SUPREME COURT OF QUEENSLAND

CITATION:	*R v Savage* [2017] QCA 139
PARTIES:	**R** **v** **SAVAGE, David Richard Towa** (appellant)
FILE NO/S:	CA No 262 of 2016 SC No 1 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	Supreme Court at Cairns – Date of Conviction: 30 August 2016
DELIVERED ON:	21 June 2017
DELIVERED AT:	Brisbane
HEARING DATE:	3 April 2017
JUDGES:	Gotterson and McMurdo JJA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – CORROBORATION – DIRECTIONS TO JURY – OTHER MATTERS – where the appellant admitted to stabbing the deceased during a violent altercation but the defence case was that the stabbing was not a willed act, was done in self-defence, that the appellant lacked the intention to cause the death or grievous bodily harm or that the stabbing was provoked by the deceased – where Mr Baira, an indigenous witness, gave evidence that there was a period of separation between the two men during the altercation which, it was argued, was consistent with the appellant acting in self-defence – where Mr Baira's evidence was in some respects internally inconsistent – where the trial judge told the jury at the start of the trial that Aboriginal and Torres Strait Islander witnesses may be intimidated by giving evidence and may take longer to respond to questions but that the phenomenon was "not a sign of dishonesty" – where the trial judge, when referring to Mr Baira's evidence, said that the jury might think he gave inconsistent answers and appeared to have difficulty expressing himself in sequential detail, which was "not uncommon with Aboriginal or Torres Strait Islander witnesses" and that it "may not mean he was being dishonest" – where s 632(3) of the *Criminal Code* (Qld) provides that a judge "must not warn or suggest in any

way to the jury that the law regards any class of persons as unreliable witnesses" – whether s 632(3) applies only in a case where the jury is asked to convict on the uncorroborated testimony of one witness – whether s 632(3) prohibits only a warning or suggestion about the content of the law as opposed to a comment upon the reliability of certain witnesses – whether the judge's comments suggested to the jury that the law regards indigenous persons as unreliable witnesses – whether any unfairness could have resulted from the trial judge's comments

Criminal Code (Qld), s 632

Bowles v Western Australia [2011] WASCA 191, cited
Morgan v Western Australia [2011] WASCA 185, cited
R v Condren (1987) 28 A Crim R 261, cited
R v Knight & Ors [2010] QCA 372, considered
Robinson v The Queen (1999) 197 CLR 162; [1999] HCA 42, considered
Stack v Western Australia (2004) 29 WAR 526; [2004] WASCA 300, cited

COUNSEL: P J Davis QC, with B K Buckley, for the appellant
P J McCarthy for the respondent

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

[1] **GOTTERSON JA:** I agree with the order proposed by McMurdo JA and with the reasons given by his Honour.

[2] **McMURDO JA:** After a trial by a jury, the appellant was convicted of the murder of a man in Cairns in 2015. He appeals against that conviction upon one ground only, which is expressed, in his amended notice of appeal, as follows:

> "The learned trial judge erred in directing the jury as to how to assess the evidence of Indigenous witnesses."

The appellant's original grounds of appeal, including an argument that the jury's verdict was unreasonable, have been abandoned.

[3] The applicant's argument is focussed upon, if not limited to, a contention that what was said by the judge about the evidence of indigenous witnesses contravened s 632(3) of the *Criminal Code* (Qld) in that the judge suggested that the law regarded indigenous persons as unreliable witnesses. If that was the effect of what the judge said, the summing up involved a legal error which would require the appeal to be allowed, and a re-trial granted, except if this Court was persuaded to apply the proviso.[1] There is a further argument that the judge's statements about indigenous witnesses, if not in contravention of s 632(3), nevertheless involved an error of law or an irregularity which could have affected the outcome. For the

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1 Under s 668E(1A) of the *Criminal Code.*

reasons that follow, those arguments should be rejected and the appeal should be dismissed.

