SUPREME COURT OF QUEENSLAND

CITATION:	*R v MBT* [2012] QCA 343
PARTIES:	**R** **v** **MBT** (appellant)
FILE NO/S:	CA No 144 of 2012 DC No 5 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Rockhampton
DELIVERED ON:	7 December 2012
DELIVERED AT:	Brisbane
HEARING DATE:	23 November 2012
JUDGES:	Holmes, White and Gotterson JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction allowed.** **2. Conviction and verdict set aside.** **3. A re-trial is ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – OTHER MATTERS – where the appellant was convicted of rape – where the complainant was the four year old granddaughter of the appellant's de facto partner – where the appellant argued the verdict was unreasonable – where the appellant pointed to the complainant's invention of details during her interview with police as showing that she was an unreliable witness – where the appellant contended that other matters such as the limited opportunity for the incident and the complainant's cheerful demeanour immediately after it militated against its having occurred – whether the jury could have been satisfied beyond reasonable doubt of the appellant's guilt CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL ALLOWED – where the appellant was convicted of one count of rape – where the complainant gave unsworn evidence - where the appellant argued the trial judge failed to

comply with the requirements of ss 9A and 9B of the Evidence Act 1977 – where the appellant argued that the trial judge failed to properly assess the complainant's competence to give evidence and to explain the duty of speaking the truth – whether the trial judge should have made inquiry as to the complainant's competence to give evidence – whether the trial judge should have made inquiry as to the complainant's competence to give sworn evidence – whether a miscarriage of justice resulted from the failure to ascertain whether the complainant was competent to give sworn evidence – whether the proviso could be applied

Evidence Act 1977 (Qld), s 9, s 9A, s 9B

Lau v The Queen (1991) 6 WAR 30, considered
M v The Queen (1994) 181 CLR 487, [1994] HCA 63, considered
R v BBR [2010] 1 Qd R 546; [2009] QCA 178, considered
R v Brooks (1998) 44 NSWLR 121, considered
R v Chalmers [2011] QCA 134, considered
R v Starrett (2002) 82 SASR 115; [2002] SASC 175, considered

COUNSEL: P E Smith with K M Hillard for the appellant
S P Vasta for the respondent

SOLICITORS: Fisher Dore Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA:** The appellant appeals against his conviction of rape on the grounds that the verdict was unreasonable; that the trial judge erred in failing properly to assess the complainant's competence to give evidence; and that the judge erred in failing to warn the jury that it would be dangerous to convict the appellant on the complainant's testimony alone. As will become apparent, it was unnecessary to consider the last of those grounds.

The evidence of the adult witnesses

[2] The complainant child, A, was a little over four years old in September 2009 when the events resulting in the rape charge occurred. The appellant was the de facto husband of her grandmother. He and his wife regularly looked after the little girl and her younger brother. The child's mother said that the appellant behaved with the child as a grandparent would, and she regarded him as a grandfather; she called him "Pa". A's father gave evidence that on the day in question he had dropped her and her brother at the appellant's house at about 10.30 am, leaving her in the care of the appellant and A's grandmother. A's mother said that about 12.45 pm she went to the house. She chatted for a while to A's grandmother before taking the younger child home and leaving A there.

[3] A's grandmother gave evidence. Her recall of the day was that the children had arrived somewhat earlier than A's father suggested, at about 6.45 am. Her daughter had taken the little boy home at about 11.30 am. The appellant spent the middle of

the day at a local club while she and A watched television; he returned home at about 2.15 pm. She took A into a bedroom to try to persuade her to have a nap. They lay on the bed and the grandmother told the child stories. She, the grandmother, dozed off at about 3.00 pm, although she was aware that A had got up and gone out of the bedroom. About five minutes later, the telephone woke her.

[4] A's grandmother said that on waking, she got up and went to the toilet, and then into the lounge room where the appellant was sitting in his chair, wearing a T-shirt and long pants. A was sitting on another chair watching cartoons, and appeared normal. She and A spent the rest of the afternoon together, with A cutting pictures out of magazines to paste into a book and later doing cartwheels on the lawn. When A's father arrived to collect the child, he and the appellant had a beer together for a half an hour or three quarters of an hour, during which A sat on the appellant's lap. A's grandmother had never had any concerns about the way the appellant acted towards A or any other child. A was a child with a strong imagination.

