SUPREME COURT OF QUEENSLAND

CITATION:	*R v SCS* [2017] QCA 78
PARTIES:	**R** **v** **SCS** (appellant)
FILE NO/S:	CA No 282 of 2016 DC No 10 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Roma – Date of Conviction: 14 September 2016
DELIVERED ON:	2 May 2017
DELIVERED AT:	Brisbane
HEARING DATE:	31 January 2017
JUDGES:	Morrison and McMurdo JJA and Bond J 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 THE EVIDENCE – where the appellant was tried for three counts of indecent treatment of a child with the circumstances of aggravation that the complainant was her son, was aged under 12 years and was under her care – where the appellant was only convicted of the second of the three counts on the indictment – where the complainant was six years old at the time of the offending and his evidence was uncorroborated – where the complainant's father was involved in litigation against the appellant concerning their children in the Family Court – where the complainant gave evidence that his father and his step-mother had asked him, for a number of nights prior to his pre-recorded evidence, whether he remembered what he had to say – where the complainant mentioned only one incident at the time of his first police interview yet by the time of the trial the complainant's version was that similar conduct occurred each time he stayed at the appellant's residence – where the evidence in his initial police interview was clear and largely internally consistent – where the lack of disclosure of the other offending could have been consistent with a shyness or wish to disclose only a single instance of offending which

had already been disclosed to the complainant's father and step-mother – whether the verdict of guilty on the second count was unreasonable

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where the appellant was tried for three counts of indecent treatment of a child with the circumstances of aggravation that the complainant was her son, was aged under 12 years and was under her care – where the appellant was only convicted of the second of three counts on the indictment – where the complainant made a prompt preliminary complaint about the conduct the subject of the second count and maintained a largely consistent account of that offending throughout the trial – where the first count was affected by differences between the complainant and the father as to bruising which was alleged to have been present upon the complainant's penis – where the prosecution case upon the third count was weaker than upon the second count because the conduct was alleged to have occurred on the same occasion as the second count but was not mentioned during the first police interview – where the prosecution case depended upon the jury's acceptance of the complainant as a credible and reliable witness but that did not mean that the jury had to be persuaded of the accuracy of everything which he said – where the two verdicts of innocent could be explained by the jury taking a cautious approach to a less persuasive case, without the jury disbelieving or lacking confidence in the complainant – whether the verdicts were inconsistent such that the conviction was not open to the jury

CRIMINAL LAW – EVIDENCE – CORROBORATION – DIRECTIONS TO JURY – ADEQUACY OF WARNING – EVIDENCE OF CHILD – where the appellant argued that a *Robinson* direction should have been given – where the factors identified by the appellant as requiring a *Robinson* direction were all likely to have been apparent to the jury – whether there was a perceptible risk of miscarriage of justice which required a *Robinson* direction – where the appellant argued that a *Markuleski* direction was required – where the finding of a reasonable doubt about the complainant's testimony in relation to one count did not require the rejection of all of it – whether a *Markuleski* direction was required or appropriate

MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
R v Ford [2006] QCA 142, applied
R v Markuleski (2001) 52 NSWLR 82; [2001] NSWCCA 290, considered
R v SBL [2009] QCA 130, considered
R v Tichowitsch [2007] 2 Qd R 462; [2006] QCA 569, considered
Robinson v The Queen (1999) 197 CLR 162; [1999] HCA 42,

cited

COUNSEL: J J Allen QC for the appellant
G P Cash QC for the respondent

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

[1] **MORRISON JA:** I have had the considerable advantage of reading the reasons of McMurdo JA, in draft. I agree with those reasons reflecting, as they do, my own review of the evidence at the trial. I also agree with the order proposed. I wish to add a few comments of my own.

[2] In paragraph [14], footnote 14, McMurdo JA notes a difference in the transcript from that which can be heard on the recording. I agree that it is the word "smack" which can be heard.