The evidence at the trial

[4] There was no question that it was the appellant who killed the deceased man, by stabbing him with the appellant's knife. The defence case was that the stabbing was not a willed act,[2] he acted in self-defence,[3] the appellant did not intend to cause the death or grievous bodily harm[4] or the stabbing was provoked.[5]

[5] The man who was killed was a homeless person, at that time sleeping near the home unit where the appellant lived. The appellant gave evidence at the trial in which he said that he had suspected that it was the deceased man who had broken into his unit and left it in a mess. Consequently, he said, he decided to confront the man, so as to scare him and deter him from coming to his unit again, but not to hurt him. The evidence included the appellant's statement to police where this was said:

> "[I] went up home without him seeing me, put that balaclava on, and I grabbed a knife. I didn't want to – I wasn't setting out to kill the guy. Really, truly, I just wanted to scare him and that. Anyway, when he had his back to me, I ran up to him and I grabbed him by the neck and had the knife to his neck, but he struggled out of that. I didn't mean to stab him – truly. It's the truth."

[6] The appellant and the deceased man had known each other for some time. Occasionally the deceased man had been allowed to stay the night at the appellant's unit. They were each recipients of a disability pension and had met when collecting their doses of prescribed medication. In the course of the dealings between the two men, the appellant said in evidence, he had learnt that the deceased man carried a knife for his own protection and as a tool for housebreaking.

[7] The appellant said that on the morning in question, when he decided to confront the man, he took a knife from his unit and went to where the man was standing outside a neighbouring unit. The appellant immediately assaulted the man, grabbing him by the throat and around his neck and pulling him back from a railing. He said that there was a struggle, during which the appellant was telling the deceased man that he was not to come around to the building anymore. He let the deceased go, having held him in a headlock. He said that the deceased then flung his arm at the appellant in an aggressive manner and, in an "instinctive reflex action," the appellant's arm, at the end of which was the appellant's knife, came into contact with the deceased.

[8] A forensic pathologist gave evidence that the deceased man had been stabbed by the entry of a knife to the chest, which either hit the fifth rib or went near to it and went through the left lung into the left ventricle of the heart,[6] and that this was the cause of death.

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2 s 23 of the *Code.*
3 s 272 of the *Code.*
4 s 302 of the *Code.*
5 s 304 of the *Code.*
6 AR 199.

[9] In the prosecution case, several witnesses from nearby units gave evidence of what had happened before, after or during the altercation in which the deceased was stabbed. It is unnecessary to set out their accounts here. It is sufficient to say that some of this evidence, if accepted, negatived each of the defences raised by the appellant's evidence. For example, one neighbour[7] recalled hearing the appellant "raging" about two hours before the incident and recalled seeing the incident itself. She said that the deceased was knocking on the door of unit 20, near the appellant's unit which was number 18, when the appellant "come down and … attacked him". She saw the deceased man fall to the ground and saw the appellant "rip off the balaclava and look at me, and then run down the stairs …"[8].

[10] It is necessary to discuss only the evidence of one of the eye witnesses, Mr Baira, because it is the judge's comments about his evidence, as well as some general comments about indigenous witnesses, which are the basis of this appeal.

[11] Mr Baira lived in another unit in the building. He remembered hearing a "scuffle", as a result of which he turned around and "saw the events happen".[9] The scuffle was between the deceased man, whom he had seen a few times around the building, and a man with a mask on his face.[10] The man in the mask was holding the other man in a "chokehold" position, standing behind the victim with his arm around his throat.[11] The man with the mask had a knife in his other hand.[12] After about 10 to 15 seconds, "the victim went down on the ground, and the masked man ran away."[13] Blood was pouring from the rib cage of the victim, even before he was on the ground.[14]

[12] Still in evidence in chief, Mr Baira then said that he witnessed the stabbing of the victim by the man with the mask, after the victim fell to the ground. He said that he saw the masked man remove the mask and he then recognised him as the appellant.

[13] In cross-examination, Mr Baira gave a different version. He agreed with a suggestion that the period in which he witnessed the chokehold (or headlock) could have been only about five seconds, after which, he said, this happened:[15]

> "Could the headlock have been for five seconds and then there was more scuffling?---Yeah, five seconds and probably more scuffling.
>
> All right. And then was there more scuffling after the two men broke apart?---Yes.
>
> You saw them both pull apart?---Yes.
>
> Okay. And then there was some more scuffling?---Yes.
>
> Okay. And was that more scuffling when the two men were facing each other?---Not that I can remember.

