SUPREME COURT OF QUEENSLAND

CITATION:	*R v OT* [2017] QCA 257
PARTIES:	**R** **v** **OT** (appellant/applicant)
FILE NO/S:	CA No 24 of 2017 DC No 173 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Maroochydore – Date of Conviction & Sentence: 10 February 2017 (Jones DCJ)
DELIVERED ON:	3 November 2017
DELIVERED AT:	Brisbane
HEARING DATE:	18 August 2017
JUDGES:	Fraser and McMurdo JJA and McMeekin J
ORDERS:	**1. The appeal be allowed on the convictions for counts two, three, four, five, six, seven, eight, ten, eleven, twelve, thirteen and fourteen on the indictment.** **2. The convictions on those counts be set aside and a retrial be ordered.** **3. The appeal against the convictions on counts one and nine be dismissed.** **4. The parties, within 21 days of the date of this judgment, are to provide written submissions as to whether the application for leave to appeal against sentence for counts one and nine should be refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – NON-DIRECTION – where the appellant was found guilty by a jury of 14 offences of a sexual nature, committed against his stepdaughter at various times over a three year period – where the appellant was convicted of all 14 counts, and was sentenced to various concurrent terms of imprisonment – where the only evidence of the offences came from the complainant – where three other witnesses gave evidence of her preliminary complaints – where the trial judge instructed the jury that they had to give separate consideration to each

charge – where the trial judge summarised each of the final addresses – where those summaries did not contain a particularisation of the counts – where the prosecution's final address did not repeat the particulars – where the appellant argues that the jury could not have discharged its duty to consider each charge separately without being properly reminded by the trial judge of the particulars in relation to each charge – whether there was a miscarriage of justice because the trial judge did not instruct the jury as to the particular facts which had to be proved for each charge

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where the jury were provided with transcripts of the entirety of the complainant's evidence, all of that of another witness in the prosecution case as well as transcripts of the entirety of the evidence of the three witnesses in the defence case, including the appellant – where the appellant argues that the jury should not have been burdened with so much written material and may have been overwhelmed by it – whether there was a miscarriage of justice from the jury being provided with a large volume of written material, absent a direction from the judge that they should not place undue weight upon the written material

Criminal Code (Qld), s 620

Fingleton v The Queen (2005) 227 CLR 166; [2005] HCA 34, applied
Gilbert v The Queen (2000) 201 CLR 414; [2000] HCA 15, cited
R v Mogg (2000) 112 A Crim R 417; [2000] QCA 244, cited
R v Mowatt [1968] 1 QB 421; [1967] EWCA Crim 1, cited
R v Nagy [2004] 1 Qd R 63; [2003] QCA 175, cited

COUNSEL: D A Holliday for the appellant/applicant
G J Cummings for the respondent

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

[1] **FRASER JA:** I agree with the reasons for judgment of McMurdo JA and the orders proposed by his Honour.

[2] **McMURDO JA:** The appellant was tried before a jury in the District Court on 14 charges of a sexual nature, committed against his stepdaughter at various times from January 2012 to August 2015. There were five counts of the indecent treatment of the child when she was under the age of 12 years. There were eight counts of indecent treatment of her as a child under 16 years. And there was one count of rape. The appellant was convicted of all counts, and was sentenced to various concurrent terms of imprisonment, the longest being a term of three and half

years for the offence of rape. That term, together with another term of two years, was suspended after 21 months, with an operational period of five years.

[3] Originally, the appellant challenged each of those convictions upon the ground that the verdicts were unreasonable. That ground has been abandoned, as has his application for leave to appeal against sentence. The convictions are challenged now upon two grounds, namely:

> 1. That a miscarriage of justice occurred because the trial judge, in summing up to the jury, did not distinguish between the various counts by instructing the jury, charge by charge, as to the particular facts which had to be proved for that charge;
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> 2. That a miscarriage of justice resulted from the jury being provided with transcripts of the entirety of the complainant's evidence, all of that of another witness in the prosecution case as well as transcripts of the entirety of the evidence of the three witnesses in the defence case, including the appellant.

The effect of all of this material, it is said, was to overwhelm the jury and thereby impede its proper deliberation.

