JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 255/77

BEFORE: The Hon. President,
The Hon. Mr. Justice Melville, J.A.
The Hon. Mr. Justice Robotham, J. A.

R. v. HENRY WHITELY

Mr. Enoch Blake for the Applicant

Mr. W. James for the Crown.

October, 6 and 20 1978

ROBOTHAM J.A.

This applicant was convicted before the High Court Division of the Gun Court on October 28, 1977 on one count charging him with illegal possession of a firearm and two counts charging him with shooting with intent. On each count he was sentenced to imprisonment at hard labour for life.

His application for leave to appeal was heard on October 6, 1978 and the appeal was allowed, the conviction and sentence was set aside and a verdict of acquittal was entered. We promised to put our reasons in writing and this we now do.

The facts briefly are that on the night of August 2, 1977 at about 9: 30 p. m. Paul Hamilton a young boy who on oath gave his age as twelve years and who said he attended the Tivoli Gardens Community School was walking alone along Beeston Street Kingston,

when he saw and recognized the applicant, who was known to him, with a gun in his hand. He was then about two chains away (pointed out) and immediately upon seeing and recognizing the applicant the boy turned and ran off in the opposite direction. Simultaneously he heard 2 explosions of a gun, and was shot in the back. He went straight to the Kingston Public Hospital where he remained for one week and four days and on September 6, 1977, after hearing that the applicant was in custody at Denham Town Police Station, he went there and pointed him out to Constable Jones as the man who had shot him. There was no other witness called to substantiate the story of this boy, so his evidence stood uncorroborated.

The defence was an alibi. The applicant said that on the night in question, he was at his mother's home in Beeston Street playing ludo and did not leave the house at any time that night. He called his mother to support his alibi.

The crucial issue in the case was one of identification. Not only did the learned trial judge have the evidence of the boy that the applicant was known to him before, but there was also evidence both from the boy himself and the applicant that the area was very brightly lit with modern vapor lights recently installed in certain sections of the city of Kingston. On this evidence as

it stood, he convicted the applicant, making a passing reference in his summation to the fact that in believing the little boy he warned himself "that he is a little youngster and one must be careful about the evidence of young children...."

There would have been no room for argument about the soundness of the conviction if the only witness had been an adult, or a person of the age of 14 years and over. The only ground of appeal argued however, was that the learned trial judge, having heard that the boy was only twelve years of age, failed to examine him on the voir dire to decide on his competency to be sworn. The question of the competency of the witness to be sworn is a matter for the judge. If upon inquiry by him it was decided that he should not be sworn because of his lack of understanding of the impiety of falsehood, then his unsworn testimony would have to be corroborated as a matter of law, or if there was no corroboration as was the position in this case, the applicant would have been entitled to an acquittal.

Age is not necessarily the only test of the competency of a witness to be sworn. It has generally been accepted in these courts that a child of the age of 14 is capable of being sworn as a witness. Idiots, lunatics, deaf and dumb persons to name but a few, although adults may however still have to examine on the voir

dire. The real test is "does the witness or potential witness appear sufficiently to understand the nature and moral obligation of an oath."

Section 54 of the Juvenile Law allows the unsworn testimony of a child of tender years called as a witness to be received if, although he does not understand the nature of an oath, in the opinion of the Court he is possessed of sufficient intelligence to justify the reception of the "evidence" and he understands the duty of speaking the truth. Such evidence however must be corroborated.

There is no definition of who is a child of tender yeras, but again it was generally accepted that this applied to a child of about 8 - 9 years. Support was no doubt given to this by the fact that up to 1975, the age of criminal responsibility was eight years. By law 42 of 1975 this age was lifted to twelve years and section 3 of the Juveniles Act now reads:-

> "It shall be conclusively presumed that no child under the age of twelve years can be guilty of an offence.