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7 Ms Clarke.
8 AR 135.
9 AR 106.
10 AR 107.
11 AR 108.
12 Ibid.
13 AR 109.
14 Ibid.
15 AR 113.

All right. Well, you saw them pull apart?---Yes."

Mr Baira then said that the two men were standing when they pulled apart from each other, and he could see something in the appellant's hand which "could have been any size knife or whatever kind of weapon".[16] He saw the deceased man "moving his arms"[17] and the appellant then held the victim by one hand and "jabbed him" with the other.[18] At this point in his evidence, Mr Baira said that the victim was not stabbed while he was on the ground.[19]

[14] It is submitted for the appellant that Mr Baira's evidence was important because, at least during his cross-examination, he said that there was a period of separation between the two men before the victim was stabbed, during which the victim was moving his arms. Mr Baira's evidence was the only evidence that there was a period of separation between the initial scuffle between the men and when the deceased was stabbed. The existence of that period, it is argued, was "fundamental to a reasonable argument about self-defence."[20] It is argued that if there had been a period of separation during the struggle, the jury might not have been able to exclude the possibility that by the end of that period, the appellant apprehended a threat of death or grievous bodily harm and that it was necessary for his own preservation to use force in self-defence.[21] In fact the deceased was not armed, but the appellant might have feared that he was armed because he knew that he usually carried a knife.

[15] The appellant's argument also refers to evidence given by another witness, Mr Yasso. In the address by defence counsel to the jury, it was argued that also on Mr Yasso's account, it was possible that the two men had separated at one point, although that had not been put to Mr Yasso in cross-examination.[22] Mr Yasso lived in another unit in the building and was another eye witness. He said a man with a balaclava was fighting the victim, and had one hand on the victim's throat as he was grabbing the victim's arm with the other. The victim was fighting back, trying to grab the other man around the throat or to grab hold of him to get away. As the two struggled, he heard the victim say "he got me", after which the struggle stopped and the victim was "going down."[23] In my view, Mr Yasso's account does not appear to be consistent with there having been a period of separation, after an initial struggle, before the victim was stabbed. It may be accepted then that Mr Baira's evidence was the only evidence of a separation between the men before the stabbing.

The judge's comments about indigenous witnesses

[16] At the commencement of the trial and before there had been any evidence, the judge said this to the jury:

> "A typical example is this, sometimes in the course of the trial a witness might be softly spoken. I don't know yet, but it could be we have some Aboriginal and Torres Strait Islander witnesses who are

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16 AR 114.
17 Ibid.
18 AR 115.
19 AR 122.
20 Appellant's outline of argument, paragraph 19.
21 s 272(1) of the *Code,* this being an assault which the appellant had provoked.
22 As the judge noted at AR 310.
23 AR 62-63.

> called, and it's well enough known that they are probably more intimidated than any other category of society in giving evidence in courthouses. So they can often tend to be softly spoken and sometimes be difficult to understand in response.
>
> By the way, they can also take a while to answer a question in a longer way than is normal for, for example, Caucasian people in society. That's no reflection on their intelligence. It's simply a cultural way in which they deal with how to meet a response to a question when they know that their answer may not be liked, or when they simply want to form as best they can a response that accords more with the way they know that the questioner is talking. So bear those qualities in mind if we do encounter such witnesses. It's not a sign of dishonesty."

[17] At the beginning of the summing up, the judge said this:

> "Consider also in the case, particularly, of Aboriginal and Torres Strait Islander witnesses, the difficulty that I alluded to at the beginning of this trial, that it's a matter of notoriety in the Courts that of all parts of the community, they find the experience most daunting and difficult. Not merely because it's daunting in the sense of this white man's Courtroom, if I can put it bluntly, but also because of cultural and heritage factors which mean that at times, they express themselves in quite different ways than are well accommodated for by our insistent question and answer pattern in a Courtroom. So bear that cultural and sociological feature in mind when you're considering the evidence of Aboriginal and Torres Strait Islander witnesses. It will be plain to you that some such witnesses in this case were more disadvantaged in that sense than others. Some of them, you might have thought, it seemed not to be a consideration at all; there were one or two where you might have thought it was very obviously a consideration."

