HIGH COURT OF AUSTRALIA

FRENCH CJ,
BELL, GAGELER, KEANE AND NETTLE JJ

THE QUEEN — APPELLANT

AND

GW — RESPONDENT

The Queen v GW
[2016] HCA 6
2 March 2016
C13/2015

ORDER

1. *Appeal allowed.*

2. *Set aside orders 1 to 3 of the Court of Appeal of the Supreme Court of the Australian Capital Territory made on 24 April 2015.*

3. *Remit the proceeding to the Court of Appeal for consequential orders with respect to sentence.*

On appeal from the Supreme Court of the Australian Capital Territory

Representation

J White SC with N S Drumgold for the appellant (instructed by Director of Public Prosecutions (ACT))

S J Odgers SC with B K Baker for the respondent (instructed by Kamy Saeedi Law)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

The Queen v GW

Criminal law – Evidence – Unsworn evidence – Where respondent convicted following trial in Supreme Court of the Australian Capital Territory of commission of act of indecency in presence of daughter, R – Where R six years old when giving evidence – Where R's evidence received unsworn under s 13(3) of Uniform Evidence legislation – Where ex tempore reasons of pre-trial judge suggested reversal of presumption of competence to give sworn evidence – Where respondent agreed to be bound by pre-trial judge's ruling under s 13(3) – Whether pre-trial judge failed to apply s 13 – Whether open to pre-trial judge to be satisfied s 13(3) test met – Whether R's unsworn evidence wrongly admitted.

Criminal law – Evidence – Jury directions – Where audiovisual recording of child witness' unsworn evidence tendered at trial – Where respondent requested trial judge direct jury that evidence unsworn – Whether Uniform Evidence legislation required direction – Whether common law required direction to avoid perceptible risk of miscarriage of justice – Whether adequate directions given.

Words and phrases – "competence", "evidence of a kind that may be unreliable", "evidence of children", "obligation to give truthful evidence", "perceptible risk of a miscarriage of justice", "presumption of competence", "reliability", "sworn evidence", "unsworn evidence".

Crimes Act 1900 (ACT), s 61(1).
Evidence Act 2011 (ACT), ss 12, 13, 21, 165, 165A, Sched 1.
Evidence (Miscellaneous Provisions) Act 1991 (ACT), s 70.

1 FRENCH CJ, BELL, GAGELER, KEANE AND NETTLE JJ. The respondent was convicted following a trial in the Supreme Court of the Australian Capital Territory of the commission of an act of indecency in the presence of R, his daughter, R being a person under the age of 10 years[1]. The offence is alleged to have occurred between 29 March 2012 and 2 April 2012. R was five years old at the time.

2 R's evidence was taken at a pre-trial hearing before Burns J on 6 August 2013. Following a voir dire hearing, Burns J determined that R's evidence should be received unsworn. The recording of R's unsworn evidence was tendered at the respondent's trial, which commenced on 21 March 2014 before Penfold J and a jury.

3 The respondent appealed on seven grounds against his conviction to the Court of Appeal of the Supreme Court of the Australian Capital Territory (Murrell CJ, Refshauge and Ross JJ). Relevantly, the respondent's third ground of appeal contended that Burns J did not apply the presumption of competence to give sworn evidence in determining that R's evidence should be given unsworn. His fourth ground complained that the trial judge failed to direct the jury concerning the significance of the fact that R's evidence was unsworn. The determination of these grounds required consideration of the provisions of the Uniform Evidence legislation governing the competence of witnesses and warnings about reliability.

4 The Court of Appeal upheld both grounds and dismissed the remaining five grounds of appeal. In determining the fourth ground, the Court of Appeal held that the trial judge was required to instruct the jury on the difference between sworn and unsworn evidence and to instruct the jury to take that difference into account in assessing the reliability of R's unsworn evidence[2]. The

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1 The indictment charged the respondent with six offences involving the commission of an act of indecency upon or in the presence of a person aged under 10 years contrary to s 61(1) of the *Crimes Act* 1900 (ACT). Three counts charged offences against R and the remaining three counts charged offences against the respondent's other daughter, H, who was three years old at the time. All of the offences were alleged to have occurred in the period between 29 March 2012 and 2 April 2012. The respondent was acquitted of counts five and six. The jury was unable to agree on counts one, two and four.

2 *GW v The Queen* [2015] ACTCA 15 at [103].

appeal was allowed, the respondent's conviction was set aside and a new trial ordered.

5 On 16 October 2015, Bell and Gageler JJ granted special leave to appeal on grounds which challenge the Court of Appeal's determination of each of the respondent's successful grounds. The respondent filed a notice of contention challenging the Court of Appeal's dismissal of his seventh ground. That contention was abandoned before the hearing of the appeal.

6 Before turning to the reasons of the Court of Appeal, it is convenient to outline the scheme for taking the evidence of child complainants on the trial on indictment of an offence against the law of the Australian Capital Territory and to refer to the provisions of the *Evidence Act* 2011 (ACT) ("the Evidence Act") governing the competence of witnesses. The latter discussion requires brief reference to the history of legislative provision for the reception of the unsworn evidence of children in proceedings in the ACT.

The statutory scheme for taking the evidence of a child complainant

7 The *Evidence (Miscellaneous Provisions) Act* 1991 (ACT) ("the EMP Act") provides that an audiovisual recording of a child answering questions asked by a prescribed person, in the course of the investigation of an alleged sexual offence, may be played at the trial of a person charged with the offence and admitted as the child's evidence in chief[3]. The balance of a child prosecution witness' evidence in a sexual offence proceeding may be given at a pre-trial hearing[4], which hearing need not be conducted by the judicial officer who presides at the trial[5]. Evidence taken at the pre-trial hearing must be audiovisually recorded and the recording must be played at the trial[6].

