SUPREME COURT OF QUEENSLAND

CITATION:	*R v CCH* [2019] QCA 79
PARTIES:	**R** **v** **CCH** (appellant)
FILE NO/S:	CA No 192 of 2018 DC No 353 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Townsville – Date of Conviction: 29 June 2018 (Coker DCJ)
DELIVERED ON:	10 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	7 February 2019
JUDGES:	Holmes CJ and Fraser and McMurdo JJA
ORDERS:	**1. Appeal allowed.** **2. Conviction quashed.** **3. A retrial ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – APPEAL DISMISSED – where the appellant was convicted of unlawful and indecent dealing with a child – where the complainant gave evidence of a number of sexual incidents – where the complainant's evidence of those sexual incidents was inconsistent as to where they occurred, what the complainant was wearing and what occurred – whether the verdict was unreasonable CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – WHERE APPEAL DISMISSED – where the appellant was convicted of one count of unlawful and indecent dealing with a child but found not guilty of two further counts of unlawful and indecent dealing with a child and one count of rape – where the complainant was unable to explain what sexual intercourse is – where the further counts of unlawful and indecent dealing with a child emerged at a critical point of a custody dispute between the complainant's

parents – where no *Markuleski* direction was requested by defence counsel, suggested by the prosecutor or given by the trial judge – whether it was reasonable for the jury to accept some of the complainant's evidence whilst rejecting other parts of the complainant's evidence – whether the trial judge erred by failing to give a *Markuleski* direction

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – WHERE APPEAL ALLOWED – where the appellant was convicted of unlawful and indecent dealing with a child – where the complainant gave evidence of a number of sexual incidents that could have been the subject of the count – where there was uncertainty in that evidence as to the location and physical acts involved in the incidents – where the prosecutor's opening and closing addresses did not identify the incident the subject of the charge – where defence counsel sought a direction as to the factual matrix of the charge – where no such direction was given – whether the trial judge failed to direct the jury as to what was the incident the subject of the charge

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – WHERE APPEAL ALLOWED – where the appellant was convicted of unlawful and indecent dealing with a child – where the complainant made a preliminary complaint to her aunt – where the aunt's evidence was only admissible as evidence of the preliminary complaint – where no direction was given as to the limited use that a jury could make of the aunt's evidence – whether the trial judge erred by failing to give a preliminary complaint direction

R v Markuleski (2001) 52 NSWLR 82; [2001] NSWCCA 290, cited

COUNSEL: M Hibble for the appellant
S J Bain for the respondent

SOLICITORS: Groves and Clark Solicitors for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES CJ:** I agree with the reasons of McMurdo JA and with the orders his Honour proposes.

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

[3] **McMURDO JA:** The appellant was charged with four sexual offences against the same complainant, who was a 12 year old girl. After a trial, he was acquitted by the jury on three of the charges but convicted on count 1 on the indictment, which was that he unlawfully and indecently dealt with the child, with the circumstance that she was under his care. He was sentenced to a term of 12 months' imprisonment, to be suspended after serving a period of six months, with an operational period of two years.

[4] He appeals against that conviction on three grounds. It is said that the verdict of the jury was unreasonable, that the trial judge ought to have given a *Markuleski* direction[1] and that the judge failed to identify to the jury the evidence which was relevant to this count.

[5] For the reasons that follow, I would allow the appeal and order a retrial, upon the basis of that third ground of appeal and also because the judge failed to instruct the jury as to the limited use that could be made of evidence of a preliminary complaint.

The evidence

[6] The complainant was born in April 2004. At relevant times, the appellant was in a de facto relationship with the complainant's mother, living with her, the complainant and the complainant's three younger siblings. The relationship began in August 2015, and at first the couple and her children lived in a house in Kelso, before moving to a property at Mt Louisa in February 2016. The complainant's mother did shift work, leaving home at about 3.00 am and returning on some days at about 10.00 am and on others at about 2.00 pm. The appellant was not employed and he was to look after the children when their mother was out.

[7] After the move to Mt Louisa, but before July 2016, the complainant's mother found a piece of the complainant's underwear on the unmade bed in the bedroom used by the mother and the appellant.