[3] In my view, there is an additional way in which the jury might have reasoned logically to conclude that count 1 was not established, whilst count 2 was. As will be recalled, count 2 arose out of the first interview and did not mention any bruising caused by the conduct of the complainant's mother. Count 1 arose out of what was said at the second interview. However, viewed in context, there were remarkable similarities about the description of the events on each occasion, the real differences being the complainant's ascribing a time when each occurred, and that bruising was caused.[1] I have set out below, in short form, what was said as to each occasion, which suffices to show the significant similarity:

1st interview – count 2	**2nd interview - time with bruise – count 1**
At Roma	At Roma
In mother's room after lunch	In mother's room
There to play on tablet	There to play on tablet
He was on the bed	He was on the bed
Dragon doona cover (grey), dragon pillows	Dragon on the bed
He was at the top of bed, lying down	(not asked)
He was wearing a shirt, and grey shorts, and underwear like pants but shorter	He was wearing green shirt with a dinosaur, red pants with dragons
(not asked what mother was wearing)	Mother wearing short sleeve dragon shirt, grey button-up pants
She rolled his pants and underwear down a bit	She rolled his pants and underwear down a bit
Squeezed his privates hard, poked them	Squeezed his privates hard
Penis went up and red, then down	Penis went up and red
He said "stop", a number of times	He said "stop", a number of times
She said: If you tell anyone I'll smack you	She said: If you tell anyone I'll smack you
She said: It's you and my little secret	She said: It's you and my little secret

[1] With the fact of bruising, goes the consequences of it, such as complaint about it and the evidence of having been seen by doctors.

She opened the door to let him out	(not asked)
He went outside to play with sisters in sprinkler; no-one else outside but Grandma looking after the sisters	He went outside to play with sisters in sprinkler; Grandma looking after the sisters
Uncle A at work	Uncle A at work
When it happened: on weekend - Saturday	When it happened: last year, 2014

[4] During the second interview, the complainant was describing when the bruise had been noticed. He said that he did not notice it until he got home and was in the shower.[2] He went on to say that his father and C had not noticed it until one day which he identified as being when his sister, P, was at school and he (the complainant) was home sick.[3]

[5] Shortly after that the interviewer asked the first question about the timing of this incident as opposed to the one described in the first interview. The relevant passage is as follows:[4]

> "[Interviewer]: … Okay and when you got that bruise on your penis do you remember how long ago that was?
>
> [Complainant]: Um when we were back with mum, we were um, [at an address] and that was in 2014.
>
> [Interviewer]: Mmhmm.
>
> [Complainant]: Last year.
>
> [Interviewer]: Last year, okay alright. And now you said before that um, that there was day that [P] was sick and she wasn't, um and you were at home, sorry that you were sick and [P] was at school, and you talked to um, to your Daddy and [C].
>
> [Complainant]: Yep.
>
> [Interviewer]: Tell me was that the same time as when you had the bruise on your penis or a different time?
>
> [Complainant]: No it was a different time."

[6] The jury may have taken the view that the complainant's answer was really directed to saying that it was not the same day as the day he noticed the bruise. Whilst the alternative, that he was identifying a different occasion, was open given what he had just said about when the bruise was revealed to his father and C, it was not necessarily compelling. For example, he did seem to say (in the first part of the passage above) that the bruise was acquired when they were living with the mother in 2014, yet his account had it at the grandmother's house in Roma: see paragraph [3] above.

[7] However that may be, the interviewer then asked the complainant twice whether this occasion was different from "what you've told me about before".[5] On each

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2 AB 205 line 12.
3 AB 205 line 17.
4 AB 207 lines 24-45.
5 AB 208 line 43 and AB 215 line 58 – AB 216, line 2.

occasion, the response of the complainant, when viewed on the video recording, was hesitant compared to other evidence he gave. The jury may have concluded that there was still the same confusion from the question and answer referred to in paragraph [5] above. Against that is the fact that the complainant did give a different time period for count 1. Even accepting that, one possibility is that the jury were not satisfied, given his reaction, and given the possible confusion from his answers at paragraph [5] above, that there was, in fact, a separate occasion of the conduct as opposed to the complainant becoming confused as to when it had happened. Given his age at the time of the interviews, the jury may have reasoned, as McMurdo JA has pointed out, that the first interview was the more reliable.

