HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL AND BELL JJ

RAYMOND HOWARD LYLE DOUGLASS APPELLANT

AND

THE QUEEN RESPONDENT

Douglass v The Queen
[2012] HCA 34
Date of Order: 16 August 2012
Date of Publication of Reasons: 11 September 2012
A17/2012

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Criminal Appeal of the Supreme Court of South Australia made on 3 December 2010 and in its place order:*

   (a) appeal allowed;

   (b) conviction and sentence quashed; and

   (c) direct the entry of a verdict of acquittal.

On appeal from the Supreme Court of South Australia

Representation

M E Shaw QC with B J Doyle for the appellant (instructed by Patsouris & Associates)

M G Hinton QC, Solicitor-General for the State of South Australia with A F Cairney and J Litster for the respondent (instructed by Director of Public Prosecutions (SA))

CATCHWORDS

Douglass v The Queen

Criminal law – Evidence – Trial by judge alone – Appellant convicted of aggravated indecent assault of granddaughter ("CD") – CD aged three years at time of alleged offence – Appellant gave sworn evidence denying offence – CD's unsworn statement only evidence of offence – Trial judge did not record any finding respecting appellant's evidence – Whether reasons sufficient to make clear appellant's evidence rejected beyond reasonable doubt – Whether CD's evidence reliable – Whether evidence sufficient to prove offence beyond reasonable doubt.

1 FRENCH CJ, HAYNE, CRENNAN, KIEFEL AND BELL JJ. After a trial before a judge alone in the District Court of South Australia (Barrett DCJ) the appellant was convicted of the aggravated indecent assault[1] of his granddaughter, CD, a child aged three years. He was alleged to have persuaded CD to hold his penis on an occasion when the two were alone in a shed.

2 The only evidence of the offence came from CD. It comprised statements made by her in an interview with a psychologist employed by the Child Protection Agency ("the interview") and her unsworn answers in cross-examination at the trial. The offence was alleged to have occurred on or about 23 October 2008, one week before CD's fourth birthday. The interview took place five weeks later on 26 November 2008. The trial was held in August 2010. CD was then aged five years and nine months. Her evidence was confined to her answers to questions on four topics for which the Court had given permission for cross-examination[2].

3 The appellant gave evidence of his contact with CD on the day of the alleged offence. He denied that they had been inside a shed or that she had touched his penis. The trial judge did not in terms reject the appellant's evidence. Nonetheless, his Honour was satisfied beyond reasonable doubt that on or about 23 October the appellant had contrived to have CD touch his penis around the time he urinated in a shed. His Honour was not able to identify the shed in which the offence occurred since, as will appear, CD had given inconsistent accounts in this respect.

4 On 10 November 2010, the appellant was sentenced to a term of three years' imprisonment, with a non-parole period of 18 months.

5 The Court of Criminal Appeal of the Supreme Court of South Australia (Doyle CJ, Anderson and David JJ) dismissed the appellant's appeal against his conviction[3].

6 On 11 May 2012, Crennan and Bell JJ granted the appellant special leave to appeal from the order of the Court of Criminal Appeal. The appeal was heard before the Full Court on 16 August 2012. At the conclusion of the hearing, the

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1 *Criminal Law Consolidation Act* 1935 (SA), s 56(1).

2 *Evidence Act* 1929 (SA), s 34CA.

3 *R v Douglass* [2010] SASCFC 66.

Court made orders allowing the appeal, setting aside the order of the Court of Criminal Appeal made on 3 December 2010 and in its place allowing the appeal to that Court, quashing the appellant's conviction and sentence and directing the entry of a verdict of acquittal. Our reasons for joining in the making of those orders are set out below.

The first ground – sufficiency of the reasons

7 The appellant's primary challenge was to the sufficiency of the judge's reasons for the verdict. He complained that the judge had arrived at a conclusion of guilt without rejecting his sworn denial of the offence. The material discussion is contained in the concluding three paragraphs of the judgment:

> "I warn myself of the caution I must take in determining whether to accept CD's unsworn evidence and the weight to be given to it.
>
> I bear in mind as well that the accused has given sworn evidence denying the allegations. Further, I do not find anything in his demeanour that assists the prosecution.
>
> While bearing all these matters in mind, I am satisfied beyond reasonable doubt that the accused 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 the incident occurred on or about 23 October ..."

