New South Wales
Court of Criminal Appeal

CITATION :	**Regina v JTB [2003] NSWCCA 295**
HEARING DATE(S) :	Friday 3 October 2003
JUDGMENT DATE :	3 October 2003
JUDGMENT OF :	Grove J at 1; Hulme J at 18; Greg James J at 24
DECISION :	APPEAL ALLOWED; NEW TRIAL ORDERED
CATCHWORDS :	CRIMINAL LAW AND PROCEDURE - WITNESS AGED 8 - ASSUMPTION THAT SHE COULD GIVE "EVIDENCE" WITHOUT BEING SWORN - ABSENCE OF RELEVANT ENQUIRIES AS TO HER UNDERSTANDING - STATUTORY AND COMMON LAW REQUIREMENTS UNFULFILLED
LEGISLATION CITED :	Criminal Appeal Act Evidence Act
CASES CITED :	R. v Brooks 1998 44 NSWLR 121 Bulejcik v The Queen (1996) 185 CLR 375 Dhanhoa v The Queen [2003]HCA 40
PARTIES :	Regina v JTB
FILE NUMBER(S) :	**CCA** 60234/03
COUNSEL :	E. Wilkins (Crown) L. Flannery (Applicant)
SOLICITORS :	C.K. Smith (Crown) B. Duchen (Applicant)
LOWER COURT JURISDICTION :	District Court
LOWER COURT FILE NUMBER(S) :	01/51/0194
LOWER COURT JUDICIAL OFFICER :	Christie DCJ

IN THE COURT OF CRIMINAL APPEAL

60234/03

GROVE J
HULME J
GREG JAMES J

Friday 3 October 2003

REGINA v J.T.B.
Judgment

1 GROVE J: This is an appeal against conviction upon two counts after a trial before Christie DCJ and a jury at the Coffs Harbour District Court. The offences charged involve sexual misconduct towards a young child who was in fact the granddaughter of the appellant. The convictions were followed by the imposition of terms of imprisonment.

2 A number of grounds of appeal have been lodged. None of those grounds would ordinarily result in an order of this Court other than including a new trial, should such a ground succeed. As, in my view, the fourth ground must be sustained, it is unnecessary to deal with the others.

3 The background can be briefly sketched. When the matter came to trial, arrangements had been made for the infant complainant to give evidence by videolink and the transcript shows that there was some attention given to putting her outside of the range of looking at her grandfather. It may be that the need to make these practical arrangements led to matters which I believe must have been overlooked.

4 The complainant at the time was aged eight years of age. The Crown Prosecutor mentioned to his Honour, "And I won't be asking that the complainant be sworn, your Honour, she's only eight". His Honour's response was to say, "Yes, I understand".

5 The child was then brought to what I might describe for convenience as the witness position and upon arrival his Honour inquired of her whether she could see and he then had this exchange with her:

> "Q. (E), there is a gentleman about to stand up who wants to ask you a number of questions. You understand that?
> A. Yes.
>
> Q. And you understand that you are here to respond to his questions truthfully?
> A. Yes."
>
> The complainant was neither sworn nor affirmed.

6 It appears to me then, therefore, that it is an issue to be considered by this Court whether what the complainant had to say was ever elevated into the category of being evidence.

7 I note that s21 of the **Evidence Act** provides that a witness in a proceeding must either take an oath or make an affirmation before giving evidence. Section 12 of that Act provides a presumption that every person is competent to give evidence. There is no limitation in the statute relating purely to age.

8 An exceptional circumstance can arise if the requirements of s 13 are met. Section 13(1) reads:

> "A person who is incapable of understanding that, in giving evidence, he or she is under an obligation to give truthful evidence, is not competent to give sworn evidence."

Subs(2) then provides a procedure for such a person to give evidence not on oath,

> but the very terms of subs(2) commence with the expression "A person who because of subs(1) is not competent".

9 One, therefore, has to look at what information the trial judge had before the Court at Coffs Harbour. It is true that subs(7) of s 13 permits the Court to inform itself as it thinks fit, but the only information before the Court related to the age of the complainant - as I have recited, the remark of the Crown Prosecutor - and the acknowledgment by the complainant that she understood her obligation to tell the truth.

10 It is obvious, therefore, that there was no evidence which could sustain a finding and indeed no information which could sustain a finding that the complainant was a person incapable of understanding that in giving evidence she was under an obligation to give truthful evidence.

11 The situation is not identical to but not dissimilar from that in **R v Brooks** 1998 44 NSWLR 121. As Priestley JA observed, the High Court had said in **Bulejcik v The Queen** (1996) 185 CLR 375, "It is fundamental to the common law system of criminal justice that a person can only be convicted on admissible evidence given in open court". His Honour then went on to conclude:

> "It is thus well-established that 'evidence' not given under oath or under some lawful alternative sanction is not admissible evidence, and it follows that the trial in the present case in which non evidence of that kind played a material part, was not a trial according to law."