[18] In the summing up, the judge summarised the evidence of each witness. When he came to Mr Baira's evidence, the judge said, amongst other things, the following:

> "Another witness who seemed to see a reasonably helpful amount was Christin Baira. Members of the jury, this witness was an Aboriginal and Torres Strait Islander witness who you might think did appear, at times, to give inconsistent answers, which you might think were the product of misunderstanding of questions and him otherwise struggling to express himself in sequential detail. That is not uncommon with Aboriginal or Torres Strait Islander witnesses giving evidence. It may not mean he was being dishonest. You should, of course, bear in mind in assessing the reliability of any particular answer he gave that he did exhibit those traits, though. And bear in mind, the same traits may have been in play when he gave his police statement. The traits of which I speak are that people of his heritage and culture do not always express sequential details with the same ease as people from other walks of society.
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> So with that word of caution, which applies in both directions to his evidence …"

Section 632

[19] Section 632 of the *Code* is as follows:

> **Corroboration**
>
> (1) A person may be convicted of an offence on the uncorroborated testimony of 1 witness, unless this Code expressly provides to the contrary.
>
> *Note-*
>
> See section 52 (Sedition), 125 (Evidence on charge of perjury) and 195 (Evidence).
>
> (2) On the trial of a person for an offence, a judge is not required by any rule of law or practice to warn the jury that it is unsafe to convict the accused on the uncorroborated testimony of 1 witness.
>
> (3) Subsection (1) or (2) does not prevent a judge from making a comment on the evidence given in the trial that it is appropriate to make in the interest of justice, but the judge must not warn or suggest in any way to the jury that the law regards any class of persons as unreliable witnesses."

The appellant's principal argument is that what was said in those passages was inconsistent with the proviso in s 632(3), because the judge thereby suggested to the jury that the law regards indigenous persons as unreliable witnesses. The argument requires an analysis of the passages which I have set out, but it is first necessary to discuss the effect of s 632.

[20] Section 632 was analysed by the High Court in *Robinson v The Queen*.[24] The question in that case was whether it had been necessary for the trial judge to give a warning about convicting on the basis of the complainant's evidence, when there were particular features of that evidence which, in the interests of justice, were said to have required it. This involved a question of whether s 632(2), on its proper interpretation, meant that such a warning was unnecessary.

[21] It was held that s 632(2) did not abrogate the general requirement of the law to give a warning whenever it is necessary to do so to avoid a risk of a miscarriage of justice. Instead, s 632(2), and s 632(3), properly understood, were enacted to displace the common law rules which regarded certain classes of persons as unreliable witnesses and which required trial judges to warn juries of the dangers of acting upon their testimony. The Court said:[25]

> "[18] Sub-section (1) of s 632 does not materially alter the common law, putting to one side the exceptional case of perjury. As Lord Diplock explained in *Director of Public Prosecutions v Hester*[26], in common law systems, unlike some other systems, an accused can be convicted on the testimony of a single witness. The sub-section restates the general common law rule, and, to an extent, establishes the context of what is to follow.

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24 (1999) 197 CLR 162.
25 Ibid at 167-168.
26 [1973] AC 296 at 324.

[19] Sub-section (2) is to be understood in the light of common law rules which developed by way of qualification to the general principle stated above. Since an accused person could be convicted on the evidence of one witness only, the law was required to address the problem of unreliability. Such unreliability could arise from matters personal to the witness, or from the circumstances of a particular case. The law requires a warning to be given "whenever a warning is necessary to avoid a perceptible risk of miscarriage of justice arising from the circumstances of the case"[27]. However, as was held in *Longman v The Queen*[28], in relation to a similar Western Australian provision, the sub-section is not directed to such a general requirement. Rather, it is aimed at a more specific rule, by which the common law identified certain classes of case where evidence was considered to suffer from intrinsic lack of reliability. Although the classes were not closed, they included certain well-established categories. Thus, in *Carr v The Queen*[29], reference was made to "the rules which oblige a trial judge to warn the jury of the danger of convicting upon the uncorroborated evidence of an accomplice, the victim of a sexual offence and the sworn evidence of a child". It will be noted that the present case fell into both of the second and third categories. The reasons for those categories were discussed in such cases as *Longman v The Queen*[30] and *B v The Queen*[31]. They included what are now rejected as "stereotypical assumptions"[32].

