IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

No. C13 of 2015

BETWEEN:

THE QUEEN

Appellant

and

GW

Respondent

RESPONDENT'S SUBMISSIONS

PART I. CERTIFICATION

1.1 It is certified that these submissions are in a form suitable for publication on the Internet.

PART II. A CONCISE STATEMENT OF ISSUES

2.1 The issues raised by the appeal are:

(a) Did the Court of Appeal err in holding that the presiding judge's determination of R's competence failed to address the question arising under s 13(3) *Evidence Act 2011* (A.C.T.)?

(b) Did the Court of Appeal err in holding that, in the particular circumstances of the case, the jury should have been told about the difference between sworn and unsworn evidence and directed to take that difference into account when assessing the reliability of R's unsworn evidence?

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PART III. CERTIFICATION WITH RESPECT TO SECTION 78B

3.1 It is certified that the respondent has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act 1903* and it is considered that no notice should be given.

PART IV. MATERIAL FACTS

4.1 A comprehensive summary of the facts is provided in the judgment of the Court of Appeal: *GW v The Queen* [2015] ACTCA 15 ("Court of Appeal judgment") at [16]-[39]. In addition, the following facts are relevant:

(a) While R was 6 years and 5 months old when she gave evidence, she had just turned 5 at the time of the alleged offences.

(b) During the pre-trial hearing on 6 August 2013, all of the evidence given by R was audiovisually recorded. That included the evidence given by R on the voir dire when the presiding judge was determining her competence to give evidence. However, none of the evidence given by R on the voir dire was played to the jury at the respondent's trial in March 2014.

(c) The respondent gave sworn evidence denying any sexual abuse.

(d) It was the defence case that, in the context of a legal dispute between the respondent and his wife over access to the children of the marriage, there was a "risk of manipulation" by the mother of R to make the allegations against the respondent (T 785.43). It was contended that R was a young child who was vulnerable to "take on" a story that her mother wanted her to give to the authorities (T 788.7). She had been "coached" by her mother (T 787.36). It was the defence case that either R was telling lies or that she had been manipulated by her mother to "take on" a false account of sexual abuse.

(e) The matters relied upon by the respondent in contending that the verdict of guilty in respect of count 3 (the only count where there was a verdict of guilty) was unreasonable are summarised in the judgment of the Court of Appeal at [41]. The Crown's response is summarised in the Court of Appeal's judgment at [42].

4.2 The request made by defence counsel for a judicial direction to the jury as set out in the appellant's submissions is incomplete: Appellant's written submissions ("AWS") at para 10. Defence counsel sought a direction to the jury that R's evidence was unsworn, and that the evidence was unsworn on the basis that R did not have the capacity to understand that, in giving evidence, she was under an obligation to give truthful evidence (T 681.28, 690.33). Defence counsel then advanced an alternative submission seeking a direction

that R's evidence was unsworn and that it was not subject to the same obligation to give truthful evidence as applied to sworn evidence (T 691.25, 692.36, 693.10).

4.3 The appellant's submissions at paras 13-21 purport to be a "statement of relevant facts" but rather are a summary of what was decided by the Court of Appeal. Some of the submissions are contentious (in particular, AWS at paras 18, 20 and 21).

PART V. APPLICABLE PROVISIONS

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5.1 The appellant's statement of applicable statutes is accepted.

PART VI. THE ARGUMENT

The text and history of s. 13 of the *Evidence Act 2011* (A.C.T.)

6.1 Section 13 of the *Evidence Act 2011* (A.C.T.) provides as follows:

> **Competence—lack of capacity**
>
> 20 (1) A person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability)—
>
> (a) the person does not have the capacity to understand a question about the fact; or
>
> (b) the person does not have the capacity to give an answer that can be understood to a question about the fact;
>
> and that incapacity cannot be overcome.
>
> Note See s 30 and s 31 for examples of assistance that may be provided to enable witnesses to overcome disabilities.
>
> (2) A person who, because of subsection (1), is not competent to give evidence about
> 30 a fact may be competent to give evidence about other facts.
>
> (3) A person who is competent to give evidence about a fact is not competent to give sworn evidence about the fact if the person does not have the capacity to understand that, in giving evidence, the person is under an obligation to give truthful evidence.
>
> (4) A person who is not competent to give sworn evidence about a fact may, subject to subsection (5), be competent to give unsworn evidence about the fact.
>
> (5) A person who, because of subsection (3), is not competent to give sworn evidence is competent to give unsworn evidence if the court has told the person that—
>
> (a) it is important to tell the truth; and

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

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

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

(7) Evidence that has been given by a witness does not become inadmissible only because, before the witness finishes giving evidence, the witness dies or ceases to be competent to give evidence.

