SUPREME COURT OF QUEENSLAND

CITATION:	*R v McCaskill* [2017] QCA 172
PARTIES:	**R** **v** **McCASKILL, Henry** (appellant)
FILE NO/S:	CA No 273 of 2016 DC No 336 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Townsville – Date of Conviction: 9 September 2016
DELIVERED ON:	Orders delivered 11 August 2017 Reasons delivered 15 August 2017
DELIVERED AT:	Brisbane
HEARING DATE:	24 July 2017
JUDGES:	Sofronoff P and McMurdo JA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Delivered ex tempore on 11 August 2017:** **1. The appeal is allowed.** **2. The convictions are set aside.** **3. A re-trial on counts 3, 4 and 6 is ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – GENERALLY – where appellant was convicted by jury of two counts of indecent dealing and one count of indecent assault – where trial judge made direction to jury that observations by two witnesses of the complainant's conduct after the alleged offence and the appellant's admission that the complainant had confronted him after the alleged offence could 'counter' another direction that it might be dangerous to convict on the complainant's uncorroborated testimony – whether direction gave rise to miscarriage of justice – whether supportive evidence to counter dangers identified by *Robinson* direction must originate from source 'independent' of the complainant – whether proviso applies *Longman v The Queen* (1989) 168 CLR 79; [1989] HCA 60, cited *R v Baskerville* [1916] 2 KB 658, cited

R v Kendrick [1997] 2 VR 699, cited
R v Sailor [1994] 2 Qd R 342; [1993] QCA 23, cited
R v Williams [2010] 1 Qd R 276; [2008] QCA 411, cited
Robinson v The Queen (1999) 197 CLR 162; [1999] HCA 42, cited
Weiss v The Queen (2005) 224 CLR 300; [2005] HCA 81, cited

COUNSEL: M J Copley QC for the appellant
G J Cummings for the respondent

SOLICITORS: Rennick Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of Douglas J and with the orders his Honour proposes.

[2] **McMURDO JA:** I agree with Douglas J.

[3] **DOUGLAS J:** The learned trial judge directed the jury that observations made by two witnesses of the complainant's conduct and the appellant's admission that the complainant had confronted him, were capable of constituting supportive evidence to "counter" another direction by his Honour to the jury that it might be dangerous to convict on the complainant's testimony. The issue on this appeal is whether the first direction gave rise to a miscarriage of justice.

[4] The ground of appeal related to that issue replaced two other abandoned grounds that the three verdicts of guilty entered by the jury were unreasonable and that they were also inconsistent with other verdicts of acquittal.

[5] The offences of which the appellant was found guilty were two of indecent dealing (Counts 3 and 4) and one of indecent assault (Count 6). He was acquitted on two further counts of indecent dealing and three of indecent assault. The offences were alleged to have occurred in 1987.

The evidence

[6] Although there is now no ground of appeal that the verdicts of guilty were unreasonable the respondent argued that the case was one where it would be suitable to apply the proviso. It is useful, in any event, to provide a brief survey of the relevant evidence to set in context the issue related to the direction given by the learned trial judge.

[7] The complainant was, in 1987, a 15 to 16 year old talented student and basketball player. The appellant coached an under 18 regional representative team for which she played.

[8] The first two of the eight counts were charges of indecent dealing, of which the appellant was found not guilty. They were supported by the complainant's evidence that the appellant, while travelling in a bus with her returning to her home city from a basketball tournament in another city, was seated next to her, required her to handle his exposed penis and then touched her genitals through her clothing. Counsel for the respondent argued that the jury's not guilty verdict in respect of these counts was explicable by some inconsistencies in the evidence about it. The

appellant denied that the events occurred and the cross-examination on his behalf also suggested that such an event was unlikely to have occurred given the number of other people on the bus at the time.

[9] Counts 3 and 4, were two of the counts of which the appellant was found guilty. Count 3 was particularised as an occasion in a weights room associated with the place where she trained when the appellant rubbed his penis against her. That was said to have occurred in May 1987 and the defence case was, again, that the incident did not occur. The appellant gave evidence to that effect as he did in respect of Count 4, another occasion said to have occurred in the appellant's office when it was alleged he rubbed his penis against the complainant. That was at the basketball training premises also. It was also denied by the appellant.

[10] Count 5 was alleged to have occurred just after the complainant's sixteenth birthday. The appellant offered her a lift home which she accepted. He took her down to the end of the street near a park, put her seat in the car down and then climbed on top of her. Both remained fully clothed. She told him to get off because it hurt and he eventually did so. Counsel for the respondent submitted that the not guilty verdict in relation to this count was entirely consistent with the complainant's evidence failing to establish a lack of consent on her part or the absence of an honest and reasonable mistake on the part of the appellant.