8 R was interviewed by officers of the Australian Federal Police on 13 September 2012 ("the interview"). An audiovisual recording of the interview was tendered as R's evidence in chief at the pre-trial hearing. The audiovisual

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3 EMP Act, ss 40E(1), 40F(1)(b).

4 EMP Act, s 40Q.

5 EMP Act, s 40R(4).

6 EMP Act, s 40S.

recording of the pre-trial hearing, together with the recording of the interview, were played at the trial and constituted R's evidence.

Competence to give evidence

9 Before the enactment of the *Evidence Act* 1995 (Cth) ("the Commonwealth Act"), courts in the ACT were empowered to receive the unsworn evidence of a child who had not attained the age of 14 years without any formality. This was subject to the court explaining, or causing it to be explained, to the child that he or she was required to tell truthfully what he or she knew about the matter to which the evidence related[7]. From its commencement until the commencement of the substantive provisions of the Evidence Act in 2012, the Commonwealth Act governed the determination of the competence of witnesses to give sworn and unsworn evidence in proceedings in the ACT[8].

10 As enacted, s 13(1) of the Commonwealth Act provided that a person who was incapable of understanding that, in giving evidence, he or she was under an obligation to give truthful evidence was not competent to give sworn evidence. Where a person was not competent to give sworn evidence under s 13(1), the Commonwealth Act, as enacted, imposed three conditions on competence to give unsworn evidence: (a) the court was satisfied that the person understood the difference between the truth and a lie; (b) the court had told the person that it was important to tell the truth; and (c) the person had indicated, by appropriate response when asked, that the person would not tell lies in the proceedings[9].

11 A decade after the enactment of the Commonwealth Act, the Australian Law Reform Commission, the New South Wales Law Reform Commission and the Victorian Law Reform Commission (collectively, "the Commissions") conducted a joint review of the operation of the Uniform Evidence legislation[10]. That review addressed the subtlety of the distinction between the test of competence to give sworn evidence – capacity to understand the obligation to give truthful evidence – and the test of competence to give unsworn evidence –

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7 *Evidence Act* 1971 (ACT), s 64.

8 Commonwealth Act, as enacted, s 8(4); Evidence Regulations 1995 (Cth), reg 4.

9 Commonwealth Act, s 13(2)(a)-(c).

10 Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102, (2005).

satisfaction that a person understands the difference between the truth and a lie[11]. In their joint report the Commissions recommended the introduction of a test of general competence to give evidence based upon basic comprehension and communication skills[12]. In the case of unsworn evidence, the Commissions proposed removing the requirement of satisfaction that the person understand the difference between the truth and a lie and the requirement that the person indicate that he or she will not tell lies[13]. It was said to be inconsistent to impose either requirement on a person who had been found to lack the capacity to understand the obligation to give truthful evidence[14].

12 Amendments to the Commonwealth Act introduced in 2008 ("the 2008 amendments") gave effect to the Commissions' recommendations in these respects. Section 13 was repealed and re-enacted in its present form[15]. In 2011, s 13 of the Commonwealth Act was enacted in almost identical terms in the Evidence Act:

> "**13 Competence—lack of capacity**
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> (1) A person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability)—
>
> (a) the person does not have the capacity to understand a question about the fact; or

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11 Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102, (2005) at 101-103 [4.30]-[4.37], 104 [4.40].

12 Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102, (2005) at 106 [4.49].

13 Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102, (2005) at 108 [4.60].

14 Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102, (2005) at 110 [4.69].

15 *Evidence Amendment Act* 2008 (Cth), Sched 1 item 3.

(b) the person does not have the capacity to give an answer that can be understood to a question about the fact;

and that incapacity cannot be overcome.

(2) A person who, because of subsection (1), is not competent to give evidence about a fact may be competent to give evidence about other facts.

(3) A person who is competent to give evidence about a fact is not competent to give sworn evidence about the fact if the person does not have the capacity to understand that, in giving evidence, the person is under an obligation to give truthful evidence.

(4) A person who is not competent to give sworn evidence about a fact may, subject to subsection (5), be competent to give unsworn evidence about the fact.

(5) A person who, because of subsection (3), is not competent to give sworn evidence is competent to give unsworn evidence if the court has told the person that—

(a) it is important to tell the truth; and

(b) the person may be asked questions that the person does not know, or cannot remember, the answer to, and that the person should tell the court if this happens; and

(c) the person may be asked questions that suggest certain statements are true or untrue and that the person should agree with the statements that the person believes are true and should feel no pressure to agree with statements that the person believes are untrue.

(6) It is presumed, unless the contrary is proved, that a person is not incompetent because of this section.

...

> (8) For the purpose of deciding a question arising under this section, the court may inform itself as it thinks fit, including by obtaining information from a person who has relevant specialised knowledge based on the person's training, study or experience."

13 It will be observed that competence to give evidence about a fact is confined to the person's capacity to understand a question about the fact and to give an intelligible answer to the question. It is only competence to give sworn evidence that requires the person to have the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence.

14 The s 13(6) presumption applies to both competence to give evidence and competence to give sworn evidence. In either case, the presumption will be displaced where the court is satisfied on the balance of probabilities of the contrary[16]. Where the presumption of competence to give sworn evidence is displaced, a person who is competent to give evidence about a fact may give unsworn evidence about the fact provided that the court has told the person the things set out in s 13(5).

