



Subject: SCC 407 of 2011

TO: ~~Jon White~~

FROM: Shawanah Tasneem

DATE: 18 December 2012

Appeal approved
JW
18/12/12

Background

This matter is listed for trial on 15 April 2013. The pre-trial hearing for the child complainant (7 years old) was conducted on 12 December 2012 before Higgins CJ. His Honour viewed a portion of the complainant's interview with police in 2011 and found the complainant to be a competent witness at the time of his interview. His Honour allowed the recording to be tendered at the pre-trial hearing, with a ruling it would be admissible at the trial.

His Honour then conducted an inquiry into the complainant's competence to give evidence at the pre-trial hearing. His Honour asked the complainant various questions and found him incompetent to give either sworn or unsworn evidence. As a consequence, he was not called to give evidence at the pre-trial hearing and he was therefore not subject to cross-examination.

It is recommended that an interlocutory appeal be lodged with respect to His Honour's finding of the complainant's incompetence.

Errors of law

Taking into account irrelevant considerations

1. Religious belief of witness:

His Honour commenced the inquiry by asking the complainant if he knew what sworn evidence was (answer: no) and then asking him if he knew what the bible was. When the complainant answered it was ‘a book that tells you about the Lord’, His Honour asked ‘What is your understanding of the term “the Lord”’ (answer: I don’t know). The complainant was then asked if he had any religious belief himself and attended church (answer: yes) and what his religion was or what church he attended (answer: I can’t remember).

The complainant was then asked: ‘If you were to promise God to tell the truth, what would you understand that you would be doing?’ (answer: I don’t know). He was then asked: ‘If you were to promise God to tell the truth, what do you think would happen if you did not tell the truth?’ He answered: ‘The next day I would have a bad day.’

At this point, His Honour indicated he would now move to section 13(5) of the *Evidence Act 2011* (ACT) – that is, the procedure to be followed for the giving of unsworn evidence. This was an indication he was not satisfied that the complainant was competent to give sworn evidence pursuant to s 13(3).

The enactment of section 13(3) superseded the previous common law test of competence which required a witness to demonstrate they understood the nature and consequence of the oath.¹ The Australian Law Reform Commission has explained the current inquiry under this subsection would no longer require an exploration of ‘the religious belief and knowledge of the witness.’² His Honour committed an error of law in inquiring as to the complainant’s religious beliefs and his understanding of religious concepts in assessing his competence. Furthermore, His Honour erred in inquiring whether the complainant understood what sworn evidence was and, effectively, what an oath was, as the current test is simply about whether the witness understands the duty to tell the truth.

Additional criteria imposed into s 13(5)

2. Upon finding the complainant was not competent to give sworn evidence, His Honour proceeded to s 13(5) which dealt with competence to give unsworn evidence. Under this provision, a witness is competent to give unsworn evidence if the court has ‘told’ the witness: it is important to tell the truth (s 13(5)(a)); he or she should tell the court if he or she does not know or cannot remember the answer to a question (s 13(5)(b)); and he or she should not feel pressure to agree with statements he or she believes are untrue (s 13(5)(c)).

¹ *R v Brasier* (1799) 1 Leach 199, 168 ER 202, cited in Australian Law Reform Commission Report 102 at paragraph 4.10.

² Australian Law Reform Commission Report 26, paragraph 522.

3. In advising the complainant of these matters, His Honour went a step further and tested the complainant's understanding of what he was being told. Instead of only informing the complainant it was important to tell the truth, His Honour also asked him what he understood by the term 'tell the truth' (answer: I don't know). His Honour held that a witness must have an understanding of the warning given under s 13(5) in order for the warning to be effective. This is similar to His Honour's reasoning in *R v Cooper* (2007) 175 A Crim R 94, where he held: 'The provision requiring the court to tell the person proposing to give unsworn evidence that it is "important" to tell the truth, is not a mere ritual. The court has to be satisfied that the witness not only accepts but also understands that obligation'.
4. This construction of s 13(5) is incorrect.³ There is no requirement for a witness to understand the obligation; that requirement is contained in s 13(3) and relates to competence to give sworn evidence. His Honour erred in holding that the complainant had to understand the warnings being given to him under s 13(5) for him to be competent to give unsworn evidence.
5. In addition, His Honour asked the complainant: 'If I said to you that telling the truth was saying what happened, but not saying that something did happen if it didn't, what would you say to that?'. This question followed the question 'What do you understand by the term "tell the truth"?'. His Honour erred in asking both of these questions as they are targeted to determining if a witness understands the difference between the truth and a lie. Under the present formulation of s 13(5), witnesses are no longer required to demonstrate this understanding to be competent to give unsworn evidence.

Failure to take into account relevant considerations

Test under s 13(3)

6. When the complainant was asked what would happen if he promised God he would tell the truth and he did not ultimately tell the truth, the complainant replied: 'The next day I would have a bad day.' His Honour accepted that this answer showed the complainant understood there would be a negative consequence of not telling the truth, but His Honour held it was not an answer from which he could infer the complainant would feel an obligation to tell the truth. Therefore, His Honour stated he could not be satisfied the complainant passed the test to give sworn evidence under s 13(3).
7. His Honour erred in this finding as he failed to take into account, and give proper weight to, the evidence of the complainant understanding the consequences of breaking a promise to tell the truth. At the very least, further questions should have been asked on this point before His Honour concluded he could not infer an understanding of an obligation to tell the truth.

³ See Stephen Odgers, *Uniform Evidence Law*, 8th edition (2009), p 59.