[8] During the hearing of the appeal, Senior Counsel for the appellant placed reliance upon parts of the second interview, where the complainant indicated that his mother had used both hands when squeezing his penis. The point made was that it was inherently incredible considering the complainant was six at the time, and his mother's two adult sized hands would have extended beyond the complainant's penis. However, because the complainant's responses in that regard, and indeed on a number of other occasions during the second interview, were ones where the transcript did not reveal what the complainant was indicating by way of answer, Senior Counsel for the appellant invited the Court to view the video recording. Having done so, it is evident that when the complainant was asked about his mother using her hands, the complainant indicated with his left hand, with the fingers curled up. He then also indicated with his right hand in the same fashion, but not in such a way that necessarily compels the view that he was intending that both hands were used at the same time.[6] It is sufficient in this respect to observe that the jury may have taken the view that the complainant's description, as articulated physically, was simply that both hands were used, though not at the same time.

[9] In my view, it was open the jury to convict on count 2 whilst acquitting on the other counts. On count 2, I am unpersuaded that there is a significant possibility that an innocent person has been convicted.

[10] **McMURDO JA:** The appellant was tried before a jury in the District Court on three charges of the indecent treatment of a child with the circumstances of aggravation that the complainant was her son, was aged less than 12 years and under her care. She was convicted of one count and acquitted of the other counts. She was sentenced to nine months' imprisonment to be suspended after serving one half of that term with an operational period of three years.

[11] She appeals against her conviction upon three grounds. The first is that the verdict was unreasonable in that on the state of the evidence, it was not open to the jury to be satisfied of her guilt. The second is that the verdict was unreasonable because there is a factual inconsistency between the guilty verdict and the verdicts of not guilty. The third is that the trial judge did not adequately direct the jury, an argument that makes two complaints, namely that both a Robinson direction[7] and a Markuleski direction[8] should have been given.

The evidence at the trial

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6 AB 213-214.
7 *Robinson v The Queen* (1999) 197 CLR 162.
8 *R v Markuleski* (2001) 52 NSWLR 82.

[12] The complainant boy was born on 6 March 2009. He had an older sister, whom I will call P, and a younger sister. His parents had divorced and he and P lived with his father and his father's wife, whom I will call C. The complainant and P stayed with their mother every other weekend.

[13] Just after his sixth birthday, the complainant stayed with the appellant on the weekend of 14 and 15 March 2015. At the end of that weekend, as the complainant and P were driven home by their father and C, the father said that the complainant seemed "real distant and real scared".[9] He asked the complainant how he was feeling and what had happened on the weekend. The complainant responded that "mum touched him" on his "privates".[10] The father said: "he just told me that mum touched him on the penis – touched him on the private parts, pulled it and prodded it, squeezed. Also he told me if – he told me Mum would smack him." The father said that the complainant had said that this conduct had occurred in his mother's bedroom and continued for 30 minutes, which the complainant was able to quantify because there was a timer on an electronic tablet computer which "went for 30 minutes."[11] C gave evidence that on that trip home the complainant seemed "just a little bit distant, like sad or something …".[12] She confirmed the evidence of her husband of this preliminary complaint.

[14] Consequently the complainant was interviewed by police. The first of his interviews, tendered at the trial under s 93A of the *Evidence Act* 1977 (Qld), occurred on 27 March 2015. During that interview, the complainant spoke of only the one incident which he said had occurred "last Saturday".[13] It happened when he was alone with his mother in her bedroom where he had gone to play games on a tablet. As he did so she "started touching my privates … she … pulled them out … squeezed them … poked them and pulled them very hard". This caused his privates to "go up and go red" and to go "hard and red and … up and down …". The complainant asked her to stop and said that he felt sad. No one else was in the room. His mother told him not to tell anybody of what had happened and that if he did so she would "spank" him.[14] His mother eventually let him out of the room by unlocking the door. He went outside to play with his sisters. He said that he had told his father and C about the incident. Importantly there was then this exchange between the complainant and the police officer:[15]

> "Police Officer: … Has there been any other times where this has happened before?
>
> Complainant: Mmm.
>
> Police Officer: No?
>
> Complainant: No."

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9 AR 64.
10 AR 64.
11 AR 64-65.
12 AR 80.
13 AR 199.
14 At AR 187 the transcript of this interview attributes the words "I'll kill you" to the appellant but as I heard the recording, the complainant used the word "spank" or perhaps "smack".
15 AR 199-200.

[15] C described a subsequent conversation with the complainant in their house when, "just randomly", the complainant said:

> "[D]o you know that mum made me put my hand down her pants and told me I had to wiggle my fingers…?"[16]

C did not report that to the police straight away because "we thought it was … too late to add anything else". But she raised it with the prosecutor when a charge based upon the March interview was before the Magistrates Court in December 2015.

