HIGH COURT OF AUSTRALIA
FILED
12 JUN 2012
THE REGISTRY ADELAIDE

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A17 of 2012

BETWEEN:

RAYMOND HOWARD LYLE DOUGLASS
Appellant

and

THE QUEEN
Respondent

10

APPELLANT'S SUBMISSIONS

PART I PUBLICATION

1. This submission is in a form suitable for publication on the Internet.

PART II CONCISE STATEMENT OF ISSUES PRESENTED BY APPEAL

2. If a judge sitting alone is to convict an accused who has given sworn evidence denying the charge, must he or she expressly reject the accused's evidence and/or articulate the basis upon which the defence case has been negatived beyond reasonable doubt, and in the absence of any such reasons, can a Court of Criminal Appeal be satisfied that the judge has not fallen into the error identified in *Murray v The Queen* (2002) 211 CLR 193?

20 3. Where the entire prosecution case against an accused is an unsworn *ex curia* statement of a young child and the evidence is contradicted by the accused's sworn testimony:

3.1. when undertaking an assessment of whether it is dangerous to allow a guilty verdict to stand, ought the Court of Criminal Appeal to differentiate between the status of evidence which is sworn or which is permitted on an unsworn basis (and subjected to cross-examination), and the *ex curia* statement of a child (in respect of whom cross-examination is curtailed by statute)?

3.2. in the absence of any independent basis for rejecting the accused's sworn denials, and in the absence of any corroboration of the child's allegation, is there an inevitable danger that a guilty verdict is unsafe?

30 ### PART III SECTION 78B OF THE JUDICIARY ACT 1903 (Cth)

4. The appellant has considered whether a notice should be given pursuant to s 78B of the *Judiciary Act* 1903 (Cth). No such notice is required.

PART IV CITATION

5. The reasons for verdict and on appeal are unreported. The media neutral citation of the CCA decision is *R v Douglass* [2010] SASCFC 66.

Filed by: Patsouris & Associates
82 Halifax Street
ADELAIDE SA 5000

Telephone: (08) 8232 1993
Facsimile: (08) 8232 1970
Ref: Harry Patsouris

PART V NARRATIVE STATEMENT OF FACTS FOUND OR ADMITTED

The charges

6. The appellant, a 57 year-old orchardist, was tried before a judge alone on two counts of indecent assault against his daughter (**LD**) and one count of aggravated indecent assault against his granddaughter (LD's daughter) (**CD**) contrary to s 56(1) of the *Criminal Law Consolidation Act* 1935 (SA). The appellant was found not guilty of the counts concerning LD, and guilty of the count concerning CD.

7. The counts concerning LD related to an incident, said to have occurred some time between November 1981 and 31 December 1983. The complainant, LD, gave evidence that the incident occurred in the woodshed on the appellant's property. In cross-examination, she was adamant that it occurred in the woodshed (Trial [78]). Since the appellant's evidence demonstrated the shed was not built until March 1987, the judge could not be satisfied beyond reasonable doubt that the appellant was guilty (Trial [81]).

8. The charge concerning CD was that on 23-24 October 2008, when CD stayed overnight with her grandparents, the appellant asked CD, who was 3 years old at the relevant time, to hold his penis while he was urinating in a shed. The appellant was convicted and his appeal to the CCA was dismissed. This appeal concerns the charge relating to CD.

The prosecution evidence

The child psychologist's interview admitted pursuant to s 34CA of the Evidence Act

9. The only evidence of guilt led by the prosecution was a video interview with CD, undertaken by a psychologist employed by the Child Protection Agency on 26 November 2008. This was three weeks after CD's fourth birthday, one month after the alleged incident, and nearly two years before the trial (Trial [45]).

10. The video interview was admitted (over objection) for a testimonial purpose pursuant to s 34CA of the *Evidence Act* 1929 (SA) (**Evidence Act**)[1]. CD was a "*protected witness*" within the meaning of that section.

11. An extract of the transcript of interview appears in the reasons for verdict (Trial [45]).

---

[1] The section is set out in an annexure to these submissions. The drafting gives rise to some difficulties. The section contains the apparent paradox that a court may permit tender of the *ex curia* statement if it has sufficient probative value (s 34CA(1)(a)) and if the Court has decided that it is possible and appropriate for the maker of the statement to be cross-examined (s 34CA(1)(b)), yet such cross-examination will only be permitted if it is likely to elicit material of substantial probative value or material that would substantially reduce the credibility of the evidence (s 34CA(2)). The CCA has suggested it be considered by the legislature: *R v J, JA* (2009) 105 SASR 563 at [59] (Duggan J), [154] (Nyland J), [180] (White J); *R v Byerley (Question of Law Reserved No 1 of 2010)* (2010) 107 SASR 517 at [18] (Doyle CJ).

11.1. The interviewer asked the child whether anyone had ever asked her to touch their "*willy*". She initially responded "*I touched my brother's*". When asked "*And what about anybody else. Did someone ask you to touch their willy?*", CD responded "***No***". "*Or do anything to their willy?*" "***No***".

11.2. Then, the child was asked: "*Has anyone asked you to touch their penis?*", to which CD again responded "***No***".

11.3. Only after the questioner said "*I was just* ***talking with mum*** *about all that sort of stuff before*", and prompted by the question "*If somebody did ask you to hold or touch their penis ...*", CD responded "*I touched on my grandpa's*".

11.4. CD was asked further questions in the course of which she said the incident happened "*In the shed*", "*His shed*".

11.5. The child was not able to say or recall what the appellant said, but when asked "*has that happened mmm, more than one time*", CD responded "*It happened* ***two times***".

11.6. When asked to describe the appellant's "*willy*", she said it looked like MD's (her brother, who was two years older than her).

11.7. When asked what the appellant was doing in the shed, the child said "*Just doing a wee*". Later, when asked "*Where did he do a wee?*", CD responded "***I don't know***".

12. In order to meet the requirement of s 34CA(1)(b)(i), CD was "*called*", and the judge permitted CD to give unsworn evidence. The only investigatory questions asked by the trial judge relevant to her competence or the status of her evidence related to whether she understood the difference between the truth and a lie[2]. In fact, it is submitted, the questions did not expose the difference between the truth and a lie, so much as between a correct and patently incorrect statement.

13. Although "*called*", CD gave no evidence in chief (Trial [55]), and did not, for example, attest to the truth of things said by her in the video interview.

14. Over the appellant's objection, the video interview was admitted into evidence under the section, but it did not take on the status of the evidence in chief of the child[3], and in suggesting otherwise, the CCA erred (CCA [28], [31], [53]).