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

6.2 The operation of s 13 *Evidence Act 2011* (A.C.T.) may be summarised as follows:

As to the giving of evidence generally:

(a) The first question is whether the person is "*not* competent to give evidence about a fact": s 13(1) and s 13(2).

(b) The person is not competent to give evidence if the person does not have the capacity to understand and answer questions, and that incapacity cannot be overcome: s 13(1). There is no requirement that the person understand the difference between a truth and a lie, rather, the provision is directed at "the ability of the witness to comprehend and communicate": Explanatory Memorandum to the *Evidence Amendment Bill 2008* (Cth) at [11].

(c) It is presumed that the person is competent to give evidence about a fact unless it is proved that the person is not so competent: s 13(6).

As to the giving of sworn evidence:

(d) If it is *not* proved that the person is *not* competent to give evidence about a fact, the next question is whether the person is "*not* competent to give *sworn* evidence about the fact": s 13(3).

(e) The person will only be *not* competent to give sworn evidence about the fact "if the person does not have the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence": s 13(3).

(f) It is presumed that the person is competent to give sworn evidence about a fact unless it is proved that the person is not so competent: s 13(6).

(g) If it is *not* proved that the person does *not* have that capacity, then the person is competent to give *sworn* evidence about the fact (ss 13(3) and 13(6)) and that sworn evidence may be given under an oath or affirmation (s 21(1)).

As to the giving of unsworn evidence:

(h) If it is proved that the person does not have the capacity to give sworn evidence, then the person is not competent to give sworn evidence about the fact, but may be competent to give *unsworn* evidence about the fact.

(i) The person *is* competent to give unsworn evidence about the fact if it has been proved that the person is *not* competent to give sworn evidence about the fact and the court has told the person the three matters specified in s 13(5): ss 13(4) and 13(5).

Procedure

(j) In answering the question of whether a person is competent to be sworn, the court "may inform itself as it thinks fit": s 13(8).

(k) If there is a jury, the jury is not to be present at a hearing to determine whether a particular fact exists on which the question of whether a person is competent depends "unless the court so orders": ss 189(1) and 189(4).

(l) The court is to find that the fact that the person "does not have the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence" has "been proved if it is satisfied that" that fact has "*been proved on the balance of probabilities*": s 142(1).

(m) Section 21(1) provides that "A witness in a proceeding *must* either take an oath, or make an affirmation, before giving evidence" but is subject to section 21(2) which provides that "Subsection 1 does not apply to a person who *gives unsworn evidence under section 13* (Competence—lack of capacity)".

(n) Section 190, which permits a court to "by order dispense with the application of any 1 or more of" a number of provisions of the Act, does not apply to any of the provisions referred to above.

6.3 At common law, a witness was not permitted to give evidence otherwise than on oath: see *R v Climas* [1999] SASC 457; 74 SASR 411 at [62] – [81]. Section 13 permits unsworn evidence to be given on oath in the circumstances there provided. The section is identical, in substance, to provisions in other uniform evidence law jurisdictions (namely,

New South Wales, Victoria, Tasmania and the Northern Territory). Section 13 is the product, in part, of a series of Reports by the Australian Law Reform Commission (ALRC).

6.4 The ALRC *Evidence (Interim) Report No 26* (1985) ("ALRC 26") proposed that all witnesses be presumed competent to give evidence but proposed that there be a test of "psychological competence" whereby a person would not be competent if the person did not have "the ability to understand the obligation to give truthful answers" (ALRC 26, vol 1, at paras 521-2). The traditional common law test based on understanding of the religious nature and consequences of an oath (see, for example, *Maden v Cattanach* (1861) 158 ER 512 at 515) was not adopted.

6.5 The ALRC considered a test based on psychological competence to be "desirable" because "[w]ithout it, the courts would be faced, on occasions, with evidence of no probative value" (para 521). The draft Bill provided (ALRC 26, vol 2, Appendix A, cl 14(1)): "A person who is incapable of understanding that, in giving evidence, he or she is under an obligation to give truthful evidence is not competent to give evidence." Clause 14(4) provided: "Unless it appears otherwise, it shall be presumed that a witness is not incompetent by reason of sub-section (1), (2) or (3)." These proposals were maintained in the 1987 Final Report (ALRC, *Evidence,* No 38 (1987) ("ALRC 38"), para 65, cl 19). The ALRC did not make a proposal for the giving of unsworn evidence by a person not competent to give (sworn) evidence.

6.6 However, as enacted, the *Evidence Act 1995* (Cth) and the *Evidence Act 1995* (NSW) *did* make provision for unsworn evidence. Section 13(1) in both Acts was identical with cl 19(1) proposed by ALRC 38, except for the addition of the word "sworn" before the last word ("evidence"). Provision was made for the giving of unsworn evidence by s 13(2) as follows:

> (2) A person who because of subsection (1) is not competent to give sworn evidence is competent to give unsworn evidence if:
>
> (a) the court is satisfied that the person understands the difference between the truth and a lie, and
> (b) the court tells the person that it is important to tell the truth, and
> (c) the person indicates, by responding appropriately when asked, that he or she will not tell lies in the proceeding.