8 In South Australia, s 7 of the *Juries Act* 1927 (SA)[4] provides for the trial of an accused on an information presented in the Supreme or District Court by a

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4 Section 7 relevantly provides:

> "(1) Subject to this section, where, in a criminal trial before the Supreme Court or the District Court –
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> (a) the accused elects, in accordance with the rules of court, to be tried by the judge alone; and
>
> (b) the presiding judge is satisfied that the accused, before making the election, sought and received advice in relation to the election from a legal practitioner,
>
> the trial will proceed without a jury.

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judge alone. Unlike the statutory provisions governing trial by judge alone considered in *Fleming v The Queen*[5] and *AK v Western Australia*[6], the South Australian statute does not specify requirements for the contents of the reasons for judgment. However, it was common ground on the appeal that a judge returning a verdict following a trial without a jury is obliged to give reasons sufficient to identify the principles of law applied by the judge and the main factual findings on which the judge relied[7]. The appellant submitted that discharge of that obligation required that the judge give some explanation of why he had excluded the appellant's evidence as not reasonably possibly true.

The first ground – the Court of Criminal Appeal

9 The same challenge was advanced in the Court of Criminal Appeal[8]. The Court said that following a trial by judge alone, a judge should state findings on the main grounds on which the verdict rests and the judge should usually give reasons for making those findings[9]. However, when a finding or the resolution of a case turns on credibility, the Court said that it may be enough for the judge to state that he or she believes one witness in preference to another[10]. This was a

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(4) If a criminal trial proceeds without a jury under this section, the judge may make any decision that could have been made by a jury and such a decision will, for all purposes, have the same effect as a verdict of a jury."

5 (1998) 197 CLR 250; [1998] HCA 68, considering the *Criminal Procedure Act* 1986 (NSW), s 33(2).

6 (2008) 232 CLR 438; [2008] HCA 8, considering the *Criminal Procedure Act* 2004 (WA), s 120(2).

7 See *AK v Western Australia* (2008) 232 CLR 438 at 480-481 [107] per Heydon J.

8 *R v Douglass* [2010] SASCFC 66 at [2].

9 *R v Douglass* [2010] SASCFC 66 at [46].

10 *R v Douglass* [2010] SASCFC 66 at [47].

reference to the statement of McHugh JA in *Soulemezis v Dudley (Holdings) Pty Ltd*[11]:

> "Where 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': *Connell v Auckland City Council* [1977] 1 NZLR 630 at 632-633 per Chilwell J." (emphasis in original)

10 The Court of Criminal Appeal characterised the appellant's trial as a case of "word against word"; observing that it had been for the trial judge to assess the credibility and reliability of the evidence of CD and the appellant. It said[12]:

> "The fact that there was no inherent weakness in the evidence given by [the appellant], and the fact that there was nothing in his demeanour that led the Judge to reject his evidence, do not mean that the Judge was not entitled to do so."

11 And[13]:

> "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]."

The first ground – consideration

12 The Court of Criminal Appeal's reliance on McHugh JA's statements in *Soulemezis* was misplaced. *Soulemezis* concerned the sufficiency of the reasons of a judge of the Compensation Court of New South Wales in a proceeding in which the right of appeal was confined to a question of law or in relation to the admission or rejection of evidence. It was an error to view the appellant's trial as reducing to a case of "word against word". It is a characterisation which fails to recognise that the resolution of a criminal case does not depend on whether the evidence of one witness is preferred to that of another. The resolution of a

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11 (1987) 10 NSWLR 247 at 280.

12 *R v Douglass* [2010] SASCFC 66 at [63].

13 *R v Douglass* [2010] SASCFC 66 at [64].

criminal trial depends upon whether the evidence taken as a whole proves the elements of the offence beyond reasonable doubt. The point is made by Gummow and Hayne JJ in *Murray v The Queen*[14]:

> "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. This required no comparison between alternatives other than being persuaded and not being persuaded beyond reasonable doubt of the guilt of the appellant."

13 To dismiss the appellant's complaint respecting the sufficiency of the reasons on the footing that the judge's acceptance of CD's evidence necessarily carried with it rejection of his evidence was to overlook that the judge's acceptance of CD as truthful was not inconsistent with the existence of a reasonable doubt as to guilt. Even if the judge was not persuaded by the appellant's evidence, he could not convict unless satisfied that it was not reasonably possibly true[15].

