ORIGINAL

IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

No. C13 of 2015

BETWEEN:

HIGH COURT OF AUSTRALIA
FILED
25 NOV 2015
THE REGISTRY CANBERRA

THE QUEEN
Appellant

and

GW
Respondent

APPELLANT'S REPLY

Part I: PUBLICATION

1. The appellant certifies that this reply is in a form suitable for publication on the internet.

Part II: REPLY

Issues

2. The appellant takes issue with the respondent's contention - respondent's written submissions ("RWS") [2.1(b)] - that the reasoning of the Court of Appeal was confined to "the particular circumstances of the case". The Court of Appeal's reasons[1] are of general application. They were not expressed to be, nor are they apt to be, confined to the "particular circumstances of the case": rather they will apply to every case where unsworn evidence is given by a complainant or indeed other significant witness.

Material facts

3. The appellant takes issue with the relevance of the respondent having given sworn evidence (RWS at [4.1(c)]). This could only be relevant if the argument is assumed, that is, that greater weight was to be attached to the respondent's evidence or that the evidence given by R was inherently less reliable because it was unsworn. Further, the matters set out at RWS [4.1(d)] were all contentions raised in defence counsel's closing address. Whether those contentions were properly raised or not, they were certainly not accepted by either R or her mother who also gave evidence.[2] Again it seems that the relevance of these contentions could only be if the argument is assumed and the evidence of R was somehow inherently unreliable.

History of s13

4. The appellant takes issue with the respondent's assertion (RWS [6.2(m)]) that s21(1) is "subject to" s21(2). It is submitted that neither subsection is subject to the other, rather they describe the two different destinations that result from the operation of

[1] Court of Appeal, [102] [103].
[2] For example, see R's evidence at AB 20.39. Her mother's evidence is not reproduced in the appeal book.

The Director of Public Prosecutions (ACT)
20-22 London Circuit
GPO Box 595
Canberra City ACT 2601
DX 5725 Canberra City

Telephone: (02) 6207 5399
Fax: (02) 6207 5428

Ref: James Walker

s13. The phrase "subject to" is apt to describe a subordinate relationship and is presumably used by the respondent to give colour to the assertion of the "primacy" of sworn evidence over unsworn evidence.

ALRC 102 does not support differentiation based on weight

5. The respondent (RWS [6.8] and [6.30-1]) takes out of context a remark from ALRC 102.[3] With all respect, this is then parlayed into the proposition at RWS [6.31] that "the ALRC expressly contemplated that different weight might be given to sworn and unsworn evidence". It is submitted that the ALRC contemplated no such thing, and there is nothing in ALRC 102 that supports the warning now discovered by the Court of Appeal.

6. The comment about weight in ALRC 102 at 460 had its genesis in ALRC DP 69.[4] The reference to weight is slightly puzzling but is entirely unexceptional. Matters of weight are for tribunals of fact. If - as the respondent asserts - the ALRC had contemplated that **different** weight should be given to sworn and unsworn evidence, it might have been expected that a provision to this effect would have been included at the time that s13 was to be amended. Not only was there no mention of any such provision, ALRC 102 (and ALRC DP 69) recommended the insertion of s165A in the uniform Evidence Acts prohibiting warnings that suggested that children as a class were unreliable witnesses, or warnings about the reliability of the evidence of a child solely on account of the age of a child, or general warnings about the danger of convicting on the uncorroborated evidence of a child witness.

Court of Appeal ground (c) – compliance with s13(3)

7. The remorseless logic of the respondent's argument (RWS [6.13]) masks an absurdity. It was accepted on all sides that R was competent to give evidence. It was not contended by either party that she was competent to give sworn evidence. In those circumstances it was to be expected that she would give unsworn evidence, subject to being told the matters in s13(5). The respondent now seeks to rely upon the supposed failure of the primary judge to find that for which the respondent did not contend - that R was competent to give sworn evidence - to argue that the trial was not conducted according to law. And this in the context that the issue which arose was binary: R was going to give either sworn evidence or unsworn evidence.

8. The primary judge directed himself to the process in s13(3) before going to s13(5). The primary judge asked questions of R. R did answer "yes" to the question set out at RWS [6.17(b)]. However Burns J was not bound by that answer, indeed he was obliged in deciding the issue to inform himself as he thought fit: s13(8). Relevant factors would include the demeanour of the witness, the way she answered other questions, her age, and other factors all assessed in the light of the judge's experience. This was a standard exercise of discretionary judgement by an experienced judge based on the material available to him. The respondent goes too far in suggesting (RWS [6.17)(c)]) that it was **not open** to Burns J to be satisfied on the balance of probabilities that R lacked the capacity to give sworn evidence.