The evidence at the trial

[4] There were four witnesses in the prosecution case: the complainant, her younger sister and two school friends of the complainant. The only evidence of the offences came from the complainant. The other witnesses gave evidence of her preliminary complaints. Her sister also testified that she had not observed any wrongdoing by the appellant, in circumstances where most of the offences had taken place in a house where both girls lived. The first complaint of any of these offences was when, in August 2015, the two school friends were told of some of these events. The complainant was then interviewed by police, when she was aged 14. A video recording of that evidence was tendered at the trial.[1] This constituted effectively all of her evidence in chief and her pre-recorded cross-examination was played to the jury. The prosecution case closed at about 11 am on the second day of the trial. The appellant then gave evidence in which he denied any wrongdoing, and called two witnesses who gave testimonial evidence. The defence case closed by lunch on the second day, and that afternoon each counsel addressed the jury.

[5] On the following day, because of the unavailability of the appellant's trial counsel, the trial did not continue but resumed on the day after that, when the judge summed up to the jury for just over an hour. They retired to consider their verdicts that morning.

[6] After approximately one hour of deliberations, the jury sent to the judge notes in which they raised four questions. The first was whether they could have a transcript of the prosecutor's address. The judge answered that they could not, because the address had not been transcribed. The second question has no present relevance. The third question requested transcripts of all of the complainant's evidence and the fourth question requested transcripts of the evidence of her sister. After much discussion about those requests, the judge decided that the jury should have all of that evidence together with the transcript of the appellant's evidence and that of the

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1 Under s 93A of the *Evidence Act* 1977 (Qld).

two other witnesses called in his case. The transcripts of the evidence in the defence case were provided on the argument of defence counsel.

[7] After about four and a half hours of deliberation, the jury returned its verdicts later that day.

The charges on the indictment

[8] In the course of his opening address, the prosecutor provided to each juror a copy of the indictment and proceeded to particularise the prosecution case on each count. No document was provided to the jury, at any stage, which contained these particulars. And as I will discuss, the particulars were not repeated, or indeed mentioned, by the judge in his summing up.

[9] There is now no suggestion that the case which was opened by the prosecutor was not supported, on each and every count, by the complainant's evidence from her interview by police. Within that interview, as the prosecutor said in his opening, the complainant related more extensive offending than was the subject of the 14 charges. She referred to an extensive history of similar offending, albeit in more general terms than her descriptions of the incidents which became the subject of the charges. There is no complaint as to that other evidence being put before the jury or about the judge's directions in respect of it.

[10] Counts 1 – 5 were alleged to have occurred at the house where the complainant lived with her mother, her two younger sisters and the appellant. They were alleged to have been committed, in each case, before the complainant had turned 12 (as she did in January 2013). Counts 1, 4 and 5 alleged that the appellant unlawfully and indecently dealt with the complainant. Counts 2 and 3 alleged that he wilfully exposed the complainant to an indecent film. For present purposes, count 6 should be grouped with these other charges. It was a further count of unlawful and indecent dealing, occurring at the same house. The case in relation to those counts was opened by the prosecutor as follows.

[11] Count 1 was said to have involved an event in which the appellant had gone into the complainant's bedroom, where she was watching a movie. The rest of the household was asleep. The appellant told her that he wanted to try something. He pulled her underpants down, spread her legs apart and started to lick her vagina. This occurred for five to ten minutes. The complainant said that this was the first of the episodes of a sexual nature with the appellant.

[12] Count two, the prosecutor said to the jury, most likely occurred on the same night. The appellant returned to the complainant's bedroom and awoke to find the appellant on her bed showing her an image on his phone. The image was of women "touching themselves". The appellant suggested to the complainant that in the same way, she should "explore her body".

[13] Count three was said to have occurred probably two or three nights later. The appellant came into her bedroom and showed her a pornographic video on his phone. The video depicted a woman walking by herself, before being grabbed by a man who then had sex with her, after which the woman went home and masturbated.

[14] Count four was said to have occurred, again in the complainant's bedroom, when after making her watch a pornographic film on his phone, the appellant touched the complainant on the outside of her underpants for about four to five minutes. The

appellant also tried to put his fingers underneath her underpants but the complainant was able to prevent him from doing so by moving her legs. The prosecutor said, as to this count, that there were two aspects of the conduct: touching her outside her underpants and trying to move his hand underneath her underpants.

