cannot expect any eye witness or independent witness... It is settled proposition of law that when the evidence of prosecutrix (child) is cogent, consistent and trustworthy and inspires confidence of the Court, conviction can be recorded solely based on the evidence of the victim, unless there is a reason to discard or disbelieve the evidence of the sole witness" - K Ruban v. State (Madras HC 2021)

Children's testimony: The issue of consistency

“**Consistency**” of statements and evidence is one of the primary requirements for a conviction in a criminal trial.

However, children may be inconsistent, which is usually not because of deliberate falsehood.

Inconsistency may be caused by numerous factors, including:

- 1) The nature of disclosure among abused children,
- 2) developmental immaturity.

Children's testimony: The issue of consistency

- Inconsistencies in Child Witness Testimony call into question the reliability of the testimony, and in some cases, the credibility of the witness itself.
- Typically, inconsistencies in the Child's testimony may be an indicator of the possibility of tutoring, thereby requiring the Court to consider further evidence, or in some cases, acquit the accused altogether.
- Let's look at the case of ***Ali Mohammed Shaikh v. State of Maharashtra...***

Children's testimony: The issue of consistency

- ***Ali Mohammed Shaikh v. State of Maharashtra (Bombay HC 2020)***
- "The testimony of the victim so far as the identity of the accused is concerned, appears to be inconsistent. When the evidence of the P.W.5 was recorded in the Chamber of the learned Judge, the appellant (accused) was shown to her and she identified him in the Court saying that he is a friend of her father. The victim then deposed that she did not see the person prior to the date of offence committed on her, but then goes on to say that he used to meet her father and that she knew him well. It is in her evidence that she had an occasion to see the appellant again since the day she was assaulted. Considering these inconsistencies in her evidence, the version of the victim has to be scrutinized carefully."
- **As child was the sole witness in this case, the accused was acquitted by the High Court...**

Let's analyse the case

- What were the reasons for the court to distrust the credibility of the child's testimony?
- How did this affect the outcome of the case?

Children's testimony: The issue of consistency

- Case law has typically recognised that inconsistency, in itself, is not sufficient reason to discredit a witness. The question is with regard to the extent of omission/discrepancy.
- If it is a minor inconsistency, it does not affect the reliability of the evidence. Only inconsistency in material particulars i.e., key aspects of the testimonial account, would require greater scrutiny.
- Let's look at the case of **Narayan Chetanram Chaudhary & Anr. v. State of Maharashtra** 2000 SC)

“Only such omissions which amount to contradiction in material particulars can be used to discredit the testimony of the witness. The omission in the police statement by itself would not necessarily render the testimony of witness unreliable. **When the version given by the witness in the court is different in material particulars from that disclosed in his earlier statements, the case of the prosecution becomes doubtful and not otherwise.** Minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and the sense of observation differ from person to person...**Even if there is contradiction of statement of a witness on any material point, that is no ground to reject the whole of the testimony of such witness.”**

Let's analyse the case

- What kinds of inconsistencies are fatal to the prosecution's case?
- On what basis do we differentiate between different kinds of inconsistencies in the child's testimony?

Application of Presumptions and Burden of Proof

- The basic presumption in criminal law is that a person is innocent until proven guilty i.e., the **burden of proof is on the prosecution to prove the accused's guilt beyond reasonable doubt** i.e., beyond the possibility of reasonable alternatives.
- This presumption is reversed in the POCSO i.e., there is a **presumption of guilt on the accused**. However, by definition, proving a negative fact is exceedingly difficult. Therefore, there are certain requirements for the 'presumption of guilt' to apply in any POCSO case...

Application of Presumptions and Burden of Proof

- In **Manirul Islam @ Manirul Zaman Vs. State of Assam:**

“...mere insertion of sections 29 and 30(2) in the POCSO does not altogether relieve the prosecution of the burden of proof ... but merely lessen the burden on the prosecution by shifting the onus upon the accused. However, such reverse onus would shift upon the accused only when the prosecution succeeds in prima facie establishing the charge by adhering to the standard of proof of preponderance of probability. It is only then, the accused would have to displace the presumption of guilt.”

