[2013] QCA 360

COURT OF APPEAL

MARGARET McMURDO P
FRASER JA
MORRISON JA

CA No 162 of 2013
DC No 210 of 2011

THE QUEEN

v

AMBER, Bert **Appellant**

BRISBANE

WEDNESDAY, 4 DECEMBER 2013

JUDGMENT

THE PRESIDENT: The appellant pleaded not guilty to the rape of an eight year old girl on 2 April 2010 on an island in the Torres Strait. His first trial was in November 2012 but the jury were unable to reach a verdict. His retrial commenced in Cairns on 25 February 2013. He has appealed against his conviction on the following four grounds:

> "The learned Judge presiding over the pre-recording of the complainant's evidence on 22 August 2011 erred in permitting the complainant to give unsworn evidence without first ascertaining whether she should be sworn as required by s9B(2) of the *Evidence Act 1977* (Qld).
>
> The learned trial Judge erred in failing to instruct the jury as to the presence of a support person during the pre-recorded evidence of the complainant as required by s 21AW(1)(c) and (2) of the *Evidence Act*…

> A miscarriage of justice occurred as a result of the admission of inadmissible evidence of [AW] as to the demeanour of the complainant.
>
> The learned trial Judge erred in failing to direct the jury as to the use that might be made of the evidence of [AW] as to the demeanour of the complainant."

Compliance with s 9B(2) *Evidence Act*

The complainant's evidence was pre-recorded under Pt 2 Div 4 *Evidence Act*. She gave it by video link from a remote witness room in the presence of a support person. The following exchange occurred:

> "HIS HONOUR: It's the Judge here. Can you hear me nice and clear?-- Yes.
>
> [SUPPORT PERSON]: Your Honour, it's a bit – the volume is a bit faint.
>
> HIS HONOUR: Well, we'll see what we can do about that. It's usually not a problem hearing me. [Addressing the complainant:] do you understand that you're here today to give evidence in a Court case?-- Yes.
>
> Have you ever heard of the term 'swearing on oath on the Bible to tell the truth'?-- Yes.
>
> Have you had any religious instruction at all? Have you… had religious classes or been taught religion?
>
> [SUPPORT PERSON]: Say you don't understand him.
>
> HIS HONOUR: You don't understand; all right?-- Mmm.
>
> Do you go to church?-- Yes.
>
> All right. You said before you understand what was involved with swearing on the Bible on oath to tell the truth. Can you tell me what that means? If you can't, you can't. Don't worry about it. All right. Well, we'll go another way. What we often do with witnesses is ask them to swear on the Bible, to swear in the name of God that they will tell the truth when they give Court evidence. Have you ever heard of that?-- No.
>
> No; all right. Well, look, I'm not satisfied that she can take an oath. Would both of you agree on that?
>
> PROSECUTOR: Yes, your Honour."

The judge then went on to explain to the complainant the importance of telling the truth.

The *Evidence Act* contains the following provisions as to the competency of a child to give sworn evidence:

"**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.

(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."

As this Court noted in *R v BBR* [2010] 1 Qd R 546, 558-559, s 9B *Evidence Act* provides a test for determining whether witnesses, including child witnesses, are competent to give evidence on oath. This test differs from the common law. It is only if witnesses do not satisfy this statutory test for competence that they are permitted to give unsworn evidence: see *BBR*, [46], [51] and [54]. It is clear from the passage of transcript set out above that the judge

conducting the pre-recording did not follow the procedure mandated by s 9B. The judge's inquiries of the complainant were not directed to the tests in s 9B(2)(a) and (b). His opinion that the complainant could not take an oath was not informed by those tests. This failure to comply with s 9B has the result that the trial was not conducted according to law. Contrary to the respondent's submissions, this fundamental procedural flaw means that the proviso in s 668E(1A) *Criminal Code* 1899 (Qld) can have no application: see *BBR*, 560, [57] and *R v WAU* [2013] QCA 265, [18]-[19]. It follows that the appeal must be allowed, the verdict set aside and a retrial ordered. Unfortunately, this means that the complainant will probably have to be cross-examined again, many years after the alleged offence. This case highlights the need for the care that judges must take when presiding at pre-recordings of evidence under Pt 2 Div 4 *Evidence Act*.