The pre-trial hearing

15 R was aged six years and five months at the date of the pre-trial hearing. There was no issue as to R's capacity to understand questions about the facts of the alleged offence and to give intelligible answers to those questions. Accordingly, there was no issue as to R's competence to give evidence. There was an issue as to R's competence to give sworn evidence. The issue was raised by the prosecutor, who informed the Court:

> "[T]he child is six years old. I've spoken to her. I don't believe she can give sworn evidence. She doesn't understand what a Bible or affirmation is. It seems to me that the procedure is set out in 13(5) of the Evidence Act. When I spoke to her before she understood the importance of telling the truth."

16 Defence counsel did not demur to the proposal that the Court should follow the procedure set out in s 13(5) and take R's evidence unsworn. Nonetheless, Burns J declined to adopt that course, informing counsel that "[i]t seems to me that I need to go through the process in subsection (3) of section 13

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16 Evidence Act, s 142.

before we get to subsection (5)". R was called and questioned by Burns J. After some preliminary questions, the examination continued:

> "Now, you'll be asked to tell us the truth about what happened to you in the past. What do you understand to be the truth about what happened to you in the past?
>
> (No audible reply)
>
> Now, I'll ask it another way. How long have you been at your school?
>
> I don't know.
>
> Right. Did you come to the court today in a car or in a bus?
>
> In a car.
>
> All right [sic]. So if I was to say to you, you came to court today in a bus would that be true or not true?
>
> Not true.
>
> And do you understand that today in giving evidence you have to only tell us the truth? You have to tell us things that really happened, you understand that?
>
> Yes.
>
> Things that you saw and you heard. You understand that?
>
> Yes."

17 At the conclusion of the examination, the transcript records the following exchange:

> "HIS HONOUR: Gentlemen, despite the fact that the witness has indicated that she understands that – at least understands the difference between the truth and what is not the truth, and says that she understands that she has an obligation to tell the truth today, I think that it is probably better to proceed under subsection (5). At the present time, because of the difficulty in truly gauging the level of her understanding and her age, *I am not satisfied that she has the capacity to understand that in giving evidence today she has an obligation to give truthful evidence*. So I

propose to proceed under subsection (5) of section 13. Do you want to be heard in relation to that, [defence counsel]?

[DEFENCE COUNSEL]: No, your Honour." (emphasis added)

18 R was recalled and Burns J informed her of each of the matters of which he was required to inform her under s 13(5). R's evidence was then taken unsworn.

19 A party dissatisfied with a ruling made at a pre-trial hearing may appeal by leave to the Court of Appeal[17]. The respondent did not apply for leave to appeal from Burns J's decision to take R's evidence unsworn. At a directions hearing before Murrell CJ, the respondent agreed to be bound by the rulings made by Burns J at the pre-trial hearing.

The trial

20 At the trial, defence counsel objected to the admission of R's evidence on the ground that the pre-condition for the reception of R's evidence unsworn – the court's satisfaction that R did not have the capacity to understand that in giving evidence she was under an obligation to give truthful evidence ("the requisite capacity") – had not been established. In counsel's submission, Burns J was merely left unsatisfied that R possessed the requisite capacity. It was submitted that, in circumstances in which the presumption of capacity to give sworn evidence was not displaced, s 21 of the Evidence Act required that R take an oath or make an affirmation before giving evidence.

21 Penfold J considered that, absent good reason for not seeking leave to challenge a pre-trial ruling, a party should not be permitted to re-argue the ruling at trial. Her Honour concluded that the interests of justice were not offended by holding the parties to their agreement not to challenge Burns J's pre-trial ruling. The audiovisual recording of R's unsworn evidence at the pre-trial hearing was played to the jury. The recording did not include the voir dire examination or Burns J's instruction to R of the s 13(5) matters.

The Court of Appeal

22 As earlier noted, a ground of appeal in the Court of Appeal contended that R's unsworn evidence should not have been admitted. The Court of Appeal

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17 *Supreme Court Act* 1933 (ACT), s 37E(4).

acknowledged that, in determining the question of R's competence to give sworn evidence, Burns J had been entitled to inform himself in "the manner that he saw fit"[18]. Their Honours noted that it had been open to Burns J to take into account matters such as R's answers to, and manner of answering, the questions asked of her; that she was six years old; the prosecutor's indication that she did not understand the oath or affirmation; and that defence counsel, having seen the examination, conceded that it was appropriate that her evidence be given unsworn[19]. An analysis of Burns J's remarks, which prompted this last-mentioned concession, led the Court of Appeal to conclude that his Honour had reversed the statutory test: Burns J said he was "*not satisfied* that [R] *has* the [requisite] capacity" (Court of Appeal's emphasis) when s 13(3) required satisfaction that R did not have that capacity[20]. The Court of Appeal inferred that Burns J wrongly treated competence to give unsworn evidence as the "default" position under the Evidence Act[21]. The assumed failure to apply s 13 meant that the respondent's trial had not been conducted according to law[22], a conclusion that the Court of Appeal said required that the appeal be allowed and the respondent's conviction set aside[23].

23 The Court of Appeal acknowledged that Burns J's reasons for this apparently uncontentious determination were delivered ex tempore and may not have been articulated with the same felicity as considered reasons resolving a contentious question[24]. Their Honours went on to observe that compliance with s 13, in determining competence to give unsworn evidence, cannot be waived[25].

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18 *GW v The Queen* [2015] ACTCA 15 at [79], referring to s 13(8) of the Evidence Act.

19 *GW v The Queen* [2015] ACTCA 15 at [79].