[16] Two months earlier, C had had another conversation with the complainant in which the complainant had said:[17]

> "[D]o you remember when I had the bruise on my penis? … Do you know how I got that bruise? … I got that when [Mum] was squeezing my penis too hard."

She said for the same reason she did not report this conversation to the police until after speaking to the prosecutor.

[17] In consequence of these disclosures, the complainant was again interviewed by police and the recording of this second interview, conducted on 13 December 2015, was tendered under s 93A. In this interview, the complainant said that there was an event in which he had a bruise from the appellant "squeezing my private".[18] He said that he had told his father and C of the bruising but that he had not said what caused it.[19] He said that on this occasion his penis had been squeezed "really, really hard" and that he had kept saying that the appellant should stop but she would not do so.[20] After his father had seen the bruise, the complainant was taken to a doctor but was not asked any questions about its cause.[21] He believed that this bruising had occurred "in 2014 … last year".[22] He said that the event which had caused the bruise had taken place in his mother's bedroom when he was playing on her tablet but on a different occasion from that which he had previously related to police.[23] When asked whether he had told his father and C about this incident, at one stage he said "they just keep on asking me so I can remember the stuff."[24] On this occasion also, he said, the appellant had told him not to tell anybody, "otherwise I'll smack you and it's you and my little secret, that's all".[25]

[18] There was this exchange with the police officer:[26]

> "Police Officer: … And you said before that she was squeezing your privates, tell me what was she using to squeeze your privates?
>
> Complainant: Her hand.

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16 AR 83.
17 AR 84-85.
18 AR 205.
19 AR 206.
20 AR 205.
21 AR 206.
22 AR 207.
23 AR 208.
24 AR 208.
25 AR 213.
26 AR 213-214.

> Police Officer: Her hands? … And did you … think back to when she was using her hands, can you describe to me how she was using her hands?
>
> Complainant: Like that … that and that.
>
> Police Officer: Okay, alright and she was using both of her hands or one hand?
>
> Complainant: Both."

When the complainant was saying this, he was using his hands to give some demonstration. But having seen this recording, I think that it is unlikely the jury were assisted by it.

[19] He was asked whether he had told anyone else about what happened with the bruise on his penis and answered that he had told "Grandma … after it happened" and that she had told him to wait until he was at his father's place.[27]

[20] He was asked whether there had been any other times in which such conduct had occurred, other than the one which he had just described and the one "you've already told me about before" and said that it had happened just "two times".[28]

[21] In this same interview, the police officer said that she had heard that the complainant had told "someone about something else that had happened with your mum" and asked: "did your Mum get you to do something else?" [29] He answered: "she told me to put my hands down her pants and move my fingers."[30] He said "I didn't like it … And then I stopped and I got my hands out … And then I got out of the door."[31] He was asked about when this occurred and there was this exchange:[32]

> "Police Officer: … On this day that you had to put your hands down her pants, is that a different day to the days you've told me about today … when you got the bruise? Or is it a different day?
>
> Complainant: Um, it's the same.
>
> Police Officer: The same okay, so is it the same day … as when you got the bruise or is it the same day as the day you've told me about before?
>
> Complainant: The same day as what I've told you before. … I just [indistinct] that out by accident."

He said that he had told his father and his father's wife about this third incident when he got home and was in his home ready to go to bed.[33]

[22] In his oral evidence at the trial, recorded on 1 April 2016, the complainant said that the appellant grabbed or touched his penis "almost every time I went out there".[34]

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27 AR 221.
28 AR 215.
29 AR 216.
30 AR 216.
31 AR 216.
32 AR 217.
33 AR 219.
34 AR 162.

He said she squeezed it hard every time but left a bruise only once.[35] In cross-examination he was asked whether the appellant would use "one or two hands" to which he answered "one".[36] There was then this exchange:[37]

> "One hand. Definitely not two hands. Is that right?---No. She actually used two. I just got confused.
>
> You got confused. Okay. And when she – are you able to show with your hands just out in front of you as to how she did this – how she grabbed you? I see. So you've got – what you're demonstrating there is one fist closed on the table and the other fist closed on top of that. Is that right?---Yes.
>
> Okay. And was the end of your penis at the top of your fists or where was it?---Yeah.
>
> Could you see it?---At the top.
>
> So you could see it, could you?---Yes."