14 In *R v Keyte*, Doyle CJ explained why a judge is required to give reasons for the judge's verdict following a trial under s 7 of the *Juries Act* 1927 (SA)[16]. These included that in the absence of reasons, the appellate court is unable to determine whether the judge has correctly applied the relevant rules of law. In this case, the failure to record any finding respecting the appellant's evidence left as one possibility that the judge simply preferred CD's evidence and proceeded to convict upon it applying a standard less than proof beyond reasonable doubt. The absence of reasons sufficient to exclude that possibility constituted legal error. It is unnecessary to address the consequence of that error in circumstances in which, as will appear, the appellant's second ground must succeed.

The second ground – the sufficiency of the evidence

15 In its discussion of the appellant's challenge to the sufficiency of the trial judge's reasons, the Court of Criminal Appeal said that the judge had adequately explained why he found CD "to be credible and reliable."[17] The judge's finding

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14 (2002) 211 CLR 193 at 213 [57]; [2002] HCA 26.

15 *Liberato v The Queen* (1985) 159 CLR 507 at 515 per Brennan J; [1985] HCA 66.

16 (2000) 78 SASR 68 at 76.

17 *R v Douglass* [2010] SASCFC 66 at [64].

was of satisfaction "beyond reasonable doubt of the *truthfulness* of CD's evidence" (emphasis added). Nowhere did the judge address the distinct question of the reliability of CD's evidence in the sense of its capacity to establish the commission of the offence to the criminal standard. That question is the subject of the appellant's second ground, which contends that the verdict cannot be supported by the evidence[18]. Success on this ground requires that the appellant's conviction be quashed and a verdict of acquittal be entered[19].

The evidence of young children

16 Before referring to the evidence it is convenient to say something about the reception of the evidence of young children under the *Evidence Act* 1929 (SA) ("the Evidence Act"). A "young child" is a child of or under the age of 12 years[20]. A young child is a "protected witness" for the purposes of s 34CA of the Evidence Act. That section permits the court to admit evidence of the nature and contents of a statement made outside the court by a "protected witness" to prove the truth of the facts asserted in the statement[21]. Reception of an

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18 *Criminal Law Consolidation Act* 1935 (SA), s 353(1).

19 *M v The Queen* (1994) 181 CLR 487; [1994] HCA 63; *MFA v The Queen* (2002) 213 CLR 606 at 618 [38] per McHugh, Gummow and Kirby JJ; [2002] HCA 53.

20 Evidence Act, s 4, definition of "young child".

21 Section 34CA relevantly provides:

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

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out-of-court statement under s 34CA is subject to the court's satisfaction that the statement has sufficient probative value to justify its admission and the availability of the protected witness to be called as a witness in the proceeding[22].

17 CD's statements made in the interview were received under s 34CA as evidence of the truth of the facts asserted therein. Senior counsel for the appellant objected to their admission at trial, submitting that they lacked sufficient probative value to justify admission. Following a voir dire examination, the trial judge ruled that CD's statements possessed sufficient probative value to justify admission (subject to an inquiry into CD's capacity to give unsworn evidence).

18 A court may only give permission to allow a protected witness to be cross-examined on matters arising from evidence admitted under s 34CA 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[23].

(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."

22 Evidence Act, s 34CA(1).

23 Evidence Act, s 34CA(2).

The Court of Criminal Appeal of South Australia has remarked on the difficulties presented by the drafting of s 34CA[24]. No question involving the interpretation of the provision arises in the appeal. The appellant's counsel sought and obtained permission to cross-examine CD on four topics: CD's account that she had touched her older brother's penis; the relationship between CD and the appellant; the number of times CD had spoken to people about her allegation; and putting the appellant's case that "it didn't happen".

19 A person is presumed to be capable of giving sworn evidence in any proceedings in South Australia unless the judge determines that the person does not have sufficient understanding of the obligation to be truthful entailed in giving such evidence[25]. As earlier noted, CD was not yet six years old at the date of the trial. The judge did not embark on an inquiry of the sufficiency of her understanding of the obligation entailed in giving sworn evidence. His Honour proceeded directly to the consideration of whether the requirements for the admission of unsworn evidence were satisfied.

20 Section 9(2) of the Evidence Act provides:

> "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 –
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> (a) the judge –
>
> (i) is satisfied that the person understands the difference between the truth and a lie; and
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> (ii) tells the person that it is important to tell the truth; and
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> (b) the person indicates that he or she will tell the truth."

