SUPREME COURT OF QUEENSLAND

CITATION:	*R v Holland* [2017] QCA 69
PARTIES:	**R** **v** **HOLLAND, Christopher Lee** (appellant)
FILE NO/S:	CA No 246 of 2016 DC No 409 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 23 August 2016
DELIVERED ON:	21 April 2017
DELIVERED AT:	Brisbane
HEARING DATE:	22 February 2017
JUDGES:	Gotterson JA and Boddice and Dalton JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where the appellant was charged on indictment on three counts of offending – where the appellant was convicted by a jury of Count 1, entering a dwelling at night with intent to commit an indictable offence, and Count 2, robbery in the circumstances of aggravation, namely, that the appellant used personal violence and was armed with a knife – where the appellant was acquitted by the same jury of Count 3, rape – where the appellant contends both Count 2 and Count 3 relied upon acceptance of the complainant as a credible and reliable witness – whether the evidence of Count 2 was of comparable quality to the evidence of Count 3 – whether the different verdicts amounted to an affront to logic and common sense – whether the conviction ought be set aside APPEAL AND NEW TRIAL – OBJECTIONS OR POINTS NOT RAISED IN COURT BELOW – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – where the appellant's case at trial sought to undermine the reliability of the complainant's evidence – where counsel for the appellant at trial sought a *Markuleski* direction – where the

jury was directed to take into account any doubt about the presence of a knife in their consideration of the claim of rape – where no redirection was sought at trial – where the appellant submits that the direction was inadequate as it did not state the converse, namely, that doubt about the penile-vaginal penetration should be taken into account when considering the presence of the knife – whether the absence of the direction sought occasioned a miscarriage of justice

MacKenzie v The Queen (1996) 190 CLR 348; [1996] HCA 35, cited
R v CX [2006] QCA 409, cited
R v Markuleski (2001) 52 NSWLR 82; [2001] NSWCCA 290, cited
R v Smillie (2002) 134 A Crim R 100; [2002] QCA 341, cited

COUNSEL: B J Power for the appellant
D Balic for the respondent

SOLICITORS: Legal Aid Queensland for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **GOTTERSON JA:** The appellant, Christopher Lee Holland, was charged on indictment on three counts of offending. Count 1 alleged that, on 13 May 2015, he and Maddison Lee Noy entered the dwelling of Qinghui Zong ("the complainant") at night with intent to commit an indictable offence. Count 2 alleged that, on the same date, he and Ms Noy robbed the complainant in circumstances of aggravation, namely, that they used personal violence towards the complainant and that he was armed with a dangerous weapon, a knife. Count 3 alleged that, on the same date, he raped the complainant.

[2] The appellant pleaded guilty to Count 1.[1] To Count 2, he pleaded guilty to robbery with personal violence, but not guilty to robbery with a dangerous weapon.[2] He pleaded not guilty to Count 3. The appellant was tried on the counts to which he had pleaded not guilty in the District Court at Brisbane over five days in August 2016. On 23 August 2016, the jury found him guilty on Count 2 and not guilty on Count 3.[3]

[3] Later that day, convictions for the Count 1 and the Count 2 offences were recorded. The appellant was sentenced to concurrent terms of imprisonment for each offence of three years nine months. A parole eligibility date at 7 February 2018 was fixed. Pre-sentence custody of 82 days was taken into account in structuring the sentence.

[4] On 17 September 2016, the appellant filed a combined Form 26 notice of appeal against conviction and an application for leave to appeal against sentence.[4] At the hearing of this appeal, the appellant was granted leave to amend in terms of an amended Form 26 which had been filed on 8 December 2016. By virtue of that

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1 AB17 Tr1-11 ll41-46.
2 AB18 Tr1-12 ll1-8. On 19 May 2016, Ms Noy pleaded guilty to Counts 1 and 2 as they concerned her: AB137 Tr2-67 ll21-25.
3 AB225 ll16-32.
4 AB251-252.

document, the appellant discontinued his application for leave to appeal his sentence.

Circumstances of the alleged offending

[5] The complainant was a prostitute who was operating out of a unit at the Greenslopes Motor Inn. The appellant arranged to avail himself of her services and was let into the motel unit on that basis. The complainant alleged that once he was inside the motel unit, the appellant first pretended to be a police officer, then robbed her at knife point and raped her by way of penile-vaginal rape.