Compliance with s 21AW *Evidence Act*

The respondent rightly concedes that ground 2 is made out, although submitting that this is an appropriate case for the exercise of the proviso in s 668E(1A). It is strictly unnecessary to determine this question in light of the appellant's success on the first ground. I note that the Court has been informed that the support person was visible in the pre-recording. I further note that the complainant's evidence was at the heart of the Prosecution case against the appellant who disputed the truth and accuracy of her account. The respondent is able to point to no case where such an error in respect of a complainant's pre-recorded evidence has resulted in an appeal being dismissed on the basis of the proviso in s 668E(1A). Compare *R v WAT* [2013] QCA 251 especially [23], *R v BCL* [2013] QCA 108, *R v Drake* [2013] QCA 222, *R v Little* [2013] QCA 223 and *R v Bisht* [2013] QCA 238. The case of *R v FAD* [2013] QCA 334 upon which the respondent places reliance is readily distinguishable.

The third and fourth grounds of appeal

As there is likely to be a retrial, it may be helpful if I deal briefly with the remaining grounds of appeal.

The principal of the school which the complainant attended, AW, gave evidence that on 15 April 2010, the complainant seemed really quiet and shy, sitting at her desk with her head

down. She was not interacting with other children or with her; this was unusual. She also noticed that on 22 April, when she was teaching the complainant, that her demeanour was again unusual in this way. As a result, she asked whether she was all right. The complainant said she was "OK" but she said "she had blood on her wee". AW asked whether anybody had touched her. The complainant said she could not remember. AW told the complainant that if she wanted to speak to her, she could do so at any time.

A week later, on 29 April, the complainant said she wanted to talk. AW arranged to meet her outside the classroom after school when the other children had left. They spoke in Yumplatok or Torres Strait Creole language. The complainant said that when she was at the appellant's house, she was touched on the breast and "inside", apparently gesturing towards her private parts. She said this was done by an elderly person or granddad. It is not entirely clear whether she was saying that the appellant touched her, although that was clearly and unequivocally the complainant's evidence in the case.

The appellant rightly points out that there was nothing in the evidence of the complainant to link AW's evidence of the complainant's changed demeanour to the alleged offence. The appellant contends that the evidence was inadmissible and a miscarriage of justice occurred through its admission.

Defence counsel at trial did not ask for the evidence to be excluded. He may have had tactical reasons for this. The evidence was admissible, at least as to the 22 and 29 April incidents, as an important part of the background to the preliminary complaint evidence. This evidence assisted the defence contention that the complainant had the opportunity to complain to a person in authority but did not do so; as a result the jury would have a doubt about her reliability and truthfulness. Defence counsel's decision to allow the evidence to be given was a legitimate forensic decision, and as I have stated, the evidence was admissible in any case, at least in respect of the evidence of 22 and 29 April, as part of the narrative of AW's account of the preliminary complaint.

As the complainant did not give evidence that her demeanour on these occasions was linked to the offence, the judge should have directed the jury about the limited use to be made of

AW's evidence about the complainant's demeanour. This was especially so in light of the prosecutor's emphasis on that evidence in his closing address. The judge should have directed the jury that AW's evidence about the complainant's demeanour could not corroborate or independently support the complainant's evidence: see *R v Litzow* [2011] QCA 366, [23].

I propose the following orders:

1. The appeal is allowed.
2. The verdict of guilty is set aside.
3. A retrial is ordered.

FRASER JA: I agree.

MORRISON JA: I agree.

THE PRESIDENT: The orders are as I have proposed.