20 *GW v The Queen* [2015] ACTCA 15 at [80].

21 *GW v The Queen* [2015] ACTCA 15 at [80]. See Evidence Act, s 190.

22 *GW v The Queen* [2015] ACTCA 15 at [84].

23 *GW v The Queen* [2015] ACTCA 15 at [131].

24 *GW v The Queen* [2015] ACTCA 15 at [81].

25 *GW v The Queen* [2015] ACTCA 15 at [81], [82].

Each proposition may be accepted. However, acceptance of the latter does not reduce the force of the former.

Submissions in this Court

24 Reduced to its essentials, the appellant's case is that the Court of Appeal erred by drawing from brief, ex tempore remarks that Burns J did not comply with s 13. The appellant says that it is evident that his Honour was mindful of the presumption of competence to give sworn evidence and satisfied that it had been displaced.

25 The respondent's argument embraces the Court of Appeal's analysis; it is evident from his reasons that Burns J was not satisfied one way or the other of whether R possessed the requisite capacity. Moreover, the respondent observes that at no stage in the course of the hearing did Burns J correctly state the s 13(3) test. In his submission, it was well open to the Court of Appeal to infer that his Honour was under the misapprehension that unsworn evidence was the "default" position because the material suggested that R had the requisite capacity. R's affirmative answer to the question of whether she understood that, in giving evidence, she had to tell the truth is suggested by the respondent to amount in effect to an acknowledgment of her understanding that she was under an obligation to do so. Correctly understood, the prosecutor's submission is suggested to have supported that conclusion. This is because R's want of understanding of the Bible or an affirmation was "utterly irrelevant" to the question while the prosecutor's opinion that R understood the importance of telling the truth was "almost identical to the criterion" (of competence in s 13(3)). The respondent submits that it is questionable that it was open to Burns J to be satisfied affirmatively to the contrary.

Consideration

26 Turning to the respondent's last submission first, "obligation" in s 13(3) is to be understood in its ordinary, grammatical meaning as the condition of being morally or legally bound – in this case, to give truthful evidence[26]. A child may agree that he or she understands that he or she is to tell the truth without having any understanding of what it is to give evidence in a court proceeding, much less of the concept of being morally or legally bound to give truthful evidence.

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26 *The New Shorter Oxford English Dictionary*, (1993), vol 2 at 1966, "obligation", sense 3.

Contrary to the respondent's submission, R's affirmative answer to the question "[a]nd do you understand that today in giving evidence you have to only tell us the truth? You have to tell us things that really happened, you understand that?" is not to be understood as necessarily conveying that R had the capacity to understand that, in giving evidence, she was under such an obligation.

27 There are many ways to explore whether a child understands what it means to give evidence in a court and the concept of being morally or legally bound to be truthful in so doing. Here, it would seem the prosecutor questioned R about her understanding of swearing an oath on the Bible or making an affirmation. Her lack of understanding of either was not determinative but it was not irrelevant to the formation of the opinion that she did not possess the capacity to understand the obligation. The suggestion that it may not have been open to Burns J to be satisfied that R, a six-year-old child, lacked that capacity is unsustainable.

28 It was necessary for Burns J to be affirmatively satisfied that R did not have the requisite capacity before instructing her pursuant to s 13(5) and admitting her evidence unsworn. At the end of the examination of R, Burns J expressed his provisional conclusion, subject to any submission by defence counsel, in terms that he was not satisfied that R had the requisite capacity. In the absence of controversy over the indication of the intention to proceed under s 13(5), Burns J was not required to, and did not, give further reasons for the determination. Whether it is correct to conclude that Burns J was not satisfied that R lacked the requisite capacity, and that his Honour treated the reception of R's unsworn evidence as the "default" position under the Evidence Act, does not turn on analysis of his remarks alone. It requires consideration of the whole of the circumstances.

29 The Court of Appeal acknowledged that Burns J was aware of the requirements of ss 13(3) and 13(5)[27]. Their Honours went on to say[28]:

> "His Honour expressly referred to both, and to the distinction between the importance of telling the truth (which relates to whether a witness is competent to give unsworn evidence) and understanding the meaning of the obligation to give truthful evidence when under oath (which goes beyond the importance that ordinarily attaches to telling the truth)."

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27 *GW v The Queen* [2015] ACTCA 15 at [78].

28 *GW v The Queen* [2015] ACTCA 15 at [78].

30 The explanations in parentheses are the Court of Appeal's analysis of the distinction between competence to give unsworn evidence and competence to give sworn evidence. It is an analysis that harks back to the reception of unsworn evidence under the Commonwealth Act before the 2008 amendments. As earlier explained, s 13 does not condition the admission of unsworn evidence on an understanding of the importance of telling the truth. In determining the inference to be drawn from Burns J's remarks at the conclusion of the examination, it is necessary to appreciate that the only purpose of the examination was to assess R's competence to give sworn evidence about a fact.

31 Neither party submitted that R was competent to give sworn evidence. Nonetheless, Burns J insisted that it was necessary to "go through the process in subsection (3) of section 13" before considering taking R's evidence unsworn. This might be thought to allay any concern that his Honour was under a misapprehension that the "default" position was to take R's evidence unsworn. His Honour's conclusion was not based solely on the "difficulty in truly gauging the level of [R's] understanding"[29]. It took into account that R was a six-year-old child. In the circumstances, the failure to express the conclusion in the terms of the statute did not support a finding[30] that Burns J was not satisfied on the balance of probabilities that R lacked the requisite capacity.