[6] As his plea indicated, the appellant acknowledged that he and Ms Noy, with whom he was in a relationship, decided to rob the complainant, and that he entered the motel unit with that intention. He accepted that he then robbed the complainant using actual violence once he had gained entry to the unit, but disputed being armed with a knife.

[7] With regard to the rape count, the appellant's case was that he did not have penile intercourse with the complainant at any time. His case, as put in cross-examination, was that the only sexual act that occurred was one in which the complainant performed oral sex on him at a time before she was tied up with zip-ties.

[8] Ms Noy drove the appellant to the motel and stayed in the vehicle until he returned. She did not enter the motel unit. She was criminally liable for the counts to which she pleaded guilty by virtue of s 8 of the *Criminal Code* (Qld) ("the Code").

[9] The complainant was the only witness to testify in the Crown case as to events that occurred in the motel unit. She gave evidence with the assistance of an interpreter. The account which follows is taken principally from her evidence-in-chief. It is convenient to detail other evidence she gave in cross-examination in discussion of Ground 1.

[10] The complainant testified that the appellant entered the unit and then produced a badge and said he was a policeman.[5] He grabbed her hands behind her back and put her on a single bed.[6] The appellant tied her hands with a white plastic zip tie and lay her stomach downwards on the bed.[7]

[11] The complainant's evidence-in-chief was that the appellant used his right hand to take a knife out of his pants pocket. The complainant described it as "quite sharp" with a black plastic-like handle.[8] The appellant used it, along with a black baton or torchlike object, to threaten her while asking her where her money was.[9] She pointed to a small purple suitcase on the top of a cupboard and told the appellant that the money was inside the suitcase.[10] The suitcase contained a wallet with about $700 in it.[11] The appellant then dragged the complainant over to a round table in a

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5 AB36 Tr1-30 ll14-30; AB40 Tr1-34 ll37-39.
6 AB41 Tr1-35 ll7-12.
7 Ibid ll16-20.
8 Ibid l45 – AB42 Tr1-36 l17.
9 AB42 Tr1-36 l26 – AB46 Tr1-40 l5.
10 AB46 Tr1-40 ll24-39.
11 Ibid l41 – AB47 Tr1-41 l3.

corner of the room and tied her two hands behind her back to the single leg of the table.[12]

[12] The complainant said that the appellant took the suitcase from the top of the cupboard. As he walked towards her, he was pointing the torch-like object at her.[13] He said, "I want to fuck you for free."[14] The complainant's mobile phone then rang and the appellant put the suitcase on the floor. He grabbed the phone, demanded to know the password, and then put it in his pocket.[15]

[13] The complainant said that she felt that she did not have any options and could not fight against him. The appellant took off his pants and she said to him, "Ok, but you have to wear a condom."[16] The complainant said that she offered to get a condom but the appellant refused the offer.[17] She told him that they were in a box in a bedside drawer. He retrieved a condom and put it on. He knelt down between her legs and penetrated her vagina with his erect penis. He "was just thrusting very violently and forceful". She asked him to use a lubricant but he said he did not have time to do that. The penetration lasted for three to five minutes.[18]

[14] According to the complainant, the appellant then withdrew his penis and put it in front her mouth and asked her for a "blow job". He was still wearing the condom. The complainant gave the appellant oral sex for one to two minutes. He then removed the condom and asked the complainant to continue with oral sex. She refused because he was "quite stinky" and it would have been uncomfortable for her. The appellant said that he could not wait. He masturbated himself and then ejaculated onto her stomach and legs. He then used wipes to clean himself and threw them on the floor.[19] She asked for wipes and he threw some at her.[20]

[15] The complainant testified that the appellant then dressed himself, placed the torch-like object in the suitcase, and took it, with the cash also inside, with him. He left in a rush. She managed to free herself and from the doorway saw him cross to the other side of the road.[21] Once the appellant had departed, the complainant noticed some blood stains on the wipes on the floor and also on the box of condoms.[22]

[16] The appellant did not give or call evidence at trial. I note, that in cross-examination, the complainant rejected the defence contentions that the appellant did not have a knife or a black torch-like object with him[23] and "that any sexual activity was limited to oral sex".[24] She also rejected a contention that the oral sex that she performed on the appellant took place before he tied her up and robbed her.[25]