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24 *R v J, JA* (2009) 105 SASR 563 at 575 [56]-[59] per Duggan J, 593 [154] per Nyland J and 598 [176]-[180] per White J; *R v Byerley (Question of Law Reserved No 1 of 2010)* (2010) 107 SASR 517 at 524 [18] per Doyle CJ.

25 Evidence Act, s 9(1).

21 At the commencement of the s 9(2) inquiry it was ascertained that there were two other persons in the remote location from which CD gave her evidence. The judge asked CD the following questions and obtained the following replies:

> "Q. If I were to say there were two people in the room with you, would that be the truth or would that be a lie.
>
> A. Truth.
>
> Q. If I were to say there were 50 people in that room with you, would that be the truth or would that be a lie.
>
> A. A lie."

22 The judge impressed on CD the need for people to tell the truth in court and she agreed that she would do so. His Honour was satisfied that the conditions of s 9(2) were met and CD was permitted to give unsworn evidence.

The evidence – CD's complaint

23 In summarising the evidence at the trial it is convenient to commence with an account of how CD's allegation came to light.

24 CD's parents were separated at the time of these events. On 27 October 2008, CD and her older brother, MD, were staying with their father, TD. It was about a week before CD's fourth birthday. Both the children were in TD's bedroom when CD asked "Do you have a beautiful penis, daddy?". TD had never heard CD use the word "penis" before and he was shocked by her question. The following day a further incident occurred. TD had taken CD with him to visit the home of a friend. During the course of the visit, TD urinated in the backyard of his friend's house. CD asked, "Did you just do wees, daddy?", TD said that he had, and CD volunteered "I had to hold grandpa's willy while he did wees". She said that this had happened on the weekend. CD did not understand the distinction between weekends and week days at the time. She had not stayed with the appellant on the weekend; however she had stayed with him overnight on the previous Wednesday.

25 TD's evidence of CD's statements was admitted as evidence of her "initial complaint"[26]. The statements were not evidence of the truth of the assertions but they were available to be used as evidence of the consistency of her conduct[27].

26 TD told CD's mother, LD, of CD's complaint. LD confronted the appellant, her father, with the allegation. The appellant denied it. LD said that TD was going to report the matter to the police, to which the appellant replied "Let him".

27 LD gave evidence of statements made by CD, which were received by way of elaboration of her initial complaint[28]. LD had spoken with CD on 31 October 2008 and asked her about "what they did at [CD's] grandparents". This inquiry led to CD saying that the appellant had told her to "hold his willy". On a subsequent occasion, CD told her mother that the offence occurred while the appellant was urinating on the tyre of a tractor in the tractor shed.

28 The contents of CD's statements to LD were not received to prove the truth of the assertions. Those statements, too, were received as bearing on the consistency of CD's conduct.

The interview

29 The evidence relied upon by the Crown to establish the offence was the answers that CD gave during the interview. After some initial questions, the interview with the psychologist, L, proceeded as follows:

"L Has someone ever asked you to touch their willy?

[CD] … I touched [m]y brother's.

L You touched your brother's did you. And what happened?

[CD] … I told to MD to pee in the bucket.

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26 Evidence Act, s 34M(3).

27 Evidence Act, s 34M(4).

28 Evidence Act, s 34M(6).

L Did you? And he did. Oh Okay. And what about anybody else. Did someone ask you to touch their willy?

[CD] No.

L Or do anything to their willy?

[CD] No.

L Or. Some people call this a penis. Did you know that? That's the proper word for it isn't it.

[CD] Yes.

L Has anyone asked you to touch their penis?

[CD] No.

L Are you sure?

[CD] No.

L Yeah? Okay. I was just was talking with mum about all that sort of stuff before.

[CD] …

L If somebody did ask you to hold or touch their penis.

[CD] I touched on my grandpa's.

L O did you? You touched your grandpa's? Oh, tell me about that. What happened?

[CD] I don't know.

L Oh, okay. Well do you know what. I wasn't there and you were there. So what if I try and figure out what happened and you help me. Okay?

[CD] Yes.

L Alright. So where were you when that happened?

[CD] In the shed.

L You were at the shed, were you? At whose house?

[CD] His shed.

L His shed, yeah, and what were you do[i]ng in the shed?

[CD] Holding his willy.

L Holding his willy. Ohm, and how did that happen, like?

[CD] He told me.

L Yeah, and then what, he said, what did he say to you?

[CD] He just said I said to him I didn't want to.

L Oh did you? Good. That was good. And then what happened?

