IN THE HIGH COURT OF AUSTRALIA

ADELAIDE REGISTRY

No. A17 of 2012

BETWEEN:

RAYMOND HOWARD LYLE DOUGLASS

Appellant

and

THE QUEEN

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Respondent

APPELLANT'S REPLY

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PART I

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

PART II

Reasons and the methods of reasoning capable of discharging the burden of proof

2. The respondent acknowledges (at [8]) that it would involve error to reason to guilt by preferring a prosecution witness over a defence witness and that the evidence of the complainant and the accused is of a different qualitative status (at [14]). It is therefore driven to contend that the CCA's characterisation of the case as one involving "*word against word*" and the CCA's reference to the dictum of McHugh JA in *Soulemezis* was not to invoke the notion that the trier of fact in a criminal matter can resolve the issue before it by preferring one witness to another. It follows that if the CCA approached the matter in that way it erred.

3. The respondent places an alternative construction upon the trial judge's reasons for verdict. The respondent contends (at [8]) that if the trial judge found that the complainant should be accepted beyond reasonable doubt or that the accused's version was not a reasonable possibility, the trial judge was entitled to convict, and that on proper construction of the reasoning of the trial judge, that is how he approached the matter.

4. The appellant submits that the respondent's argument fails to acknowledge that one obvious explanation for the trial judge not giving reasons for rejecting the accused's evidence beyond reasonable doubt is that he did not do so. Both the CCA and the respondent infer, from the trial judge's acceptance of the truthfulness of the complainant' evidence and the verdict, that the burden of proof must have been properly discharged.

5. In issue is whether, in the absence of such a finding in relation to the accused's evidence, it is open to a trier of fact to infer that this critical finding was made, particularly where the Judge's analysis of the accused's evidence and demeanour does not identify any flaws in his credibility or reliability. Further, is it open to the CCA to propose reasons that the trial judge must have had for rejecting the accused upon the basis that the prosecution case depended upon the evidence of a single witness and the accused's evidence was in conflict with that witness? In other words, a situation that ordinarily itself calls for caution[1] has been relied upon to explain a failure to expressly reject the accused's evidence beyond reasonable doubt.

6. The appellant submits that where the prosecution case depends on the evidence of a single witness and the accused denies the charge on oath, the trial judge cannot convict unless and until the accused's evidence has been rejected beyond reasonable doubt. Further, even if the accused's evidence is rejected beyond reasonable doubt, the trier of fact must determine whether the evidence of the single witness is sufficient to discharge the burden of proof having regard to its infirmities and features that give rise to the need for scrutiny.

7. In other words, in order to discharge the burden of proof, it is neither correct nor sufficient to:

   7.1. prefer one witness over another or choose between the conflicting accounts;

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[1] Although the debate in the present case is about the significance of the CCA's use of the expression "*word against word*" on the question of reasons and the permissible mode of reasoning to guilt (see, in that regard, *The Queen v E* (1995) 89 A Crim R 325 at 330), the expression "*word against word*" or "*oath against oath*" has generally been employed to mark the occasion for a careful direction, both because of the risk of misconceiving the burden of proof, and because, in a case where the totality of the evidence which is capable of proving or defending the allegation of its nature comes down to two rival accounts, the means of *disproof* available to an accused is correspondingly limited. In *R v Murray* (1987) 11 NSWLR 12 at 19, Lee J (with whom Maxwell and Yeldham JJ agreed) observed that in all cases of serious crime it is customary for judges to stress that where there is only witness asserting the commission of the crime, the evidence of that witness must be scrutinized with great care before a conclusion is arrived at that a verdict of guilty should be brought in. See also *Longman v The Queen* (1989) 168 CLR 314 at 318 (McHugh J).

7.2. decide whether to accept the prosecution witness as truthful and therefore deduce that the accused's evidence is necessarily rejected, or is not a reasonable possibility, without more (the approach of the respondent at [8], which the appellant contends is erroneous);

7.3. fail to make a finding that the accused's evidence is rejected beyond reasonable doubt[2] (and give reasons for that finding).

8. The trier of fact may not be able to make any particular finding about the accused's evidence but simply not be able to reject it beyond reasonable doubt. And a finding that the accused's account is a reasonable possibility may be a source of reasonable doubt but it is not the only possible source[3]. There may be factors associated with the prosecution evidence that give rise to a doubt which is not (cannot) be removed simply by a rejection of the contrary account. The law reports record numerous examples of mis-directions in word against word cases[4]. It is not appropriate, in the absence of clear reasons, to assume, against the appellant's interests, that the judge adopted a correct reasoning process in finding that the burden had been discharged. Justice must not only be done but be seen to be done[5].