[5] A's father said that he collected her at about 4.30 pm. When he arrived, the appellant was using his whipper-snipper in the yard. A was inside the house with her grandmother and appeared entirely normal. He and the appellant drank beer together before he brought A home, where the child's mother also noticed nothing out of the ordinary in her behaviour. While they were eating dinner that evening, however, she told A not to put too much food in her mouth at once. A responded,

> "Pa put his wee-wee in my mouth… He said that that would make my lips better."

(On the morning of the day in question, A's mother said, the child had dry lips and she had applied a Chapstick to them.) Her parents asked her to repeat what she had said and she made the same statement. When her father asked what she meant, she repeated,

> "Pa put his wee-wee in my mouth."

A's father's evidence was that he asked her to show him what she meant and she touched his lips. A's mother said that she asked the child,

> "When you say his 'wee-wee', what do you mean?"

upon which A pointed to her father's groin area and said,

> "You know, there, wee-wee."

They telephoned the police and went immediately to the police station.

The s 93A statement

[6] That evening, A was interviewed by police officers from the Child Protection and Investigation Unit. A commenced the interview with a good deal of cheerful chatter and some songs, before the police officer managed to focus her attention on what she had done that day. She said that she went to her "Nanna and Pa's". When she was asked what happened there, she responded,

> "Well, Pa actually put his wee wee in my mouth."

She said that she was standing in the middle of the room watching television and had sore lips. Then, she said,

> "Pa put his wee wee in my mouth pretending he'd dropped it in there."

[7] Asked for more detail of what had happened when she arrived at the house, A said that she had watched TV

> "and then when I was watching TV Pa put his wee wee in my mouth. That's all."

Questioned about what had happened after that, A said that she did not like it; she went to get a drink but did not like the germs which washed into her drink. A was asked what she did after she had a drink and answered,

> "I said, 'Pa, never do that again'...Pa pretended, he laughed, a ha ha."

Asked what she did next, A said, "Nothing"; she was angry at Pa because he was laughing.

[8] A was then briefly distracted by some pictures on the wall, but when the police officer returned to questioning about what happened after she became angry with Pa, she answered,

> "It was, well I can't remember, do you know the things after you just had a wee wee in your mouth?"

A said that when she went home, she had told her mother and father. She then went on to talk about difficulties in getting the right channels on the appellant's TV. She was pressed to say more about her Pa but added nothing of any consequence. Invited to draw a picture of him, she did so. She was asked to describe the TV room at her grandmother's house and set about drawing various pieces of furniture.

[9] In response to more questioning, A said that there was no-one else in the room with her and the appellant. She was standing in the middle of the room. The appellant came in but she was hiding in the couch and he could not find her. Then she hid in a box which the appellant picked up. She came rolling out and said "Boo" and frightened him. That story went on for some time. The police officer, in an attempt to persuade her to return to the alleged offence, said that he wanted her to tell him about what had happened when she and the appellant were in the TV room. She answered,

> "Well, I can't remember. I should have stayed at Nanna and Pa's, I wish you could come with me."

[10] The child began to play with her trousers, making folds in them; she explained that she was "making shapes" with her clothes. The police officer, mishearing her, said,

> "You're spinning shapes with your clothes"

an expression which A seems subsequently to have adopted. There was some more inconsequential conversation before the police officer asked directly,

> "You were telling me something about Pa – that Pa did something to you because you had a sore lip?"

To which A responded,

> "Yes, he put his wee-wee in my mouth."

[11] A complained about her sore lip and a scratch on her leg before the following ensued:

> "SCON LOGAN: A tell me everything that happened when Pa put his wee wee in your mouth?
>
> A: I can't remember.
>
> SCON LOGAN: Tell me about Pa's wee wee.
>
> A: Pa's wee wee is that long like a rectangle.
>
> SCON LOGAN: Mmm.
>
> A: And it's grown really fast like pressed, there's a circle full of lines to it.
>
> SCON LOGAN: And what's it do?
>
> A: It – well I closed my eyes he poked it into my mouth."
>
> SCON LOGAN: How do you know he poked it into your mouth?
>
> A: Because it – he wanted me to – to – he wanted to do it."