Limitations on the nature of warnings or other information concerning the evidence of children

32 Before turning to the appellant's second ground of appeal in this Court, it is apposite to note s 165 of the Evidence Act and other provisions of ACT law which limit the nature of warnings or information which a judge may give to a jury with respect to the evidence of a child.

33 Section 165 of the Evidence Act applies to evidence of a kind that may be unreliable. Section 165(1) non-exhaustively sets out seven categories of evidence of that kind. Unsworn evidence is not one of them. Section 165(2) requires the judge, on the request of a party, to warn the jury that evidence of such a kind may be unreliable and to tell the jury about matters that may cause the evidence to be unreliable, warning the jury of the need for caution in deciding

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29 cf *GW v The Queen* [2015] ACTCA 15 at [80].

30 *GW v The Queen* [2015] ACTCA 15 at [84].

whether to accept the evidence and the weight to be given to it. The judge need not give such a direction if there are good reasons not to do so[31].

34 Sub-sections (6) and (7) of s 165 of the Evidence Act operate to preclude a judge from warning or telling a jury, in proceedings in which a child gives evidence, that the reliability of the child's evidence may be affected by the age of the child. Any warning or information in relation to that matter may only be given in accordance with s 165A(2) and (3)[32]. Sections 165(6) and (7) and 165A reflect the 2008 amendments to the Commonwealth Act[33].

35 Section 165A(1) of the Evidence Act precludes warning or suggesting to the jury that children as a class are unreliable witnesses, or that the evidence of children as a class is inherently less credible or reliable or requires more careful scrutiny than the evidence of adults; or giving a warning or suggestion about the unreliability of a particular child's evidence solely on account of the child's age. Section 165A(2) provides that sub-s (1) does not prevent the judge, at the request of a party, from telling the jury that the evidence of the particular child may be unreliable and the reasons why it may be unreliable and warning or telling the jury about the need for caution in deciding whether to accept the evidence of the particular child and the weight to be given to it. Such a direction may only be given if the court is satisfied that there are circumstances, other than solely the age of the child, particular to the child that affect the reliability of the child's evidence warranting the giving of the warning or information[34]. Section 165A(3) provides that the section does not affect any other power of a judge to give a warning or to inform the jury.

36 Section 70 of the EMP Act provides that, if evidence is given by a child in a sexual offence proceeding[35], the judge must not give the jury any warning or

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31 Evidence Act, s 165(3).

32 Evidence Act, s 165(7).

33 *Evidence Amendment Act* 2008 (Cth), Sched 1 items 71, 72.

34 Evidence Act, s 165A(2).

35 Section 70 is in Div 4.6 of the EMP Act, which governs directions and warnings to juries in sexual offence proceedings. A sexual offence proceeding for the purposes of Div 4.6 is a proceeding for a sexual offence before a jury: EMP Act, s 68(2).

suggestion to the effect that the law regards children to be an unreliable class of witnesses.

The trial – adequacy of directions

37 At the respondent's trial, before R's evidence was played to the jury, defence counsel asked Penfold J to direct the jury that the evidence was unsworn because R did not have the capacity to understand the obligation to give truthful evidence. In the course of developing the submission, counsel put that the circumstance that R's evidence was unsworn would "probably at least require a [s] 165 warning" because evidence from those incapable of understanding the obligation to give truthful evidence constituted a class of potentially unreliable evidence. Penfold J declined to give the direction sought.

38 After the close of the evidence and before final addresses, counsel renewed his application for a direction that R's evidence was unsworn "because it was found that she didn't comprehend the obligation to tell the truth". Counsel stated that he had "no difficulty with your Honour saying that does not necessarily make [R] less reliable". As the application was developed, counsel again made reference to s 165 of the Evidence Act. However, the submission did not amount to a request under s 165(2) for a warning that R's evidence may be unreliable. Penfold J declined to give the direction sought.

The Court of Appeal – adequacy of directions

39 In the Court of Appeal, the respondent's ground of appeal uninformatively contended that Penfold J erred "in failing properly to direct the jury regarding the unsworn evidence of [R]". His principal contention on the hearing of that appeal was that there was a legal requirement to warn the jury that R's evidence may be unreliable because it was unsworn. That requirement was sourced in s 165 because unsworn evidence was submitted to be "evidence of a kind that may be unreliable". Alternatively, it was sourced in the common law and arose from the fact that "unsworn evidence was a matter bearing on the reliability of the witness which, in the absence of a direction, the jury may not fully appreciate"[36]. The latter submission relied on the rule of practice explained in *Bromley v The Queen*[37]. The respondent's fall-back position in the Court of Appeal was that the law required Penfold J to explain to the jury the differences between sworn and

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36 *GW v The Queen* [2015] ACTCA 15 at [87].

37 (1986) 161 CLR 315; [1986] HCA 49.

unsworn evidence and to direct the jury to consider those differences when assessing R's evidence[38]. This was the direction which was sought at trial. It is the direction which the respondent contends in this Court that the law required and which, correctly understood, the Court of Appeal held should have been given.

40 The Court of Appeal did not consider it "manifest" that a s 165 warning had been required[39]. The Court observed that, had defence counsel pursued a request for a s 165(2) warning, it would have been necessary to consider whether R's evidence was "of a kind that may be unreliable" and, if it was, the terms of the warning or whether there were "good reasons" for not giving a warning[40]. The Court of Appeal turned to consider whether, apart from s 165, "the jury should have been told about the differences between sworn and unsworn evidence"[41]. The Court of Appeal had earlier discerned from ss 12, 13(3), (4) and (6) and 21 that it is the policy of the Evidence Act to give "primacy" to sworn evidence[42]. Two reasons were identified for the adoption of that policy: the solemnity that attaches to the taking of an oath or the making of an affirmation and the fact that failure to adhere to the oath or affirmation may result in significant sanctions[43]. The Court of Appeal identified the object of the policy as the maintenance of the integrity of the judicial process and the promotion of truthful evidence in court proceedings[44].