[11] Count 6, the third count on which the appellant was found guilty, was particularised as an occasion at his apartment when he rubbed his penis against the complainant without her consent. That charge also related to events that occurred after her sixteenth birthday.

[12] In respect of Count 6 the evidence was that the appellant offered to drive her home but went to his own home, persuaded her to come up to his unit where he kissed her, pulled her down to her knees, placed her on the floor and lay on top of her between her legs pushing his penis against her pubic bone. She said that she asked that he stop it and get off her but that he kept grinding his penis against her vaginal area, that what he did really hurt and she was left with bruising in that area for some days. The appellant stopped it, went to his bedroom, changed and drove her home.

[13] She described a photograph in the unit as a photograph of the appellant and his wife on their wedding day with their faces superimposed into the bowl of a wine glass beside which was another normal wedding photograph.

[14] The appellant's former wife, a prosecution witness, confirmed that a photograph like that described by the complainant had been in their unit. The appellant said that a photograph like the one the complainant described was kept in his office at the basketball stadium and that he did not take the complainant to his unit. He could not recall the details of the wedding photograph in his office.

[15] Count 7 related to an assertion that the complainant again received a lift from the appellant, stopped at a park where he again put the car seat back and climbed on top of her and simulated intercourse. She told him to stop and he did.

[16] Count 8 was an allegation related to the same event that the appellant then picked her up and carried her into the park whilst speaking of having sex with her. She resisted and told him to put her down. He put her on the ground and started undoing his pants when she got up and ran away.

[17] Counsel for the respondent submitted that the evidence in respect of Count 7 again raised at the least honest and reasonable mistake of fact not excluded by the complainant's evidence while, with Count 8, it was difficult to see how the evidence of the complainant taken at its highest established an indecent assault. No verdict was sought in relation to common assault.

[18] There was evidence of a number of preliminary complaints made by the complainant to others. One was a girlfriend from the same basketball team to whom she mentioned, in particular, the events said to have occurred on the bus trip and at the park. No issue arises on this appeal in respect of the summing up about that preliminary complaint.

[19] The next preliminary complaint was to a former boyfriend of the complainant. Her evidence was that the appellant was coming to her school to give lessons or a demonstration about basketball in a physical education lesson. She did not want to go to it and her then boyfriend asked why. Eventually she told him "very briefly that he had done some bad things to me when I was younger". There was no evidence establishing the period between the events the subject of the charges on the indictment and the date of this visit by the appellant to the complainant's school.

[20] That boyfriend's evidence was that they were walking towards the basketball courts on this occasion when the complainant started to cry and ran off. That afternoon, after he kept questioning her about why she was so upset, she said that the appellant "had done things to her … 'sexual things'". That boyfriend placed the event as having occurred in very late 1987 or at some point in 1988.

[21] Another former boyfriend of the complainant also gave evidence. The complainant and he went out towards the end of her university degree, therefore some years after the relevant events, and for a month or two when she returned to Australia after about 18 months in England from where she returned in about May 1993. She and he were watching television in his apartment and the appellant was in an advertisement on television. She remembered pointing the appellant out and saying to the boyfriend "that's the coach that abused me".

[22] That boyfriend confirmed that the complainant had spoken to him about the appellant, he thought between late 1992 and into 1993, when she said to him that she had experienced some sexually inappropriate behaviour when she was a teenager and pointed out the appellant as the person who was involved in that behaviour when an advertisement appeared on television. She described the appellant as the person with whom she had experienced the sexual abuse.

[23] There was also evidence of a confrontation between the complainant and the appellant on 28 December 1994. The complainant says that it was through a pretext telephone call made from a police station after she had visited where he worked only to find that he was not then at work. The appellant's recollection was that the complainant came to the shop that he then worked at.

[24] The complainant's recollection of the call was that the appellant acknowledged who she was, she told him that she had a breakdown and wanted to talk to him, that, although he did not admit to anything specific, he did say that he had liked her, that he thought she was more mature and intelligent than the other girls and that what had occurred was not that bad and had been a normal part of growing up.

[25] The appellant's version of that event was that the complainant came to the shop that he then worked at. She told him that she had had a nervous breakdown and that her psychiatrist thought that she should go and talk to the appellant. He asked her what she wanted to know. She started making allegations so he cut her off and told her never to come near him again with those sorts of allegations and she stormed off. He also recalled her later telephoning him and starting to say the same things and he hung up on her. He said when cross-examined that, when the complainant told him about her breakdown, he told her that he had endured difficulties in his life and said that his brother had been murdered. Apparently there had been a recording made of the telephone conversation between the complainant and the appellant but it could no longer be found.