9. Moreover, if an appeal court is entitled to infer that the learned trial judge did correctly apply the burden, the question remains: how and why? If the reason for concluding that the accused's evidence was rejected beyond reasonable doubt was not simply that the judge accepted that the child's account in her video interview was truthful and reliable, one asks rhetorically, what was it?

10. Assuming there was a case of "*word against word*" and the only issue was credibility, there may be little that can be said by way of explanation, as McHugh JA identified in *Soulemezis*[6], but where what is in issue is not only the complainant's credibility but the *reliability* of the evidence, and where the requirement is to reject the accused's account beyond reasonable doubt, it is difficult to conceive how the criminal burden could ever properly be discharged without reasons for rejecting the accused's evidence.

11. The respondent's submissions at [9] - [10], that the reasoning of the trial judge discloses that he did not reason to guilt by preferring the evidence of CD to that of the appellant, list only two references to the accused's evidence, one of which is that there was nothing in the demeanour of the sworn evidence of the appellant denying the allegation which assisted the prosecution case. This simply reinforces the failure of the learned trial judge to reject the appellant's evidence.

Detail, consistency and cross-examination nullified lesser status of video interview

12. The respondent concedes that there is a qualitative difference between CD's out of court statement and the appellant's evidence given on oath (at [14] and [30]), and acknowledges that evaluation of a young child's evidence *must* take into account the age and development of the child, the way in which the narrative of the evidence unfolded, the extent to which external influences may have been involved, the child's understanding of the concept of the truth and its importance, but the respondent also twice contends (at [14] and [31]) that: "*[t]he other evidence and [CD] submitting to cross-examination*[7] *prohibited any real weight being given to the fact that her out of court statement was not made on oath*".

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2 *Liberato v The Queen* (1985) 159 CLR 507 at 515 (Brennan J).

3 *Rusovan v The Queen* (1992) 62 SASR 86 at 106 (Olsson J).

4 In addition to the authorities mentioned in the appellant's submissions in chief, see *R v Beserick* (1993) 30 NSWLR 510 at 528, *The Queen v E* (1995) 89 A Crim R 325, *R v R* (1998) 198 LSJS 119.

5 *Fleming v The Queen* (1998) 197 CLR 250 at 260 [22], 265 [37].

6 The appellant contends that the observation by McHugh JA in *Soulemezis* cannot apply at all in a criminal case. During argument in *Fleming v The Queen* [1998] HCA Trans 314, Gleeson CJ doubted that it applied in a criminal case.

7 The fact that cross-examination of the person making the out of court statement occurs does not cure or alleviate the difficulties brought about by the unsatisfactory circumstances in which the statement was taken, for reasons set out in the appellant's submissions in chief at [74] – [75].

13. In contending (at [9]) that the evidence of CD was sufficient to prove the offence beyond reasonable doubt and negative the denials of the appellant as a reasonable possibility, the respondent calls in aid: the judge's characterisation of the "*initial complaint*" to TD as "*completely spontaneous*", "*detailed*" and "*striking in its consistency with her evidence*" ([9.2]); the reports made to LD, which the trial judge characterised as "*significantly consistent*" with the evidence of CD and "*important bolsters*" to her credibility ([9.3]); and the "*detail*" that CD provided ([9.5]).

14. Detail? The only evidence of the commission of an offence admitted as part of the prosecution case in chief for a testimonial purpose was the video interview. During the interview, the child:

    14.1. did not identify the shed in which the incident was alleged to have occurred but did refer to it as "*His shed*";

    14.2. did not give any detail as to when the offence was alleged to have occurred or the circumstances surrounding the alleged incident;

    14.3. when asked about further details said she "*did not know*".

15. In those respects there was a *lack* of detail, which the trial judge acknowledged (Trial [86]). The details that *were* revealed either lacked probative significance or tended to cast doubt on the reliability of the account[8].

16. Consistency with "*initial complaint*"? The respondent contends that the trial judge was "*confronted by the consistency of [CD's] out of court statement with the evidence of initial complaint given by her mother and father*".

17. Consistent with the common law position[9], the "*initial complaint*" (comprising a report to TD, and "*elaborations*" by way of reports to LD, over an indeterminate period) was not admissible as to the truth of its contents: s 34M(4)(b). There are two senses in which complaint evidence is assessed for "*consistency*": consistency of the complaint with the alleged event having occurred and consistency with the account given in court[10]. Although s 34M(1) "*abolishes the common law relating to recent complaint in sexual cases*", the authorities do not suggest that s 34M(1) makes evidence of complaint relevant for some broader purpose[11]. If the complaint when analysed does not demonstrate such consistency, s 34M does not give it any significance. Here any such probative force was very limited.