Section 13(5) was identical to the current s 13(7).

6.7 In 2005, the ALRC reviewed the operation of the uniform evidence law (ALRC 102). It was proposed that the test for sworn evidence in s 13(1), as it then was, be retained (ALRC 102, Recommendation 4-1). As regards the giving of unsworn evidence, no change was proposed with respect to the requirement that:

> ... the threshold issue must be established – that is, by virtue of s 13(1), the person is not competent to give sworn evidence because he or she is incapable of understanding the obligation to give truthful evidence (ALRC 102 at para 23).

6.8 However, it was proposed that the requirements that the court be "satisfied that the person understands the difference between the truth and a lie" and that the person "indicate ... that he or she will not tell lies in the proceeding" be removed. In particular, the ALRC explained that:

> It would therefore no longer be necessary for a person to understand the 'difference between the truth and a lie' as part of the test for competence to give unsworn evidence. Rather, it will be up to the court to determine the weight that should be given to unsworn evidence (at 4.60 and 4.86).

6.9 The ALRC explained at para 4.69 that "it would be inconsistent with the approach taken to require a witness who has been unable to demonstrate a capacity to understand an obligation to give truthful evidence (s 13(1)) and is therefore ineligible to give sworn evidence, to nonetheless be required to indicate appropriately that he or she 'will not tell lies' or to promise to tell the truth". That approach was adopted in amendments made to both the *Evidence Act 1995* (Cth) and the *Evidence Act 1995* (NSW) and in s 13 of the *Evidence Act 2011* (A.C.T.). However, some changes were made with respect to what the court was required to tell the person before the person gave unsworn evidence.

Admission of R's unsworn evidence

6.10 When R came to give evidence at the pre-trial hearing held on 6 August 2013 pursuant to s 40Q *Evidence (Miscellaneous Provisions) Act 1991* (A.C.T.), she was not sworn but, rather, was permitted to give unsworn evidence pursuant to s 13.

6.11 The presiding judge's reasons for finding that R was not competent to give sworn evidence were as follows:

> Gentlemen, despite the fact that the witness has indicated that she understands that – at least understands the difference between the truth and what is not the truth and says that she understands that she has an obligation to tell the truth today, I think that it is better to proceed under subsection (5). At the present time, because of the difficulty in truly gauging the level of her understanding and her age, I am not satisfied that she has the capacity to understand that in giving evidence today she has an obligation to give truthful evidence. So I propose to proceed under subsection (5) of section 13. (T8.20 – 8.30)

6.12 Although no objection was taken to that course at the time by counsel for the respondent, at the trial in March 2014, counsel objected to the admission of that unsworn evidence on the basis that there had not been compliance with the requirements of s 13.

6.13 The Court of Appeal agreed that there had not been compliance with the requirements of s 13. The reasoning of the Court was as follows:

(a) The effect of s 13(4) and s 13(5) is that a statutory precondition to the giving of unsworn evidence is that the person "is not competent to give sworn evidence" (Court of Appeal judgment at [82]).

(b) The effect of s 13(3) is that a person is not competent to give sworn evidence "if the person does not have the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence" (Court of Appeal judgment at [76]).

(c) The presiding judge failed to address the correct question, asking instead whether R had that capacity, and made no finding that he was satisfied that R did not have that capacity (Court of Appeal judgment at [80]).

(d) Accordingly, the statutory precondition for R giving unsworn evidence was not met and the trial was not conducted according to law (Court of Appeal judgment at [84]).

6.14 The appellant accepts that it was necessary for the presiding judge to be satisfied that it had been proved on the balance of probabilities that R did *not* have the capacity to understand that, in giving evidence, she was under an obligation to give truthful evidence (AWS at para [77]). The appellant also accepts that it would not be sufficient for the presiding judge to merely not be satisfied that R had that capacity. Rather, the appellant argues that the Court of Appeal erred in making the factual finding that the presiding judge asked the wrong question (and that his Honour failed to make the necessary finding that he was satisfied that it had been proved on the balance of probabilities that R did not have that capacity) (AWS at [74]).