[12] There was an interruption while the child had her nose blown, and then the police officer asked what "Pa use[d] his wee wee for", to which A replied,

> "Because he pretends it's a pencil and my mouth is paper."

The conversation wandered a little at this point as the child said that Pa liked to pick flowers and wanted to take people's toys. Asked what Pa's wee-wee was, A said it looked

> "like a red circle with a black circle on it".

It was a penis. She identified where on the body a penis was. There was some discussion of what a penis was used for; A said that it went in a mouth and suggested that perhaps Pa thought her lip was sore. She had a drink because she didn't want germs in her mouth. She added that her little brother was still there.

[13] Later, A said that when Pa walked into the room, she was "spinning shapes" at him. She said that neither of them had said anything, but shortly after claimed that the appellant had said,

> "…I'm going to put my wee wee in your mouth."

He pulled his pants down and stuck his wee-wee into her mouth. When he took it out she said,

> "that's yucky."

She had opened her eyes before he was about to do it and saw his "wee wee" about to be put into her mouth. She spun shapes at it and tried to get away from it. Then she had germs in her mouth and had to try and get rid of them.

[14] Next A claimed that her grandmother had seen the incident. She was asked if that was really so. She replied that she was just pretending that her grandmother had seen it; she was making up a story. A was asked once more to describe everything

that happened and first said she could not remember, but then said that when she went to her grandmother's house she was watching TV and the appellant put his wee-wee in her mouth. He had said he was going to do that and she responded, "No". When he put the wee-wee in her mouth, he got an M&M and ate it and then threw all the M&Ms on the floor. (When A said these things she was holding a soft toy shaped and coloured to look like an M&M lolly and was, quite evidently, weaving it into her account.) A was asked what the appellant was wearing when he walked in the room and said,

> "His shorts and not a shirt."

She could see his wee-wee. She was asked how that could be if he was wearing shorts. She said,

> "Well he's wearing shorts, I closed my eyes and then he put his wee wee in my mouth pretending it dropped into my mouth."

[15] On another attempt at having her explain what had happened from start to finish, A said that she had told her grandmother that she did not like having the appellant's wee-wee in her mouth. She said she had her eyes closed when the appellant put his wee-wee in her mouth. Asked when she had opened her eyes, she answered,

> "Well, I did open my eyes after Pa put his wee wee in my mouth. I noticed that. I said Pa did you put my wee wee – his wee, your wee wee in my mouth and he said yes I did. I did put my penis in your wee wee bum. He was making up stories."

Pressed further about whether she had actually seen "Pa put his wee wee in [her] mouth", she said, "No". When asked how she knew that it happened she said,

> "Because he put his wee wee in my mouth I know because I'm really good at knowing."

She reiterated later that she did not see his wee-wee, but she "knew".

The determination of A's competence

[16] On 16 November 2011, the appellant's trial began with the pre-recording of A's evidence. She was then six years old. The Crown prosecutor, saying that he wanted to "pre-empt any concerns with respect to [A's] capacity to give evidence", tendered a report from a psychologist, Dr Alan Keen, dated 9 November 2009, in which the latter gave his opinion that A then had superior intelligence for her age, equivalent to that of a five or six year old child. In particular, her verbal memory and learning appeared to be at the level of a five year old child. She could distinguish between appropriate and inappropriate social behaviour and understood concepts such as truth and lies. A was not overly susceptible to the suggestions of others and was, in his opinion, able to provide reliable evidence. In particular, Dr Keen said this with reference to ss 9A and 9B of the *Evidence Act* 1977:

> "She is competent to give evidence in [a] court of law. She is able to provide an intelligible account of the alleged incident of the sexual assault. She is able to understand that giving of evidence is a serious matters."

[17] The judge observed,

> "Well, I can simply accept Dr Keen's opinion as to her competency to give evidence, can't I?",

which met with no demur from either the prosecution or defence. The prosecutor was asked by the judge whether he had canvassed the taking of an oath with A; he replied that he had not. There was an adjournment while he did so. When the prosecutor returned, he said that he had "confirmed with the witness that she'll be taking an affirmation".