    17.1. In terms of consistency with the offence having occurred, the complaint was not made at the earliest opportunity. CD made no complaint to the appellant's wife, her grandmother, Mrs Hay, in the period after when the appellant was alleged to have offended.

    17.2. In terms of consistency with CD's *evidence*, ordinarily, the comparison would be between the contemporaneous complaint and the later evidence at trial. Here it must be between the reports to TD and LD and the video interview which constituted the evidence of her account. Certain of the elaborations to LD likely occurred *after* the video interview, and the video interview was less than one month after the initial report to TD and then LD. Any

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8 The statement that the appellant wore pants and a singlet is not a detail of the alleged offending conduct. The statement that the appellant's wee was yellow is not of any moment. She clearly knew from watching her brother wee that wee was yellow (Tr p 207). The statement that the appellant's penis looked like her brother's might be said to constitute detail, but, bearing in mind her brother was only approximately two years older than her, and that the appellant was in his mid 50's at the time of the alleged offence, the assertion hardly gives rise to confidence in the reliability of her account.

9 *R v Kilby* (1973) 129 CLR 460, *R v Freeman* [1980] VR 1.

10 *R v Corkin* (1989) 50 SASR 580 at 581 (King CJ).

11 Rather, the chief difference would appear to be the relaxation of the requirement that the evidence be given at the first reasonable opportunity, and the relaxation of the test of what constitutes a complaint.

consistency between the initial report and the video interview, had limited significance[12]. Moreover, the extent of any consistency is questionable.

(a) On TD's account, all CD said was that she had to hold grandpa's willy while he did wees in the shed, and that that had happened on the weekend (Tr p 217).

(b) On LD's account, CD had said, on one occasion that "*it was in a tractor shed that he'd weed on the tractor tyre*" (Tr p 84).

(c) On a later occasion, when a policeman permitted LD to ask CD to identify on a map (Exhibit P2) where the incident had occurred, CD pointed to the shed near Shane's house (Tr p 85). According to the policeman, "*she had a look at the picture and was pretty precise*" (Tr p 256). The appellant gave uncontradicted evidence that there was no tractor in the shed near Shane's house (Tr p 307).

(d) The shed CD is said to have identified on the map was neither the tractor shed nor the shed on the appellant's property, and therefore not "*his shed*".

17.3. Finally, the evidence as to the complaint was not given by CD, nor by an independent witness, but by LD and TD. The reports to LD appeared to span a period of time (cf. Tr p 84 – 85). LD was herself a complainant. CD said under cross-examination she had spoken about the alleged incident with her parents 10 times (Tr p 208).

18. In circumstances where the prosecution case concerning the alleged charge against LD was proved to be fatally flawed on the basis that the shed in which LD was adamant the incident had occurred had not been built at the relevant time, the inconsistencies were not insignificant. On any view, it was unfair to say there was a "*significant consistency*" between the accounts. The initial complaint therefore did not "*bolster*" the prosecution case, and the late suggestion that the complaint should now be deployed for testimonial purposes should be rejected[13] - if anything it constitutes an implicit recognition that the video interview was incapable of discharging the burden of proof.

Abolition of the warning, and the reliability of the evidence of young children

19. The respondent contends that, Parliament having abolished class warnings in respect of children, there is no empirical evidence which would suggest any need for a warning in relation to the reliability of evidence of a very young child, and it is noted that it has been doubted in South Australia that warnings are necessary in a trial by judge alone in any event[14].

20. The respondent contends that extrinsic materials reflect that s 34CA was designed to preserve a child's account at an early stage, making it a reliable form of evidence. However, in introducing legislation to repeal and replace s 34CA with a new s 34LA, the Attorney General said that. .... *At present [s 34CA] is being used to enable the admission into evidence of records of police interviews*

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12 In *R v H, T* [2010] SASCFC 24, the initial complaint concerning an alleged offence in 1980 occurred in 2008, before a trial held in 2010. Gray J pointed out (at [25]) that it was difficult to perceive how comparing the complainant's out of court statement in 2008 with her evidence given in 2010 could assist the jury in assessing her credibility or reliability.