6.15 It was necessary for the presiding judge to be positively satisfied that R did not have the capacity to give sworn evidence. It would not be sufficient for the presiding judge to be merely not satisfied that R had that capacity. Section 13(3) is drafted in such a way that, if the court is not sure as to whether or not the person has the specified capacity, the person is competent to give – and must give - sworn evidence. Only if the court is satisfied that the person lacks the capacity is the person not competent to give sworn evidence. As Campbell JA stated in *RJ v The Queen* [2010] NSWCCA 263; 208 A Crim R 174 at 184 [40]:

> [I]t remains the case that section 21 permits only one exception to the requirement that a witness in a proceeding must either take an oath or make an affirmation before giving evidence. That exception is if the person "*gives unsworn evidence under section 13*". It is possible to give unsworn evidence "*under section 13*" only if two separate conditions are satisfied. The first is that the presumption of competency to give sworn evidence that arises from section 13(6) has been displaced, through a decision being made that the test for being not competent to give sworn evidence, set out in section 13(3) has been met. In other words, it is possible to give unsworn

evidence "*under section 13*" only if there is material that the judge has considered, on the basis of which the judge has decided that the witness does not have the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence. The second condition for giving unsworn evidence "*under section 13*" is that the judge has informed the witness of the matters in paras (a), (b) and (c) of section 13(5).

6.16 It is in this sense that, as the Court of Appeal noted at [76], the provision "gives primacy to sworn evidence". That is, unless the presumption of competency to give sworn evidence that arises from section 13(6) has been displaced by the court's satisfaction that it has been proved on the balance of probabilities that the witness lacks the specified capacity – doubts about it are not sufficient – the witness must be sworn.

6.17 For the reasons outlined below, the appellant's contention that the Court of Appeal erred in finding that the presiding judge had not made a positive finding that R was not competent to give sworn evidence should not be accepted. Specifically, the presiding judge's reasons, particularly when read together with the comments that his Honour made during the *voir dire*, the submissions that were made by the Crown Prosecutor and on behalf of the Appellant, and the evidence as to R's capacity, demonstrate that the presiding judge did not make the positive finding required by s 13 for R to give unsworn evidence.

The presiding judge's comments

(a) At no stage did the presiding judge address the correct question under s 13(3). Before conducting the voir dire, the judge stated, correctly, that he would "need to go through the process in subsection (3) of section 13 before we get to subsection (5)" (T 3.31). However, his Honour did not state what "the process in subsection (3)" required.

The evidence

(b) The presiding judge asked questions of R designed to determine whether she understood the difference between a true statement and a statement that was not true (T 8.5). It was apparent that she understood the difference between true and untrue statements. His Honour then asked (T 8.10):

> And do you understand that today in giving evidence you have to only tell us the truth? You have to tell us things that really happened, you understand that?

R answered "Yes". That is, in response to a question asking in effect whether she understood that, in giving evidence, she was under an obligation ("have to") to give truthful evidence, the witness answered in the affirmative.

(c) Nothing said by R suggested a lack of capacity to understand that, in giving evidence, she was under an obligation to give truthful evidence. The only consideration which could raise a doubt as to whether she had that capacity was her age. There was no information pursuant to s 13(8) from a person with relevant specialised knowledge based on the person's training, study or experience regarding the capacities of an average 6 year old or this particular 6 year old. In the light of her answers to the questions asked of her, it could not be said that the only reasonable conclusion was that R lacked the capacity. Indeed, on the information before the presiding judge, it may be questioned whether it would have been open to the presiding judge to be satisfied that it had been proved on the balance of probabilities that R lacked the capacity.

The submissions of the Crown and the Respondent

(d) The presiding judge would not have been assisted by the submissions of the Crown Prosecutor, who stated before R was called on the voir dire:

> "I've spoken to her. I don't believe she can give sworn evidence. She doesn't understand what a Bible or affirmation is. It seems to me that the procedure is set out in 13(5) of the Evidence Act. When I spoke to her before she understood the importance of telling the truth." (T 3.25)

Whether or not R understood what a Bible or affirmation was not an issue for the purposes of s 13(3). That the witness understood "the importance of telling the truth" strongly suggested that the witness had "the capacity to understand that, in giving evidence, the person is under an obligation to give truthful evidence". As the ALRC noted in ALRC 102 at paras 4.37-4.40, an understanding of the importance of telling the truth is close to an understanding of the obligation to give truthful evidence, the applicable criterion for the witness giving sworn evidence.

(e) Defence counsel did not "consent to R giving unsworn evidence" (cf AWS at para 72). After the presiding judge stated "It seems to me that I need to go through the process in subsection (3) before we get to subsection (5)", defence counsel simply asked the presiding judge: "... when your Honour deals with the subject matter in section 13 does your Honour propose to do that in a non-leading fashion?" (T 4.15). Defence counsel was not seeking to make any submission when the presiding judge indicated that he "proposed to proceed under subsection (5)". Counsel's comment at T8.30 does not constitute "consent" to R giving sworn evidence. Further, as noted above, at the trial in March 2014 the same counsel objected to the admission of that unsworn evidence on the basis that there had not been compliance with the requirements of s 13.

The reasons

(f) His Honour also stated that R had "indicated ... that she understands that she has an obligation to tell the truth today" but then stated that it was "probably better to proceed under subsection (5)", giving the reason that "[a]t the present time, *because of the difficulty in truly gauging the level of her understanding and her age*" he was not satisfied that she had the capacity (T8.25).