[20] Once it is understood that s 632(2) is not aimed at, and does not abrogate, the general requirement to give a warning whenever it is necessary to do so in order to avoid a risk of miscarriage of justice arising from the circumstances of the case, but is directed to the warnings required by the common law to be given in relation to certain categories of evidence, its relationship to the concluding words of s 632(3) becomes clear, although the symmetry between the two provisions is not perfect."

The "imperfect symmetry," described at the end of that passage, was explained by the Court as follows:[33]

> "Section 632 distinguishes between witnesses and complainants. Ordinarily, in this context, a complainant is a species of the genus witness. The generic term is used in sub-section (2), but the concluding words of sub-section (3) are specific. In that respect the relationship between the two sub-sections lacks complete symmetry. Perhaps the

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27 *Longman v The Queen* (1989) 168 CLR 79 at 86. See also *Bromley v The Queen* (1986) 161 CLR 314 at 319, 323-325; *Carr v The Queen* (1988) 165 CLR 314 at 330.

28 (1989) 168 CLR 79.

29 (1988) 165 CLR 314 at 318-319.

30 (1989) 168 CLR 79 at 91-94.

31 (1992) 175 CLR 599 at 616.

32 *R v Ewanchuk* [1999] 1 SCR 330 at 336.

33 (1999) 197 CLR 162 at 169-170 [22].

> explanation is that the drafter had mainly in mind sexual cases, but the section is not limited to sexual offences, and the common law's categories of potentially unreliable witnesses included some who were not complainants."

A consequence of that observation was the amendment, in the following year, of s 632(3), to substitute the word "persons" for "complainants".[34]

[22] It follows from *Robinson* that what is precluded by the proviso in s 632(3) is a warning or suggestion about the content of the law. The purpose of the proviso is to ensure the trial judges do not misstate the law as it is following the modification of those common law assumptions about the unreliability as witnesses of persons in certain categories. A trial judge may make a comment about the reliability of the witnesses, so long as it is appropriate in the interests of justice, but may not *instruct* the jury that *the law* assumes the witness to be unreliable.

[23] Further, the structure of s 632 indicates another limitation on the operation of the proviso in s 632(3). On one view at least, s 632(3) applies only in a case where the jury is asked to convict on the uncorroborated testimony of one witness. Subsections (1) and (2) operate only in that context. Subsection (3) commences with a clarification of the effect of subsections (1) and (2). The concluding words of subsection (3) are a limitation of the permissive words in the subsection. If s 632(3) is to be interpreted as limited to such a case, its proscription cannot assist the appellant in this case, because the proof of the appellant's guilt came from more than one witness. On the other hand, that interpretation would have the effect, which is unlikely to have been intended, of preserving the common law's "stereotypical assumptions"[35] in many cases, such as the present. It is unnecessary to decide this question, because of the view I have reached, discussed below, about the effect of the judge's comments.

[24] The effect of s 632 was considered, but not decided, by this Court in *R v Knight & Ors*.[36] The appellant's argument seeks to draw particular support from this case, although none of the judges accepted that the directions which were there given offended s 632(3). The appellants had been convicted of the murder of a fellow prisoner. There were several indigenous persons who were witnesses in the prosecution case. In his summing up, the trial judge in that case said, relevantly:

> "One of the additional difficulties you face, in this case, is in assessing the evidence of indigenous witnesses. Quite often English is not their first language. As well, some may have come from a different culture to your own, with differing customs and differing habits of dealing with aggressive questioning, and you might expect, in your own culture, or from your own experience, some had a habit of just agreeing with whatever was put to them, even though it might be contrary to what they had just said.
>
> You need to decide [if] any agreement was merely the witness giving up or acceding to the questioner, without any real adoption of the point and issue, or whether the agreement was a deliberate and thoughtful acceptance of the proposition put. …

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34 *Criminal Law Amendment Act* 2000 (Qld) s 31.