---

[3] Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102, 2006 at para 460 ("ALRC 102").

[4] Australian Law Reform Commission, *Review of the Uniform Evidence Acts*, Discussion Paper 69, 2005 ("ALRC DP 69"). The Commissions' view was expressed at para 4.44 in ALRC DP 69.

9. The appellant takes issue with the respondent's characterisation of the Court of Appeal's finding in relation to the way in which Burns J approached the task under s13(3) as a "factual finding" (RWS [6.14]). Whether a judge has correctly applied a statutory test is a matter of law, not a matter of fact. It is quite clear that the Court of Appeal did not purport to disagree with the **conclusion** reached by the primary judge, but the way he reached it. In other words, an issue of law.

10. The respondent urges adoption of the concept of "positive satisfaction" (RWS at [6.15], [6.17] and [6.17](f)). "Positive" is the respondent's word, not one used by the legislature in s13 or s142 of the Evidence Act. This submission should be rejected as an attempt to constrain the legislative policy behind s13, (identified in the Appellant's written submissions ("AWS") at [53]) by reference to a limitation not used by the text of the section.

11. The only relevant limitation was that the s13(6) presumption had to be displaced by a finding under s13(3) that on the balance of probabilities R did not have the relevant capacity. That presumption means only that, without evidence on which to find the absence of the capacity proved, a particular state of affairs exists. Once Burns J decided that for R the capacity was absent – even if expressed as being "not satisfied that [R] has the capacity" – the presumption is displaced because the contrary state of affairs has been found to exist. Depending on how a judge's reasons are expressed as a whole, positive or negative language could be apt to describe whether the s13(6) presumption has been displaced. This flows from the essentially binary nature of s13 highlighted in the AWS at [49] and the nature of the satisfaction required to be reached under s13(3) and s142 (see AWS at [75], fn 70; [77]). The suggestion that the statutory presumption (framed in the negative; i.e. "not have the capacity", "not incompetent because of this section") can only be displaced if "positive" language is used is a statutory gloss. Indeed, Burns J did exactly what was described by Campbell JA in *RJ v The Queen*:[5] he "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".

12. The respondent seeks to explain away the Court of Appeal's reference to the "primacy" of sworn evidence as being purely chronological – a mere reference to the statutory framework of s13 (RWS [6.16] and [6.19]. It was not. It is clear that the Court of Appeal's recognition of the primacy accorded to sworn evidence went far deeper and was based on policy reasons which the Court of Appeal derived - inappropriately - from *Lomman*,[6] and accorded the status of common law principle. The Court of Appeal[7] saw the "primacy" of sworn evidence as a rising out of policy considerations which gave preference to sworn evidence and meant that "as far as possible," courts should ensure that "truthful" evidence was given in Court proceedings. The "primacy" to be given to sworn evidence was fundamentally about the reliability of the evidence. The appellant's argument is that this process of reasoning was inappropriate and did not reflect the common law.

---

[5] [2010] NSWCCA 263; (2010) 208 A Crim R 174 at [40].
[6] [2014] SASCFC 55; (2014) 119 SASR 463 ("*Lomman*").
[7] Court of Appeal, [102]-[103].

13. The appellant takes issue with the assertion (RWS [6.21]) that if - which is by no means conceded - there was a failure to apply the correct test under s13(3) then there was not a trial according to law. In the context of this matter, where the parties' conduct shows R would have given sworn evidence had she not given unsworn evidence, there **was no** substantial miscarriage of justice. This is not a case, like *Bulejcik v The Queen*,[8] where the respondent was deprived of the opportunity to respond to R's evidence and therefore denied a fair trial.[9] Further, the unsworn evidence of R - unlike the unsworn statement from the dock of the *Bulejcik* accused - **is** "evidence" under the Evidence Act.

10

Court of Appeal ground(d) – Jury direction

14. The appellant accepts that the general common law principles regarding jury directions apply in the ACT - RWS [6.25]. It is also accepted that in ruling as it did the Court of Appeal purported to rely on common law principles. The difficulty for the respondent's argument is that *Lomman* does not represent the common law, and none of the cases now cited by the respondent (RWS [6.27]) provides any assistance in relation to a direction concerning unsworn evidence arising at common law.

20 15. The respondent submits (RWS [6.32]) that it is "unlikely" that in amending s13 Parliament intended unsworn evidence to be an equal pathway to sworn evidence. This argument is partly advanced on the basis of the dubious proposition dealt with earlier that the ALRC contemplated that different weight should be given to sworn and unsworn evidence, a contention which is unsupported when one looks at the ALRC reports.