When the presiding judge stated that he intended to proceed under s 13(5) and permit R to give unsworn evidence, his Honour stated (T 8.28): "... I am not satisfied that she has the capacity to understand that in giving evidence today she has an obligation to give truthful evidence". These words did not meet the statutory test. Rather than making a finding that he was positively satisfied that R lacked capacity to give evidence, his Honour found that he was not satisfied that R had the capacity to give evidence.

6.18 In summary, it is apparent from the presiding judge's reasons that the presiding judge was not satisfied one way or the other on the question of R's capacity. That is, left in doubt on the matter, his Honour erred in favour of R giving unsworn evidence. A correct application of s 13(3) would have required the presiding judge in those circumstances to direct that R be sworn. His Honour's consideration of the question of competence failed to give effect to the presumption of competence in s 13(6); failed to give effect to the requirement in s 13(3) and s 13(4) that a witness only give unsworn evidence if the witness is found to be not competent to give sworn evidence; and failed to give effect to the requirement in s 142 that the absence of a capacity to give sworn evidence be proved on the balance of probabilities. The Court of Appeal did not err in finding that the presiding judge failed to make the necessary finding required by s 13(3).

6.19 The contention of the appellant at AWS para 79 that the Court of Appeal "placed a gloss on the statutory test" when the Court of Appeal stated at [80] that "[p]erhaps his Honour intended to give primacy to sworn evidence, but that is not apparent from his reasons", should not be accepted. As outlined above, the Court of Appeal's reference to the "primacy [of] sworn evidence" is a reference to the statutory framework of s 13, which requires the witness to be sworn unless the presumption of competency to give sworn evidence that arises from s 13(6) has been displaced by the court being satisfied that it has been proved on the balance of probabilities that the witness lacks the specified capacity. In para [80], the Court of Appeal was doing no more than observing that it was possible that the presiding judge did, in fact, find that R did not have the requisite capacity (that is, the judge may have made the necessary finding that was the precondition for rebutting the presumption that R should give sworn evidence) but that his reasons indicated that he did not make this finding and, accordingly, the Court of Appeal had to proceed on the basis that the statutory precondition for the giving of unsworn evidence was not satisfied.

6.20 The presiding judge's erroneous statement of his level of satisfaction is not a mere question of syntax (cf AWS at [79]). As outlined above, the presiding judge's reasons, particularly when read against the evidence and submissions, demonstrate that the

presiding judge was not positively satisfied that R lacked capacity to give evidence. Such a finding was required by the statutory test set out in s 13. The present case is not one where there is only "some phraseology" that is suggestive of error: cf *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6, 185 CLR 259 as cited in AWS at para 84. In *Wu Shan Liang*, "the correct criterion appear[ed] at least twice within each set of reasons" (Brennan CJ, Toohey, McHugh and Gummow JJ at 280.7); "the delegate start[ed] and finish[ed] with the correct test" (at 271.8); the incorrect criterion which it was contended was wrongly applied "nowhere appear[ed] within the reasons" (at 280.7) and the material considered "did not go very far towards satisfying" the correct criterion (at 282.3). In contrast, in the present case, the correct criterion appeared nowhere within the reasons, the presiding judge did not commence or conclude with the correct test and the material considered was arguably insufficient to satisfy the correct test.

6.21 The appellant does not contend that, if the presiding judge failed to make the necessary finding required by s 13(3), the appeal should nonetheless be allowed. That is consistent with the view that, if the pre-condition of the giving of unsworn evidence is not satisfied, there was not a trial according to law and it could not be concluded that no substantial miscarriage of justice had actually occurred (s 37O(3) *Supreme Court Act 1944* (A.C.T.)): see *R v Brooks* (1998) 44 NSWLR 121 at 122G, 125E-126D, 127G-128A; *RJ v The Queen* [2010] NSWCCA 263; 208 A Crim R 174 at 184 [41]-[42], 185 [48].

Jury direction

6.22 At the outset, it is important to note that the appellant's argument in respect of the jury direction is premised on the assumption that R's unsworn evidence was properly admitted. In other words, the issue concerning the correct direction to be made to the jury only arises if it is accepted that R did not have the capacity to understand that, in giving evidence, she was under an obligation to give truthful evidence.

6.23 In the Court of Appeal, it was argued on behalf of the respondent that a warning was required under s 165 *Evidence Act 2011* (A.C.T.) in respect of the unsworn evidence of R, on the basis that it was "evidence of a kind that may be unreliable". The Court of Appeal did not accept that argument: see Court of Appeal judgment at [99]. In particular, the Court did not accept that the unsworn evidence was evidence that was of a kind that might be unreliable or "intrinsically unreliable": Court of Appeal judgment at [99] (cf AWS at para 24).