35 *R v Ewanchuk* [1999] 1 SCR 330 at 336, cited in *Robinson v The Queen* (1999) 197 CLR 162 at 168 [19].

36 [2010] QCA 372.

> The real difficulty, especially with indigenous witnesses, is their readiness to agree to leading propositions put to them. That might, of course, infect the [witness's] statement as much as the oral evidence, [no] matter how careful the taker of the statement might try to be …
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> Again, you have the difficulty of dealing with an indigenous witness in determining to what extent his apparent acceptance of propositions put to him reflect what he truly means to say. …
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> Again, … you have the difficulty of dealing with an indigenous witness and determining to what extent his apparent acceptance of propositions put to him in a leading fashion in cross-examination is reliable."[37]

[25] The principal judgment was given by McMurdo P who, relevantly for the present case, said:

> "[283] The evidence of Indigenous witnesses, like the evidence of non-Indigenous witnesses, varies greatly as to honesty, reliability and credibility. Indigenous witnesses, like non-Indigenous witnesses, range from the not well educated, through the inarticulate and the dishonest, to the highly educated, the honest and the reliable, and with every combination and shade of grey in between. In this case all the Indigenous witnesses were prisoners who did not appear to be well educated. But it did not automatically follow that they were all likely to succumb to suggestions put to them by defence counsel, a recognised phenomena known as gratuitous concurrence, common amongst some Indigenous people. A broad general statement like that given by the judge was contrary *to the spirit of* the terms of s 632(3). More importantly, it tended to suggest that evidence of Indigenous witnesses, especially in cross-examination, may be less reliable than evidence of non-Indigenous witnesses. The judge invited the jury to consider whether his general proposition in respect of Indigenous witnesses applied to the evidence of a particular witness. But even so, the judge's general direction was not helpful to the jury and wrongly encouraged a stereotypical approach to the evidence of Indigenous witnesses, especially in cross-examination. If the judge considered the interests of justice required a warning about a particular Indigenous witness's evidence, for example, because the witness may have been disadvantaged for cultural reasons or may have given answers through gratuitous concurrence, the judge should have given that direction in respect of that individual witness's evidence. Indeed, the judge did exactly that on occasions. For example, the judge gave such a direction as to Barlow's evidence. His Honour then added an additional comment that the defence submission, that Barlow may have been manipulated in giving his statement to police,

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37 These passages are set out at [2010] QCA 372 at [196], [245], [247] and [254].

was an observation which may also have been apposite to Barlow's cross-examination by skilled barristers.

[284] Whilst specific directions where warranted were apposite, the judge's general direction, exacerbated by the later directions, was unhelpful, inappropriate, and should not have been made. My summary of the evidence of the Indigenous witnesses demonstrates that most of them, though not well-educated, were assertive when cross-examined and none seemed to be answering questions by way of gratuitous concurrence. Certainly some were at times confused during cross-examination, but only when the cross-examination was itself confusing. Their confusion did not seem to me to be related to the fact that they were Indigenous. On these occasions, the trial judge rightly intervened and ensured questions were reframed in a more comprehensible way. The evidence of the Indigenous 10 Block witnesses, Nelson, Barlow, Weribone, Lionel Malcolm, Edward Malcolm, Booth and Shipp, was a critical part of the prosecution case. The appellants' counsel also placed considerable weight on parts of the evidence of Indigenous witnesses, especially in cross-examination. For example, the evidence of Lionel Malcolm and Edward Malcolm in cross-examination was particularly helpful in Robertson's defence case. The judge's general directions as to Indigenous witnesses tended to diminish the effect of the cross-examination of the Indigenous witnesses by the appellants' counsel. It was another aspect of the judge's summing-up which caused unfairness to the appellants. The appellants' seventh contention is made out."