[18] The recording of evidence began with the bailiff reading the terms of the affirmation to the child. Unsurprisingly, the first time it was read to her, she said,

> "Can you please say that again?"

and when it was repeated,

> "I don't know what that is."

Hearing those responses, the trial judge expressed his view that it was unnecessary for A to give her evidence on affirmation. The prosecutor suggested that the affirmation be explained to her in terms of a promise to tell the truth, and his Honour responded:

> "Yes, but I don't know that it needs to be a formal affirmation, does it? She can give evidence, I can explain to her that - well, ask her if she knows the difference between the truth and a lie, and explain to her that it's very important that she tells the truth, and ask her if she understands that. And that's all I need to do, I think, because she clearly doesn't understand the words of the formal affirmation."

The prosecutor added the caveat that the court would need to be satisfied that the child understood the obligation to tell the truth. Defence counsel agreed with the proposed course of action.

[19] The trial judge then proceeded by asking the child if she understood what it meant to tell a lie and gave some simple examples concerning the colour of her dress. This sequence of questions and answers followed:

> "And do you know that when you talk to us today, that it is important for you to tell the truth?-- Yes.
>
> And do you know that you can get into trouble if you tell a lie?-- Yes.
>
> And do you promise to tell the truth?-- Yes."

The learned judge expressed the view that those responses were sufficient, and the examination of A proceeded without the administration of any oath or affirmation.

A's evidence in the pre-recorded hearing

[20] In examination-in-chief, A said that some of the things she had told the police about the appellant were true, but others were not. She could not explain what she meant when she spoke about "spinning shapes". She had watched the recorded interview the previous day.

[21] In cross-examination when being asked about her grandmother's sitting with her little brother, A, somewhat unresponsively, answered,

> "And one day when they were doing that, I was watching the cartoons and Pa told me to open my mouth and close my eyes and he pretended to say that his penis dropped into my mouth.
>
> He pretended to say it?-- Yes. And - but he did do it.
>
> Mmm?-- He did do-----
>
> Well, I'll ask you about - I'll ask you about this pretending stuff. But you're talking about the thing you were talking to the policeman about?-- Yes, yes.
>
> Are you?-- And Pa put his wee wee in my mouth and then I went to get a drink of water to wash the germs away.
>
> Mmm-hmm?-- And then I never wanted to go back there again.
>
> I see. And you're saying that [the younger brother] was there on that day?-- Yes.
>
> And he was with Nan then?-- Yeah."

[22] When it was put to A that she had not told her grandmother anything about what she said the appellant had done, she answered that she did not remember, but she did remember what had happened to her. She could not remember detail put to her of what she had told the police about being angry with the appellant, his laughing at her or playing hide-and-seek with him. A maintained, however, that the appellant had "put his wee-wee in [her] mouth"; she had told the police some things that were made up, but the appellant actually had put his penis in her mouth.

The trial judge's directions

[23] The appellant did not give evidence at the trial. The trial judge gave the usual directions in that regard and in relation to the assessment of witnesses' evidence. He went on to say that the prosecution case stood or fell depending on whether the jury was satisfied beyond reasonable doubt of the credibility and reliability of A's evidence, since there was nothing to corroborate it; but if they were so satisfied, they were entitled to convict the appellant on the child's evidence alone. His Honour noted that A had repeated the allegation that the appellant put his penis in her mouth on a number of occasions, but she appeared reluctant to give much detail when asked to do so.

[24] The trial judge pointed to some of the contradictions in A's evidence and made these remarks about her demeanour:

> "You're entitled when assessing [A's] evidence, to have regard to her demeanour at the time. I mentioned that to you at the outset. That applies to every witness. Remember the interview took place only a matter of a few hours after the incident is said to have occurred. It is a matter for you, but you might think that if it happened it would have been a shocking experience for a four year old girl to endure. You might wonder whether she would have appeared as happy and outgoing as she seemed to be during that interview."