[15] Count five was said to have involved the appellant pulling the complainant's pyjama pants down to her knees and touching her on the outside of her underpants in the area of her vagina. The complainant said that the appellant tried to make her touch her vagina, which she refused to do.

[16] Count six was said to have involved an occasion, about two nights later than count five, when the appellant came into her bedroom, put his hands inside of her pyjama shorts and then took her finger and moved it around her vaginal area underneath her underpants.

[17] Counts seven, eight, nine, twelve, thirteen and fourteen were particularised as occurring in a town to which the family moved after the commission of counts one to six. Count seven was a charge of wilfully exposing the complainant to an indecent film and was charged as having occurred in 2013. In his opening, the prosecutor said that this offence occurred when the appellant and the complainant were in a car on the way to collect a tank for the complainant's pet fish. In the course of that journey, the complainant was shown pornographic images on the appellant's phone.

[18] Counts eight and nine were said to have been committed in the same incident. The complainant was in the lounge room playing on her iPad when the appellant arrived and said that he could give her "goose bumps". He started kissing her on the neck and touching her breasts. That touching, the prosecutor said, was the subject of count eight. The appellant then moved his hand underneath her underpants and penetrated her genitalia with his finger, conduct which the complainant said went on for about 20 minutes. That was the subject of count nine, the rape offence.

[19] Counts 10 and 11 were charged as having occurred at a different town and, in each case, as involving the complainant being exposed to an indecent film. Each was said to have occurred when the appellant went to the town to do some work with horses. For count 10, the evidence was that the appellant was in a car with the complainant when he pulled over to make a phone call but then used his phone to show her a pornographic video. The complainant said that she recalled the film depicting girls masturbating. For count 11, the incident was said to have been when the appellant was on a quad bike and told her to sit on the bike with him, upon which he then showed her a pornographic video on his phone.

[20] Count 12 was alleged to have occurred on 4 August 2015 and counts 13 and 14 on the following day. Each was a charge of indecent dealing occurring at the family home. The complainant's interview by police, as played to the jury, was recorded on 6 August 2015.

[21] For count 12, the incident was said to have involved the appellant touching the complainant's breasts. The complainant said that she recalled that this was the first time he had touched her during 2015.

[22] Count 13 occurred on the next day, when the complainant was in the bathroom brushing her hair before going to school. The appellant came in and asked her to

stand next to him, and began feeling up and down her legs and then rubbing her vagina on the outside of her underpants. It seems that this was interrupted because the complainant's sister was heard nearby, before the sister left and the same conduct resumed. The resumed conduct was the subject of count 14.

[23] This Court has the advantage, not enjoyed by the jury, of a transcript of the prosecutor's opening. This was a clear particularisation of the 14 counts. But unfortunately, there was not a written equivalent which was given to the jury. The jury did have copies of the indictment, and conceivably some of them may have made some notes of the opening. But it is not suggested that all of them, or indeed any of them, must have done so.

The summing up

[24] As already noted, the complainant's account related a considerable history of uncharged sexual acts, about which the jury was instructed in the summing up. The extent of that conduct, according to the complainant's evidence, is indicated by this passage from the summing up:

> "Now, turning to the evidence of the – of a sexual nature but sexual conduct that is not the subject of any specific charge, you might recall that the complainant gave evidence to the effect that the Defendant would come into her room – and at one stage she said – and try and show her or showed her pornography. And at one stage she said every night, on another occasion she said "like, every second night" and then later she used the term "a lot". Similarly, in respect of the physical touching, the complainant gave evidence that the [d]efendant would come into her room and touch her breasts and/or vagina. And at one stage she said every time he came into her room, and then again, similar – similar to the situation involving the pornography, she then said "every second night" or "a lot".

[25] After (correctly) instructing the jury about the use which they could make, and not make, of that evidence, the judge then instructed the jury as to the legal elements of the charges. He gave each juror a copy of a document in which the 14 counts were divided into three categories. The first consisted of the charges of indecent dealing, the second the charges of exposing the child to an indecent film, and the third was constituted by the rape charge. In each case the elements of the charge were succinctly defined. But there was no reference to the facts, and more particularly, the evidence within this document. The document could only have been helpful. But of itself, it was not sufficient to instruct the jury about the particular questions, which of course were factual questions, which they had to answer.