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38 *GW v The Queen* [2015] ACTCA 15 at [87].

39 *GW v The Queen* [2015] ACTCA 15 at [99].

40 *GW v The Queen* [2015] ACTCA 15 at [99].

41 *GW v The Queen* [2015] ACTCA 15 at [100].

42 *GW v The Queen* [2015] ACTCA 15 at [76].

43 *GW v The Queen* [2015] ACTCA 15 at [76], [102].

44 *GW v The Queen* [2015] ACTCA 15 at [102].

41 The Court of Appeal concluded[45]:

> "R was the key witness in the prosecution case. The most fundamental and most difficult task that the jury had to undertake was to assess the reliability of [R's] evidence. *With a view to bolstering the reliability of evidence given in courts, the Evidence Act gives primacy to sworn evidence* and makes it clear that unsworn evidence is acceptable only from a witness who is not competent to give sworn evidence. In those circumstances, *it was important for the jury to understand the difference between sworn and unsworn evidence and take that difference into account when assessing the reliability of R's evidence*." (emphasis added)

42 As will appear, the respondent submits that the direction which the Court of Appeal held should have been given is not a direction that R's evidence may be unreliable. That submission requires consideration of the basis for, and content of, a direction to take the differences between sworn evidence and unsworn evidence into account in assessing the reliability of unsworn evidence, if it is accepted that the direction is not required because the evidence may be unreliable. Before turning to that question, it is necessary to consider the premise for the Court of Appeal's conclusion that the direction was required because the Evidence Act gives primacy to sworn evidence as a "bolster" to the reliability of evidence given in courts.

43 Section 12 provides that every person is competent to give evidence subject to any other provision of the Evidence Act. Section 13 makes other provision in sub-ss (1) and (2). Section 13 distinguishes competence to give sworn evidence from competence to give unsworn evidence (sub-ss (3) and (4)). Competence to give sworn evidence is presumed, subject to the contrary being proved (sub-s (6)). This presumption is the only respect in which the Evidence Act may be said to give "primacy" to sworn evidence; the evidence of a competent witness will be given sworn unless the presumption is displaced. Where the presumption applies, s 21(1) requires a witness in a proceeding to take an oath or make an affirmation before giving evidence. The form of the oath and the affirmation are set out in Sched 1 to the Evidence Act. In each case, the person undertakes that the evidence to be given "will be the truth, the whole truth and nothing but the truth". An oath requires the person to give that undertaking by swearing to do so by Almighty God or the god recognised by the person's

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45 *GW v The Queen* [2015] ACTCA 15 at [103].

religion[46]. An affirmation requires the person to give that undertaking by a solemn and sincere declaration to do so. Section 21(5) provides that an affirmation has the same effect for all purposes as an oath. Where the presumption of competence to give sworn evidence is displaced, s 21(2) relieves the witness of the requirement to take an oath or make an affirmation. In either case, the evidence of the witness is before the court. The assessment of the reliability of the evidence is for the trier of fact. Sections 12, 13(3), (4) and (6) and 21 do not support a conclusion that the Evidence Act accords primacy to sworn evidence as a bolster to the reliability of evidence.

44 The Court of Appeal found the discussion of the directions relating to unsworn evidence by the Full Court of the Supreme Court of South Australia in *R v Lomman* instructive in light of the perceived "primacy" of sworn evidence in the Evidence Act[47]. Their Honours referred with approval to Kourakis CJ's statement[48]:

> "The element which disentitles a person from testifying in solemn form is an insufficient understanding of the critical importance of giving truthful testimony in maintaining the integrity of the trial process and ensuring the just administration of the law";

and Sulan J's statement[49]:

> "What is important is that the judge direct the jury that the taking of an oath or affirmation requires an understanding that the person is accepting the solemnity of the taking of an oath or affirmation, both morally and legally, and if the person fails to comply with that obligation the consequence may be that sanctions will follow."

45 The influence of these statements is evident in the Court of Appeal's analysis of the reason a direction was required at the respondent's trial and the

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46 Evidence Act, Sched 1.

47 *GW v The Queen* [2015] ACTCA 15 at [101], [102].

48 *GW v The Queen* [2015] ACTCA 15 at [101], citing *R v Lomman* (2014) 119 SASR 463 at 465 [5].

49 *GW v The Queen* [2015] ACTCA 15 at [101], citing *R v Lomman* (2014) 119 SASR 463 at 476-477 [42].

content of that direction. However, the Full Court of the Supreme Court of South Australia was not discussing a common law requirement to direct a jury of the difference between sworn evidence and unsworn evidence. The discussion in *R v Lomman* concerned s 9(4) of the *Evidence Act* 1929 (SA) ("the South Australian Act"), which, when unsworn evidence is given in a criminal trial, requires the judge to "explain to the jury the reason the evidence is unsworn" and, if requested to do so, to "warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it".