It was argued by Counsel for the applicant that the reasoning behind section 3 of the Juveniles Law lies in the fact that a child under that age cannot determine right from wrong, sufficiently to fix him with criminal responsibility. Ought it to be assumed therefore, he continues, that such a child when called as a witness,

is possessed of sufficient understanding of the nature and moral obligation of an oath without being examined on the voir dire? we are of the opinion that the answer to that question must be in the negative.

Had this boy been examined on the voir dire it is not unlikely that he would have been found competent to be sworn and a Court of Appeal would not disturb the exercise of the Judge's discretion in those circumstances, unless it could be shown that it was improperly exercised. This made us all the more reluctant to allow the appeal.

In the Queen v. Cecil Cyrus a case from Guyana, 12 W.I.R 1968 p. 97 a girl of fourteen was called to give evidence in a rape case. The judge treated her as a child and having examined her on the voir dire had her sworn and she gave evidence. There was no corroboration of her testimony. The only ground argued on appeal was whether or not it was competent for her to be sworn as a witness after the examination by the judge. It was argued that the examination was inadequate and the answers she gave did not show that she was aware of the nature and obligation of an oath, and that to speak falsely was a violation of the moral law.

As against this the Crown argued that a voir dire was not necessary as she was fourteen and a half years old and was no longer

a child under section 71 of the (Guyana) Evidence Ordinance. It was said in that case by Luckoo J.A. at page 99

> "In any event the Court has a right to have a voir dire if there is reason to believe that the capacity for being sworn does not exist, irrespective of the age of the witness."
>
> (R. v. Antrobus (1947) 2 D.L.R. 55).

The appeal was dismissed.

No precise age is fixed above or below which a child may or may not be permitted to give evidence on oath. Much depends on the discretion of the judge and the matter was succinctly put in R. v. Brasier 1779 1 Leach 199 1 East P.C. 443 where it says:

> "There is no precise or fixed rule as to the time within which infants are excluded from giving evidence but their admissibility depends on the sense and reason they entertain and the danger and impiety of falsehood which is to be collected from their answers to questions put forwarded by the Court."

In R. v. Antrobus (supra) the British Columbia Court of Appeal held that no presumption exists as to the competency of a child under fourteen years of age to be sworn as a witness, but the competency must be shown and for this purpose it is necessary for the trial judge to satisfy by an inquiry (which may be brief) that a child of tender years understands the nature of an oath. At page 59 the judgment reads:

> ....."It is stated speaking of the Competency of a child that "the requsite degree of religious knowledge should be presumed at the age of fourteen" but the Court has a right to examine as to the religious knowledge even of an adult if it suspects him to be deficient. The fact of capacity is not presumed but must be shown where the child is under fourteen years of age."

The girl in that case was 9 years old and no inquiry as to the childs competence to give evidence was made by the Judge on the voir dire.

The appeal was allowed and a new trial ordered because of this failure on the part of the Judge.

This Court did not consider it would have serve any useful purpose here in ordering a new trial as was done in the case of Antrobus, because of an application on behalf of the applicant to hear new and further evidence from the boy Paul Hamilton. That application was dismissed by another division of this Court on July 6, 1975 and it was supported by an affidavit by the said Paul Hamilton that his evidence at the Gun Court trial as to his identification of the applicant as being the person who shot him was untrue. It need hardly be reiterated however, that that affidavit had no bearing on the outcome of this appeal and indeed was not relied on in any way by Counsel on either side, but its contents were indicative of the futility of ordering a new trial.

It has always been the practise here for the Court to examine on the voir dire all children under the age of fourteen when they are presented as witnesses. This practise should continue especially where such child is the only witness of fact.

Before parting with the appeal, we feel sure that had this trial judge been altered at the outset of the case by Counsel for the Crown to the fact that the entire case would have rested on the evidence of this boy of twelve, he would have been put on his inquiry as to the desirability of conducting and recording an examination on the voir dire.

For the reasons stated therefore the appeal was allowed. The Conviction and sentence was set aside and a verdict of acquittal entered.

212