IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 97/69.

BEFORE: The Hon. President

The Hon. Mr. Justice Shelley

The Hon. Mr. Justice Eccleston

R. v. N O R R I S H E N R Y

Mr. Howard Hamilton for the Appellant

Mr. Horace, Q.C. for the Crown.

13TH FEBRUARY, 1970

SHELLEY, J.A.,

This is an application for leave to appeal from conviction for carnal abuse of a girl under the age of twelve years.

The facts in this application are not important. The complainant a girl aged thirteen years at the time she gave evidence, was permitted to give her evidence on oath. The only point which we propose to deal with is the complaint by Counsel for the applicant that "the learned trial judge erred in permitting the complainant to be sworn when her cross-examination by Counsel clearly indicated that she did not recognise and understand the obligations of the oath."

Counsel relied upon R. v. Nelson, 5 W.I.R. at page 48. We say straight off that the Nelson case may be easily distinguished from the instant case. That was a case in which both the competency test and the test under section 53 of Chapter 189, The Juvenile Law, were considered by the Court. In that case there was no enquiry by the learned Resident Magistrate himself although Defence Counsel cross-examined the witness as to competency. In the instant case, the learned trial judge asked the witness three questions as to age and schooling, and decided that she should be sworn. Having done that, Counsel for the defence raised the question of competency and the learned judge examined the witness carefully as to competency. Moreover, when Counsel rose to cross-examine, he embarked upon his own enquiry, as to the competency of the witness, and upon all that evidence the learned trial judge ruled that the witness should remain sworn. We see no similarity between the Nelson case and the instant case in that respect.

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In the Nelson case there was no evidence of age, the learned Resident Magistrate noted an estimate of age on the record; in the instant case, there is very definite evidence of age.

Learned Counsel for the applicant has raised arguments under Section 53 of Chapter 189. That section applies when the witness is a child of tender years. Under that Law, a child is a person under fourteen years. Common sense seems to dictate, and indeed, reference to the Law itself seems to indicate that a person in the last days of childhood, so to speak, ought not generally to be regarded as a child of tender years. Section 3 of that Law fixes criminal responsibility at the age of eight years. We do not lay it down as a rule, but it seems to us that the section may give some guidance as to whom is to be regarded as a child of tender years. We are of the view that section 53 has no application in the instant case and that the complainant's evidence in this case falls within the general rule on the competency of witnesses.

In this regard there was enquiry by the learned trial judge, there was further enquiry by learned Counsel for the defence, the judge had the benefit of Counsel's submissions on the point, and he proceeded to make a ruling which it was his duty to make, as the competency of witnesses is a matter for the judge. (See R. v. Whitehead, (1866) L.R.1, C.C.R.33) It seems also that it is the exercise of a discretion. It is clear that the judge appreciated this, and exercised his discretion having regard to what evidence he had before him. It is not our duty to substitute our discretion for that of the learned trial judge, once it does not appear that he went wrong in exercising that discretion.

We are of the view that there was ample evidence before the learned judge to support the ruling which he made. The application is therefore refused.