[8] A little later the mother found a notebook in the complainant's bedroom, which contained a note by the complainant of sexual misconduct by the appellant. After an initial objection by defence counsel, the relevant note was tendered by the prosecutor. No point is taken in this Court about its admission. It was a page and a half of the complainant's handwriting. The note spoke of her love for her parents, her unhappiness about their separation and her anxiety that something would happen to her mother. Most relevantly, the complainant wrote this:

> "[T]he thing I[']m scar[e]d of is to tell mum that I had sex with [the appellant] ever since last year. I hated it but it's only when she was gone to work or out somewhere. I hate myself for it it started as his cuddles I[']m afraid if I tell mum she will get up me and everyone will hate me … when [the appellant] started this sometimes I told him to stop and I would walk out this … to me was bad and I[']m [truly] sorry …"

[9] After the mother showed the complainant the note, she took her to see a doctor and then the police. The complainant was interviewed by police on 20 July 2016 and again on the following day. Recordings of those interviews were tendered under

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1 See *R v Markuleski* (2001) 52 NSWLR 82; [2001] NSWCCA 290.

s 93A of the *Evidence Act* 1977 (Qld) and what was there said became the basis of counts 1 and 2.

[10] After these events the mother took the children to live elsewhere for a short time, before returning with them to the house at Mt Louisa and resuming her relationship with the appellant. However, there were rules which were imposed on the children, as to not having any physical contact with the appellant and when and where they would use a bathroom. After a while, the mother gave up work to look after the children.

[11] In early January 2017, when the complainant and her sisters were staying with their father, the mother received a call from her own father, who asked her to go around to his house. When she arrived, the children's father was there. As a result of what he then said to the mother, police again interviewed the complainant. A recording of that interview was tendered under s 93A and what was there said became the basis of counts 3 and 4.

[12] Count 1 on the indictment alleged that between 1 December 2015 and 20 July 2016, the appellant unlawfully and indecently dealt with the complainant, a person under his care. Count 2 alleged that in the same period, the appellant raped the complainant. Counts 3 and 4 alleged that between 19 July 2016 and 5 January 2017, the appellant unlawfully and indecently dealt with the complainant (who was under his care).

[13] The complainant gave pre-recorded evidence in January 2018. The prosecution case was dependent upon the jury accepting the complainant as a credible and reliable witness.

[14] In the July 2016 interviews, the complainant told police that the appellant had sexually abused her on two specific occasions, each occurring when her mother was at work. On the first occasion, she said, the appellant took her into his bedroom and locked the door. She said that he pushed her down onto the mattress and got on top of her when "he pushed his dick into me … It hurt". She appeared to be saying that, at the same time, he was attempting to take her clothes off, but she kept pulling them back up. After a while, she told him to stop, pushed him off and left the room.

[15] The second occasion happened on a Saturday when her mother went to farewell a friend who was moving away from Townsville. (The mother testified that there was an occasion when, in May 2016, she left the house to say goodbye to a friend who was moving to Brisbane.) On this occasion, the complainant said, the appellant took her into his bedroom, pushed her onto the bed, took her pants off and pushed his penis into her vagina. She said that after a few minutes, she pushed him off and left the room.

[16] In her July interviews, she said that there were other occasions where similar things happened, one of which seemed to be an incident when, again in his bedroom, he took off the underpants which her mother subsequently found there.

[17] When she was asked by police to tell them about the appellant having sex with her, as she had written in the note, she said:

> "Um a few times he asked me to come into the room he will lock, he will lock the other girls out … It happened every time my Mum was at work".[2]

[18] She described him locking the door to the bedroom from the inside, saying that the door had "one of those slide across locks".[3]

[19] At times she said things such as "he pushed his dick into me", and later explained that this involved his pushing his dick "somewhere near my vagina".[4] She was asked whether she had clothes on when he pushed his dick into her, and said "Yeah" and described the clothing.[5] She said that there was another occasion when she had her pants off when "he pushed his dick into me".[6] At another point, she seemed to say that this occurred on a different day from the day on which her underpants were left on the bed where they were found by her mother.[7]

[20] As the case was opened to the jury, count 1 involved the appellant rubbing his genitals on the outside of her clothing covering her genitals. The complainant seemed to say that this was at the Kelso house, but later she seemed to say that it was at the Mt Louisa house. It was only at Mt Louisa that there was a sliding lock on the bedroom door.[8] This was said to be the first sexual incident which occurred.

[21] In cross-examination, at one point the complainant said that this first incident involved his taking her clothes off, before she put them back on and that this was all which had occurred.[9] On this occasion, she said, he did not try to put his penis in her vagina.[10]

[22] When she was asked about the incident which was the subject of the rape charge, she was asked to "describe what sex is", to which she answered "I don't know exactly, because I've never done sex ed."[11] A little later in cross-examination, she again agreed that she did not know what sex was, and said also that she did not know how someone became pregnant.

[23] As is submitted for the appellant, there were many possibilities from the complainant's account of what might have been an offence as charged in count 1. There were differing accounts of the house where this occurred, differences as to what clothing she was wearing and differences as to what had happened. Initially in the police interview, she seemed to be saying that there was sexual intercourse between them, before saying later that there was no penetration of her vagina on that day. And in cross-examination, she seemed to say that the incident was limited to his starting to take her clothes off, which she resisted by pulling them back on before she walked out of the room. That was at odds with her statement to police that "he hopped on top of me".