---

2 See Tr p 195 - 196.

3 See *R v J, JA* (2009) 105 SASR 563 at [26], cf. the position in respect of pre-recorded evidence pursuant to s 21AM of the *Evidence Act* 1977 (Q), dealt with by the Court in *Gately v The Queen* (2007) 232 CLR 208.

15. The child was cross-examined, but the cross-examination was constrained by the operation of s 34CA(2) of the Evidence Act. The appellant's counsel was asked to identify in advance the topics which were likely to elicit material of substantial probative value or material that would substantially reduce the credibility of the evidence of CD, and permission was given on discrete topics (Trial [54] – [57]).

Evidence of initial complaint pursuant to s 34M of the Evidence Act

16. The prosecution also adduced evidence of the first "*complaint*" CD had made to her father (TD), and two later "*complaints*" made to her mother (LD), pursuant to s 34M of the Evidence Act.

17. In the second discussion with her mother, CD had reportedly said that her grandfather had urinated on the tyre of a tractor in the tractor shed. But later, LD drew a map of the buildings on the property in the presence of a police officer and CD pointed to a shed near "*Shane's house*" (Trial [12]), a shed in which there was and had been no tractor (Trial [42]).

18. Under s 34M(4), the "*initial complaint*" was admissible to demonstrate how the allegations first came to light, or as to the consistency of the victim's conduct, but not as to the truth of the facts asserted by the complaint[4].

Relevance of charges relating to LD

19. As noted above, the charges concerning LD were alleged to have occurred between 1981 – 1983, and the charge concerning LD's daughter, CD, was alleged to have occurred in October 2008. Despite this, in closing, the prosecutor said: "*In our submission it's implausible that these two witnesses would have similar accounts of such unusual events unless they were true*"[5]. The similarity was presumably said to lie in the fact that the prosecution case in respect of both CD and LD was that they had been asked to hold the appellant's penis, in LD's case, immediately after the appellant had been urinating in a shed, and in CD's case, while he was urinating in a shed.

20. The judge said that he would regard the two allegations as being strikingly similar but because LD's allegations were demonstrably incorrect as to an important aspect, and the charges concerning LD were not proved, he "*put aside LD's evidence when considering that of her daughter*" (Trial [95]).

---

4 Despite this, the trial judge appears to have relied on the complaint in order to identify the time of the alleged offending, because the child said nothing during the interview to locate that time to 23 or 24 October 2008. In fact, even in the complaint to TD, CD referred to "*the weekend*", which did not correspond to the dates CD had stayed with her grandparents, but the judge evidently accepted TD's evidence that CD did not accurately understand the concept of the weekend (Trial [31]).

5 Tr p 402.

21. It is noteworthy, however, that in the s 34CA interview with CD, CD said she had also held her brother's penis while he was urinating. If one accepted that evidence it is difficult to see on what basis the judge later commented that the allegation was "*of an unusual event, something that it is unlikely for a 3 year old to make up*" (Trial [82]).

The defence evidence

22. The appellant gave sworn evidence. He gave a detailed account of the events of 23 October 2008, in which he explained that he had taken CD with him on his daily trip to visit his mother but that he had set out slightly earlier than usual to fix a pipe. He denied that the alleged incident had taken place, denied that he had urinated in CD's presence, and denied that CD had ever been with him in either of the two sheds[6].

23. The child's grandmother also gave evidence and her account as to the sequence of events on 23 October 2008 was consistent with the appellant's (Trial [66]). She said that CD and the appellant were only away from the house for about an hour and that when CD returned she was happy and excited, and that the child had mentioned that she had seen the appellant's mother's dog and also that the appellant had fixed a pipe[7]. The following day she had taken CD with her to go shopping and then she dropped CD home after picking up CD's brother MD[8].

The reasons for verdict

24. The trial judge accepted the truthfulness of CD's evidence (that is, the s 34CA statement) about the appellant "*contriving to have her touch or hold his penis while urinating*" (Trial [82]). He considered the "*initial complaint*" to be "*striking in its consistency*" with the *ex curia* statement and her cross-examination. The judge thought the allegation was an unusual event, something that it was unlikely for a three year old to make up (Trial [82]). Although the judge noted there was a possible inconsistency in terms of location of the events in the complaint made to LD, he "*did not regard it as significant*" and he considered the reports to LD were "*important bolsters to CD's credibility*" (Trial [84]). He also considered the "*firmness*" of CD's confirmation of the allegation under cross-examination to be "*persuasive of her credit worthiness*" (Trial [93]).

25. Notwithstanding that the evidence of CD was unsworn and uncorroborated, and that he considered there was nothing in the appellant's demeanour that assisted the prosecution (Trial [98], [65]), the learned trial judge concluded (Trial [99]):

> "*... I am satisfied beyond reasonable doubt that the [appellant] contrived to have CD touch his penis during or about the time he urinated in a shed. I am unsure of which shed. I find that the incident occurred on or about 23 October 2007 [scil. 2008]. I find the [appellant] guilty of count 3.*"

---

6 Tr p 287 - 291.

7 Tr p 341 - 343.

8 Tr p 344.

Reasons of the Court of Criminal Appeal

26. On appeal, the appellant contended that the verdict was unsafe, *inter alia*, on the basis the complainant's evidence was unsworn in contrast to the appellant's sworn denials, and that the judge failed to give adequate reasons for rejecting the appellant's evidence and the defence case.

27. Despite accepting that "*one might argue with particular steps in [the trial judge's] reasoning*" (CCA [52]), that counsel for the appellant made some valid points at trial and on appeal about the child's responses to questions from the interviewer (CCA [52]), and that the trial judge had not given any reasons for rejecting the evidence of the appellant (CCA [58], [61]), the CCA (Doyle CJ, Anderson and David JJ agreeing) held that:

    27.1. the judge must have rejected the appellant's evidence and the reason for doing so must have been because he accepted the truthfulness of CD's *ex curia* statement (CCA [56], [65]);

    27.2. although in other circumstances it might not be sufficient for the CCA to say that the judge's decision might have rested on his acceptance of the evidence of a central witness, leading to the conclusion that he rejected the evidence of the appellant on that point (CCA [67]), in the particular circumstances of the case (being a case of "*word against word*" (CCA [56], [63])) it was not necessary for the judge to spell out why he rejected the appellant's evidence (CCA [65]);

    27.3. there was evidence that the judge was entitled to accept and rely upon to reach a finding of guilt beyond reasonable doubt, and the evidence did not suffer from weaknesses that meant the judge should have had a reasonable doubt (CCA [57]).