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12 AB47 Tr1-41 ll8-33; AB100 Tr2-30 ll12-14.
13 AB97 Tr2-27 ll38-39.
14 AB48 Tr1-42 l29 – AB49 Tr1-43 l32.
15 AB48 Tr1-42 l43 – AB49 Tr1-43 l27.
16 AB49 Tr1-43 ll41-42.
17 AB50 Tr1-44 ll35-45.
18 AB51 Tr1-45 ll1-47.
19 AB52 Tr1-46 ll13 – AB53 Tr1-47 l42.
20 AB54 Tr1-48 ll1-10.
21 Ibid l24 – AB55 Tr1-49 l37.
22 AB57 Tr1-51 ll32-33.
23 AB134 Tr2-64 ll36-43.
24 AB116 Tr2-46 ll1-12.
25 AB135 Tr2-65 ll3-8.

Medical evidence

[17] The complainant was examined by Dr K F Robinson of the Clinical Forensic Medicine Unit of Queensland Health. The examination took place at the Brisbane Sexual Assault Services facility at the Royal Brisbane and Womens Hospital on 14 May 2015 with the assistance of an interpreter. Dr Robinson testified at trial.

[18] Upon examination, Dr Robinson observed a 2 cm long red linear abrasion on the palmar surface of the complainant's right wrist. There were abrasions on her left wrist. As well, bruising to her left thumb and elbow were observed.[26] The abrasions were most likely the result of the application of pressure by a flexible cable-like material.[27]

[19] A genital examination was conducted. There was no evidence of injury to the vagina. However, absence of evidence of injury to that region was very common where penetration had occurred, according to Dr Robinson.[28]

[20] In evidence-in-chief, Dr Robinson outlined the complainant's description of the physical assault on her, the penile penetration of her vagina and the appellant's request for oral sex. She told Dr Robinson that she refused to put his penis in her mouth.[29] In cross-examination, Dr Robinson confirmed that the complainant did not at any point indicate to her that she had engaged in oral sex with the appellant. The complainant was clear about that.[30]

[21] At trial, the results of DNA, fingerprint and swab tests were the subject of formal admission under s 644 of the Code.[31] The tests detected the appellant's DNA in blood on zip ties located on the table leg, on an open condom wrapper, on a condom box on top of the table and on a wipe; and in spermatozoa on the carpet in the unit and on wipes found on the unit floor. His DNA was found on one side of the used condom as was the complainant's DNA on the other side of it. The appellant's fingerprint was located on a wipes packet found on the floor of the unit.

[22] High and low swab samples from the complainant's vagina taken by Dr Robinson tested negative for seminal fluid. Vulval and oral swab samples showed the complainant's DNA. Swab samples taken from her abdominal region showed both her and the appellant's DNA.

Grounds of appeal

[23] The appellant relies on the following two grounds of appeal:

1. The verdict on Count 2 is unreasonable, or cannot be supported having regard to the evidence, due to the inconsistency between the conviction on Count 2 and the acquittal on Count 3.
2. A miscarriage of justice was occasioned by a failure of the learned trial judge to give a direction in accordance with *R v Markuleski*.[32]

Ground One

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26 AB149 Tr3-4 ll10-23.
27 Ibid l35 – AB150 TR3-5 l4.
28 AB151 Tr3-6 ll21-27.
29 AB148 Tr3-3 l33 – AB149 Tr3-4 l1.
30 AB152 Tr3-7 ll40-47.
31 Exhibit 22: AB243.
32 [2001] NSWCCA 290; (2001) 52 NSWLR 82.

[24] **Appellant's submissions**: The appellant submitted that there is no rational way by which the acquittal on Count 3 can be reconciled with the conviction on Count 2. In developing the submission, counsel for the appellant observed that both counts relied upon an acceptance of the complainant as a credible and reliable witness. He argued that where, on the facts of this case, a jury had a doubt about the complainant's unequivocal evidence that the defendant had penetrated her vagina with his penis without her consent, then it should also have had a doubt about her evidence that he was armed with a knife.[33]

[25] Counsel referred to evidence that independently supported the complainant's account that a knife had been used:[34] a small nick in the lining of the right pocket of the appellant's trousers,[35] and the presence of the appellant's blood in a number of places which was consistent with his having sustained a cut that bled.[36] It was submitted that evidence that independently supported penile intercourse having taken place was at least as strong as that. That evidence consisted of the appellant's blood on the open condom wrapper and the condom packet, his spermatozoa on the carpet, his DNA on the one side of the condom and the complainant's DNA on the other, his DNA on her abdomen and his fingerprint on the wipes packet.[37]