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2 AR 195-196.
3 AR 200.
4 AR 203.
5 AR 202.
6 Ibid.
7 AR 211.
8 In cross-examination at T1-30.
9 T1-30.
10 Ibid.
11 T1-31.

[24] As to count 2, there were inconsistencies in her evidence as to where penetration first occurred (in the bedroom or in the lounge room before going to the bedroom) and what the complainant had been watching on television immediately before the incident began.

[25] When interviewed in January 2017, the complainant said that the appellant had again taken her into his bedroom, when her mother was not at home. She had been watching a movie, when he told her to go into his room so that they could talk. Once they were there, she said, he took off her clothes and told her to lay on the bed, but she refused, put her clothes on and ran out of the room. That evidence was the subject of count 3.

[26] The final count was said to have occurred in the lounge room, when the mother was home but asleep in the bedroom. The complainant said that the appellant trapped her under a blanket, and described that he was on top of her, moving up and down. She said that the blanket was between the two of them and he was rubbing his genitals against her genitals. The complainant told police that after this incident, she spent the day playing a game called Uno. In cross-examination, she accepted that the Uno game was a Christmas present in 2016, although she had told police that this incident occurred about a month after she returned to the house in the middle of that year.

[27] Police also interviewed a younger sister (C), and a recording of that interview was tendered. C was cross-examined in pre-recorded evidence. C said that there had been numerous occasions, when her mother was at work, when she observed that the appellant and the complainant were in his bedroom with the door locked. She said that this door had a round door knob and the complainant's mother gave evidence that there was a door of that kind at the Kelso property.

[28] The complainant's aunt gave evidence of an occasion at the beginning of 2016, at her brother's house, when she observed the appellant putting his hand on the complainant's upper leg with a closed fist and rubbing her leg with his thumb. The aunt also gave evidence of an occasion, later in 2016, when she was picking her own children up from school, and she spoke to the complainant. The aunt said that the complainant told her that "her and CCH had been having sex". When the aunt asked her "What do you mean?", the complainant said "We took our clothes off, and he'd rub on top of me". The aunt asked her "why wouldn't you tell anyone" of this, and the complainant replied that she did not think that anyone would believe her. The complainant was crying as she was saying this. It appears that it was a short time later that the complainant, her mother and her sisters stayed with the aunt and the aunt's parents for four days.[12] The jury could have inferred that this was the period when they had left the house after the initial police interviews.

An unreasonable verdict?

[29] As the appellant submits, there were many inconsistencies amongst the various accounts given by the complainant, and those which related to counts 2, 3 and 4 were relevant also to count 1. But the focus of the appellant's argument is that the complainant said different things at different times about the incident the subject of count 1.

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12 T2-27.

[30] However, the complainant was consistently saying that, prior to being interviewed by police in July 2016, there had been at least one incident of penile intercourse as well as a number of other sexual incidents. It was open to the jury to interpret her evidence overall as describing one or more incidents in which there was some simulation of intercourse, when her clothing had not been removed, as well as another occasion, which she described in cross-examination, where her clothing was removed but nothing else occurred.

[31] Notwithstanding the weaknesses in the complainant's evidence, in my view, it was open to the jury to find that there were incidents of these various kinds, of which one *might* have been the subject of count 1. So if the jury had been clearly instructed that the incident the subject of count 1 was, for example, that in which her clothes had been removed but when he did nothing else, it was open to the jury to conclude that this occurred and to convict on this count. The same may be said by substituting an incident of simulated intercourse, with the clothing not removed. As I am about to discuss, there is a risk that all members of the jury may not have been considering the same incident. But the present question is whether it was open to the jury to find that there was an incident, of any of these kinds, which did occur.

[32] The complainant's evidence did not provide a reasonable basis for a conviction on count 2 and, not surprisingly, the jury acquitted on this count. The jury had heard her evidence, in cross-examination, that she did not understand what amounted to sexual intercourse. This means that the jury may have rejected her evidence on the rape charge without concluding that she was an untruthful witness. Notably, whilst weaknesses of her evidence in relation to counts 2, 3 and 4 are relevant, it is not argued that the verdicts are inconsistent.

[33] In my conclusion, the first ground of appeal is not established.

Should a *Markuleski* direction have been given?