6.24 The Court of Appeal accepted the alternative argument advanced on behalf of the respondent that, under general principles of the common law, a direction was required with regard to the fact that R's evidence was unsworn: Court of Appeal judgment at [100] – [103]. In particular, the Court of Appeal held (at [102]) that, in the particular circumstances of the case (where R was the key witness in the prosecution case and the assessment of her reliability was the fundamental and most difficult task facing the jury), the jury should have been:

(a) informed of the difference between sworn and unsworn evidence; and

(b) directed to take that difference into account when assessing the reliability of R's evidence.

6.25 The *Evidence Act 2011* (A.C.T.) does not deal specifically with the giving of directions to a jury about unsworn evidence. However, the Act does not codify the giving of directions to the jury about evidence, so that it could not be concluded that the absence of a provision means that nothing may be said. General common law principles regarding necessary jury directions continue to apply in the Australian Capital Territory.

6.26 It is well established in all Uniform Evidence Act jurisdictions that those common law principles applied in decisions of the High Court such as *Bromley v The Queen* (1986) 168 CLR 79 continue to apply (although that will change in Victoria with the enactment of the *Jury Directions Act 2015*). A specific manifestation of "the overriding duty of the trial judge ... to ensure that the accused secures a fair trial" (*Crofts v The Queen* (1996) 186 CLR 427 at 451) is that directions may be "necessary to avoid the perceptible risk of miscarriage of justice arising from the circumstances of the case" (*Longman v The Queen* (1989) 168 CLR 79 at 86).

6.27 More generally, directions may be required under the common law with respect to any matter where the jury may approach the assessment of evidence in a way that fails to take into account a material consideration. For example, directions may be required with respect to:

(a) not using evidence for a particular purpose: *BRS v The Queen* [1997] HCA 47; 191 CLR 275;

(b) where the prosecution case depends on one witness: *Robinson v The Queen* [1999] HCA 42; 197 CLR 162 at 169;

(c) how expert opinion evidence should be taken into account: *Velevski v The Queen* [2002] HCA 4; 76 ALJR 402; *R v Kotzmann* [1999] VSCA 27; 2 VR 123 at [34]; *Nguyen v The Queen* [2007] NSWCCA 249; 173 A Crim R 557 at [75];

(d) those considerations which make a comparison of voices by a jury difficult and dangerous: *Bulejcik v The Queen* [1996] HCA 50; 185 CLR 375, Toohey and Gaudron JJ at 398-9;

(e) not drawing an inference (where the trial judge is aware of information not given to the jury which is contrary to that inference): *Mahmood v The State of Western Australia* [2008] HCA 1; 232 CLR 397 at 404 [18].

6.28 In none of the ALRC Reports is there any discussion regarding what a trial judge might say, or not say, to a jury with respect to unsworn evidence permitted to be given pursuant to s 13. That is not surprising with respect to ALRC 26 and ALRC 38 because, as outlined above, no proposal was made for the giving of unsworn evidence by a person not competent to give (sworn) evidence.

6.29 As regards ALRC 102, nothing was said about what a judge might say to a jury where unsworn evidence is given. As noted above, the ALRC proposed that the requirements for unsworn evidence that the court be "satisfied that the person understands the difference between the truth and a lie" and that the person "indicate ... that he or she will not tell lies in the proceeding" be removed. Accordingly, it was proposed that there be significantly less restriction on the giving of unsworn evidence.

6.30 That approach has been adopted in the uniform evidence law provisions. As the extract from ALRC 102 at para 4.60 indicates, the view was taken that "it will be up to the court to determine the weight that should be given to unsworn evidence". While the ALRC considered that the oath and an affirmation should be treated as "equal options" (AWS at para 34), there is no suggestion in ALRC 102 that sworn and unsworn evidence should be regarded as "equivalent" (cf AWS at para 54).

6.31 The ALRC expressly contemplated that different weight might be given to sworn and unsworn evidence (cf AWS at para [44]). Contrary to the appellant's submissions "the basic idea behind both tests" is not that "the ability to tell the truth" should be "the threshold test of competence". Rather, the threshold test of competence is the ability of the witness to understand and answer a question about a fact: s 13(1). Section 13 provides that unsworn evidence may be given even where the person:

> (a) does not have the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence,
>
> (b) does not understand the difference between the truth and a lie, and
>
> (c) has not indicated that he or she will not tell lies in the proceeding.