PART VI SUCCINCT STATEMENT OF ARGUMENT

28. The grounds of appeal in respect of which special leave was granted essentially involve the following two contentions:

    28.1. the CCA erred in holding that, in the absence of an adverse finding in respect of the appellant's evidence, or in the absence of reasons for rejecting the appellant's evidence, it could be inferred that the judge had concluded that the evidence had been negatived beyond reasonable doubt, and not merely preferred the prosecution witness (CD) over that of the appellant (grounds 1.1 and 1.2);

    28.2. the CCA erred in failing to find that the verdict was unsafe, and had erred in treating the case as one involving "*word against word*" and in approaching the matter by asking whether the judge was entitled to reach the verdict that he did, rather than by undertaking an independent qualitative assessment of the evidence in order to determine whether it was dangerous in all the circumstances to allow the verdict to stand (grounds 2.1 and 2.2).

Ground 1: Non-rejection of appellant's evidence and absence of reasons

29. The trial judge did not expressly reject the appellant's sworn evidence. He gave no reasons which related to whether and if so why he not only rejected the appellant's evidence but considered the defence case was negatived beyond reasonable doubt.

30. The only comment he made was to say that it admitted of the opportunity to commit the offence and that there was nothing in the demeanour of the appellant that assisted the prosecution case.

31. The CCA considered that the trial judge must have rejected the appellant's evidence, and that he must have done so because he accepted CD's evidence.

10 32. Doyle CJ said (at [64]-[65]):

> "*The judge adequately explained why he found [CD] to be credible and reliable.* ***[The appellant's counsel] was right in saying that the Judge does not explain how and why he came to the conclusion that he could and should reject the denials by [the appellant], and make a finding of guilt beyond reasonable doubt. But to my mind, the explanation is obvious. Having considered the evidence as a whole, and being satisfied of the truth and reliability of [CD's] evidence, the Judge necessarily rejected the denials by [the appellant].***
>
> *In the particular circumstances, it was not necessary for the Judge to spell out why he rejected [the appellant's] denials. Indeed, there is little he could say other*
20 *than that;* ***because he accepted and acted on the evidence of [CD], he necessarily rejected the evidence of [the appellant]. This is a case of kind referred to by McHugh J in Soulemezis at 280*** *and by me in Keyte at [59]. ...* ***The Judge's acceptance of [CD's] evidence is the explanation for the rejection of the defence case***". (Emphasis added)

33. It is submitted that that approach was erroneous. The last sentence of each of the two foregoing paragraphs involves an acceptance of the notion that, in a case where the evidence of a prosecution and defence witness is logically inconsistent, the task of the trier of fact is to select between the two witnesses, accepting one and rejecting the other, in order to determine "*where the truth lies*"[9].

30 34. In *Murray v The Queen*[10], Gummow and Hayne JJ observed (at [57]) that a direction to a jury which suggests it is for the jury to decide which version to accept is erroneous and apt to mislead. "*The choice for the jury was not to prefer one version of events over another. The question was whether the prosecution had proved the relevant elements of the offence beyond reasonable doubt.*" Gaudron J said (at [23]) that "*as the issue for the jury was not whether it should accept the appellant's version but whether the prosecution had negatived it as a reasonable possibility, [the] direction mis-stated the issue for*

---

9 As is pointed out in *Cross on Evidence* (8th Australian edition) at [9020], there are three, not two, logically possible outcomes to the application of the appropriate degree of proof to the facts.

10 (2002) 211 CLR 193. See also *R v Calides* (1983) 34 SASR 355 at 357-359 (Wells J), *Selig v Hayes* (1989) 52 SASR 169 at 171-172 (Jacobs J).

determination in a way that relieved the prosecution of proving its case beyond reasonable doubt".

35. In a case where an accused gives evidence denying commission of the offence, it is necessary (but not sufficient) that the trier or fact reject the accused's evidence and reject that the accused's account is even a reasonable possibility[11]. If, as the CCA was prepared to infer, the trial judge rejected one account simply because he accepted the other, this would have involved an error, and a distortion of the onus of proof.

36. With respect, the reliance on the statement of McHugh JA in *Soulemezis v Dudley (Holdings) Pty Ltd*[12] was misplaced. There, McHugh JA said that "*[w]here the resolution of the case depends entirely on credibility, it is probably enough that the judge has said that he believed one witness in preference to another; it is not necessary "for him to go further and say, for example, that the reason was based on demeanour ...*".

37. There are several reasons why that observation could not be applied to the present case: (1) the present case did not involve a contest of sworn evidence against sworn evidence; (2) the resolution of the competing versions did not depend entirely on credibility; (3) in a criminal case, it may be questioned whether the approach can be applied without misconceiving the nature of the prosecution's burden for the reason identified above.

38. The appellant's complaint respecting the adequacy of the trial judge's reasons is related to the ground relating to the unsafeness of the verdict.

39. The point may be illustrated by asking:

> "*Where a prosecution and defence witness give evidence which is inconsistent, by what process of reasoning can a trier of fact make a finding of guilt beyond reasonable doubt?*"

40. Different answers may suggest themselves to that hypothetical question. Perhaps one account is corroborated or is more likely having regard to objective circumstances. Perhaps the trier of fact not only prefers the evidence of one witness but positively disbelieves the other, for example, because he or she has contradicted himself or herself under cross-examination, or has presented in a manner revealing a reluctance to tell the truth[13]. Perhaps if one account is very detailed but another account is vague or general, this *might* entitle a trier of fact to make a finding beyond reasonable doubt.

41. But as will be submitted in respect of ground 2, none of those possibilities can have applied in the present case; on the contrary – if there was corroboration, it was of the appellant's account; if there was self-contradiction, it was by CD during her interview; the

---

11 *Liberato v The Queen* (1985) 159 CLR 507 at 515 (Brennan J). See also *R v Woods* (2008) 102 SASR 422 and *R v Smith* [2008] SASC 135 at [12] – [13] (Doyle CJ).

12 (1987) 10 NSWLR 247 at 280.

13 In such a case, reasons should be given for why that view of the witness has been reached: *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 at [62] – [68] (Heydon, Crennan, Bell JJ).

appellant's account was detailed whereas CD's was bereft of detail or context. Moreover, the critical consideration was that the appellant had given sworn evidence, and the evidence of the child was, for reasons which will be developed, of a lesser status.

42. So by what process of reasoning was the judge able not only to prefer the complainant's evidence over that of the appellant, but to reach the requisite finding beyond reasonable doubt? The answer does not appear from the trial judge's reasons.

43. Thus the first ground of appeal is that in the absence of an articulation of those reasons there is error: the judge has not sufficiently exposed his reasoning to permit the CCA to have confidence that he did not simply prefer one witness over another, or did not bring to bear an irrelevant consideration[14].