He was asked why, when he had originally spoken to police, he had told them of only one occasion and answered "because I got confused".[38] There was then this exchange in cross-examination:[39]

> "You got confused. And – all right. You also told them about mum putting your hand down her pants, didn't you?---Yes.
>
> Right. When did that happen?---That happened just – the same day.
>
> Right. It's all on the same day, is it?---Yes.
>
> And that was when – so just so I'm sure that she grabbed you on the penis twice on one day - - -?---Yeah.
>
> - - - and also put your hand down her pants on that same day?---Yeah."

[23] He was cross-examined about whether he had discussed his evidence with his father and C. At first he denied that he had done so, but was then reminded of what he had said in his second s 93A interview and he said that he had had several conversations with them on the subject of what he could remember.[40]

[24] The complainant's sister was also interviewed by police on 27 March 2015. She was then aged eight years. She said that on the previous weekend when she and the complainant were at their mother's house and he was in the mother's room, the mother told her to go away and shut the door on her. She said that when the complainant came out of the room he looked sad.[41] She gave pre-recorded evidence to the same effect in April 2016.

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35 AR 163.
36 AR 164.
37 AR 164.
38 AR 168.
39 AR 168.
40 AR 171.
41 AR 238.

[25] The complainant's father gave evidence that when he was living at a certain address where he lived from July to September 2013, the complainant called him to the shower and showed him a purple bruise around the base of his penis. There was no conversation about the cause of the bruising.[42] He was cross-examined about litigation with the appellant in the Family Court about their children. He denied asking the complainant whether the complainant remembered what he had to say in court.[43] The complainant's evidence, in re-examination, was that for a number of nights shortly prior to his pre-recorded evidence, his father and C had asked him whether he remembered what he had to say.[44]

[26] C gave evidence of the preliminary complaints about the offences to which I have already referred.

[27] The appellant's mother, with whom the appellant lived, gave evidence that the complainant was always very quiet and sometimes upset when he left at the end of a weekend with the appellant.

[28] The appellant did not give or call evidence.

[29] The alleged incident which had occasioned the bruising was the subject of count 1 on the indictment, an offence said to have been committed between 30 June and 21 September 2013. The incident which was related in the first s 93A interview was the second count on the indictment, an offence alleged to have been committed on 14 March 2015. The alleged incident involving the complainant's hand being forced down the appellant's pants was the third count, an offence alleged to have been committed also on 14 March 2015.

The first ground of appeal

[30] The appellant argues that upon the whole of the evidence, it was not open to the jury to be satisfied beyond reasonable doubt of her guilt.[45] Setting aside the jury's verdict on the grounds that it is unreasonable[46] is "a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial."[47] This Court has the advantage which the jury had in being able to see the complainant's evidence. Nevertheless the consideration of the reasonableness of a jury's verdict "involves a function to be performed within a legal system that accords special respect and legitimacy to jury verdicts deciding contested factual questions concerning the guilt of the accused in serious criminal trials."[48]

[31] The appellant's argument list the following facts and circumstances which, in combination, are said to have made the verdict unreasonable. The complainant was aged only six years at the time of the alleged offence and his complaints and statements to police. The complainant's evidence was "essentially" uncorroborated. The complaints were made in the context of litigation in the Family Court between the appellant and

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42 AR 66.
43 AR 77.
44 AR 178.
45 *M v The Queen* (1994) 181 CLR 487 at 493.
46 Within the meaning of s 668E(1) of the *Criminal Code*.
47 *R v Baden-Clay* [2016] HCA 35 at [65].
48 *MFA v The Queen* (2002) 213 CLR 606 at 624 [59] per McHugh, Gummow and Kirby JJ.

the complainant's father regarding their children, giving rise to concerns as to whether the complainant had been coached as a witness. There was an unexplained failure to mention any incident other than count 2 in the first interview. Yet by the time of the pre-recorded evidence, the complainant's version was that effectively the same conduct occurred every time he stayed at his mother's residence. The complainant's evidence contained internal inconsistencies. His description of the acts of indecent dealing in some respects offended common sense: for example there was his description in the pre-recorded evidence of her using both of her hands at the same time.[49] And there was no evidence from P to confirm the alleged preliminary complaint regarding count 2.