12 As I said in that same case, where such an argument needs to be sustained, the appeal may be regarded as highly technical, but if the consequence has been that a trial was not held according to law, it must result in the conviction being set aside.

13 For the reasons which I have indicated, the statements not on oath by the complainant at no stage became either the subject of sworn or affirmed testimony, nor was there a relevant lawful sanction for her giving evidence in that fashion.

14 It may be that other inquiries might have led to a different result. I have already observed that there is no statutory limitation upon the age of a competent witness. As was observed in **Brooks,** in some jurisdictions the sort of problem which has arisen here is avoided by the selection of an arbitrary age below which any child is able to give testimony without being sworn or affirmed. That is not the case in New South Wales.

15 It follows then, therefore, inevitably in my view, that the convictions must be quashed. I am conscious that the terms of full time custody do not expire until May next year and have been served since February this year. Nevertheless I think it is a matter for the prosecutorial discretion whether a new trial takes place.

16 I propose that the appeal be allowed, the conviction and sentences quashed, and new trials be ordered upon the counts on the indictment upon which the appellant was convicted.

17 I am reminded we should continue or make a suppression order in relation to the complainant's name.

18 HULME J: The appellant was convicted on the evidence given by the complainant. There was little else. As Grove J has pointed out a witness in the proceedings must either take an oath or make an affirmation before giving evidence subject to the qualification contained in s 21(2).

19 It was clearly believed that the complainant fell within the exceptional category of those who do not need to be sworn, though that belief it would seem was without anyone directing any attention whatsoever to the terms of ss12 and 13 of the **Evidence Act.**

20 The jury clearly believed what the complainant, though not sworn or having made an affirmation, said. It is inconceivable that the taking of an oath or the making of an affirmation would have made the slightest difference to what she said. Certainly there is nothing to suggest it would have, and there is no conceivable ground for thinking that had she made an oath or taken an affirmation or had the steps envisaged by s13 been taken, the jury's verdict would have been any different.

21 There is, thus, much in favour of the view that no substantial miscarriage of justice has occurred and the Court should apply the proviso to s6 of the **Criminal Appeal Act**.

22 However, this Court in **R v Brooks** (1998) 44 NSWLR 121 has made it clear that the deficiency or defects which occurred in this case are of a nature so fundamental that the proviso should not be applied.

23 Though I am not sure I would have reached the same conclusion had I approached the matter de novo, I do not feel sufficiently confident of the view that what was said in **Brooks** is wrong to depart from it and, accordingly, I agree with the orders proposed.

24 GREG JAMES J: I agree with the orders proposed and the reasons given by the presiding judge. I add only this for myself, it was in response to the supplementary submissions on behalf of the applicant that the Crown submitted that regard could be had to the silence of the applicant's counsel at trial, bearing in mind the applicant's relationship to the witness, for the purpose of testing whether some adequate inquiry had been made; whether there was some consent or waiver which might have permitted the course taken at trial for the witness to provide material to the Court on an unsworn basis.

25 The Act makes provision in a number of sections for the giving of consents or the waiver of the application of the provisions of the Act.

26 There is nothing that I can see in particular under s52 which provides for the adducing of evidence in a way other than by witnesses giving evidence, or in ss184 and 190, which would have permitted the course taken here to have been taken on the material that was before the Court. In particular, s190 prescribes a formal procedure which must be undertaken before the waiver, to which that section speaks, occurs.

27 In addition, s189 of the **Evidence Act** refers to what should be undertaken by way of an inquiry as to whether a witness is competent or compellable and to that extent at least sheds some light on what might be expected to occur at trial concerning the application of s13(1).

28 Section 189 is not without its own problems in that it speaks of the necessity for the determination of the question of whether the witness is competent or compellable but gives little assistance thereafter as to how that question or those questions are to be determined.

29 I do not for myself apprehend that the remarks of Gleeson CJ and Hayne J, to which our attention was drawn by the learned Crown Prosecutor in **Dhanhoa v The Queen** [2003] HCA 40 in support of a submission based upon an analogy between what needs to be done in relation to identification evidence and these questions of deciding whether a witness is competent or not, are sufficiently close for me to have any comfort in applying them to this situation.

30 It is for these reasons, in addition to those that the presiding judge has given, that in my view

the appeal should be upheld.

31 GROVE J: The orders of the Court, therefore, will be as I proposed including orders in relation to the suppression of the name of the complainant and any material which would tend to identify her.

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