Ground 2: Unsafe verdict and miscarriage of justice

44. When analysed by reference to the requirements and safeguards of sworn evidence tested under cross-examination, the status of the prosecution evidence in this case departed so fundamentally from those requirements and safeguards, that it could not sustain the guilty verdict, *a fortiori* where it was contradicted by uncriticised sworn evidence (grounds 2.1 and 2.2). The verdict was unsafe.

The requirement of an independent assessment of the evidence

45. The appellant appealed to the CCA on grounds including that there had been a miscarriage of justice and that the verdict was unsafe. This invoked s 353(1) of the *Criminal Law Consolidation Act* 1935 (SA)[15].

46. In stating his ultimate conclusion on this ground, Doyle CJ said (CCA [56] - [57]):

> "*This is not a case in which the Judge's failure to explain how and why he rejected Mr Douglass's evidence denying the commission of the alleged offence leads to the conclusion that the Judge* ***must have or should have had a reasonable doubt.*** *... [I]n this case it is apparent that the rejection of Mr Douglass' denials must have been based on the Judge's acceptance of C's evidence as truthful and reliable. There is no difficulty in reaching that conclusion. In relation to the allegation of the offence,* ***the case was one of word against word.*** *... [T]he fact that there was no inherent flaw in the evidence of Mr Douglass, and the fact that there was nothing in his demeanour that assisted the prosecution, as the Judge noted, did not mean that the Judge could not, having considered the evidence on both sides, accept C's evidence and make a finding of guilt beyond reasonable doubt.*

---

14 For example, although the judge said he "*put aside LD's evidence when considering that of her daughter*" (Trial [95]), might the judge have considered that, having generally accepted LD's evidence save that he considered the offence could not have occurred in 1983, the appellant's credit had been damaged in some way, because he denied on oath the charges relating to CD?

15 Doyle CJ acknowledged that the CCA was required to conduct its own review of the evidence, and on the basis that the Court could draw its own conclusions as to the quality of that evidence, making due allowance for the advantage of the trial judge (CCA [39]).

> *A case of this kind is difficult and worrying for the person who must decide the facts, be that person a judge or a member of a jury. But the fact is that there was evidence that the Judge was entitled to accept, and to rely upon to reach a finding of guilt beyond reasonable doubt.* ***The evidence did not suffer from weaknesses that meant that the Judge should have had a reasonable doubt.***" (Emphasis added)

47. For reasons set out below, the appellant challenges the proposition in the last sentence by reference to the nature of the *ex curia* statement.

48. But even accepting the proposition, it was not sufficient so to conclude, because the function of a CCA is not discharged merely by a consideration whether there was evidence sufficient to *entitle* a reasonable jury or here a reasonable judge to convict; the CCA was required undertake its own independent assessment of the evidence, and to consider whether nonetheless it would be dangerous in all the circumstances to allow the verdict of guilty to stand[16]. It is submitted that the CCA failed to consider whether it was dangerous in all the circumstances to allow the verdict of guilty to stand.

49. An independent and qualitative assessment of the evidence ought to have concluded that the status of the prosecution evidence was such that it could not justify a finding of guilt beyond reasonable doubt, let alone where it was contradicted by a sworn account which was not itself criticised in any way.

The qualitative status of an ex curia statement by a young child

50. This was not a contest of "*word against word*", let alone "*oath against oath*". Whereas the appellant gave sworn evidence, the claims of CD in the s 34CA interview were neither sworn nor made in unsworn evidence of a kind permitted by s 9 of the Evidence Act.

51. The evidence comprised an out of court statement made at a time when no investigation had been made of whether the child understood the difference between the truth and lies, and without any undertaking by the child to tell the truth.

52. At common law, witnesses testify on oath and give evidence in chief in response to generally non-leading questions, after which they are cross-examined, and the golden thread[17] requires that the duty is on the prosecution to prove the accused's guilt beyond reasonable doubt.

53. Legislation may (and does) abrogate the common law principle of orality[18] by permitting the *reception* of an out of court statement of a very young child for a hearsay purpose, but

---

16 *Morris v The Queen* (1987) 163 CLR 454 at 473 (Deane, Toohey and Gaudron JJ) (referring to the observations of Gibbs CJ and Mason J in *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521 at 531); *M v The Queen* (1994) 181 CLR 487 at 492-493 (Mason CJ, Deane, Dawson and Toohey JJ); *SKA v The Queen* (2011) 243 CLR 400 at [14] (French CJ, Gummow and Kiefel JJ), at [80] (Crennan J).

17 *Woolmington v DPP* [1935] AC 462 at 481 (Viscount Sankey LJ).

18 Cf. *Gately v The Queen* (2007) 232 CLR 208 at [123] (Heydon J).

does that mean the trier of fact can and should treat it as though it had the same status as sworn evidence? And if not, how is the difference in status to be brought to bear?

54. The appellant contends that the legislation cannot lend to evidence a qualitative evidentiary value that it inherently lacks, and the same frailties and concerns that informed common law rules of exclusion (and rules of practice relating to corroboration) dictate that the evidence is of a lesser status. By treating the matter as one of "*word against word*" (CCA [55], [63]) that significant difference in status was not properly considered. In order to demonstrate the difference in status, it is appropriate to have regard to the reasons which informed the requirements for sworn evidence and the requirement for corroboration warnings as a matter of practice.

Requirement that evidence be sworn

55. At common law, a witness who is not capable of giving evidence on oath[19] was not permitted to give evidence. An infant was able to be sworn provided the infant appeared, on strict examination by the court, to possess sufficient knowledge of the nature and consequences of an oath: *R v Brasier*[20]. It was there said that "*[t]here is no precise or fixed rule as to the time within which infants are excluded from giving evidence, but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded by the court*"[21].

Warning even where child's evidence is sworn

56. Where a child was cable of giving sworn evidence, there was a common law rule of practice that the jury should be warned against acting on the uncorroborated sworn evidence of a young child, although they could do so if they were convinced the child was truthful and reliable[22] and after weighing it with extreme care[23] or giving it the most careful scrutiny[24].

57. The reasons advanced for that rule included that young children may be under the influence of others (conscious or subconscious), are apt to allow their imaginations to run away with them and to invent untrue stories, have a tendency to confuse fantasy with fact,

---

19 As to the introduction of affirmations, see *Cheers v Porter* (1931) 46 CLR 521 at 527-531 (Dixon J) *R v Climas (Question of Law Reserved)* (1999) 74 SASR 411 at 426 (Lander J).

20 (1779) 1 Leach 199 (KB); 168 ER 202. Although, as is noted in *Cross & Tapper on Evidence* (1999, 9th ed) at p 210 fn 17 there was a contrary suggestion of Hale in relation to the evidence of young children: 1 *Pleas of the Crown* 634.