[34] A direction of this kind need not be given in every case where there are sexual counts based upon the evidence of the same complaint. The direction will be appropriate where the evidence is such that, from a rejection of part of the testimony of the witness, it ought reasonably to follow that the balance would be rejected.[13]

[35] In this case, no such direction was requested by defence counsel, or suggested by the prosecutor. I am not persuaded that the direction was required. This was a case where it was reasonable for the jury to accept such of the evidence as they thought was the basis for count 1 whilst rejecting other parts of the complainant's evidence. As I have said, they may well have rejected her claim used to support count 2 as coming from an ignorance of what amounted to sexual intercourse. And they may have been unpersuaded by her evidence of the later incidents (the subjects of counts 3 and 4) because of the particular circumstances in which she was taken back to the police to be interviewed in January 2017. It emerged that this occurred at a critical point in the dispute between her parents about who would have custody of the children, and at a time when she had been staying with her father. The jury may well have thought that she had been honest in what she was saying to police in July 2016, but was a reluctant complainant in 2017.

What was count 1?

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13 *R v Ford* [2006] QCA 142 at [124] per Keane JA.

[36] The jury had to be directed as to what was the incident the subject of count 1. Otherwise, there was the risk that some of them would consider an incident where there was some simulation of intercourse (with the clothing not removed), and others would consider a different incident, in which her clothing was removed but with nothing else occurring. Unfortunately the jury did not receive this instruction.

[37] In his opening address to the jury, the prosecutor said that the first count involved the appellant "pushing her onto the mattress and pushing his genitals into her". The jury was told that in this incident "He got on top of her" and, using the complainant's words, "pushed his dick into me and, it hurt." Even on that description, count 1 covered a number of possibilities, so that the trial did not begin with the jury having a clearly identified incident to consider as the subject of this charge.

[38] Nor did the prosecutor's closing address identify the incident. At the conclusion of the addresses by both counsel, in the absence of the jury, the appellant's counsel asked whether the judge intended to give the jury "a summary of what the evidence is in relation to each count?" His Honour replied "Yes, I do. Well, I intend to give a summary in relation to each of your addresses as well as an indication of the elements of the charges."

[39] The appellant's counsel then said:

> "In my submission, your Honour, this case needs your Honour to direct the jury as to what evidence constitutes count 1, count 2, count 3, count 4. Because there are uncharged acts, and the jury has to be satisfied beyond a reasonable doubt as to the specific charge and not the uncharged act."

[40] Counsel went on to say that the jury had to be satisfied:

> "[A]s to the factual matrix for count 1, and, to be frank, I don't know what it is.
>
> The learned crown prosecutor had said, well, it might be Kelso. It might be Mount Louisa. Your Honour, this is a case where the jury have to be told which place it occurred because it may have occurred at more than one place. … Because it's unsatisfactory to leave it on a factual matrix it could be either when, in fact, there could be multiple occasions where this has occurred."

[41] In those passages, counsel referred to a particular point of uncertainty, which was the location of the offence. But as I have discussed, the problem was more extensive because there were several possible incidents, not only at different places but involving different physical acts.

[42] Unfortunately the trial judge did not direct the jury as suggested by defence counsel. His Honour did carefully explain the relevant law and he extensively described the respective arguments of counsel. But as I have said, the prosecutor's argument to the jury had not clarified the position for count 1, and defence counsel was unable to do so. At no point did the judge instruct the jury as to what facts they had to find in order to convict on count 1.

[43] On the state of the evidence, that created the real risk that different jurors considered different incidents, and that the appellant was convicted without the jury

being unanimous (or of a requisite majority) as to a particular incident. There was thereby a miscarriage of justice requiring that the conviction be set aside and a retrial ordered.

The preliminary complaint evidence

[44] In my view it is clear that the aunt's evidence was admissible only as evidence of a preliminary complaint. Having regard to the timing of this conversation, it would appear that it was tendered as evidence of a preliminary complaint about the incident the subject of count 1.

[45] In this Court, counsel for the respondent suggested that the evidence may have been admissible, not as proving a preliminary complaint of a particular offence,[14] but as evidence "explaining the context of the unfolding of the complaint and then the report to police." But on any view as to the basis for its admission, the jury had to be told of the limited use which could be made of it.

[46] The trial judge was required to instruct the jury that this evidence was not evidence of the truth of what the complainant said to her aunt and, at its highest, its relevance was confined to showing a consistency in her complaints as to one or more of the offences. Consequently, there is a risk that the jury, or at least some of them, were inclined to misuse the evidence as proof that there was a sexual incident as the prosecution alleged. On this basis also, there was a miscarriage of justice.

Orders

[47] For these reasons there should be orders as follows:

1. Appeal allowed.
2. Conviction quashed.
3. A retrial ordered.

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[14] cf *R v NM* [2013] 1 Qd R 374; [2012] QCA 173.