[26] The judge instructed the jury that they had to give separate consideration to each charge and they should not reason that if the appellant was guilty of one charge, he was guilty of the others. He told the jury that because the evidence in relation to each charge was different, they might return different verdicts charge to charge. But the judge did not discuss the content of the evidence. Most importantly, perhaps with one exception, he did not instruct the jury as to what constituted the relevant evidence for a certain charge. The exception was that the judge told the jury that the prosecution had to prove that the "[d]efendant penetrated the vulva or vagina of the complainant to any extent with a thing or part of the defendant's body that is not his penis … the evidence of the complainant was that it was with his finger."

[27] The judge summarised each of the final addresses. Nowhere within those summaries was there a particularisation of the counts. The prosecution's final address did not repeat the particulars.[2]

The first ground of appeal

[28] It is argued (for the appellant) that the jury could not have discharged its duty to consider each charge separately, without being properly reminded by the judge of the particulars in relation to each charge. It is said that the jury could not have had a clear recollection of the particularisation of the prosecution case which they had been given, orally, at the commencement of the trial. Although the trial had been a relatively short one, the jury were considering their verdicts at a point in time three days from the commencement of the trial, and the one day away from the trial would have increased the difficulty for them. Absent the provision of written particulars, it is said that it was incumbent upon the trial judge to ensure that the jury had those particulars in mind. There is a risk that the jury did not consider the charges separately, or that if they did so, there was confusion amongst them as to what evidence related to a certain charge. The appellant's counsel properly conceded that perhaps there was not that second risk for the rape charge, because the jury could have had no misunderstanding about the evidence which related to it. It was argued that this was a failure to instruct the jury according to s 620 of the *Criminal Code* (Qld), which requires 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."

[29] The respondent submits that the jury should be presumed to have followed the direction given by the judge, so that there is no risk that they did not follow the instruction to consider each of the charges separately. It is submitted that the prosecution case was effectively particularised again, when that case was put to the appellant in cross-examination. The evidence of the uncharged acts, it is said, was distinguishable from the evidence of the charges because of its generality. Defence counsel did not seek further and better particulars or ask for those particulars to be given by the judge in his summing up. And it is said that the jury, although sufficiently inquisitive to send four questions to the judge, asked for no clarification of the particulars. For those reasons, the respondent argues, there was no miscarriage of justice.

[30] In *Fingleton v The Queen*,[3] McHugh J, referring to s 620, said:

> "The court does not discharge that duty by merely referring the jury to the law that governs the case and leaving it to them to apply it to the facts of the case. The key term is "instruct". That requires the court to identify the real issues in the case, the facts that are relevant to those issues and an explanation as to how the law applies to those facts."
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> (Footnote omitted)

McHugh J there endorsed the statement by McMurdo P in *Mogg*,[4] that the duty of a trial judge ordinarily requires the judge to identify the relevant issues and relate

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2 Respondent's outline of argument paragraph 27.5.
3 (2005) 227 CLR 166 at 197 [77].
4 (2000) 112 A Crim R 417 at 427 [54].

those issues to the relevant law and facts of the case.[5] McHugh J also endorsed this statement in *Mogg* by Thomas JA:[6]

> "The consensus of longstanding authority is that the duty to sum up is best discharged by referring to the facts that the jury may find with an indication of the consequences that the law requires on the footing that this or that view of the evidence is taken."
>
> (Footnote omitted)

And McHugh J also cited the statement by Diplock LJ in *R v Mowatt*[7] that:

> "The function of a summing-up is not to give the jury a general dissertation upon some aspect of the criminal law, but to tell them what are the *issues of fact* on which they must make up their minds in order to determine whether the accused is guilty of a particular offence."[8]

[31] In order for the jury to properly consider an individual charge, the members of the jury had to have an understanding, and importantly the same understanding, about what conduct was the subject of that charge. Clearly that would have been an impossible exercise, without a particularisation of the prosecution case. The conduct which was relevant for a particular charge could not have been identified simply from the indictment and complainant's evidence. That was because a certain incident, according to the evidence, could have been related to more than one of the counts as pleaded on the indictment, and secondly, because of the high incidence of other similar events, of which the complainant gave evidence but which were not the subject of any charge.