(Emphasis added; footnotes omitted)

[26] In the same case, Muir JA said that these directions, as to "the effect that the evidence of this large and significant body of indigenous witnesses should be approached differently to that of other witnesses had the potential to disadvantage the defence [in that] the directions implied, for example, that concessions made in cross-examination should be scrutinised more carefully than would be the case with other witnesses."[38] Still, Muir JA was not persuaded that the directions "caused unfairness to the appellants so as to cause a miscarriage of justice"[39] and ultimately, he found it unnecessary to express a concluded view on that ground, because he agreed the appeal should be allowed on the bases of other parts of the summing up. The third judge (Douglas J) agreed with the President.[40]

[27] *Knight* contains no analysis of the effect of s 632(3): none was necessary because the directions about indigenous witnesses were irregular for other reasons (in the view of the President and Douglas J) and because there were other grounds of appeal which were established (in the view of each judge). It provides no assistance to the appellant's argument in support of the proposition that the present directions contravened s 632. Notably, the President said only that the judge's statements

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38 [2010] QCA 372 at [344].
39 [2010] QCA 372 at [348].
40 [2010] QCA 372 at [374].

were "contrary to the spirit of s 632(3)." The judgments are of some relevance to an alternative argument, that the directions here were irregular because they unfairly affected the jury's consideration of Mr Baira.

The appellant's argument beyond s 632

[28] No other case is cited in this appeal which has considered s 632(3).[41] But there were other cases cited which it is necessary to discuss.

[29] The appellant's submissions referred to decisions of the Court of the Appeal of the Supreme Court of Western Australia, namely *Stack v Western Australia,*[42] *Bowles v Western Australia*[43] and *Morgan v Western Australia*.[44] *Stack* was cited by McMurdo P and Muir JA in *Knight*, where the President said that "[j]udges must be circumspect about giving directions of this kind".[45] In *Morgan*, Pullin JA said that "it has long been recognised that the reliability of answers given by [Aboriginal witnesses] may be suspect if given in answer to leading questions. The answer may result in 'gratuitous concurrence'."[46] In *Bowles*, Hall J said the same and referred to an article by Mildren J, then a judge of the Supreme Court of the Northern Territory, entitled "Redressing the Imbalance against Aboriginals in the Criminal Justice System",[47] a work from which have come the so-called Mildren Directions for the guidance of juries in assessing the evidence of Aboriginal persons.[48] However neither Western Australia nor the Northern Territory has an equivalent to the proviso in s 632(3).[49]

[30] The appellant's argument also cites the judgment of Macrossan CJ in *R v Condren.*[50] The issue in that case was whether opinion evidence, as to the general speech characteristics of Aboriginal persons, was admissible. The suggested relevance of this judgment, which was cited in *Knight*, is in this passage:[51]

> "There are difficulties in defining the class of Aboriginals in any helpful way since it is necessary to include such a diverse range of individuals within it and one would think there are difficulties in accounting for the variations in speech characteristics which might be observed amongst all members of that large class. The verbal response characteristics of a class is not a matter at issue but only the alleged responses of the applicant. [The witness] has conferred with the applicant and, as it is claimed, has had an opportunity to detect any of his idiosyncratic speech characteristics which are relevant for mention. To the extent that he may share these speech characteristics with other Aboriginals or other persons in general is not relevant and to the extent that other Aboriginals have alleged speech patterns which differ from the applicant's then that is even more obviously

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41 Indeed *Robinson* was not cited.
42 (2004) 29 WAR 526.
43 [2011] WASCA 191.
44 [2011] WASCA 185.
45 [2010] QCA 372 at [282].
46 [2011] WASCA 185 at [109].
47 The Hon Justice Dean Mildren, 'Redressing the Imbalance Against Aboriginals in the Criminal Justice System' (1997) 21 *Criminal Law Journal* 7.
48 [2011] WASCA 191 at [53]-[54].
49 See the more limited provisions in *Evidence Act* 1906 (WA) s 106D and *Sexual Offences (Evidence and Procedure) Act* (NT) s 4(5).
50 (1987) 28 A Crim R 261.
51 Ibid at 267.

> irrelevant. These observations apply both to [the witness'] evidence about the alleged structure of Aboriginal speech patterns and to her evidence of the tendency of Aboriginals in general to make what is called "gratuitous concurrence" to propositions put to them."