46 The South Australian Act has made provision concerning the weight to be given to unsworn evidence since before the enactment of the Uniform Evidence legislation[50]. Section 9(4) in substantially its present form predates the 2008 amendments to the Commonwealth Act[51]. The Court of Appeal acknowledged that there is no equivalent to s 9(4) in ACT law but went on to draw the inference that the Evidence Act accords "primacy" to sworn evidence to secure the same object of promoting reliability[52]. The choice in the Uniform Evidence legislation not to enact a provision along the lines of s 9(4) of the South Australian Act is one indicator against that conclusion. Another is the choice not to include unsworn evidence as a category of potentially unreliable evidence under s 165(1). The appellant is correct in submitting that the Evidence Act is neutral in its treatment of the weight that may be accorded to evidence whether it is sworn or unsworn.

47 The appellant submits that the effect of a direction to take into account the difference between unsworn evidence and sworn evidence in assessing the reliability of the unsworn evidence of a child who is a key prosecution witness is to undermine the policy informing ss 165(6) and (7) and 165A (and s 70 of the EMP Act). The respondent counters that the statutory prohibitions are directed to warnings or information concerning the evidence of children whereas the direction formulated by the Court of Appeal concerns unsworn evidence. Moreover, the respondent submits that the Court of Appeal did not find that R's evidence was "of a kind that may be unreliable" within s 165, nor did the Court of Appeal hold that it had been necessary to warn the jury of the need for caution

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50 Section 13 of the South Australian Act, as made, dealt with the weight and credibility to be given to unsworn evidence given under s 9 by Aboriginals and s 12 by children.

51 *Evidence (Miscellaneous) Amendment Act* 1999 (SA), s 5.

52 *GW v The Queen* [2015] ACTCA 15 at [101].

in deciding whether to accept R's evidence. The respondent argues that too much significance should not be placed on the words "assessing the reliability of R's evidence" in the Court of Appeal's statement[53] because any assessment of the evidence of a witness involves consideration of reliability. In the respondent's submission, none of the provisions limiting what may be said to a jury about the evidence of children prohibit a direction of the kind proposed by the Court of Appeal.

48 The Court of Appeal held that the judge was required to direct the jury to take into account that R's unsworn evidence lacked the solemnity that attaches to sworn evidence, and was not subject to penal sanction in the event it was intentionally false, in assessing its reliability. This was required because R was a key witness in the prosecution case. The direction concerns the fact that the evidence is unsworn and not that the witness is a child. This is not to overlook that the great majority of witnesses who are competent to give evidence, but not competent to give sworn evidence, will be children. The ability to give an intelligible account of an event will often precede the capacity to understand what it means to give evidence and the obligation to give truthful evidence. Nor is it to overlook that in the prosecution of a sexual offence alleged to have been committed against a child, often the child will be the key witness in the prosecution case. Assuming that the direction which the Court of Appeal said should have been given is not contrary to a statutory prohibition, it remains to identify why the omission to give the direction involved legal error.

Consideration – adequacy of directions

49 The respondent locates the requirement in the common law principle enunciated in *Bromley v The Queen*[54], *Crofts v The Queen*[55] and *Longman v The Queen*[56]. In his written outline, the respondent suggests that the principle may be distilled as a requirement for "jury directions where the jury may fail to take into account a consideration that is material to the assessment of evidence". The circumstance that a key prosecution witness lacks the capacity to give sworn evidence is said to be such a consideration. The respondent submits that an

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53 *GW v The Queen* [2015] ACTCA 15 at [103].

54 (1986) 161 CLR 315.

55 (1996) 186 CLR 427 at 451; [1996] HCA 22.

56 (1989) 168 CLR 79 at 86; [1989] HCA 60.

appropriate direction, that is consistent with the Court of Appeal's holding, would inform the jury of three things: that (a) a person who gives unsworn evidence does not make a formal promise to tell the truth, the whole truth and nothing but the truth; (b) a person may only give unsworn evidence if that person does not have the capacity to understand that, in giving evidence, the person is under an obligation to give truthful evidence; and (c) a person giving unsworn evidence is not subject to the sanction which may apply for failure to adhere to the oath or affirmation. The proposed direction addresses the absence of the solemnity that attaches to sworn evidence in (a) and the absence of penal sanction in (c). To these differences between sworn and unsworn evidence is added a third item of information: the statutory condition for the admission of unsworn evidence.

50 Missing from the respondent's proposed direction is what the judge is to tell the jury about how these three items of information are to be taken into account in assessing the unsworn evidence. That omission is not usefully advanced by the submission that unspecified "jury directions" are required where the jury may fail to appreciate a consideration that is material to the assessment of evidence. The requirement of the common law explained in *Bromley*, *Crofts* and *Longman* is to warn the jury whenever a warning is necessary in order to avoid a perceptible risk of a miscarriage of justice[57]. A perceptible risk of that kind arises when there is a feature of the evidence which may adversely affect its reliability and which may not be evident to a lay jury[58]. The risk is perceptible to the court because judicial experience has shown that evidence of this description may be unreliable. Subject to any statutory prohibition, where there is a feature of that kind the fair trial of the accused requires the judge to draw it to the jury's attention, explain how it may affect the reliability of the evidence and warn the jury of the need for caution in deciding whether to accept it and the weight to be given to it.

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57 *Bromley v The Queen* (1986) 161 CLR 315 at 319 per Gibbs CJ (Mason and Wilson JJ agreeing at 322, Dawson J agreeing at 326), 323-325 per Brennan J; *Crofts v The Queen* (1996) 186 CLR 427 at 435 per Dawson J, 446 per Toohey, Gaudron, Gummow and Kirby JJ; *Longman v The Queen* (1989) 168 CLR 79 at 86 per Brennan, Dawson and Toohey JJ.