[32] It is necessary to discuss some of those matters. I accept that the complainant's evidence was uncorroborated. The evidence of P as to the second count confirmed that there was an opportunity for that offence to have been committed. But P's evidence, her recollection of his demeanour in particular, was too general to corroborate the complainant's evidence.

[33] The lack of any evidence from P as to the preliminary complaint in the car was inconsequential. She was never asked about this conversation and may not have been a participant because, for example, she was asleep.

[34] As to the proceedings in the Family Court, the complainant's father agreed that a case was before that court in April 2015. As already noted, there was some discrepancy between the father's evidence and the complainant's evidence as to whether the complainant had been told that he had to remember what to say. But it was not suggested to the father that he was trying to stop the appellant from seeing the complainant. And there was evidence that on the weekend of the complainant's birthday (the week prior to count 2) a group went to the Bunya Mountains which included not only the father and C, the complainant and P, C's parents and C's sister but also the appellant.

[35] The complainant's evidence about the bruising to his penis was not consistent with that of the father in all respects. On the father's evidence, the complainant was not taken to a doctor. The complainant said otherwise but that he had not been asked by the doctor how the bruising had been caused. It is unlikely that the complainant's evidence in that respect was accurate.

[36] The evolution of the complaints, from a single occasion to persistent offending on a fortnightly basis, was certainly relevant. But having viewed the first s 93A interview, I have the impression that the complainant was hesitant when answering that the occasion which he was then describing had been the only incident of that kind. His response could be attributed to shyness and a wish to talk only about what he had just disclosed to his father and C. Again, the change from his version in the second s 93A statement to that in his pre-recorded evidence could be similarly explained. As he got older and more familiar with the investigation process, he may have become more confident.

[37] Against these considerations raised in the appellant's argument it can be said that his evidence given in the first s 93A statement was clear and not burdened by any serious internal inconsistency. And it was consistent with the preliminary complaint to his father and C, which was made very soon after the incident. Nothing said by the

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[49] See above at [22].

complainant after that first interview contradicted his account of the occurrence of the act which constituted this offence. His later evidence as to the number of times offending conduct occurred provided a basis for questioning his credibility or reliability. But as I have discussed, that change in his recollection could be explained. In my conclusion upon the evidence it was open to the jury to convict upon the subject count.

The second ground of appeal

[38] It is argued for the appellant that there was a factual inconsistency between the verdicts, because the outcome on each count ought to have depended upon the jury's assessment of the credibility or reliability of the complainant and that there was no basis for the jury to be satisfied of his credibility and reliability for count 2 but not otherwise.

[39] The argument cites *R v SBL*,[50] in which Applegarth J (Chesterman JA and Wilson J agreeing) said:

> "The circumstances of a particular case may lead to the conclusion that a jury which has found it had a reasonable doubt with respect to a complainant's evidence on one count, ought to have such a doubt with respect to other counts. However, it does not follow that that must necessarily be the case. As *Jones*, *Markuleski* and later cases establish, whether or not a not guilty verdict involves a diminution in a complainant's credibility or reliability so that the jury ought to have had a reasonable doubt with respect to other counts depends on the complainant's evidence and the surrounding circumstances. The issue remains one of fact and degree in the circumstances of the particular case as to whether the difference in verdicts is such that, as a matter of logic and reasonableness, the verdicts should be regarded as inconsistent. There may be an acceptable explanation for divergent verdicts in a case in which there is not 'an integral connection between the counts' or where there are circumstances present which do not compel the conclusion that the complainant's overall credibility was so diminished that the jury should have acquitted on the other counts. The essential issue is whether the acquittal so affects the credibility or reliability of the complainant that, in combination with other factors, a conviction was not open to the jury on other counts."

[40] For the respondent it is argued that the evidence presented a stronger case for a conviction on count 2 than on the other counts. Most importantly, the conduct the subject of count 2 was complained of almost immediately and was related to police within a week. The case on count 1 was affected by the differences between the complainant and his father as to the bruising and, more generally, by the fact that this was an event which was said to have occurred when he was only four years old. Count 3 was a weaker case because it was said to have occurred on the same occasion as count 2, yet it was not mentioned during the first police interview. In these ways, the respondent argues, the verdicts can be reconciled.