He referred to the evidence of the adult witnesses to the effect that there was nothing unusual about the child's mood or behaviour on the day of the alleged rape, and went on to say:

> "Again, it is a matter for you, and it is, of course, a matter for you whether or not you accept [the grandmother's] evidence. But you might think that if a four year old girl had been molested by a man in the way she says she was, that she might have displayed some signs of trauma or emotional upset, or at least be withdrawn. And remember that [A's] father also said that there was nothing unusual that he observed about [A] when he picked her up."

[25] His Honour gave unremarkable directions about the significance of inconsistencies in A's account and warned the jury not to proceed on any assumption that young children were not capable of lying about such matters. He continued:

> "I'm not suggesting to you that [A] is, in fact, lying. It is a matter for you entirely whether you are satisfied that she is a credible and reliable witness. Sometimes children do have vivid imaginations. After the passage of time, children and even adults may come to genuinely believe something that they have imagined or fabricated. Sometimes children misunderstand the actions or words of adults. These are all matters for you to keep in mind when considering the evidence of [A]."

There were no applications for redirection at the end of the summing-up.

The appellant's contentions on the unreasonable verdict ground

[26] The appellant submitted that there were inconsistencies in A's evidence which could not be reconciled and which led to the conclusion that she was an unreliable witness. There was little in the way of context or detail about how the incident had occurred; A said nothing of how the penis felt in her mouth or what happened immediately after. A's account varied as to whether she had her eyes open or closed, whether there was anything said and whether she actually saw the appellant's penis. She had told the police officer her grandmother saw the incident and then conceded she had invented that aspect of her story. Similarly, she had claimed that she told her grandmother what happened, inconsistently with the latter's evidence. The grandmother had confirmed the child's vivid imagination, and A's references to pretending and "knowing" things raised questions in that regard. There were parts of A's account which were clearly invention: for example, as to the appellant eating an M&M and hiding from him in a box.

[27] Apart from the content of A's interview, other matters were such as to cause concern as to whether the child's account could be true. Her grandmother's evidence suggested there was only an extremely limited opportunity for the assault to occur. If the grandmother's account were correct, the only time at which the incident could have occurred was in the afternoon, so that A's claim that her little brother was there at the time could not have been right. The child's cheerful, normal behaviour in the company of her grandmother and parents was inconsistent with any incident of molestation, as was her bright demeanour in the police interview. Her inability, when she gave evidence, to remember most of what she had said to the police was also cause for concern. A should be regarded as an unreliable historian. In light of the inconsistencies and variations in her account,

her allegation that the appellant had placed his penis in her mouth could not be accepted as proved beyond reasonable doubt.

The verdict was not unreasonable

[28] The way in which A's interview progressed sheds some light on how the variations of which the appellant complains emerged, and makes explicable the jury's willingness to accept the allegation of penetration despite the child's later flights of fancy. Watching it, one sees that at the outset A makes the statement about the appellant putting his penis in her mouth in a matter-of-fact way. She does in fact give some immediate context for the incident: her sore lip, her going to have a drink, and her concern about germs. The police officer repeatedly, and not very adroitly, presses for more detail. Over an interview which lasted for 54 minutes, it is not surprising that he had difficulty retaining A's attention.

[29] A appears as a bright, imaginative child seeking to humour or distract a too persistent questioner. It is clear that her answers move to the fanciful, possibly through boredom, when she says that her grandmother saw what had happened, that she had played hide-and-seek with the appellant, and that the appellant had eaten an M&M lolly. When she is engaging in these elaborations, her body language changes: her eyes widen and she makes hand gestures. The jury may well have found it relatively easy to distinguish and disregard the obvious passages of invention. It seems to me reasonable that they were not dissuaded by those episodes from regarding as reliable the basic and repeated assertion that the appellant had put his penis in the child's mouth. That central allegation, moreover, was consistent, from A's first account to her parents to what she said under cross-examination two years later.

[30] As to other points made about the evidence, whether A was right or wrong about her brother's being at the house when the incident occurred is not of great consequence; he had certainly been there that day and she did not attribute any role to him in what occurred. The timing of the incident also depended on whether her grandmother was accurate in saying that there was only one opportunity for its occurrence, when she herself dozed off. The limits of that opportunity depended on the accuracy of the grandmother's recollection that she had been asleep for only five minutes or so, something always difficult to judge. There are reasons to think that the grandmother's recollection of times that day might not have been accurate; she thought the children had arrived much earlier than they did on their father's account. And the fact that A did not, when she came to give evidence, recall much of what she had said two years earlier does not seem surprising or such as to raise concern about her evidence as a whole.