21 (1779) 1 Leach 199 at 238.

22 *R v Shlaefer* (1984) 37 SASR 207 at 212 and 214 (King CJ); *R v Pahuja* (1987) 49 SASR 191 at 200 (King CJ), 215-217 (Cox J), 222 (Johnston J); *R v Starrett* (2002) 82 SASR 115 at [35] (Doyle CJ).

23 *R v Dossi* (1918) 87 LJKB 1024, 13 Cr App R 158 at 160 (Atkin J).

24 *Hargan v The King* (1919) 27 CLR 13 at 20 (Barton J) and at 24 (Isaacs J).

may have an imperfect comprehension of events and "*youthful irresponsibility*"[25]. In *DPP v Hester,* reference was made to the need for a warning in respect of children who, though old enough to understand the nature of an oath and so competent to give sworn evidence, are yet so young that their comprehension of events and of questions put to them or their own powers of expression may be imperfect[26].

Facility for children to give unsworn evidence

58. Against the backdrop of the common law prohibition against children giving evidence unless capable of doing so on oath (or later, by affirmation), legislation in most jurisdictions introduced a facility for children to give unsworn evidence.

10 59. In South Australia, the provision entitling a child to give unsworn evidence is s 9 of the Evidence Act[27]. Importantly, evidence is only to be permitted in this form if, after due inquiry, it is determined the child does not sufficiently understand the obligation of the oath or affirmation. The statutory inquiry is mandatory[28], and it is submitted that undertaking the inquiry results in a frank acknowledgment of the lesser status of the evidence. The process by which that inquiry should be undertaken must be real and meaningful; leading questions which generate monosyllabic answers do not provide a reliable guide to competency[29].

60. The significance of the oath or affirmation is multi-faceted. What is required is an understanding that, in giving sworn evidence, the person is thereby accepting the
20 solemnity of the taking of an oath or the making of an affirmation and the sanctions which would follow, both morally and legally, if that person failed to comply with the obligation to tell the truth. The obligation arises from the public declaration in taking an oath or making a declaration, the accompanying recognition of the solemnity of that declaration, the recognition of the importance of truthfulness in the proceedings and the acceptance of the moral and legal sanctions in failing to comply with that public declaration. The obligation is over and above that which would attach to similar statements made outside

---

25 See, eg, *B v R* (1992) 175 CLR 599 at 616 (Dawson and Gaudron JJ); *R v B and D* (1993) 66 A Crim R 192 at [11]-[12] (King CJ).

26 [1973] AC 296 at 325.

27 Section 9(1) creates a presumption that witnesses are able to give sworn evidence unless the judge determines the person does not have sufficient understanding of the obligation to be truthful entailed in giving sworn evidence. Section 9(2) empowers a judge to permit unsworn evidence provided that the judge has determined the witness does not have a sufficient understanding of the obligation to be truthful entailed in giving sworn evidence. In that circumstance the judge may permit unsworn evidence provided that the judge is satisfied that the witness understands the difference between the truth and a lie, the judge has told the witness it is important to tell the truth, and the witness indicates that he or she will tell the truth. Section 9(4) deals with the required explanation to the jury.

28 *R v Starrett* (2002) 82 SASR 115. See also *R v BBR* [2010] 1 Qd R 546.

29 *Grindrod v R* [1999] WASCA 44 at [34] (Ipp J).

the court even though social obligations would suggest that those extra curial statements should also be truthful[30].

61. Where the statutory inquiry has been properly undertaken, a view will have been formed, and the fact acknowledged, that the child does not have a sufficient appreciation of the multi-faceted obligation just described. Unless those matters are to be treated as unimportant, it must follow that unsworn evidence has a lesser status than sworn evidence[31].

62. Although an insufficient understanding of the obligation to tell the truth is a pre-condition to the giving of sworn evidence, it remains, of course, for the judge to be satisfied that the child nevertheless understands the difference between the truth and lies[32]. Again, non-leading questions should be used to explore whether the child truly understands the abstract notion of dishonesty as opposed to the distinction between true and false statements[33]. In this respect, it has been suggested that children under about 10 or 11 years old will not fully understand the abstract notion of dishonesty[34].

63. Although the position has now been amended in South Australia and elsewhere, previously, where a child was permitted to give unsworn evidence, there was a requirement of corroboration[35]. Where there was no corroboration an acquittal was mandated. In effect, the requirement for corroboration was the protection introduced to compensate for the relaxation in proof implicit in permitting testimony from a witness who lacks a sufficient understanding of the importance of the obligation to tell the truth.

64. Section 12A now provides that a judge must not warn the jury that it is unsafe to convict on the uncorroborated evidence of a child (a person under 18 years of age) unless the warning is warranted because in the circumstances of the particular case there are cogent reasons apart from the fact that the witness is a child to doubt the reliability of the child's evidence. The judge is not to make any suggestion that the evidence of children is inherently less credible or reliable, or requires more careful scrutiny, than the evidence of

---

30 *R v Climas (Question of Law Reserved)* (1999) 74 SASR 411 at 431 - 432 [137] – [138] (Lander J).

31 Cf. *R v Climas (Question of Law Reserved)* (1999) 74 SASR 411 at 430 [126] (Lander J). While a judge who has concluded that a child should be permitted to give sworn evidence might revoke that ruling, it has been said that it would not be appropriate to assimilate unsworn evidence into sworn evidence based on the way in which the evidence progresses (*R v Simmons* (1998) 68 SASR 81 at 88 (Perry J)) thus tending to confirm that there is a significance in the different status of the two types of evidence.

32 This requirement is express in s 9(2), and was implicit in earlier incarnations of the section: *R v Meier* (1982) 30 SASR 126.

33 Cf. *R v RAG* [2006] NSWCCA 343 at [26] – [27] (Latham J).

34 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004) at [5.89], referring to the Australian Law Reform Commission, *Evidence,* Report No 26, Vol 1 (1985) 129.

35 Section 13(2) of the *Evidence Act* 1929 (SA). Provisions to this effect have largely been repealed. References to equivalent provisions appear in Ligertwood, *Australian Evidence* (1988) at [4.07] fn 15. There were also authorities to the effect that absent any statutory provisions to the contrary, the unsworn evidence of a child of tender age required corroboration before there could be a conviction: *R v Davies* (1915) 11 Cr App R 272; *R v Manser* (1934) 25 Cr App R 18.

adults. This provision is designed to prohibit class warnings. Moreover, it is submitted that while s 12A apparently applies to unsworn evidence where, by hypothesis, there will have been an inquiry which has not caused the judge to consider that the child does not at least understand the difference between truth and lies, the section does not apply to *ex curia* statements of children, in respect of which there are no such safeguards.