[31] These judgments, together with s 632(3), are said to support the appellant's ultimate submission that "the law in Queensland is that Mildren Directions ought not be given" and that "any direction must relate to the specific witness rather than be a general direction in relation to the characteristics of Aboriginal witnesses."[52]

[32] That argument overstates the effect of those judgments. In none of them, most particularly the judgment in *Knight*, was there stated a proposition in those terms and nor is that the effect of s 632(3).

[33] By s 620 of the *Code*, it is the duty of a trial judge to instruct the jury as to the law applicable to the case "with such observations upon the evidence as the court thinks fit to make." A judge may comment upon the evidence as long as the judge makes it clear to the jury that they are to determine the facts. Ultimately the constraints upon a judge, in commenting upon the facts, are defined by the judge's duty to ensure that the trial is fair in all respects. In *Knight* that condition of fairness was not met. It does not follow from the reasoning in *Knight* that *any* comment by a judge about a witness, by reference to a class of which the witness may belong, will result in an unfair trial. Outside the particular constraint prescribed by s 632(3) (where it applies), it is impossible to define the bounds of fairness without reference to the facts and circumstances of the particular case.

Consideration of the judge's comments

[34] Did the judge's comments suggest to the jury that the law regards indigenous persons as unreliable witnesses? In my view, it is clear that there was no suggestion to that effect within the first and second passages. The first passage did contain statements about witnesses who are Aboriginal or Torres Strait Islander persons. It explained to the jury something about the *manner* of such persons, in general, when testifying. Those comments did not indicate anything about the reliability of their evidence: rather, they were advice to the jury to assist the jury to make up their own minds about reliability. The same may be said about the second passage. These were comments about the demeanour of witnesses and a guidance about using that demeanour in the assessment of the reliability of the evidence. They were not a suggestion that the evidence of witnesses of a class was unreliable. Moreover, there was no suggestion that *the law* regarded this class of persons as unreliable witnesses.

[35] In the third passage, the judge did say that in the jury's assessment of the reliability of any of Mr Baira's evidence, they were to bear in mind that, not uncommonly for a witness who is an Aboriginal or Torres Strait Islander, the witness may have misunderstood the questions of him and was "otherwise struggling to express himself in sequential detail." The judge said that "people of his heritage and culture do not always express sequential details with the same ease as people from other walks of society." By those comments, the judge was suggesting that there was a difficulty for this witness, which some but not all indigenous persons have, in expressing sequential details.

[36] However, the judge was not suggesting that as a class, indigenous persons are unreliable witnesses. And he was not saying that his comments were instructions

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52 Transcript of Appeal Hearing, 3 April 2017, T1-11, ll 26-27.

about the law. What the judge was saying about the evidence of Mr Baira was that the inconsistencies in his evidence (as would have been plain to the jury from what I have set out above) were not because Mr Baira was dishonest.

[37] Those inconsistencies clearly affected the reliability of Mr Baira's evidence. But what the judge was saying was not that Mr Baira was to be considered unreliable because he was an indigenous man; it was that his apparent unreliability which was indicated by the inconsistencies in his testimony, did not affect his credibility. The judge was saying that Mr Baira may well have witnessed what he had related, but that these inconsistencies came from a difficulty in expressing the events sequentially. This was not a suggestion which, had it been accepted, would have made the jury think that as a class, indigenous persons are unreliable witnesses.

[38] For those reasons the comments did not contravene the proviso within s 632(3).

[39] And unlike the comments in *Knight*, there was no unfairness which could have resulted from these comments. The effect of the comments, if any, was likely to enhance whatever weight the jury might have given to that evidence of Mr Baira which assisted the defence case. The jury could not have thought less of Mr Baira's evidence for these comments. This was not a case, such as *Knight*, where the judge's comments about indigenous witnesses detracted from evidence favouring the defence case.

Conclusion

[40] For these reasons there was no error or irregularity in the comments of which complaint is made and the sole ground of appeal must be rejected. I would order that the appeal be dismissed.

[41] **DOUGLAS J:** I agree with McMurdo JA's reasons and the order proposed.