[26] There was further evidence that the complainant sought psychiatric treatment from early 1994 from a psychiatrist who has continued to treat her when she has lived in Australia until the time of trial. She sought psychiatric help in that year because of episodes of self-harm. She was diagnosed with severe depression. She had harmed herself previously when she was 14 before she met the appellant. At the time of the trial she was still being treated by the same psychiatrist. One of the other manifestations of her psychiatric issues was "hearing voices".

[27] She first laid a complaint with police in 1994 shortly before the telephone call of which she gave evidence to the appellant. At that stage she was under particular stress to perform well academically, was concerned about pursuing the complaint at that stage and did not persist with it until much later.

The summing up

[28] His Honour summed up to the jury in appropriate detail about the relevant evidence and dealt with the question of delay between the events in 1987 until late December 2014 when the appellant was approached by police. Because of that delay his Honour gave a *Longman* direction.[1] He coupled that with a *Robinson* direction.[2] The need for the *Robinson* direction clearly arose from the evidence of the complainant's psychiatric treatment. It was expressed by his Honour in these terms:[3]

> "Now, because there is a risk that [the complainant's] evidence as to either its essential truthfulness or its accuracy might be affected by her medical condition - and it's up to you to make that decision whether or not that's so - but if it is, all right, then it raises some difficulty. If it is, you can still act on it if you are convinced of its truth and its accuracy but it might be dangerous to convict [the appellant] on that evidence if you can't find other evidence to support the evidence of [the complainant], that is, if you reach a decision that her medical conditions, which obviously includes self-harming and voices, is such that it causes you, perhaps, to doubt some aspects of her evidence, then, you must look at it carefully, but you're still free to act on it if you're convinced of its truth and accuracy. But I warn you, of course, it's dangerous if you can't find other evidence to support it."

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1 *Longman v The Queen* (1989) 168 CLR 79.
2 *Robinson v The Queen* (1999) 197 CLR 162, 170-171 at [25]-[26].
3 AR350/4-14.

[29] His Honour then went on to speak about what the Crown pointed to as "other supporting evidence".

[30] In that context he referred to the preliminary complaint evidence to which I have referred, including that of the psychiatrist who treated the complainant. He said that the preliminary complaint evidence could not be supporting evidence but simply went to the complainant's credibility. No complaint is made of that statement. Complaint is made, however, of the following two passages in respect of the evidence from the two boyfriends and the evidence of the confrontation that occurred between the complainant and the appellant:[4]

> "Again, with Andrew and with Tim, the evidence of what they saw and [the complainant's] reaction to it can be taken into account, right. Not what they said, not for this purpose anyway, because it simply goes to credibility.
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> …
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> There is also the matter of the pretext call judged from what [the appellant] has admitted about that pretext call because we're looking for supporting evidence for [the complainant] herself. He admitted certain things including that the confrontation had occurred. So there is, you might think – and it's entirely up to you – supporting evidence to counter 'it's dangerous to convict if you don't find evidence to support it'."

Submissions

[31] The submissions for the appellant about those two passages of the summing up were that the accounts of the complainant's behaviour, as observed by the two former boyfriends, and the appellant's acknowledgment that the complainant made allegations to him in the past did not amount to evidence supportive of the complainant's evidence. None of that evidence was independent of the complainant but was just evidence of behaviour or conduct by her that others had observed. Mr Copley QC for the appellant also submitted that the appellant's evidence about the interaction between the complainant and the appellant in 1994 was that he had made no admissions to wrongdoing.

[32] He went on to submit that the only evidence that the jury was entitled to regard as supportive of the complainant's evidence was evidence coming from a source independent of the complainant such as the former wife's evidence about the unusual wedding photograph.[5] He also made the correct submission that the supporting evidence must be from a source independent of the witness whose testimony it might otherwise be dangerous to act upon.[6]

[33] Even if his Honour's direction had been confined to evidence of the complainant's reaction showing distress when she spoke to the first boyfriend in late 1987 or early

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4 AR350/24-25 and AR350/39-43.

5 *R v Kendrick* [1997] 2 VR 699, 708.

6 Relying on Lord Reading CJ in *R v Baskerville* [1916] 2 KB 658, 667; *Bromley v The Queen* (1986) 161 CLR 315 per Gibbs CJ at 319; *R v Kerim* [1988] 1 Qd R 426 per Macrossan J at 446 ll 35-40; *R v Sailor* [1994] 2 Qd R 342 per McPherson JA at 346 ll 35-45; *R v Kendrick* [1997] 2 VR 699, 705-706; *Doggett v The Queen* (2001) 208 CLR 343, per McHugh at 359-360, [67]-[68].