[26] It was contended for the appellant that the acquittal on Count 3 could not be explained on the basis that the jury were not satisfied as to lack of consent to the penile penetration. That was so, firstly because the defence did not put lack of consent in issue, and secondly, given that the appellant's blood on the condom wrapper and box indicated that penetration occurred after he sustained some form of cut or abrasion in constraining the complaint, it would have been irrational for the jury to have found that the complainant, having initially resisted, later consented at a point after she had been restrained.[38]

[27] In summary, the appellant submitted that if the jury were not satisfied on the complainant's evidence that penile-vaginal rape for three to five minutes occurred, then that involved a very significant rejection of her evidence. As there was no difference in the quality of the supporting evidence as between the rape count and the armed robbery count, it was not rational that the jury were then able to convict on the latter count where such conviction also relied upon the complainant's credibility and reliability.[39]

[28] **Respondent's submissions**: The respondent submitted that the two verdicts are reconcilable on the basis that the jury did find the complainant to be an honest and reliable witness, that it did follow the directions of the learned trial judge that each offence had to be proved to the requisite standard, but that it was not satisfied to that standard that a penile-vaginal rape had occurred in the circumstances as particularised by the Crown.[40]

[29] Some nine factors were listed by the respondent as reflecting or resulting in differences in the quality of the evidence concerning the "armed" component of the robbery on the

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33 Appellant's Outline of Submissions, paras 18-19.
34 Ibid para 24.
35 Evidence of Detective Senior Constable J T Purcell: AB165 Tr3-20 ll22-29.
36 The defence case was that the loss of blood was caused by the sharp edge of a zip tie.
37 Appellant's Outline of Submissions, para 25.
38 Ibid paras 27-28.
39 Ibid para 29.
40 Respondent's Outline of Submissions, paras 9-10.

one hand, and of the rape count on the other.[41] Those factors relate both to evidence of factual matters and to the way in which cross-examination of the complainant was undertaken concerning them. A number of them are detailed later in discussion of this ground.

[30] Further, on Count 3 as particularised, and as instructed by the learned trial judge,[42] the jury had to be satisfied beyond reasonable doubt that a penile-vaginal penetration, and no other form of penetration, had occurred. The jury were told that "other sex acts are not part of the rape alleged in count 3".[43] The respondent contended that the jury may have believed that the sequence of events as described by the complainant did include a non-consensual act, but that they could not be satisfied beyond reasonable doubt that it involved a penile-vaginal penetration.[44]

[31] In all these circumstances, the respondent submitted that the verdicts are reconcilable and are not an affront to logic and common sense.[45]

[32] **Discussion**: In *MacKenzie v The Queen*,[46] Gaudron, Gummow and Kirby JJ spoke of an affront to logic and common sense which is unacceptable and strongly suggests a compromise of the performance of the jury's duty, as the touchstone for intervention by an appellate court when an "inconsistent verdicts" ground of appeal is advanced.

[33] Drawing on this, other statements in their Honours joint judgment[47] and the judgment of McHugh J in *Osland v The Queen*,[48] Jerrard JA of this Court in *R v CX* set out the following matters of principle as having been settled by appellate courts about the assessment of claims of inconsistent verdicts by a jury:[49]

> "1. Where inconsistency is alleged as to verdicts of acquittal and conviction on different counts, the onus is on the party alleging that inconsistency to persuade an appellate court that the different verdicts are an affront to logic and commonsense which is unacceptable, and which strongly suggests a compromise in the performance of the jury's duty, or confusion in the minds of the jury, or a misunderstanding of their function, or uncertainty about the legal difference between specific offences, or a lack of clarity in the instruction on the applicable law. Where that inconsistency rises to the point that the appellate court considers that intervention is necessary to prevent possible injustice, the relevant conviction will be set aside.
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> 2. Whether the verdicts are inconsistent as so described is a test of logic and reasonableness; has the party alleging inconsistency satisfied the court that no reasonable jury, who had applied their minds properly to the facts in the case, could have arrived at the various