6.32 The common law position was that the swearing of an oath (and later, an affirmation) was of such fundamental importance that a witness could not give evidence unless sworn, and that where unsworn evidence was before the jury, the trial did not constitute a trial according to law. Given Parliament's decision to retain the requirement for swearing an oath or affirmation for competent witnesses; and given that it is not even necessary for the court to be satisfied that a person understands the difference between the truth and a lie in order to give unsworn evidence, it is unlikely that Parliament intended unsworn evidence to be an equal "pathway" to sworn evidence (cf AWS at 47). Indeed, in *R v Cooper* [2007] ACTSC 74; 214 FLR 92 at [58], Higgins CJ of the ACT Supreme Court held (after referring to the decision of Lander J in *R v Climas* [1999] SASC 457; 74 SASR 411) that:

Evidence received without the sanction of an oath or affirmation is, it is clear, and Lander J affirms this, of lesser weight and credibility than sworn evidence.

6.33 In this respect, it may be observed that while s 21(5) of the *Evidence Act 2011* (A.C.T) provides that "an affirmation has the same effect for all purposes as an oath", there is no comparable provision in respect of unsworn evidence.

6.34 The submission at AWS para 57 that giving different weight to sworn and unsworn evidence "is entirely at odds with the recommendations of the ALRC Report 102" should not be accepted. The appellant cites a passage from ALRC 102 dealing with warnings in relation to the evidence of children in general (Part 4.5 of the *Evidence Act 2011* (A.C.T.), not the discussion of the provisions dealing with competence to give sworn and unsworn evidence.

6.35 The provisions of Part 4.5 of the *Evidence Act 2011* (A.C.T.) do not impose any substantive restriction on the giving of directions with respect to the difference between sworn and unsworn evidence. Section 165(6) provides that a judge must not direct a jury that the reliability of a child's evidence "*may be affected by the age of the child*". Section 165A(1) provides that a judge must not:

> (a) warn the jury, or suggest to the jury, that children as a class are unreliable witnesses,
> (b) warn the jury, or suggest to the jury, that the evidence of children as a class is inherently less credible or reliable, or requires more careful scrutiny, than the evidence of adults,
> (c) give a warning, or suggestion to the jury, about the unreliability of the particular child's evidence solely on account of the child's age,
> (d) in a criminal proceeding—give a general warning to the jury of the danger of convicting on the uncorroborated evidence of a witness who is a child.

A similar prohibition is contained in s 70 of the *Evidence (Miscellaneous Provisions) Act 1991* (A.C.T.).

6.36 What is prohibited by s 165 of the *Evidence Act 2011* (A.C.T.) and s 70 of the *Evidence (Miscellaneous Provisions) Act 1991* (A.C.T.) is the suggestion that *children as a class* are unreliable witnesses, that the evidence of *children as a class* is inherently less credible or reliable, or requires more careful scrutiny, than the evidence of adults, that a child's evidence may be unreliable *solely on account of the child's age* or that there is a danger of convicting on the uncorroborated evidence of a witness who is a child. So long as those prohibitions are applied, s 165A "does not affect any other power of a judge to give a warning to, or to inform, the jury" (s 165A(3)). It is important to note that any direction with regard to unsworn evidence would focus on the fact that the evidence is unsworn and would not make reference to the age of the person who gave that evidence.

6.37 In any event, s 13 is not concerned exclusively with the evidence of children. In ALRC 102, it was noted at para 4.6:

> The issue of competence generally only arises when the witness is a child or has some form of disability. There is a wide range of characteristics which may lead to a party seeking to impugn a person's competence as a witness including, for instance, age, some forms of physical or sensory disability, acquired brain injury, mental illness and intellectual or cognitive disability.

6.38 The Court of Appeal correctly observed that, absent a jury direction, the jury may be unaware of, or at least not fully appreciative of, the differences between sworn and unsworn evidence (Court of Appeal judgment at [103]). A jury direction was necessary to ensure that the jury understood the difference between sworn and unsworn evidence and to take that difference into account when assessing R's evidence.

6.39 In these circumstances, the Court of Appeal was correct to conclude that, in the particular circumstances of this case, such a direction should have been given. It was not necessary for the Court of Appeal to spell out in detail what the trial judge should have said to the jury about unsworn evidence. Since the trial judge said nothing about unsworn evidence and did not direct the jury regarding the difference between sworn and unsworn evidence, the ground of appeal had to be upheld. The precise content of an appropriate direction will vary from case to case and it was not necessary for the Court of Appeal to detail precisely what should have been said by the trial judge in the present case.

6.40 Nevertheless, it may be observed that, where unsworn evidence is given, it would generally be appropriate for a trial judge to note that the witness has given unsworn evidence, and to explain the difference between unsworn evidence and sworn evidence. The Court of Appeal noted at [102] two differences in this respect:

> (a) a person giving unsworn evidence does not engage in the solemnity attaching to the giving of sworn evidence; and
>
> (b) a person giving unsworn evidence is not subject to the sanctions which apply for failure to adhere to the oath or affirmation.

