

Moss, C.J.O.:—The applicant was convicted on the charge, under sec. 301 of the Criminal Code, of carnally knowing a girl under the age of 14 years, not being his wife, and was sentenced to imprisonment in the penitentiary for 7 years, the magistrate refusing the request of counsel for the applicant for a stated case.

The points on which the counsel desired the case are: (1) whether it was sufficiently proved that the girl was not the applicant's wife; (2) whether the girl appeared sufficiently to understand the nature of an oath to justify the magistrate in receiving her testimony under oath; and (3) whether, if her evidence should only have been received under sec. 1003 of the Criminal Code, it was sufficiently corroborated as required by that section.

The application was, with the consent of Mr. Cartwright for the Crown, treated as the argument upon a case stated for the opinion of the Court upon the points mentioned.

During the argument we disposed of the first question adversely to the applicant, holding that upon the whole evidence it manifestly appeared that the girl was not his wife.

As to the second question, no good reason appears for our saying that the magistrate was wrong in determining to receive the girl's evidence under oath. He states that having, in compliance with the wish of counsel for the applicant, examined the girl regarding her knowledge of the nature of an oath, he finds that she does not understand it. There is nothing in what was stated as being the answers given by her to questions addressed to her by the magistrate and counsel for the applicant to indicate that she was incapable of understanding or did not understand. Though sadly depraved, she is far from lacking intelligence, as her depositions shew. It appears that she has been attending school, and the handwriting of her signature to the depositions shews that she is not an inapt pupil in that branch.

The fact that she had been instructed on the subject a few days before the trial affords no sufficient ground for holding that her testimony was not to be admitted under oath.

Though all the Judges do not appear to have held precisely the same views with regard to the extent or means of instruction required in such cases, it seems quite settled that a child, ignorant in the matter, may be instructed for the purposes of a trial.