[41] Upon each count the prosecution case depended upon the jury's acceptance of the complainant as a credible and reliable witness for the facts which constituted the

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50 [2009] QCA 130 at [34].

elements of that offence. But this did not mean that the jury had to be persuaded of the accuracy of everything which he said. A guilty verdict is not necessarily unreasonable for the fact that there are some imperfections in the evidence.[51] That is why juries are usually instructed, as they were in this case, that the evidence of a witness may be accepted in whole or in part.[52]

[42] It is important to keep in mind what a verdict of not guilty might or might not imply in a case such as the present one. It might not imply that the complainant was thought to be dishonest or unreliable. Because of the onus and standard of proof in a criminal trial, it might imply no more than the existence of a doubt about the defendant's guilt on that charge. In *MFA v The Queen*,[53] Gleeson CJ, Hayne and Callinan JJ said:

> "In the case of sexual offences, of which there may be no objective evidence … [a] juror might consider it more probable than not that a complainant is telling the truth but require something additional before reaching a conclusion beyond reasonable doubt. The criminal trial procedure is designed to reinforce, in jurors, a sense of the seriousness of their task, and of the heavy burden of proof undertaken by the prosecution. A verdict of not guilty does not necessarily imply that a complainant has been disbelieved, or a want of confidence in the complainant. It may simply reflect a cautious approach to the discharge of a heavy responsibility. In addition to want of supporting evidence, other factors that might cause a jury to draw back from reaching a conclusion beyond reasonable doubt in relation to some aspects of a complainant's evidence might be that the complainant has shown some uncertainty as to matters of detail, or has been shown to have a faulty recollection of some matters, or has been shown otherwise to be more reliable about some parts of his or her evidence than about others."

Their Honours continued:[54]

> "It appears from the review of decisions of trial judges and intermediate appellate courts undertaken in *Markuleski* that some judges have taken *Jones* as authority for the proposition that where multiple offences are alleged involving the one complainant, then verdicts of not guilty on some counts necessarily reflect a view that the complainant was untruthful or unreliable, and that an appellate court should consider the reasonableness of guilty verdicts on the basis that the complainant is a person of damaged credibility. That view is erroneous."

[43] In the present case there were reasons for the jury to consider the complainant's evidence of count 2 as more reliable than his evidence on the other counts. The other verdicts could be explained by a cautious approach to a less persuasive case, without the jury disbelieving or lacking confidence in the complainant.

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51 *MFA v The Queen* (2002) 213 CLR 606 at 634 [96] per McHugh, Gummow and Kirby JJ.
52 *MFA v The Queen* (2002) 213 CLR 606 at 617 [34] per Gleeson CJ, Hayne and Callinan JJ.
53 *MFA v The Queen* (2002) 213 CLR 606 at 617 [34] per Gleeson CJ, Hayne and Callinan JJ.
54 *MFA v The Queen* (2002) 213 CLR 606 at 617-618 [35] per Gleeson CJ, Hayne and Callinan JJ.

[44] Further, the verdict on count 3 could also be explained by the jury being unpersuaded to the requisite standard that this event occurred *on the same occasion as count 2*. After the summing up, the jury asked for a further direction about count 3, enquiring whether it was necessary for the prosecution to prove that this conduct had occurred on the day of 15 March 2015. With the concurrence of counsel, the trial judge answered that question in the affirmative.

[45] And in *MFA v The Queen*, Gleeson CJ, Hayne and Callinan JJ referred to the further consideration, stated by King CJ in *R v Kirkman*,[55] that:[56]

> "[I]t may appear to a jury, that, although a number of offences have been alleged, justice is met by convicting an accused of some only."

[46] For these reasons it was open to the jury to convict on count 2 whilst acquitting on the other counts. The second ground of appeal is not established.

The third ground of appeal: inadequate directions

[47] For the appellant it is argued that the facts and circumstances relied upon to support the first ground of appeal, as I have summarised above at [12]-[29], were matters which required identification by the trial judge in a warning that those matters required the complainant's evidence to be scrutinised with great care before the jury arrived at a conclusion of guilt. The submission is that a direction should have been given according to that which was found to be necessary in *Robinson v The Queen*.[57]

[48] In *Tichowitsch*[58] Keane JA (as he then was) said:

> "But if one thing is clear about the decision in *Robinson v The Queen*, it is that it does not stand for the proposition that a warning must be given in every case where a Crown case of sexual assault depends on the uncorroborated evidence of a child complainant. So much is clear, not only from the very reasons of the High Court in *Robinson v The Queen*, but also from the reasons of the majority in *Tully v The Queen* and, indeed, from the reasons of Hayne J, the other member of the dissenting minority in *Tully v The Queen*..."