[32] The case was properly particularised by the prosecutor's opening and the question is whether that was sufficient for the jury's purposes, at the end of the trial, when they were considering their verdicts. Although the jury had listened to that opening, much of it would not have been clear in their minds by the end of the case. With two exceptions, any of the events the subject of a certain charge might have been confused with the subject of at least one other charge. Those exceptions are counts one and nine. The jury is likely to have identified count one as the event in which the appellant was alleged to have licked the complainant's vagina, because there was no such other incident recalled by the complainant and because she had said that this was the first of the offences committed. Similarly, count nine was the only occasion in which, she said, there had been some penetration of her vagina and this was the only count of rape.

[33] It is correct to say, as the respondent submits, that ordinarily a jury should be presumed to have followed the directions of a trial judge.[9] But in the present case, there is a real risk the jury did not follow the judge's instructions to consider each charge separately, because absent a clear recollection and understanding of the particularisation of the prosecution case provided at the commencement at the trial, it is unlikely that the jury could have done so. But even assuming that the jury did consider the charges separately, there is a risk that they each misunderstood what

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5 (2005) 227 CLR 166 at 197 [77].
6 (2000) 112 A Crim R at 417 at 430 [73].
7 [1968] 1 QB 421 at 426.
8 Emphasis added by McHugh J as cited in (2005) 227 CLR 166 at 197 [79].
9 *Gilbert v The Queen* (2000) 201 CLR 414 at 420 [13].

constituted the relevant evidence for a particular charge, or alternatively that within the jury there were different understandings on that matter.

[34] Consequently I am persuaded that, with the exception of counts one and nine, there was a miscarriage of justice. Counts one and nine were of a remarkably different character, for which the jury could not have been under any relevant misunderstanding.

The second ground of appeal

[35] It is argued that the jury should not have been burdened with so much written material, and that the proper course would have been for the complainant's evidence to be replayed in open court, with appropriate directions from the judge that not too much weight was given to the complainant's evidence because it had been replayed. Instead, it is argued, the jury was presented with an overwhelming task by having to consider all of this material. The appellant also argues that there was a miscarriage of justice from the judge not instructing the jury, when providing this material, that they should focus upon the evidence which they had heard and not place undue weight on the written material.

[36] In my view there was no risk of a miscarriage of justice from the provision of these transcripts and from what the judge did and did not say about them. By the course which was taken, there was no prospect of an undue emphasis upon the evidence of the prosecution case. The jury had seen and heard the witnesses only two or three days earlier and would have read the transcripts with a recollection of the way in which the oral evidence had been given. The volume of material was not so considerable that it made the jury's task too difficult for there to be a proper deliberation by them. The second ground of appeal is unpersuasive.

Conclusion and orders

[37] I would allow the appeal against convictions upon the first ground, upon all counts save for counts one and nine. On the appeal against the convictions, I would order that:

1. The appeal be allowed on the convictions for counts two, three, four, five, six, seven, eight, ten, eleven, twelve, thirteen and fourteen on the indictment.

2. The convictions on those counts be set aside and a retrial be ordered.

3. The appeal against the convictions on counts one and nine be dismissed.

[38] It will be for the Director of Public Prosecutions to determine whether to proceed to a retrial.

[39] The application for leave to appeal against sentence was abandoned. However, in case the appellant would wish to argue that the sentences for counts one and nine should be reduced, because of the outcome on the other counts, at this stage I would not refuse the application for leave to appeal against sentence. It must be said, however, that the sentences upon counts one and nine do not appear to have been

increased to incorporate some punishment also for the other counts.[10] On the application for leave to appeal against sentence, at this stage I would simply order the parties, within 21 days of the date of this judgment, to provide written submissions as to whether the application for leave to appeal against sentence for counts one and nine should be refused.

[40] **McMEEKIN J:** I have read the reasons of McMurdo JA in draft and respectfully agree with those reasons and with the orders that his Honour proposes.

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10 cf *R v Nagy* [2004] 1 Qd R 63.