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41 Ibid paras 11-12.
42 AB204 ll16-17.
43 Ibid ll17-18.
44 Respondent's Outline of Submissions, para 13.
45 Ibid para 14.
46 [1996] HCA 35; (1996) 190 CLR 348 at 368.
47 Ibid at 366, 367.
48 [1998] HCA 75; (1998) 197 CLR 316 at 356-357.
49 [2006] QCA 409 at [33].

verdicts?http://www.austlii.edu.au/au/cases/qld/QCA/2006/409.html - fn18

3. Respect for the function of the jury requires appellate courts to be reluctant to accept submissions that verdicts are inconsistent in the sense described, and if there is a proper way by which an appellate court can reconcile the verdicts, allowing the court to conclude that the jury performed their functions as required, that conclusion will generally be accepted. It is not the role of an appellate court to substitute its opinion of the facts for one which was open to the jury, if there is some evidence to support the verdict alleged to be inconsistent.

4. The view may properly be taken in a criminal trial that different verdicts, claimed to be inconsistent, reveal only that the jury followed the judge's instruction to consider separately the case presented by the prosecution in respect of each count, and to apply to each count the requirement that all of the ingredients must be proved beyond reasonable doubt. Alternatively, an appellate court can conclude that a jury took a merciful view of the facts on one or more counts, a function which is open to a jury.

5. Verdicts of guilty and of acquittal will show the required inconsistency where a verdict of acquittal necessarily demonstrates that the jury did not accept evidence which they had to accept before they could bring in the verdict or verdicts of guilty which they did; or when it follows that when acquitting on a particular count, the jury must have accepted evidence that required them to acquit on a count or counts on which they convicted the defendant. …" (footnotes omitted)

[34] In an earlier decision of this Court *R v Smillie*, Holmes J (as her Honour then was) summarised some of the factors that may explain rational differences in verdicts in the following terms:[50]

"1. **The quality of the evidence**

The jury may have found the quality of the crucial witness' evidence variable while accepting it as generally truthful. For example, the witness may have exhibited faulty recollection on some points or been able to provide more particularity about the details of some events than others. A complainant may have failed to mention some offences in his or her original complaint, giving rise to a question about the accuracy of later recollection. The witness may have been given to exaggeration in some instances, or there may have been an inherent unlikelihood to some aspect of the evidence, which casts doubt on its accuracy in those respects, but not of the witness' general honesty. Or the circumstances in which the offence is alleged to have occurred may raise the real

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50 [2002] QCA 341; (2002) 134 A Crim R 100 at [28].

possibility of mistake by the complainant as to the nature of what has occurred.

2. **The existence of contradictory evidence on some matters**

There may in respect of some counts be evidence contradicting the crucial witness' account such as to explain a variation in the jury's verdict. Whether the force of the contradictory evidence goes beyond demonstrating a discrepancy explicable as mistake and warranting a doubt on the part of the jury, so that it must be regarded as undermining the credibility of the witness (as was the case in *Jones v The Queen*[51]) is a question of fact in each case.

3. **The existence of corroboration on some counts**

Different verdicts may be explicable on the basis that the witness' evidence was supported in respect of some counts but not others, by, for example, admissions by the accused.

4. **The "merciful" verdict**

As recognised in *MacKenzie v The Queen* and *R v P*[52], a jury may have decided that it would be oppressive to convict on all charges; that, for example, in a case where there are multiple counts, conviction on a number may sufficiently reflect the culpability of the accused.

[35] Central to the appellant's case here are the dual propositions that the complainant's own evidence as to the presence of the knife and as to the penile-vaginal penetration was of equal quality and that there was no material difference in the quality of the other evidence in relation to them. It is the first of these propositions that the respondent particularly challenges. I now turn to consider it.

[36] I have summarised the complainant's evidence-in-chief with respect to the knife. That evidence was consistent with what she had told Dr Robinson[53] and the investigating police officer, Detective Senior Constable J T Purcell.[54]

[37] The complainant was cross-examined about the knife towards the beginning of her cross-examination. She was questioned about when she first saw it.[55] A concession was obtained from her that she did not see the appellant withdraw the knife from his pocket and that she had "gleaned" that he had done that because the pocket was the only place from which the appellant could have taken the knife given the position of his hand holding it when she first saw the knife.[56] The complainant was asked about the position she was in when the appellant first took up the knife.[57] She was also asked about the characteristics of the knife,[58] where the appellant put the knife away,[59] and what the appellant had said by way of a demand for money when he had the knife in his hand.[60]

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51 [1997] HCA 12; (1997) 191 CLR 439.
52 [1999] QCA 411; [2000] 2 Qd R 401 at 410.
53 AB148 Tr3-3 ll36-39.
54 AB175 Tr3-30 ll11-12.
55 AB80 Tr2-10 ll6-18.
56 Ibid l32 – AB82 Tr2-12 l7.
57 AB82 Tr2-12 l38 – AB84 Tr2-14 l21.
58 AB85 Tr2-15 l15 – AB86 Tr2-16 l30.
59 AB87 Tr2-17 ll10-18.