13 The submission, which appears in footnote 74, was not put to the CCA. Moreover, there were good reasons why reports to the child's mother and father would not have been received for testimonial purposes. The mother was, of course, a complainant, making allegations which were said to be "*strikingly similar*".

14 See the respondent's footnote 67. The appellant respectfully contends the (obiter) observations in *R v HAAK* [2012] SASCFC 19 that (a) the reference in s 12A applies to "*evidence*" in the form of a s 34CA statement, and (b) where a direction is required to be given to a jury it is not required to be given by the judge to himself, are wrong. (See also *R v E, DJ* [2012] SASCFC 6 at [2] (Vanstone J) and [84] (Kourakis J)). The issue of whether a warning is required in a trial by judge alone must be determined by reference to the purposes of a warning. It is not simply a question of the jury needing to know the law. The warning must be *heeded*, and a judge must heed the warning as much as a jury. In the absence of a reference to the warning in the reasons, and reasons which demonstrate that the reason for caution has been considered *and overcome*, there is a risk of injustice, or at least of the perception of injustice. Cf. *Fleming v The Queen* (1998) 197 CLR 250, where s 33(3) of the *Criminal Procedure Act* 1986 (NSW) made the position express. See also *AK v Western Australia* (2008) 232 CLR 438. In South Australia, trial by judge alone is pursuant to s 7 of the *Juries Act* 1927.

with the alleged victim to prove the truth of what was said in the interview. ***That was never Parliament's intention***"[15].

21. There is no empirical evidence in this matter as to the cognitive ability of very young children. But the appellant does not say that no young child is ever capable of giving a reliable account or a truthful account and difficulty in that respect must itself constitute a source of doubt. The point is that the Court must be in a position to assess the reliability and truthfulness of the account. The common law trial incorporated practices, rules and safeguards designed to provide a level of comfort in this respect, and, most importantly, to permit the *accused* to test the reliability and truthfulness in Court: the oath, the risk of contempt proceedings, the rule against hearsay, the prohibition against leading questions, practices which discourage witness contamination[16]. These are not mere historical quirks; they facilitate an assessment of the quality of the evidence adduced, and ensure fairness to the accused.

22. The respondent's submission (at [44]) that the defence do not ordinarily have a right to cross-examine a witness at the time a statement is made. However, the prosecution is not entitled to *rely* on that statement testimonially- in stark contrast to the safeguards of evidence adduced in court.

23. The same academic writings which contend that young children may be capable of giving an accurate account of an event emphasise the importance of the techniques necessary to procure such an account[17]. There has been no attempt to comply with any of that learning in the present case. Moreover, the interview does not contain within it any means by which a later observer can assess the child's cognitive ability and her capacity to understand, let alone undertake to respect, the difference between the truth and a lie. In South Australia, unlike, for example, Western Australia[18], there are no statutory guidelines, and in circumstances where no regard has been paid to the literature on the subject, there is an unacceptable risk that the evidence is not reliable.

24. The evidence called for the judge to warn himself as to all the dangers associated with reliance upon the video interview and the unsatisfactory manner in which it was conducted, for example, the use of repetitive and leading questions, the inappropriate reference to CD's mother LD (a co-complainant) and the fact that it was *not* conducted in a way which enables a retrospective assessment to be made of the child's understanding of and commitment to the truth. The reasons do not demonstrate that the judge properly warned himself, or that he heeded the warning, in the sense of explaining how it was that he had been able to overcome the caution required by the warnings and find that the appellant's account was negatived beyond reasonable doubt. That is, not only was the complainant's evidence intrinsically inferior to the accused's evidence on oath, it was fatally flawed, or at the very least, any conviction that depended upon it was unsafe[19].

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15 Hansard, *House of Assembly*, 14 September 2011, p 4944.

16 For example, witnesses should be proofed separately and encouraged not to discuss their evidence with others, particularly other witnesses: *Day v Perisher Blue Pty Ltd* [2005] NSWCA 110 at [30] (Sheller JA).

17 For example, in *The Child and the Trial* (to which reference is made in respondent's footnote 62), the author emphasises that a child is a potentially perfectly competent witness where competent and unbiased questioning is undertaken early, and the author then goes on to give extensive guidance on the nature of proper and improper questioning.

18 See the *Evidence (Visual Recording of Interviews with Children) Regulations* 2004 (WA) and the *Evidence of Children and Special Witnesses Policy – Guidelines for the use of CC TV*, Office of the DPP (WA).

19 That is, the conviction should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or because there is a miscarriage of justice: s 353(1) of the *Criminal Law Consolidation Act* 1935 (SA).