65. Accordingly, although ss 9 and 12A work a relaxation of the common law position, and indeed the intermediate legislative position whereby unsworn evidence was permitted but attracted a requirement of corroboration, the regime nevertheless retains important minimum features and also protections designed to bring home the very limitations of unsworn evidence.

Section 34CA

66. The status of evidence admitted pursuant to s 34CA should be viewed against this background.

67. Where the statement of a young child is admitted pursuant to that section, it carries with it all the risks associated with the evidence of a young child which informed the common law restrictions and rules of practice, but none of the safeguards. Moreover, such evidence suffers from additional dangers.

67.1. First, the evidence is not only unsworn, but not given in court. This has a number of important aspects to it.

(a) The gravity and solemnity which attends the occasion of the taking of evidence in court, whether sworn or unsworn, is absent.

(b) Moreover, the occasion for testing the competence of the witness in a contemporaneous way is lost. By the time CD gave evidence, she was five years and nine months old. In the appellant's submission, the reliability and cogency of her evidence at that time remained seriously questionable, and was not sufficiently probed by the trial judge's questions. However that may be, her cognitive development at the time of the interview could no longer meaningfully be probed by the time of trial, 21 months later.

(c) The 'evidence' adduced in such a context is adduced in a way which does not incorporate the safeguards of the trial process. Leading questions may be put (as they were here). Questions may be put to a child multiple times until a different answer is given (as they were here).

67.2. Not only is contemporaneous cross-examination of the account impossible where *ex curia* evidence is permitted, but s 34CA goes further, and in this respect differs

from provisions in the United Kingdom[36] and in other States[37], in that it restricts the nature of the cross-examination that will be permitted *at the trial* to cross-examination "*likely to elicit material of substantial probative value or material that would substantially reduce the credibility of the evidence*".

(a) It is accepted that at common law, the ability to cross-examine a witness in a criminal trial is not absolute[38] and the scope and manner of permissible cross-examination is not unlimited[39]. Nevertheless, the ability to cross-examine has been described as a procedural right[40] and it is an important aspect of the right to a fair trial. A fair trial implies that the parties can challenge the evidence presented against them[41].

(b) Cross-examination was described by Wigmore as "*the greatest legal engine ever invented for the discovery of truth*"[42]. Its effectiveness may be

---

36 Since s 32A of the *Criminal Justice Act* 1988 was introduced recorded interviews have been permitted in the United Kingdom. The section imposes no express limits on cross-examination. The section was introduced by s 54 of the *Criminal Justice Act* 1991. The relevant provision is now s 27 of the *Youth Justice and Criminal Evidence Act* 1999. Previously, s 1 of the *Evidence Act* 1938 and Australian equivalents (set out by Heydon J in *Gately v The Queen* (2007) 232 CLR 208 at [120]) would, on one view, have permitted the tender of a document for hearsay purposes where the maker of the statement was to be called as a witness.

37 In Queensland, s 93A of the *Evidence Act* 1977 (Q) creates an exception to the hearsay rule in respect of children and intellectually impaired persons. A condition of admissibility is that the maker of the statement be available to give evidence and be called by the tendering party if any other party requires it. There are no prescribed limits on the nature of cross-examination. This and other safeguards make the application of the provision less startling than it might otherwise appear: *Gately v The Queen* (2007) 232 CLR 208 at [124] per Heydon J. In New South Wales, provisions exist to facilitate the admission of video recordings of a child's out of court complaints to an investigating official in criminal cases, but this is subject, *inter alia*, to the child being available for cross-examination. The provisions were contained in the *Evidence (Children) Act* 1997 (NSW) and are now contained in Part 6 of the *Criminal Procedure Act* 1986 (NSW). The provision was referred to in *SKA v The Queen* (2011) 243 CLR 400. Similar but not identical regimes apply in Western Australia and Tasmania: see s 106H of the *Evidence Act* 1906 (WA) and s 5 of the *Evidence (Children and Special Witnesses) Act* 2001 (Tas). In the Northern Territory, s 26E of the *Evidence Act* 1939 (NT) creates an exception to the hearsay rule in the case of the evidence of children in relation to sexual offences where the Court considers the evidence is of "*sufficient probative value as to justify its admission*", but s 26E(3) provides that an accused cannot be convicted solely on the basis of hearsay evidence admitted under the provision.

38 In *GPI Leisure v Herdsman Investments Pty Ltd (No 3)* (1990) 20 NSWLR 15 at 18 and 22-23, Young J said that there was no right to cross-examine an opposing witness – the only right was to a fair trial.

39 *Libke v The Queen* (2007) 230 CLR 559.

40 *R v McHardie* [1983] 2 NSWLR 733 at 739 (Begg, Lee and Cantor JJ).

41 In *R v Hodge* (1987) 48 SASR 91 at 95, King CJ referred to a general rule that no material is to be used against a person unless he has had the opportunity of testing it by cross-examination. He cited, with approval, the statement of Bray CJ in *R v Lucky* (1974) 12 SASR 136 at 139 that "*It is of crucial importance that nothing should be taken into account against a convicted defendant except what he admits or what is proved against him by sworn evidence which he has had a chance to test by cross-examination*".

42 *Evidence* (Chadbourn rev), Little Brown and Co, Boston, 1974, para 1367.

subtle, and to confine cross-examination to discrete topics inevitably reduces its efficacy[43].

(c) It is accepted that the terms of the sub-section must be construed and applied, whether one approves or disapproves of its effect[44], but this does not mean that the evidence which has not been subjected to cross-examination of the ordinary kind attracts the same evidentiary value[45].

68. For these reasons, it is submitted that it was not appropriate to treat the child's video interview and the accused's sworn evidence as "*word against word*", as though they had an equal or even comparable status. They had a radically different status, and this should have been brought to bear in the independent assessment.

The interview in this case

69. There were some particularly unsatisfactory aspects of the s 34CA statement admitted into evidence in the present case. There are no particular guidelines relating to the carrying out of such interviews for evidence gathering purposes in South Australia, although there is a body of literature to which regard is apparently had in the United Kingdom, such as the ABE Report[46].

70. Here, the interview contravened a number of the principles which emerge from reports such as the ABE Report. For example, that report:

70.1. deals with establishing in the interview that the child appreciates the difference between telling the truth and telling a lie – this was not done, and it is beside the point that at the time of trial the judge asked whether the child understood the difference. By the time of trial the child had been shown her video interview and

---

43 A witness may reveal a matter in cross-examination which, while not of itself of obvious or apparent significance, when considered in the context of other evidence in the case, may be highly significant. A witness may say something on a topic, not of central relevance, which is like the thirteenth stroke of the clock - not only wrong in itself; but such as to cast doubt on everything that went before (an expression attributed by Gleeson CJ in *John Fairfax Publications Pty Ltd v Rivkin* (2003) 77 ALJR 1657 at [5] to Hardy's *Far from the Madding Crowd*).