[31] The learned trial judge gave directions in strong terms about the significance of A's apparently happy demeanour on the afternoon and evening of the incident, so there is no doubt that the jury was alert to it as a factor in assessing her evidence. In any event, while of some importance, it was far from conclusive. A was four years old; the event described was brief and presumably not painful. It may well be that she regarded the experience as unpleasant, but did not appreciate its significance or react to it as appalling and abhorrent in the way that an adult would.

[32] Having regard to the way in which A's account emerged, I do not conclude that her evidence "lacks credibility for reasons which are not explained by the manner in

which it was given".[1] On the whole of the evidence, I consider that the jury was entitled to accept her account of the offence and to be satisfied beyond reasonable doubt of the appellant's guilt; and I am not left with the impression that "there is a significant possibility that an innocent person has been convicted".[2] The verdict was not unreasonable.

Evidence Act provisions on competence to give evidence, sworn and unsworn

[33] Sections 9, 9A and 9B of the *Evidence Act* deal with competence of witnesses and capacity to be sworn. Those provisions are as follows:

> "**9 Presumption as to competency**
>
> (1) Every person, including a child, is presumed to be—
>
> (a) competent to give evidence in a proceeding; and
>
> (b) competent to give evidence in a proceeding on oath.
>
> (2) Subsection (1) is subject to this division.
>
> **9A Competency to give evidence**
>
> (1) This section applies if, in a particular case, an issue is raised, by a party to the proceeding or the court, about the competency of a person called as a witness in the proceeding to give evidence.
>
> (2) The person is competent to give evidence in the proceeding if, in the court's opinion, the person is able to give an intelligible account of events which he or she has observed or experienced.
>
> (3) Subsection (2) applies even though the evidence is not given on oath.
>
> **9B Competency to give sworn evidence**
>
> (1) This section applies if, in a particular case, an issue is raised, by a party to the proceeding or the court, about the competency of a person called as a witness in the proceeding to give evidence on oath.
>
> (2) The person is competent to give evidence in the proceeding on oath if, in the court's opinion, the person understands that—
>
> (a) the giving of evidence is a serious matter; and
>
> (b) in giving evidence, he or she has an obligation to tell the truth that is over and above the ordinary duty to tell the truth.

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1 *M v The Queen* (1994) 181 CLR 487 at 494.
2 *M v The Queen* (1994) 181 CLR 487 at 494.

> (3) If the person is competent to give evidence in the proceeding but is not competent to give the evidence on oath, the court must explain to the person the duty of speaking the truth.
>
> Note—
> *The Oaths Act 1867*, section 17, makes provision for a person called as a witness to make his or her solemn affirmation instead of being sworn."

The contentions as to the assessment of A's competence to give evidence

[34] The appellant submitted that the trial judge had not properly assessed A's competence. Dr Keen's report was two years old and did not address her current ability to give reliable evidence. Nor did it deal with A's ability to recall matters, apart from saying that she had the verbal and learning memory of a five year old. In order to ascertain her competence, the trial judge should have inquired as to her ability to provide "an intelligible account of events" as s 9A(2) of the *Evidence Act* 1977 required. Second, the appellant asserted, A's evidence was not properly received unsworn, because she was not questioned on her understanding that giving evidence was serious and that her obligation to tell the truth was "over and above the ordinary duty to tell the truth", in terms of s 9B(2). The appellant submitted that s 9B also required that she be told both those things, and the failure to do so constituted a miscarriage of justice.

[35] The respondent argued that the trial judge was entitled to accept the evidence of Dr Keen as to whether A was competent to give evidence. As to competence to give sworn evidence, the *Evidence Act* should not be construed as permitting a witness to give unsworn testimony only where it was demonstrated that the understanding described in s 9B(2) was absent. Rather, it should be regarded, once the issue was raised, as permitting sworn evidence only where the conditions in s 9B(2) had been positively made out. Counsel suggested that, since Dr Keen had expressed no opinion on A's understanding of the greater obligation to tell the truth in giving evidence and since the judge had reached no view on it, it followed that A was not competent to give evidence on oath. It was, counsel added, extremely rare for a six year old to give sworn evidence. If there were any error, he submitted, it was not fundamental: the proviso could be applied.