[CD] Mmm, I holded his willy again.

L Did you? Even though you said you didn't want to?

[CD] Yes,

L Yeah. That was a bit rough wasn't it.

[CD] Yeah."

30 The interviewer asked CD what the appellant's "willy" looked like and CD replied that it looked like MD's "willy". At the time, MD was six years old. The only other details of the offence provided by CD in the interview were that the appellant was wearing pants and a singlet and that his "wee" was yellow.

The cross-examination of CD

31 The cross-examination of CD commenced with some "settling questions". CD's answers to these questions may be thought to illustrate one difficulty in making an assessment of the reliability of her account given in the earlier interview:

"Q Do you know your great-nanna.

A Not anymore.

Q Not anymore. When did you last see great-nanna.

A A long time ago.

Q Do you remember the last time you saw her.

A No.

Q You don't or you do.

A Don't."

The last occasion on which CD had seen her great-grandmother was the date of the alleged offence.

32 In the course of cross-examination, counsel put to CD an account of the events of 23 October 2008, with which she appeared to agree, variously responding "Mm", "Yes" or "Yep". In summary, that account was that CD had gone shopping with her grandmother in the morning and bought some doughnuts. In the afternoon she and the appellant rode on a motorbike to visit her great-grandmother. Afterwards, they dug a hole in a sheep paddock and CD lined up some rocks. CD did not volunteer that the outing included a visit to a shed or that she had held the appellant's penis. Nor was it suggested to her that any such incident had occurred. The only information that CD supplied concerning the events of the afternoon was that they had buried the rocks. While CD agreed with the proposition that on her return from the outing she had told her grandmother that she had played with the dog, Lucky, other of her answers suggested that she had no memory that her great-grandmother had a dog called Lucky or of playing with Lucky that day.

33 CD had been shown a recording of her interview not long before she gave evidence. Counsel asked CD if she remembered the lady interviewer asking her about her brother, MD. The cross-examination continued:

"Q did that lady ask you this 'Has someone ever asked you to touch their willy?' and you said 'I touched my brother's'.

A Yes.

…

Q When did you touch your brother's willy.

A After a long time ago.

Q Where were you when you touched his willy.

A Toilet.

Q In the toilet. Was he having a pee.

A Yes.

Q And while he was having a pee you touched his willy, did you. Is that because he asked you to touch his willy.

A Yes."

34 Counsel put to CD that she had "never touched [the appellant's] willy". CD maintained that she had. She said that she had touched MD's "willy" and the appellant's "willy". She had talked to her mother and father about these matters on 10 occasions.

The scene of the offence

35 It will be recalled that CD told her mother that the appellant had urinated on the tyre of a tractor on the occasion of the offence. The appellant and his de facto wife, CD's grandmother, were living on a property at Lenswood at the time of these events. The appellant's mother, CD's great-grandmother, was living on a neighbouring property. There were two sheds on the great-grandmother's property: a wood shed and a tractor shed. There were three sheds on the appellant's property but none housed a tractor.

36 On 1 November 2009, Detective Kelly, who was investigating the matter, asked LD why she believed that the offence had occurred in the tractor shed. Detective Kelly permitted LD to show CD a plan with a view to inviting her to identify the shed in which the offence had taken place. For reasons that are unexplained, CD was not shown a plan of the appellant's property but only a plan of the great-grandmother's property. It appears that CD identified the wood shed on the great-grandmother's property as the scene of the offence.

The defence case

37 The appellant gave evidence of the last occasion on which CD had stayed with him and his wife. He said that he had been alone with CD for a period during the afternoon. They had left home at 2.30pm to visit the great-grandmother. He was in the habit of visiting her every afternoon at 3.00pm. They left early on this occasion because the appellant had to fix a broken pipe in the sheep paddock. He had dug a hole and glued a new piece onto the pipe. While he did this, CD lined up rocks beside the hole. They rode on a quad bike to the great-grandmother's house. They spent about 30 minutes there, during which CD ate some of her doughnut. Then they returned to the appellant's property. The appellant's wife was at home. The appellant denied that he and CD had been inside a shed or that he had urinated in CD's presence. He said that CD had never touched his penis.

38 The appellant's wife gave evidence in the defence case. She recalled the appellant taking CD to see his mother on the day he fixed the broken pipe. She had packed a doughnut for CD to take on the trip. On their return, CD was happy and excited. She had given an account of playing with Lucky at her great-grandmother's house and of digging a hole with the appellant. The appellant's wife saw nothing in CD's demeanour to cause her concern.

