HIGH COURT OF AUSTRALIA

2 March 2016

THE QUEEN v GW

[2016] HCA 6

Today the High Court unanimously allowed an appeal by the Director of Public Prosecutions for the Australian Capital Territory ("the DPP") from a decision of the Court of Appeal of the Supreme Court of the Australian Capital Territory. The High Court held that the Uniform Evidence legislation ("the UEL") is neutral in its treatment of the weight that may be accorded to evidence whether it is sworn or unsworn.

GW was convicted of committing an act of indecency in the presence of his five-year-old daughter, R. At the age of six, R gave evidence at a pre-trial hearing before a single judge of the Supreme Court. There was no dispute that R was competent to give evidence. R's competence to give sworn evidence was in issue. Under the UEL, a person is not competent to give sworn evidence if the person does not have the capacity to understand that, in giving evidence, the person is under an obligation to give truthful evidence. A person who is competent to give evidence, but not sworn evidence, may give unsworn evidence provided the court tells the person of the importance of telling the truth and certain other matters. The pre-trial judge examined R to determine whether she was competent to give sworn evidence. His Honour ruled that he was not satisfied that R had the capacity to give sworn evidence and proposed that R's evidence be taken unsworn. Defence counsel did not oppose that proposal.

At GW's trial, an audiovisual recording of R's unsworn evidence was played to the jury over defence counsel's objection. Defence counsel asked the trial judge to direct the jury that R's evidence was unsworn because it had been found that R did not comprehend the obligation to tell the truth. The trial judge declined to give the direction sought.

The Court of Appeal allowed GW's appeal, set aside his conviction and ordered a new trial. The Court held that the pre-trial judge failed to comply with the UEL because his Honour had remarked at the conclusion of R's examination that he was "*not satisfied* that [R] *has* the capacity" to give sworn evidence when the UEL required satisfaction that R *did not have* the capacity. The Court inferred that the pre-trial judge had, wrongly, treated the reception of unsworn evidence as the "default" position under the UEL. The Court also held that the trial judge should have instructed the jury on the differences between sworn and unsworn evidence and to take those differences into account in assessing the reliability of R's evidence. By grant of special leave, the DPP appealed to the High Court.

The High Court held that the pre-trial judge's failure to express his conclusion about R's capacity to give sworn evidence in the terms of the UEL did not support a finding that his Honour was not satisfied that R was not competent to give sworn evidence. The question of whether the pre-trial judge was satisfied that R lacked the capacity to give sworn evidence turned on a consideration of all the circumstances, including that the pre-trial judge took into account that R was a six-year-old child

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and examined R to determine her competence to give sworn evidence, allaying concerns about his Honour's misapprehension of the "default" position.

The High Court further held that the UEL is neutral in its treatment of the weight that may be accorded to sworn and unsworn evidence. Accordingly, the trial judge was not required to direct the jury as defence counsel sought. The fact that R did not give sworn evidence was not material to the jury's assessment of the reliability of her evidence. No direction was required by the UEL or the common law.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*