58 *Longman v The Queen* (1989) 168 CLR 79 at 86 per Brennan, Dawson and Toohey JJ, citing *Bromley v The Queen* (1986) 161 CLR 315 at 319 per Gibbs CJ (Mason and Wilson JJ agreeing at 322, Dawson J agreeing at 326), 323-325 per Brennan J; and citing *Carr v The Queen* (1988) 165 CLR 314 at 330 per Brennan J; [1988] HCA 47.

51 At the respondent's trial, the jury observed witnesses giving evidence on oath or affirmation as the case may be and may be taken to have heard those witnesses undertake to tell the truth, the whole truth and nothing but the truth. By contrast, the jury did not see R take an oath or make an affirmation before giving her evidence. It strains credulity to suggest that in order to avoid the risk of a miscarriage of justice it was necessary to instruct the jury that R's evidence had been received without the solemnity of an oath or affirmation or the possibility of sanction should it be intentionally false. It might be thought unlikely that it would occur to jurors to think a six-year-old child was at risk of prosecution for perjury regardless of whether the child's evidence was taken on oath or otherwise.

52 The respondent contends that implicit in the Court of Appeal's reasons is the necessity to inform the jury not only of the difference between sworn and unsworn evidence but of the reason that evidence is given unsworn. At least in the case of a key prosecution witness, it is argued that the jury must be informed that the evidence is only admitted unsworn because the witness does not have the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence. The respondent points out that the suggested direction is a proposition of law. He disavows any need to inform the jury of the judge's factual finding made in its absence[59].

53 This submission does not explain how instruction on the legal condition for the admission of unsworn evidence (by way of distinction from sworn evidence) might be material to the jury's assessment of the evidence. The contention must be that its materiality derives from the circumstance that a witness who lacks the capacity to understand that in giving evidence he or she is required to give truthful evidence is, or may be, less reliable than a witness who possesses that capacity. The correctness of the contention does not call for consideration. Relevantly, on this analysis the information is material not because the law imposes the condition but because, as a matter of fact, the witness meets it. Yet as the respondent's submission appears to accept, Penfold J cannot be said to have erred by failing to inform the jury of a factual finding made by the judge on the balance of probabilities in the jury's absence.

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59 Under s 189 of the Evidence Act, factual questions relevant to the determination of competency to give evidence are to be determined in the absence of the jury unless the court otherwise orders.

54 The Court of Appeal was right to say that the most difficult task that the jury had to undertake was the assessment of the reliability of R's evidence[60]. As a matter of practical reality, neither the fact that R did not take an oath or make an affirmation before giving her evidence, nor that she was not subject to the sanctions that may apply to the failure to adhere to the oath or affirmation, was material to the assessment of whether R's evidence was truthful and reliable such that the jury could accept and act upon it.

55 The jury was directed of the need to examine R's evidence "very carefully" before being satisfied that it could "safely act on [R's] evidence to the high standard required in a criminal trial". That instruction was repeated in the course of a "*Murray* direction"[61]. The further direction which the Court of Appeal held Penfold J had been required to give is likely to have been understood as conveying that even if the jury were satisfied of R's truthfulness and reliability to the criminal standard her evidence was nonetheless to be accorded less weight than sworn evidence.

56 The Evidence Act does not treat unsworn evidence as of a kind that may be unreliable. Had a direction been requested under s 165(2), there was no requirement to warn the jury that R's evidence may be unreliable because it was unsworn. Nor was there a requirement under the common law to warn the jury of the need for caution in accepting R's evidence and in assessing the weight to be given to it because it was unsworn. Nor was there a requirement under common law, falling short of a warning of that kind, to direct the jury to take into account the differences between sworn and unsworn evidence in assessing the reliability of R's evidence.

57 It is possible that different considerations would apply where a witness other than a young child is capable of giving evidence about a fact but incapable of giving sworn evidence because the witness does not have the capacity to understand that, in giving evidence about the fact, he or she would be under an obligation to give truthful evidence. Depending on the circumstances, it might prove necessary or desirable to give some further form of direction. But, for the present, that need not be decided.

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60 *GW v The Queen* [2015] ACTCA 15 at [103].

61 *R v Murray* (1987) 11 NSWLR 12 at 19 per Lee J. This appeal does not raise consideration of the relationship between s 69 of the EMP Act and the application of a *Murray* direction; cf *Ewen v The Queen* [2015] NSWCCA 117.

Orders

58 The appeal must be allowed and the orders of the Court of Appeal set aside. In the ordinary course, in addition to setting aside the orders of the Court of Appeal, a further order would be made dismissing the appeal to the Court of Appeal, thereby restoring the respondent's conviction. However, the appellant submitted that in the event the appeal succeeded the matter should be remitted to the Court of Appeal for consequential orders with respect to sentence. On 14 July 2014, the respondent was sentenced to two years' imprisonment, to be served by way of three months' periodic detention commencing on 18 July 2014[62]. The balance of the sentence was suspended upon the respondent entering into a good behaviour order for two years. On 23 July 2014, Refshauge J stayed the execution of the sentence pending the determination of the respondent's appeal to the Court of Appeal. In these circumstances, there should be the following orders:

1. Appeal allowed.

2. Set aside orders 1 to 3 of the Court of Appeal made on 24 April 2015 and remit the proceeding to the Court of Appeal.

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62 Section 11 of the *Crimes (Sentencing) Act* 2005 (ACT) provides that a court may order that a sentence of imprisonment be served by periodic detention. Sub-section (3) was amended by the *Crimes (Sentencing) Amendment Act* 2014 (ACT). It provides that the periodic detention, if ordered, must end before 1 July 2016.