44 *Gately v The Queen* (2007) 232 CLR 208 at [123] (Heydon J). Indeed, even an accused's unsworn statement, not tested by cross-examination, may be the subject of permissible comment to the effect that it is less weighty than sworn evidence: *Bataillard v R* (1907) 4 CLR 1282 at 1291 (Jacobs J), *Jackson v R* (1918) 25 CLR 113, *Bridge v R* (1964) 118 CLR 600 at 605 (Barwick CJ). See also *Mule v R* (2005) 79 ALJR 1573 at [22].

45 It has been observed that the inability to properly test the complainant's account may lead the trial judge to withdraw a case from the jury: *R v NRC* [1999] 3 VR 537 at [37] (Winneke P).

46 It would appear that regard is had to the recommendations and requirements of a series of detailed reports, namely, the *Report of the Inquiry into Child Abuse in Cleveland* (1987, Cm 412), the *Report of the Advisory Group on Video Evidence* (1989) and *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Using Special Measures* (Republished 2007) (*The ABE Report*). These were recently referred to as the three "*pivotal documents*" on the subject, and the latter described as "*self-evidently required reading for all practitioners in the field, be they interviewers, prosecutors, advocates or judges*" by the Court of Appeal in *TW v A City Council* [2011] EWCA Civ 17 at [21]-[22].

under cross-examination she said she had discussed the matter 10 times with her parents[47];

70.2. counsels against asking the child what he or she remembers about the complaint rather than about the incident – here, the interviewer prompted the child by reference to a discussion she had had with the child's mother (in context a reference to the complaint);

70.3. while recognising that leading questions cannot always be avoided, counsels against their widespread use – here, there were repeated leading questions;

70.4. counsels against verbal reinforcement (eg, telling the child they are doing "*really well*") – here, in relation to the child's statement that she had said she didn't want to hold the appellant's willy, the interviewer said "*Oh did you? Good. That was good*" and later, "*That was a bit, that was a bit rough wasn't it*".

71. Furthermore, the child's evidence in the video interview was itself internally contradictory. The child said repeatedly she had not touched anyone else's willy other than her brother's. It was only after the interviewer referred to having been "*talking with mum*" that CD mentioned "*grandpa*". In circumstances where LD was making a complaint, said to be strikingly similar, against the appellant, this is a most concerning aspect of the interview.

72. Finally, it is noteworthy that when attention is confined to the interview, the allegations were of the most general and unparticularised kind. It may be a source of great forensic disadvantage to the accused not to have the allegations adduced in a narrative fashion which locates the allegations in time and place. Indeed, that was borne out in the present case by LD's complaint. She was adamant as to the location of the alleged offence, and it was the fact that this detail was demonstrably wrong that exploded the prosecution case.

Other considerations relevant to the independent assessment

73. It might be said that whatever criticisms attended the prosecution's evidence in chief, namely, the video of the psychologist's interview with CD, the child adhered to that evidence under cross-examination, and that that adherence had a higher status than the out of court statement.

74. Indeed, the judge said (Trial [93]):

> "*In my view the firmness of CD's confirmation of the allegation in the face of contradiction was persuasive of her credit worthiness. Firmness in an adult would almost never add to credit but firmness in the face of contradiction in the case of a child so young seems to me quite powerful*".

---

47 Tr p 208.

75. With respect, the prosecution case gathered, or ought to have gathered, no support from the cross-examination, for at least the following reasons.

75.1. The child had been shown the video interview prior to giving evidence and had discussed the matter with her parents 10 times. She might have thought it honest or appropriate to adhere to what she by this stage no doubt understood she had alleged against the appellant. And in the video interview, the critical allegation was made after a reference to a discussion the interviewer had had with her mother. Accordingly, two of the major reasons for caution respecting the evidence of children, namely, susceptibility to influence, and a concern to please an authority figure, loomed large.

75.2. Strictly speaking, the child should not have been permitted to be cross-examined, because the trial judge did not comply with the pre-condition to the giving of unsworn evidence under s 9 of the Act in that he asked no questions and made no determination that she could not give sworn evidence[48]. Moreover, the questions which were asked to determine whether the child understood the difference between truth and lies were inadequate.

75.3. The cross-examination was constrained by s 34CA. It does not avail the respondent to say that the appellant has not identified further questions or topics that the appellant's counsel would have wished to have asked but was refused permission to ask.

76. With respect, neither the judge nor the CCA adequately considered *why* it was that the evidence required caution[49]. Indeed, in respect of the child's age, the trial judge appeared to have treated this as *supporting* the cogency of the evidence in two respects[50]. There was no evidentiary basis for these opinions regarding the reliability of children, and they were contrary to the common law's approach to the evidence of children and to unsworn evidence.

---

48 Although the judge correctly noted he was not invited to find she could give sworn evidence (Trial [51]), it was held in *R v Starrett* (2002) 82 SASR 115 that the failure to determine based on appropriate inquiries whether the witness could give evidence on oath represented a material irregularity which gave rise to a miscarriage of justice even though it did not affect the credibility of the evidence.

49 Although the trial judge mentioned s 9(4), and noted that the evidence of the child was uncorroborated (Trial [94], [97]), it was necessary for the trial judge to "*heed*" the warning by properly articulating and considering the inherent weaknesses of the evidence. The importance of "*heeding*" the warning was adverted to by Hayne J in *Crampton v The Queen* (2000) 206 CLR 161 at [212]-[213].

50 First, he thought the allegation was of an unusual event, something that it was "*unlikely for a 3 year old to make up*", even though she had described the same kind of incident (holding a person's penis while they were urinating) involving her brother (Trial [82]). Secondly, as noted, he thought the firmness of the child's confirmation of her allegations under cross-examination was "*quite powerful*" in the case of a child so young, even though the child had watched the video before giving evidence and discussed the matter with her parents 10 times before trial (Trial [93]).

Summary of contentions on ground 2

77. A trial judge, directing a jury, or sitting as the trier of fact, and a Court of Criminal Appeal, conducting an independent assessment, should recognise a fundamental distinction between three tiers of evidence: sworn evidence, unsworn evidence, and evidence in the form of an out of court statement which is neither sworn nor unsworn. The relevant directions should further identify and explain what it is about the evidence in question which places it in the relevant category. Where evidence is in the third category, the weight which the trier of fact should attribute to the evidence should be influenced by the extent to which the evidence is rendered less cogent or reliable by reason of the absence of features and safeguards which characterise sworn evidence and unsworn evidence.