No issue raised as to A's competence to give evidence

[36] A was, by virtue of s 9(1), presumed to be competent both to give evidence, and to give it on oath. At trial, the defence raised no question about the former. Nor did Dr Keen's report raise any issue about A's competence to give evidence; to the contrary. The trial judge did not identify any concern, but simply said that he could accept what Dr Keen said. Nothing operated to rebut the presumption in s 9(1)(a) or to raise an issue for the purposes of s 9A(1), requiring the learned judge to make further inquiry under s 9A(2) as to whether A was able to give an intelligible account of the events she had experienced.

Issue as to A's competence to give sworn evidence

[37] The position in relation to A's competence to give sworn evidence was different. She plainly did not understand the affirmation, causing the trial judge to decide that she did not have to make one, and thus raising an issue in terms of s 9B(1). But in

considering competence to give sworn evidence, whether or not A understood the affirmation was, and is, beside the point. The question is whether it was necessary, before permitting A to give her evidence unsworn, for the trial judge to form a negative opinion as to the matters in s 9B(2); that is, that A did not understand that giving evidence was a "serious matter" and that she had "an obligation to tell the truth …over and above the ordinary duty to tell the truth".

[38] In *R v BBR*,[3] the complainants were sisters, S and K, aged 12 and nine respectively. The trial judge questioned S about her understanding of truth, the consequences of lying and her belief in God. On the basis of her answers, he directed the administration of an affirmation. In relation to K, the judge observed that there would be no need to swear the witness or administer an affirmation. Defence counsel contributed his view that, at her age, she could not take an oath, while the prosecutor said he was content for her evidence to be taken without being sworn. The judge did not question K as to her understanding of the difference between lies and truth and did not say anything to her about the importance of her speaking the truth. This Court accepted the appellant's submission that the failure to explain the duty of speaking the truth as s 9B(3) required meant that the child's evidence was not properly before the court because the statutory pre-condition for its reception was not met. The appeal was upheld on that basis.

[39] In delivering the leading judgment, with which the other members of the court agreed, Chesterman JA noted that the appeal also raised another point: whether the criteria in s 9B(2) had been met. He reviewed a series of appellate decisions on the question of what was required before unsworn testimony could be received: *Lau v The Queen*,[4] *R v Brooks*,[5] and *R v Starrett*,[6] decisions, respectively, of the West Australian and New South Wales Courts of Criminal Appeal and the Court of Criminal Appeal in South Australia. In each of those cases it was held that where a statute permitted the giving of unsworn evidence on certain conditions, inquiry had to be made as to whether those conditions were met before the decision was taken as to whether evidence would be given sworn or unsworn.

[40] In both *Brooks* and *Starrett* it was said that the failure to establish that the conditions for giving unsworn evidence were met meant that the trial was not held according to law. The error was of such a nature that the proviso could not be applied with the result that the respective convictions could not stand.[7] In *Lau*, Seaman J reached a similar conclusion in respect of the receipt of unsworn testimony when the statutory requirements had not been met;[8] Owen J, with whose reasons Murray J agreed, considered that the conviction should be set aside on the basis that it had not been established that the complainant was competent to give evidence at all.[9]

[41] The ultimate view of this Court in *BBR*, as articulated in Chesterman JA's judgment, was that s 9B(2) provided a test of competence to give sworn evidence. Although the sub-section did not expressly say so, it should be construed as permitting a witness to give unsworn testimony only where it was demonstrated that

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3 [2010] 1 Qd R 546; [2009] QCA 178.
4 (1991) 6 WAR 30.
5 (1998) 44 NSWLR 121.
6 (2002) 82 SASR 115; [2002] SASC 175.
7 *Brooks* at 125, 126; *Starrett* at 122.
8 At 39.
9 At 66.

he or she did not have the understanding described in s 9B(2). The trial judge had not considered whether K was competent to give evidence by reference to that test; that is, whether she understood that giving evidence was serious and involved an obligation "over and above the ordinary duty to tell the truth". Permitting her to give unsworn testimony without ascertaining whether she should be sworn was an error of law affecting the trial and its outcome. The failure to comply with s 9B had

> "deprived the appellant of a proper trial, that is one conducted according to law, with evidence tendered according to the law's prescriptions."[10]

The errors were so fundamental that the proviso could have no application.