[49] The question here is whether there were in this case particular features which demanded a suitable warning because together they created a perceptible risk of a miscarriage of justice if the need to scrutinise with great care the evidence of the complainant before arriving at a conclusion of guilt was not brought home to the jury.[59] In the present case those features did not include, at least so far as count 2 was concerned, any delay in complaining of the offence or in the recording of the complainant's version which became part of the evidence. And none of those facts and circumstances was something which may not have been apparent to the jury.[60]

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55 (1987) 44 SASR 591 at 593.
56 (2002) 213 CLR 606 at 617 [34].
57 (1999) 197 CLR 162.
58 [2007] 2 Qd R 462 at [68].
59 *Robinson v The Queen* (1999) 197 CLR 162 at 170-171 [25]-[26].
60 *R v Tichowitsch* [2007] 2 Qd R 462 at 491 [72] citing *Tully v The Queen* (2006) 230 CLR 234 at 281-282 [156]-[162].

In my conclusion there was no perceptible risk of miscarriage of justice which required a warning of the kind suggested by this argument.

[50] The remaining argument is that there was a miscarriage of justice by the absence of what is known as a *Markuleski*[61] direction. The complaint is that the jury was not directed to consider how a reasonable doubt about one count should affect the consideration of other counts.

[51] As with the appellant's argument on the second ground of appeal, that submission somewhat misstates the effect of the jury being left in doubt upon the remaining counts. A jury might have been in doubt on one count without disbelieving or lacking confidence in the complainant. Consequently, the jury was not to be told that a doubt on one count should leave the jury in doubt on the others, as Spigelman CJ explained in *Markuleski*.[62]

[52] In *R v Ford*,[63] Keane JA described the circumstances in which such a direction is required:

> "As the reasons of Spigelman CJ in *R v Markuleski* show, the particular risk of unfairness, which needs to be addressed by the giving of a direction (which I shall refer to for convenience as a *Markuleski* direction) that any doubt which a jury 'may form with respect to one aspect of a complainant's evidence, ought be considered by them when assessing the overall credibility of the complainant and, therefore, when deciding whether or not there was a reasonable doubt about the complainant's evidence with respect to other counts', is a risk which arises especially in sexual assault cases (albeit not peculiarly in such cases) with multiple counts involving a single complainant and a single accused where a jury's findings of not guilty on one or more counts is apt logically to damage the credibility of the complainant on other counts because there is '[i]mplicit in the … acquittal … a rejection of the complainant's account of the events which were said to give rise to [the] count' on which the accused is convicted. This risk is apt to arise because, in such cases '[t]here is nothing in the complainant's evidence or the surrounding circumstances which gives any ground for supposing that [the complainant's] evidence was more reliable in relation to [the counts on which the accused was convicted] than it was in relation to [the counts on which the accused was acquitted]'. *In summary, the risk of unfairness which creates the occasion for the giving of the direction is the risk 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.*"
>
> (emphasis added)

[53] In this case, a rejection of part of the complainant's evidence did not require the rejection of all of it. This was a case where there was ground for supposing that the

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61 *R v Markuleski* (2001) 52 NSWLR 82.
62 (2001) 52 NSWLR 82 at 120-121 [180].
63 [2006] QCA 142 at [124].

complainant's evidence was more reliable in relation to count 2 than it was in relation to the other counts.[64] A *Markuleski* direction was not apt, let alone necessary.

[54] For these reasons there was no miscarriage of justice from the failure to give directions which, it should be noted, were not sought at the trial.

Conclusion and order

[55] For these reasons I would order that the appeal be dismissed.

[56] **BOND J:** I agree with McMurdo JA, and for the reasons he gives, that none of the grounds for appeal were established.[65] The appeal should be dismissed.

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64 *R v Markuleski* (2001) 52 NSWLR 82 at 95 cited by Keane JA in *R v Ford* [2006] QCA 142 at [124].

65 I agree that the transcript of the first s 93A interview was erroneous in that the word "smart" was the word used by the complainant. The discrepancy is not relevant to the course of reasoning justifying the rejection of the first ground of appeal.