39 The trial judge appears to have accepted the appellant's wife as a truthful witness. The Court of Criminal Appeal observed that the wife's evidence supported the appellant in a general way but that it did not exclude that the appellant had the opportunity to commit the offence[29]. As the Court commented, evidence of CD's normal behaviour on her return did not assume significance given that there was nothing to suggest that she would have been upset if the offence had occurred.

The trial judge's assessment of CD's evidence

40 The trial judge gave reasons for accepting that CD was truthful when she said that the appellant had contrived to have her touch or hold his penis while urinating. Her allegation was of an "unusual event", one his Honour considered unlikely that a three year old would make up. Her complaint to her father was "completely spontaneous", and her reports to her mother by way of elaboration of the complaint were "important bolsters" to her credibility. Another reason for

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29 *R v Douglass* [2010] SASCFC 66 at [54].

accepting CD as a truthful witness was the firmness with which she had maintained her allegation in cross-examination.

41 The judge noted that when the topic of touching a penis was first raised in the interview, CD volunteered that she had touched MD's penis. Thereafter, on three occasions, she denied touching anyone else's penis, before saying that she had touched the appellant's penis. That allegation only emerged after the interviewer said that she, the interviewer, had spoken to CD's mother "about all that sort of stuff". The judge said that if an adult or older child had responded in the interview in the way that CD had, it would have cast "serious doubt" on the occurrence of the incident. He considered that CD's inability to provide details of her allegation would add to the doubts about its occurrence had she been an adult or older child. However, CD's initial denials and lack of detail did not diminish her credit. Nor was the inconsistency in CD's account of the location of the offence a matter of significance.

The second ground – the Court of Criminal Appeal

42 When it came to deal with the appellant's second ground the Court of Criminal Appeal applied the test formulated in the joint reasons in *M v The Queen*[30]:

> "Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations." (footnotes omitted)

43 The Court of Criminal Appeal agreed with the trial judge that CD's initial denials and the inconsistencies between her statements in the interview and on later occasions were explicable on the basis of CD's young age. However, the

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30 (1994) 181 CLR 487 at 493 per Mason CJ, Deane, Dawson and Toohey JJ, cited in *R v Douglass* [2010] SASCFC 66 at [37].

Court was not prepared to place the same weight on the two factors on which the trial judge relied for his finding that CD was truthful. Doyle CJ, who gave the leading judgment, was not confident that the allegation was one a three year old child was unlikely to make up. Nor was Doyle CJ confident that he would have given as much weight to CD's firmness in cross-examination as the trial judge had done[31]. Nonetheless, Doyle CJ considered that it had been open to the trial judge to accept CD's account and to rely on it to reach a finding of guilt[32]. In reaching that conclusion, Doyle CJ said this[33]:

> "One cannot simply say that because [CD] was a three year old one could discard any difficulties with her evidence, accepting and acting on her evidence of the alleged offence. But equally one cannot say that [CD's] evidence should be assessed in the same way as one would assess the evidence of an adult. Nor could one say that [CD's] evidence was inherently unreliable because of her age. However, having regard to [CD's] age, it was open to the Judge to decide that she was truthful and reliable during the interview by the psychologist, which became her evidence, despite the problems with that evidence that [the appellant's counsel] identified."

The respondent's submissions

44 The respondent embraced the Court of Criminal Appeal's reasons respecting the assessment of CD's evidence. In written submissions, the respondent referred to a body of research dealing with the capacity of children to give reliable evidence[34] and to the enactment of s 12A of the Evidence Act[35].

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31 *R v Douglass* [2010] SASCFC 66 at [52].

32 *R v Douglass* [2010] SASCFC 66 at [57].

33 *R v Douglass* [2010] SASCFC 66 at [52].