16. Further, the reliance on *R v Cooper*[10] is misconceived. First, that case was decided before the amendments to s13. Secondly, the sentence quoted at RWS [6.32] is taken out of context.[11] When one goes to Lander J's judgment in *R v Climas*,[12] it is clear
30 that in the passage alluded to by Higgins CJ in *Cooper*, Lander J was directing himself to a **repealed** section of South Australian legislation which **specifically provided** for less weight to be given to unsworn evidence.[13] No assistance is proved to the respondent's position by *Cooper*.

17. This supposed legislative intention of an unequal pathway for sworn and unsworn evidence ignores the changes introduced by the legislature in the uniform Evidence Act, highlighted in AWS [53]. At the heart of the respondent's contention is an assumption that the oath or affirmation provides a bulwark which props up the reliability of the evidence given in a proceeding (cf RWS at [6.43], [6.47]). That
40 assumption ignores the role of the tribunal of fact to allocate to evidence whatever weight it concludes is appropriate. It also ignores what was pointed out by McHugh J

---

[8] [1996] HCA 50; (1996) 185 CLR 375 at 385-386 (Brennan CJ, dissenting in the result), 399-400 (Toohey and Gaudron JJ), 408 (McHugh and Gummow JJ).
[9] [1996] HCA 50; (1996) 185 CLR 375 at 408-409 (McHugh and Gummow JJ).
[10] [2007] ACTSC 74; (2007) 214 FLR 92 ("*Cooper*").
[11] See *Cooper* at [58].
[12] [1999] SASC 457; (1999) 74 SASR 411 ("*Climas*").
[13] Referring to the repealed s9(6) (set out at *Climas* at [7]) Lander J stated at [126]: "The section assumed that the evidence might have lesser weight and credibility because of the absence of the sanction of an oath."

in *Papakosmas v R,*[14] namely that the Evidence Act draws a distinction between relevance and probative value; the latter being concerned with reliability whereas the former is not. The respondent's assumption can thus be seen as contrary to the declaration in s56(1) that "[e]xcept as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding".

18. The respondent struggles to explain away the lack of guidance provided by the Court of Appeal as to the content of the new direction (cf RWS [6.39]). To argue that "the precise content of an appropriate direction will vary" leaves the content of the direction to the idiosyncratic views of individual judges. The respondent does postulate some features of the direction (RWS [6.40]). As to those:

    (a) a witness giving unsworn evidence has the "solemnity" of the s13(5) matters told to them by the judge – so "solemnity" is not all one way;
    (b) most witness giving unsworn evidence will be children under 10 years who will not be subject to legal sanction in any event.

19. The logic of the respondent's position – also at the heart of the Court of Appeal's decision – is revealed at RWS [6.43]: it is all about the **reliability** of the evidence. Accordingly any direction would be that the reliability of the witness's evidence was compromised by the fact that they gave unsworn evidence, and sworn evidence was more reliable.

20. The respondent urges this Court to view *Lomman* as "providing assistance" (RWS at [6.44]) to resolve the issues in this appeal. He notes s9(1) of the *Evidence Act 1929* (SA). But s9(1) is materially different from s13. Section 9(1) turns on whether a witness has a "sufficient" capacity to understand the obligation to give truthful evidence whereas a ruling under s 13(3) turns on the absence of that capacity. Section 9(3) provides that the judge is "not bound by the rules of evidence" when making the s9(1) determination meaning that the question of satisfaction on the balance of probabilities cannot arise, since the judge need not act according to a section equivalent to s142. Most importantly, there is no equivalent to s9(4) in the uniform Evidence Act.[15] The question to be asked, the nature of the evaluative exercise used to answer it, and use to which the answer can be put, all vary to those under s13. It was impermissible for the Court of Appeal to adopt analogical reasoning based on s9 and the policy behind it as explained in *Lomman*. This conclusion is reinforced by the scheme of the Evidence Act: while not a code, it is a well thought out scheme that has made significant changes to the law of evidence. Interpreting it by reference to foreign enactments amounts to judicial policy making (see AWS at [57]).

Dated: 25 November 2015

.....	.....
Jon White SC	Margaret Jones
Director of Public Prosecutions (ACT)	Deputy Director of Public Prosecutions (ACT)

[14] [1999] HCA 37; (1999) 196 CLR 297 at [86].
[15] Section 9(4) is the source of the commentary provided by the South Australian Full Court in *Lomman* at [38]-[43] (per Sulan J, Kourakis CJ and Peek J agreeing) (and see Court of Appeal at [101]).