[42] *BBR* was applied in a later decision of this court, *R v Chalmers*.[11] In that case, the appellant succeeded in having his convictions quashed on the ground that the verdicts were unreasonable. The court also dealt with a second ground of appeal: that the trial judge had failed to comply with the requirements of s 9B of the *Evidence Act*. All members of the court agreed that the trial judge had failed to determine, as s 9B(2) required, whether the complainant (who, like A, was six years old) was competent to give evidence on oath. Chesterman JA described the child's evidence as consequently "inadmissible"; McMurdo P, with whose analysis Cullinane J agreed, said that the failure to comply with s 9B(2) (and also s 9B(3) as to the explanation of the duty of speaking the truth) had resulted in a fundamental irregularity which would have required a retrial had the appeal not succeeded on the unreasonable verdict ground.

[43] In the present case, the trial judge similarly did not make any investigation or determination of whether A understood the particular gravity of giving evidence in court and the special importance of giving truthful evidence. The respondent's contention was that since the conditions in s 9B(2) had not been made out, it followed that A was not competent to give evidence on oath. But the starting point in s 9(1)(b) is presumed competence to give sworn evidence, including for a child, without consideration being given to the taking of unsworn testimony unless an issue is raised about competence. That approach is consistent with the common law principle that an accused person's trial should be based on sworn evidence. The presumption of competence can be rebutted, but the rebuttal cannot occur simply through a failure to consider the matters in s 9B(2).

[44] In many cases, it might readily be apparent that a child of six would be unable to appreciate the significance of answering questions in court; but A was a clever child who might have been able to do so. Dr Keen referred specifically to s 9B in describing her as competent to give evidence in a court of law, although he spoke only of her ability to understand that the giving of evidence was a serious matter. It seems likely that questions framed with proper simplicity could have ascertained whether A met the conditions in s 9B for giving evidence on oath or affirmation. However the trial judge chose to undertake the assessment, it was necessary for him to consider whether those conditions were or were not met. As in *R v BBR*, his failure to do so was an error, resulting in A's giving unsworn evidence when it was not established that she could not give sworn evidence.

[45] For completeness, I should say that I do not accept as correct the second limb of the appellant's argument as to the s 9B requirements, that the judge had not adequately

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10 At 560.

11 [2011] QCA 134.

explained the duty of speaking the truth. The appellant has, in my view, conflated the conditions for the giving of evidence on oath, and the questions which might be asked in that regard, with the explanation required before evidence is given unsworn. The trial judge told the child that it was important for her to tell the truth and that she could get into trouble if she told a lie, and asked her to promise to tell the truth. That was adequate for the purposes of s 9B(3).

[46] The respondent's submission that the proviso could be applied runs counter to the conclusion reached by the court in *BBR* as to the fundamental nature of such an error. That conclusion may have been obiter, but it was consistent with the cases cited by Chesterman JA, and with the view taken in *Chalmers*: a line of authority from which I am not inclined to depart. The result is a most unfortunate one because it means that if the trial is to proceed again, A will have to be called as a witness once more. But the appellant was entitled to a trial conducted according to law. The appeal must be allowed. It will be a matter for the Director of Public Prosecutions, no doubt taking into account the views of A and her family, whether another trial proceeds.

Orders

[47] I would allow the appeal, set aside the conviction and order a re-trial.

[48] **WHITE JA:** I have read the reasons for judgment of Holmes JA and agree with all she has said. I, too, regret that the failure to follow completely the requirements of s 9B of the *Evidence Act* means that a retrial must be ordered.

[49] **GOTTERSON JA:** I agree with the orders proposed by Holmes JA and with the reasons given by her Honour.