78. If that approach had been applied to the present case, attention would have been directed to the following features respecting the s 34CA statement (and the prosecution case).

78.1. The statement was made by a person who, even 21 months later, was not a person who sufficiently understood the importance of the obligation to tell the truth implicit in giving sworn evidence.

78.2. The statement was made by a person at a time when, there is no reason to believe, and every reason to doubt, she understood the difference between the truth and lies. Moreover, the statement was made on an occasion in which the child had not been asked to tell the truth, or had the consequences of the making of the statement explained to her. Indeed, nothing is really known of the child's cognitive ability at the relevant time.

78.3. The relevant allegations were adduced through the use of leading questions, and repetitive questions, and only after a reference was made to a discussion with the child's mother.

78.4. The relevant allegations were not adduced in any particular factual context. There was no detail as to time, sequence[51] or location.

78.5. Even putting to one side issues of competence and the circumstances in which evidence was sought to be adduced, the statements made by CD during the interview were internally inconsistent.

78.6. The fact that the child had clearly spoken to her mother, a fellow complainant, prior to the video interview, and then several times prior to giving evidence, meant that the child's evidence was obviously open to the risk of influence, overt or implicit.

---

[51] Indeed, under cross-examination, the child essentially agreed with the sequence of events testified to by the appellant (Tr p 199 – 204), and it is therefore quite unclear how and when the appellant is alleged to have found the opportunity to enter a shed, and if so which shed, and commit the offence.

78.7. The allegation of the child was uncorroborated.

78.8. The allegation of the child was firmly contradicted by the appellant in sworn evidence, unshaken by cross-examination, and not the subject of any adverse comment or criticism by the trial judge. The appellant's evidence was also consistent with that of the child's grandmother.

79. When those considerations are articulated, and not simply wrapped up in a formulaic self-caution, it is difficult to see how the child's version of events could be preferred, let alone found to be sufficiently cogent to discharge the burden of proof. The verdict was unsafe, and the CCA should have so held.

PART VII APPLICABLE STATUTORY PROVISIONS

80. The applicable statutory provisions exceed one page in length and are set out in an annexure to these submissions. Each provision set out remains in force[52].

PART VIII THE ORDERS SOUGHT

81. The appellant seeks the following orders.

1. That the appeal be allowed.

2. That the judgment of the Court of Criminal Appeal of the Supreme Court of South Australia be set aside and, in lieu thereof, it be ordered that:

2.1. the appeal be allowed; and

2.2. the verdict of guilty be set aside, and a verdict of not guilty be substituted for it.

Dated: 8 June 2012

M E Shaw QC
Gilles Street Chambers
429A Gilles Street
Adelaide SA 5000
Ph: 08 8232 3146
Fax: 08 8232 3145

B J Doyle
Hanson Chambers
56 Carrington Street
Adelaide SA 5000
Ph: 08 8212 6022
Fax: 08 8231 3640

---

[52] However, as noted in footnote 1 above, it has been suggested that s 34CA should be amended. The *Evidence (Hearsay Rule Exception) Amendment Bill* 2011 (SA) has been introduced to repeal and replace the section, however, debate on the Bill has been adjourned. The proposed new s 34LA does not condition admissibility upon the allowing of cross-examination. The proposed replacement provision would not permit the tender of a statement made by a victim to an investigating or other authority as part of a formal interview process conducted in relation to the alleged offence.

ANNEXURE: APPLICABLE PROVISIONS OF THE EVIDENCE ACT 1929 (SA)

9—Unsworn evidence

(1) A person is presumed to be capable of giving sworn evidence in any proceedings unless the judge determines that the person does not have sufficient understanding of the obligation to be truthful entailed in giving sworn evidence.

(2) If the judge determines that a person does not have sufficient understanding of the obligation to be truthful entailed in giving sworn evidence, the judge may permit the person to give unsworn evidence provided that—

(a) the judge—

(i) is satisfied that the person understands the difference between the truth and a lie; and

(ii) tells the person that it is important to tell the truth; and

(b) the person indicates that he or she will tell the truth.

(3) In determining a question under this section, the judge is not bound by the rules of evidence, but may inform himself or herself as the judge thinks fit.

(4) If unsworn evidence is given under this section in a criminal trial, the judge—

(a) must explain to the jury the reason the evidence is unsworn; and

(b) may, and if a party so requests must, warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.

(5) A justice to whom it appears that a person who desires to lay a complaint or information does not have sufficient understanding of the obligation to be truthful entailed in giving sworn evidence may ascertain by inquiry the subject matter of the complaint or information and reduce it into the appropriate form, and any action or proceedings may be taken on the complaint or information in all respects as if the complainant or informant had deposed to the truth of the contents on oath or affirmation.

12A—Warning relating to uncorroborated evidence of child in criminal proceedings

(1) In a criminal trial, a judge must not warn the jury that it is unsafe to convict on a child's uncorroborated evidence unless—

(a) the warning is warranted because there are, in the circumstances of the particular case, cogent reasons, apart from the fact that the witness is a child, to doubt the reliability of the child's evidence; and

(b) a party asks that the warning be given.

(2) In giving any such warning, the judge is not to make any suggestion that the evidence of children is inherently less credible or reliable, or requires more careful scrutiny, than the evidence of adults.

34CA—Statement of protected witness

(1) A court may admit evidence of the nature and contents of a statement made outside the court by a protected witness from the person to whom the statement was made if—

(a) the court, having regard to the circumstances in which the statement was made and any other relevant factors, is satisfied that the statement has sufficient probative value to justify its admission; and

(b) —

(i) the protected witness has been called, or is available to be called, as a witness in the proceedings; and

(ii) the court gives permission for the protected witness to be cross-examined on matters arising from the evidence.

(2) A court may only give permission to allow a protected witness to be cross-examined on such matters if satisfied that the cross-examination is likely to elicit material of substantial probative value or material that would substantially reduce the credibility of the evidence.

(3) Evidence that is admitted in a trial under this section of the nature and contents of a statement made outside the court by a protected witness may be used to prove the truth of the facts asserted in the statement.

(4) In a criminal trial, the judge must, if evidence of the nature and contents of a statement made outside the court by a protected witness has been admitted but the protected person has not, for some reason, been cross-examined on matters arising from the evidence, warn the jury that the evidence should be scrutinised with particular care because it has not been tested in the usual way.

(5) In this section—

protected witness means—

(a) a young child; or

(b) a person who suffers from a mental disability that adversely affects the person's capacity to give a coherent account of the person's experiences or to respond rationally to questions.