1988, the evidence does not support any ability to use that distress as corroboration. As McPherson JA said in *R v Sailor*:[7]

> "The basic weakness of distress in this context is that, more than in the case of the other circumstances mentioned, its value or cogency as independent evidence diminishes rapidly with the passing of time. The longer the interval from the original event, the more difficult it is to be sure that a condition of distress not manifested or observed until well after that event is not due to some other intervening and unrelated cause. Eventually a stage in time is reached where, without resorting to testimony of the complainant, it ceases to be possible to link the distress with its alleged cause. Once it ceases to be independent evidence of its cause, the complainant's distress is no longer capable of corroborating her testimony.
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> The interval of time that elapses between the incident and the distress is plainly, therefore, an important factor in deciding whether or not they are causally related: see *R v Flannery* [1969] VR 586, 591, where, as has been noticed, an interval of about an hour was considered too long. Although the period involved in *R v Roissetter* [1984] 1 Qd R 477, 480-482, was even longer, the distressed condition observed in that case was practically continuous throughout the period. Here the interval between the alleged rape and the first observation of the complainant's distress was more than eight hours. Several persons who had seen or spoken to the complainant during that period apparently noticed no signs of distress. The complaint itself is not in law capable of being considered as corroboration. Without reference to it, the sudden onset of distress at 10 o'clock can scarcely be regarded as circumstantial evidence tending of itself to confirm the complainant's account of what had happened to her at some time before 1.40 am. Viewed apart from the complaint, the relation between the incident and the distress that followed was too tenuous and remote for it to be left to the jury as evidence of a causal connection between the two that was capable of confirming her testimony that she was raped."

[34] On no view of the evidence could the distress observed by the first boyfriend have been observed so close to the events complained of as to be regarded safely as causally related to them independently of the complainant's own evidence.

[35] Mr Copley's submission, therefore, was that the warning by his Honour that it would be dangerous to convict on the complainant's evidence if the jury could not find other evidence to support it was impermissibly undermined by the erroneous directions because the jury may have resolved a doubt or doubts about the complainant's testimony in reliance upon evidence which did not relevantly support it. He also pointed out that the jury was reminded of that evidence later in the summing up as matters that had been the subject of the prosecutor's address,[8] thus enhancing the likelihood that the jury wrongly relied on them. No redirections were sought but that failure was said not to have been due to any consideration of forensic advantage in the circumstances.

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7 [1994] 2 Qd R 342, 347.

8 AR364/34-43.

[36] He submitted, therefore, that the directions gave rise to a miscarriage of justice where, similarly to the decision in *R v Williams*[9] the result should be that the conviction should be set aside and a new trial ordered. Nor was the case one for the application of the proviso, it was submitted, because we could not be satisfied of the appellant's guilt beyond reasonable doubt particularly where the jury was not satisfied of the complainant's honesty and reliability on the other counts where it also enjoyed the advantage of seeing and hearing her testimony as well as that of the appellant.

[37] Mr Copley also submitted accurately that, if the evidence of the first boyfriend was to be relied upon as original evidence of the complainant's distressed condition at the time, it would have been incumbent on his Honour also to direct the jury in terms of the customary direction in the Benchbook as to whether the distress was genuine or not.[10] That was not done.

[38] Counsel for the respondent, Mr Cummings, argued rather faintly that the evidence of what was said by the former boyfriends may have been admissible as to the truth of what they said rather than as going to the complainant's credibility on the basis that it could be used to rebut allegations of recent fabrication. The problem with that submission is that there were no allegations of recent fabrication. The highest at which the cross-examination could be put was that the complainant was queried as to why she had not complained to her mother or the police at an earlier stage. It was not suggested that her preliminary complaints were evidence recently invented.

[39] He also submitted that this was an appropriate case for the application of the proviso having regard to the whole of the evidence and the task that should have been clear to the jury of comparing the complainant's evidence with that of the appellant.

Conclusions and orders

[40] In my view the submissions for the appellant were correct. The consequence is that his Honour impermissibly undermined the appropriate warning that it was dangerous for the jury to convict in the absence of evidence supporting the complainant's case by erroneously identifying evidence that was not capable of independently supporting her version of events.

[41] Nor is this a case to which the proviso could apply. The respondent's submission that the criticised directions would not have made any difference because the jury should have been preoccupied with more important issues such as evaluating the complainant's evidence and comparing it with that of the appellant is not persuasive in the circumstances. The jury was discriminating in how it approached the question of the appellant's guilt in respect of the various counts and had the benefit of his evidence in evaluating the case. This court should not apply the proviso unless we are persuaded beyond reasonable doubt of the appellant's guilt, something which we could not do fairly in a case like this one where we have not seen him give his evidence.[11]

[42] The consequence is that the appeal should be allowed. The convictions should be set aside and a retrial on Counts 3, 4 and 6 should be ordered.

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9 [2010] 1 Qd R 276, 288 at [50].

10 See direction No 67.1.

11 See *Weiss v The Queen* (2005) 224 CLR 300, 315-318 at [39]-[47] especially at [41].