[38] During this detailed cross-examination, it was not put to the complainant that the appellant had not had a knife in his possession or had not used it. Much later, and at the conclusion of the cross-examination, it was suggested to her that the appellant had not had a knife. She denied that. The suggestion was not pursued.[61]

[39] In summary, the complainant's evidence about the knife was consistent from her initial reporting of it to medical and police authorities, through her examination-in-chief and during her cross-examination. Her evidence-in-chief on this subject was not harmed materially in cross-examination. A contrary case was not pursued with any vigour. In these circumstances, it is reasonable to suppose that the jury, considering Count 2 first, had little difficulty in being satisfied beyond reasonable doubt that the complainant used a knife while committing the robbery.

[40] By contrast, in the course of a detailed cross-examination about the penile-vaginal penetration,[62] it was twice put to the complainant that no such penetration had occurred.[63] This had been preceded by cross-examination which established inconsistencies in the complainant's account with respect to the timing of the alleged sexual acts. The complainant accepted that she had given a statement to police in which she had said that the oral sex took place once the appellant had pulled his pants down to his knees.[64] That sequence was at odds with her account in evidence-in-chief that the oral sex followed the penile-vaginal penetration[65] and her rejection of the defence case as put to her that the oral sex took place before her hands were tied.[66]

[41] The complainant accepted that she had told police that she had managed to free her left hand and that she had given the appellant a "hand job" with it while he was having sex with her.[67] However, the complainant had not mentioned this in her evidence-in-chief. That was because, she said, she "forgot".[68] Further, the complainant answered that she "just can't remember now because it happened a year ago" when it was put to her that she was very confused about the sexual acts and the order in which they had taken place.[69]

[42] As to matters of preliminary complaint, in evidence-in-chief, the complainant said that in a telephone call she made to a female friend shortly after the incident, she told the friend only that she had been robbed.[70] The complainant was cross-examined in detail as to the sequence of the events involving the zip ties, her being placed on the bed and her then being tied to the table leg. She was also questioned as to how vaginal-penile penetration had occurred when her bottom was on the floor and her hands were tied behind her back to the leg or the table, and as to whether a chair depicted in photographic exhibits as near the table had been in the way.[71]

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60 AB89 Tr2-19 l31 – AB90 Tr2-20 l8.
61 AB134 Tr2-64 ll36-39.
62 AB99 Tr2-29 l16 – AB117 Tr2-47 l8.
63 AB115 Tr2-45 ll10-11 and AB116 Tr2-46 ll1-12. A suggestion to that effect was also made at the conclusion of the cross-examination: AB134 Tr2-64 ll45-46.
64 AB113 Tr2-43 ll5-14.
65 AB52 Tr1-46 ll13-17.
66 AB116 Tr2-46 ll18-25.
67 AB113 Tr2-43 l40 – AB114 Tr2-44 l17.
68 AB114 Tr2-44 l21.
69 AB115 Tr2-45 ll3-8.
70 AB57 Tr1-51 ll10-16.
71 AB99 Tr2-29 l16 – AB109 Tr2-39 l28.

[43] There was, then, inconsistency between the complainant's account as to the nature and sequence of sexual acts as given to police and as described in her oral testimony, and an admitted impairment of memory about sexual acts on her part at the time of the trial. These factors might well have caused the jury to be unsure of the reliability of her evidence about such acts.

[44] An indication that reliability was a concern for them is that, once they had retired to consider their verdicts, the jury asked for the statement that the complainant had made to police to be read to them.[72] The learned trial judge explained to the jury that as the statement was not in evidence, only those paragraphs in it as had been read into the record in cross-examination and the complainant's answers to questions about them, were evidence in the trial and could be read to them.[73] Her Honour proceeded to redirect the jury on that basis.[74]

[45] As well, the jury may have been puzzled as to why it was that penile-vaginal penetration would have taken place in so awkward a position as the complainant described, particularly when a bed was available and the complainant had first been placed on it.