34 Baker-Ward and Ornstein, "Cognitive Underpinnings of Children's Testimony", in Westcott et al (eds), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice*, (2002) 21; Bruck et al, "Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways That Children Tell?", (2005) 11 *Psychology, Public Policy and Law* 194; Fivush, "The Development of Autobiographical Memory", in Westcott et al (eds), *Children's Testimony*: *A Handbook of Psychological Research and Forensic Practice*, (2002) 55; Layton, "The Child and the Trial", in Gray et al (eds), *Essays in Advocacy*, (2012) 201; Oates, "Problems and prejudices for the sexually abused child", (2007) 81

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The latter provision precludes the giving of a warning that it is unsafe to convict on a child's uncorroborated evidence unless, in the circumstances of the case, there are cogent reasons, apart from the fact that the witness is a child, to doubt the reliability of that evidence. No question of the giving of a warning under s 12A (or of the relationship between s 12A and s 9(4)[36]) of the Evidence Act

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Australian Law Journal 313; Pezdek and Hinz, "The Construction of False Events in Memory", in Westcott et al (eds), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice*, (2002) 99; Powell and Thomson, "Children's Memories for Repeated Events", in Westcott et al (eds), *Children's Testimony: A Handbook of Psychological Research and Forensic Practice*, (2002) 69; The Australasian Institute of Judicial Administration Incorporated, *Bench Book for Children Giving Evidence in Australian Courts*, (2010) at 22-50; Westcott, "Child witness testimony: what do we know and where are we going?", (2006) 18 *Child and Family Law Quarterly* 175.

35 Section 12A provides:

> "(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."

36 Section 9(4) of the Evidence Act provides:

> "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

(Footnote continues on next page)

arises. The respondent's invocation of s 12A was because its enactment was said to reflect "contemporary understanding of a child's capacity to give truthful and reliable evidence". Contrary to the tenor of that submission, the evident intention of the provision is that child witnesses are not to be treated as a class. The issue raised by the appeal is not resolved by recourse to the results of studies concerning the capacity of children generally to give truthful and reliable evidence. In question in the circumstances of this trial is the sufficiency of CD's evidence to support a conclusion beyond reasonable doubt that the offence charged in the Information occurred.

The second ground – consideration

45 The Court of Criminal Appeal was right to question the cogency of the reasons given by the trial judge for his acceptance of CD's account. First, CD said that she had touched her brother's penis at his request while he was urinating. In these circumstances it is not apparent how the trial judge drew the inference that CD's account of doing the same thing at the appellant's request was a description of an event that it was unlikely a child of her age would make up. Secondly, since it was at least possible that CD could not recall the day of the alleged offence when she gave evidence 22 months later, her firmness in cross-examination, while capable of bearing on her truthfulness, was an uncertain foundation for accepting that her account in the interview was reliable.

46 In the passage set out earlier in these reasons, the Court of Criminal Appeal said that one could not discard any difficulties with CD's evidence simply because she was a three year old. In the same passage, the Court went on to say that having regard to CD's age it had been open to the judge to decide she was truthful and reliable despite the problems with her evidence. The Court did not explain how the two propositions were to be reconciled. How was the judge to arrive at a state of satisfaction beyond reasonable doubt of the reliability of CD's statements in the interview given that the limited detail of the allegation was supplied in response to leading questions and only after initial denials? Those statements were the only evidence of the commission of the offence.

47 In later statements, CD gave inconsistent accounts of the scene of the offence. It is understandable that CD may have been confused when she was

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(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."

shown the plan of her great-grandmother's property and asked to identify the shed. Nonetheless, the fact that CD gave three different accounts of the scene of the offence cannot be dismissed in any assessment of her reliability as an historian.

48 The criminal standard of proof is a designedly exacting standard. A different, lesser, standard is applied by courts dealing with contested issues involving the care and protection of children[37]. This was not such a proceeding. In the circumstances of this trial, it was an error for the Court of Criminal Appeal to hold that it had been open to the trial judge to be satisfied of the *reliability* of CD's statements in the interview and to reason from that, despite the appellant's denials, to a conclusion that his guilt had been proved beyond reasonable doubt.

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37 The civil standard of proof on the balance of probabilities applies to proceedings under Pt VII Div 13A of the *Family Law Act* 1975 (Cth). See also *Children and Young Persons (Care and Protection) Act* 1998 (NSW), s 93; *Child Protection Act* 1999 (Q), s 105; *Children's Protection Act* 1993 (SA), s 45; *Children, Young Persons and Their Families Act* 1997 (Tas), s 63; *Children, Youth and Families Act* 2005 (Vic), ss 215, 551; *Children and Community Services Act* 2004 (WA), s 151; *Children and Young People Act* 2008 (ACT), s 711; *Care and Protection of Children Act* 2007 (NT), s 95. And see discussion in *M v M* (1988) 166 CLR 69 at 77; [1988] HCA 68; *Re W (Sex Abuse: Standard of Proof)* (2004) FLC ¶93-192.