6.41 Contrary to the appellant's submissions (AWS at 59), it is not the case that "the religious connotations have been removed as an essential feature of the solemnity of the oath". The solemnity of taking an oath or an affirmation remains. Both involve a formal promise to tell the truth, the whole truth and nothing but the truth. The person giving unsworn evidence makes no such promise.

6.42 It may be accepted that a witness under 10 years old cannot be prosecuted for an offence (AWS at para 60). However, unsworn evidence may be given by a witness who is not under 10 years old. As Duggan J of the Full Court of the South Australian Court of Appeal observed in *R v Climas* [1999] SASC 457; 74 SASR 411 at [137]:

> Although a child under the age of 10 years cannot be guilty of the offence of perjury a child under that age can give sworn evidence. That supports the proposition that the obligation to be truthful entailed in giving sworn evidence does not emanate solely from the legal sanction for failing to do so. 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 in the case of a person over the age of 10 years, the legal sanctions in failing to comply with that public declaration.

6.43 The judgment of Kourakis CJ in *R v Lomman* [2014] SASCFC 55 at [5], cited by the Court of Appeal at [101] also illustrates the difference between sworn and unsworn evidence, in both South Australia and the A.C.T. (and other uniform evidence law jurisdictions):

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

6.44 It is acknowledged, and the Court of Appeal well understood (see Court of Appeal judgment at [101]), that the South Australian *Evidence Act* mandates a jury direction about unsworn evidence while the A.C.T. *Evidence Act* is silent on the matter - leaving it to the common law (cf AWS at paras 21 and 54ff). The decision of the South Australian Court in *Lomman* provides assistance regarding the difference between sworn and unsworn evidence, regarding the reasons why the A.C.T. *Evidence Act* "gives primacy" to sworn evidence by imposing the statutory precondition to the giving of unsworn evidence that the person "is not competent to give sworn evidence" and regarding the content of appropriate jury directions. In this respect, it may be observed that the South Australian provision which deals with competence to give sworn evidence (s 9(1) *Evidence Act 1929* (SA)) provides:

> (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.

6.45 This provision is substantively the same as the combination of ss 13(3) and 13(6) in the A.C.T. *Evidence Act*. Both create a presumption in favour of the giving of sworn evidence, displaced only where the court is satisfied that the person lacks the capacity to understand the obligation to give truthful evidence. The observations expressed by members of the South Australian Full Court are relevant to understand the reasons why sworn evidence is "given primacy" in this way in both provisions.

6.46 In summary, it is contended that the Court of Appeal correctly determined that the jury should have been directed as to the difference between sworn and unsworn evidence. It would be appropriate for a jury to be directed that unsworn evidence may not be given unless the person giving it lacks the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence. This is a proposition of law. Contrary to the submission of the appellant (AWS at para 66), there would be no need to refer to the fact that the court made that finding.

6.47 Of course, the content of an appropriate direction would vary depending on the circumstances of the case. In the present case, the jury would not even have been aware that R's evidence was unsworn. It would have been appropriate to inform the jury of this. It would also have been appropriate to inform the jury that unsworn evidence may not be given unless the witness lacks the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence. It would have been appropriate to state that a person giving unsworn evidence does not engage in the solemnity attaching to the giving of sworn evidence. As regards the questions of possible sanctions, it would have been appropriate to point out that, unlike the other witnesses in the trial, R would not be subject to the sanctions which apply for failure to adhere to the oath or affirmation. As regards any balancing directions referring, for example, to what the person giving unsworn evidence was told pursuant to s 13(5), they would be a matter for consideration when determining the details of the appropriate direction.

There is no necessity to determine the jury direction ground if the admission of evidence ground fails

6.48 If the appellant's challenge to that part of the judgment of the Court of Appeal holding that the unsworn evidence of R should not have been admitted fails, the appeal should be dismissed. Regardless of the outcome in respect of the jury directions, if the challenge to the admission of the unsworn evidence fails, the matter will need to be remitted to the trial judge. Assuming that the DPP were to elect to proceed in circumstances where the respondent was only found guilty of one of the counts by the jury, in any retrial, the question of R's competence would fall to be determined at a time when R is more than two years older than she was when she gave evidence in August 2013. It is therefore unlikely that R would be found to be incompetent to give sworn evidence on any retrial. In these circumstances, it is submitted that, if the appellant's challenge to the admission of the unsworn evidence of R fails, it would not be necessary to determine the challenge to that part of the judgment of the Court of Appeal holding that the trial judge failed to properly direct the jury regarding unsworn evidence.

PART VII. NOTICE OF CONTENTION

7.1 The respondent's notice of contention is not pressed.

PART VII. TIME ESTIMATE

8.1 It is estimated that 1-2 hours is required for the presentation of the respondent's oral argument.

Dated: 18 November 2015

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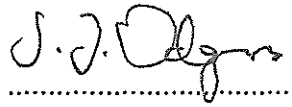

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