[46] Having regard to all those factors, I am unable to accept that, overall, the complainant's evidence of penile-vaginal penetration was of comparable quality to her evidence about the knife. It was of inferior quality, particularly because of the inconsistencies. This and the other factors to which I have referred are capable, in my view, of explaining why the jury were not satisfied beyond reasonable doubt that penetration of that kind occurred. They provide a sound basis for logically reconciling the conviction on Count 2 with the acquittal on Count 3.

[47] For these reasons, this ground of appeal cannot succeed.

Ground Two

[48] After the conclusion of the evidence and before addresses, defence counsel told the learned trial judge that he was not seeking a *Robinson* direction but would be seeking a *Markuleski* direction. The reason for it, as then put, was that if the jury had doubts about the knife, that should be taken into account by them in determining Count 3.[75] On this aspect, her Honour directed the jury in the following terms:[76]

> "The defence argues that you would have a doubt about her claim of a knife. If you do have a doubt about there being a knife, then you must take that into account in weighing up [the complainant's] overall credibility. Does it raise a reasonable doubt about the claim of rape?"

No redirection was sought.

[49] On appeal, the appellant contends that the direction given was not sufficient as a *Markuleski* direction. The appellant accepts that as a redirection was not sought at trial, in order to succeed, it is necessary for him to establish that the absence of

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72 AB212 ll25-26.
73 AB213 ll38-47.
74 AB214 l1 – AB216 l45.
75 AB189 ll9-17.
76 AB205 ll4-7.

a direction that the appellant now says ought to have been given, has occasioned a miscarriage of justice.

[50] **Appellant's submissions**: The appellant submitted that the direction given was inadequate because it did not state the converse to the direction that was given, namely, that if the jury had a doubt that penile-vaginal penetration took place, then they must take that into account in weighing up the complainant's overall credibility and ask themselves whether it raised a reasonable doubt about the presence of the knife. This direction was required, it was argued, because of "the closely related set of facts".[77]

[51] **Respondent's submissions**: The respondent submitted that the risk of unfairness which creates the occasion for a *Markuleski* direction, as explained by Keane JA in *R v Ford*,[78] is that the accused will be denied the chance of acquittal on all counts if, given the state of the evidence, such a result ought reasonably to follow if the jury were to reject as unreliable any part of the complainant's account of what occurred. Here, the respondent argued, such are the differences in quality between the evidence with respect to the knife and the penile-vaginal penetration, that it ought not reasonably follow that, because the jury were not satisfied to the requisite standard that the latter took place, then they should have acquitted on Count 2.

[52] **Discussion**: I am unpersuaded that this was a case in which a *Markuleski* direction was required. There were differences in quality of evidence concerning the knife and the sexual acts which have been identified. The complainant's memory of the latter was impaired. Allowing for these factors, the risk of unfairness at which a *Markuleski* direction is aimed, did not squarely arise in this case.

[53] A no less formidable obstacle to success for the appellant on this ground is that a decision by defence counsel not to ask for a direction that included the converse is forensically explicable. A conviction for a rape would have had more serious consequences for the appellant on sentence than a conviction on Count 2, given his preparedness to plead to robbery with personal violence.

[54] As the cross-examination illustrates, the focus in the defence case was to defeat Count 3. To have put the converse would have risked the jury giving attention to the penetration issue merely as a step on the way to deciding whether the appellant was armed with a knife or not. It was in the appellant's interests that their focus be on whether penile-vaginal penetration was proved beyond reasonable doubt and that they have drawn to their attention all considerations arguably relevant to that.

[55] This ground of appeal, too, cannot succeed.

Disposition

[56] As neither ground of appeal has succeeded, the appeal against conviction must be dismissed.

Order

[57] I would propose the following order:

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77 Appeal Transcript 1-11 ll29-37.

78 [2006] QCA 142 at [124] (Jerrard JA and Douglas J agreeing).

1. Appeal dismissed.

[58] **BODDICE J:** I have read the reasons of Gotterson JA. I agree with those reasons and the proposed order.

[59] **DALTON J:** I agree with the reasons of Gotterson JA and with his proposed order.