THE QUEEN v GW (C13/2015)

Court appealed from: Supreme Court of the Australian Capital Territory, Court of Appeal [2015] ACTCA 15

Date of judgment: 24 April 2015

Special leave granted: 16 October 2015

"GW" is the father of "R" and "H", two young girls born to "M" during her marriage to GW. On 29 March 2012 a domestic incident gave rise to the police removing M from the family home. GW then obtained an interim domestic violence order against M, which prevented her from seeing their children during the ensuing days. At that time R was five years old and H was three years old. On 2 April 2012, R and H were removed from GW's care and placed in foster care, following a complaint made to authorities at the behest of M.

GW was later tried on charges of having committed acts of indecency on both R and H between 29 March 2012 and 2 April 2012. Evidence relied on by the prosecution included unsworn evidence given by R at a pre-trial hearing before Justice Burns on 6 August 2013. That evidence was given after Justice Burns had determined, under s 13 of the *Evidence Act* 2011 (ACT) ("the Evidence Act"), that R was not competent to give sworn evidence. This was upon his Honour stating that "*... because of the difficulty in truly gauging the level of her understanding ... I am not satisfied that she has the capacity to understand that in giving evidence today she has an obligation to give truthful evidence*" ("the Finding").

The jury found GW guilty of one of the six acts charged (count 3). On 14 July 2014 Justice Penfold sentenced GW to imprisonment for two years, the first three months to be served in periodic detention and the remainder suspended upon a good behaviour bond.

GW appealed against his conviction, on grounds which included that Justice Penfold should not have admitted the unsworn evidence of R and (alternatively) that her Honour had failed to properly direct the jury in relation to that evidence.

The Court of Appeal (Murrell CJ, Refshauge & Ross JJ) unanimously allowed the appeal and ordered a retrial of GW on count 3. Their Honours held that R's unsworn evidence should not have been admitted, due to Justice Burns having made a subtle but important error in making the Finding. The Court of Appeal held that, in applying s 13(3) of the Evidence Act, the correct question for Justice Burns to answer was whether R *lacked* the capacity to understand that in giving evidence she was under an obligation to give truthful evidence. Justice Burns however had mistakenly treated unsworn evidence, rather than sworn evidence, as the default position.

Their Honours also held that, if R's unsworn evidence had been admissible, Justice Penfold ought to have warned the jury that that evidence might be unreliable because it was unsworn evidence. This was in view of both the general primacy of sworn evidence and that in the trial of GW the most

fundamental task for the jury was the assessment of the reliability of R's evidence.

The grounds of appeal include:

- The Court of Appeal erred in holding that where a witness has given unsworn evidence the jury should be directed as to the differences between sworn and unsworn evidence and that, in assessing the reliability of the witness' evidence, they should take into account that the witness was giving unsworn rather than sworn evidence.

On 3 November 2015 GW filed a notice of contention, the ground of which is:

- The Court of Appeal erred in its refusal to make an order under r 5531 of the *Court Procedures Rules* 2006 (ACT) permitting the following ground of appeal:

  "(g) the trial judge erred in failing to give any direction to the jury regarding the potential significance for other counts of a finding in respect of a count that a reasonable doubt existed as to the guilt of the accused".