- In **Babu Vs. State of Kerala (2010 SC)**

Statutes like Negotiable Instruments Act, 1881; Prevention of Corruption Act, 1988; and Terrorist and Disruptive Activities (Prevention) Act, 1987, provide for presumption of guilt if the circumstances provided in those Statutes are found to be fulfilled...However, such a presumption can also be raised only when certain foundational facts are established by the prosecution.

**Let's briefly look at Expert Evidence and
Appreciation in a CSA Context**

What are the different kinds of expert evidence in POCSO Cases?

- For Mental Health:
 - Psychiatrists, psychologists, or social workers,
- Medical Issues
 - Gynecologists and other medical professionals treating the child
- Other Experts (in domains of forensic examination like DNA evidence)

Why are Expert witnesses crucial in CSA cases?

- Corroborative evidence often is lacking.
- Victims are less than ideal witnesses, both developmentally and psychologically, because they:
 - May be unable to provide detailed spontaneous reports of the abuse, due to fear their reports may be delayed
 - May be confused about dates and frequencies of events.
 - Fail to understand questions unless phrased in age-appropriate language, and they may retract earlier accusations if proceedings are protracted.
- Expert testimony can in cases of CSA...
 - i. help the court understand and evaluate the child victim-witness.
 - ii. elucidate the characteristics of child sexual abuse victims,
 - iii. the veracity of child victims and the particular child's statement
 - iv. Elicit the typical effects and symptoms of victimization.
 - v. provide information on the characteristics of abusers or incestuous families, thus helping to identify the defendant.

If mental health professionals are expert witnesses, they may testify that...

The child was sexually abused because:

- The child's symptoms are consistent with the behavior of sexually abused children.
- The child's symptoms are consistent with child sexual abuse accommodation syndrome (CSAAS).
- Sexually abused children in general respond with certain behaviors.

When is expert evidence particularly important?

- When the case depends on circumstantial evidence, expert evidence is particularly important in establishing causality and inferences from relevant circumstantial evidence.
- Expert evidence adds to the tipping scale of presumptions in favour of or against the accused. **Let's discuss this...**

Activity: Case Discussion: *Dayal Singh and Ors. Vs. State of Uttaranchal*

Appreciation of Expert Evidence

- The Courts, normally, look at expert evidence with a greater sense of acceptability, **but it is equally true that the courts are not absolutely guided by the report of the experts, especially if such reports are perfunctory, unsustainable and are the result of a deliberate attempt to misdirect the prosecution.**
- The expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and **enlighten the court on the technical aspect of the case by examining the terms of science, so that the court, although not an expert, may form its own judgment on those materials after giving due regard to the expert's opinion, because once the expert opinion is accepted, it is not the opinion of the medical officer but that of the Court.**

Appreciation of Expert Evidence

- The essential principle governing expert evidence is that the expert is not only to provide reasons to support his opinion but the result should be directly demonstrable. The court is not to surrender its own judgment to that of the expert or delegate its authority to a third party, but should assess his evidence like any other evidence. If the report of an expert is slipshod, inadequate or cryptic and the information of similarities or dissimilarities is not available in his report and his evidence in the case, then his opinion is of no use...Indeed the value of the expert evidence consists mainly on the ability of the witness by reason of his special training and experience to point out the court such important facts as it otherwise might fail to observe, and in so doing, the court is enabled to exercise its own view or judgment.
- The opinion is required to be presented in a convenient manner and the reasons for a conclusion based on certain visible evidence, properly placed before the Court. In other words, the value of expert evidence depends largely on the cogency of reasons on which it is based.
- The skill and experience of an expert is the ethos of his opinion, which itself should be reasoned and convincing. Not to say that no other view would be possible, but if the view of the expert has to find due weightage in the mind of the Court, it has to be well authored and convincing.

Case discussion:

- What does this case tell us, in terms of the value of expert evidence in CSA cases?
- What should expert evidence contain, from your perspective as a Judge?
- How should it be presented to Court (if you were the Presiding Officer)?