SUPREME COURT OF QUEENSLAND

CITATION:	*R v Ashley* [2005] QCA 293
PARTIES:	**R** **v** **ASHLEY, William Roger** (appellant)
FILE NO/S:	CA No 137 of 2005 DC No 2285 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	16 August 2005
DELIVERED AT:	Brisbane
HEARING DATE:	5 August 2005
JUDGES:	Williams and Keane JJA and Wilson J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against conviction dismissed**
CATCHWORDS:	CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - MISDIRECTION AND NON-DIRECTION - GENERAL MATTERS - PRESENTATION OF DEFENCE CASE AND CROWN CASE AND REVIEW OF EVIDENCE - PRESENTATION OF DEFENCE CASE - where the appellant was convicted after trial by jury of two counts of indecent treatment of a child under 16 years of age - where complainant was a 13 year old friend of the appellant's daughter - where the offences were alleged to have occurred while the complainant was staying overnight at the appellant's house - where the only evidence that the offences had been committed was the evidence given by the complainant - where there were a number of inconsistencies in the complainant's evidence - where it was submitted on appeal that the trial judge had "minimized" the significance of these inconsistencies in the summing up to the jury - where the trial judge had directed the jury about the dangers of convicting on uncorroborated evidence and had commented that the other evidence in the case was "generally speaking, to the contrary" of the complainant's evidence - whether the trial judge failed to

fairly put the inconsistencies in the complainant's evidence before the jury - whether the trial judge ought to have directed the jury that a reasonable doubt with respect to the complainant's evidence on one count ought to be taken into account when making a general assessment of the veracity of the complainant's evidence

CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - UNREASONABLE AND INSUPPORTABLE VERDICT - where the appellant was convicted after trial by jury of two counts of indecent treatment of a child under 16 years of age - where appellant submitted that the evidence of the complainant was so inconsistent that a reasonable jury could not have convicted him - where the appellant did not give evidence to contradict the complainant's account of what had occurred - where the complainant's evidence was consistent with complaints made promptly after the offences were alleged to have taken place - whether the jury must have acted unreasonably in order to convict the appellant

MFA v The Queen [2002] HCA 53; (2002) 213 CLR 606, applied
R v Markuleski [2001] NSWCCA 290; (2001) 52 NSWLR 82, distinguished

COUNSEL: A J Kimmins for appellant
R G Martin SC for respondent

SOLICITORS: PHV Law for appellant
Director of Public Prosecutions (Queensland) for respondent

[1] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of Keane JA wherein the relevant facts and extracts from the summing up are fully set out.

[2] The initial complaints of the 13 year old girl were that she had been "touched", "raped", and "touched in the wrong way". The circumstances in which those complaints were made are set out in the reasons for judgment of Keane JA. Understandably the investigating police then endeavoured to have the young complainant give more specific descriptions of what had occurred. As is frequently the case, the initial description of an offence by a very young complainant will not satisfy the demands and scrutiny of the lawyers involved in a subsequent prosecution. The young complainant in a case such as this will be called upon on numerous occasions to give a precise, detailed account of the alleged improper touching. Given the nature of the allegation being made it is not surprising that a somewhat different account of what was essentially involved in the incident will be given from time to time. There are many possible explanations for that. The shyness which may be associated with the first telling of the incident may possibly be overcome by repeatedly recounting the story and in consequence more precise detail may emerge. On the other hand recounting the story with lawyers present

may result in some reticence to provide minute detail. Further, what a 13 year old girl calls "rape" will not normally accord with the definition in the *Criminal Code* 1899 (Qld). The possible explanations for inconsistencies between accounts are endless. That is why it is essentially a jury question whether or not a complainant is truthful and reliable when it comes to establishing the essential fact which constitutes an offence.

[3] In this case the critical issue was whether or not the jury was satisfied beyond reasonable doubt that the appellant pulled aside the young complainant's pants and touched her vagina. Whether there was one or two movements in so doing is not to the point if the jury are satisfied beyond reasonable doubt that the touching occurred.

[4] That is not to say that inconsistencies in describing the events alleged to constitute the offence are irrelevant. The inconsistencies are matters for the jury to consider in the course of their deliberations. A jury must be appropriately instructed that inconsistencies in the account given by even a young complainant are relevant to their determination whether or not her evidence is truthful and reliable. But the mere existence of such inconsistencies does not mean that of necessity the jury must reject her evidence.

[5] In the present case the jury was adequately instructed as to the significance of inconsistencies in the complainant's evidence and of the fact that her evidence was not objectively supported by evidence from some other source.

[6] Having regard to the totality of the evidence, and the summing up, I am not convinced that the verdicts of the jury are such that they cannot be supported and should be set aside.

[7] I agree with all that has been said by Keane JA and with the orders he has proposed.

[8] **KEANE JA:** On 6 May 2005 the appellant was convicted by a jury on two counts of indecent treatment of a child under 16 years of age in his care. The offences were alleged to have been committed on 7 December 2003.

[9] The grounds of appeal on which the appellant relies may be summarized as follows:

(a) There was a miscarriage of justice because the evidence of the complainant child was shown to be so unreliable as to render the conviction unreasonable;

(b) The learned trial judge erred in failing to put the defence case to the jury;

(c) The learned trial judge erred by summing up to the jury in a way which minimized the significance of the inconsistencies in the complainant's evidence.

The Crown case at trial

[10] The complainant was born on in 1990 and was 13 years of age at the time of the alleged offences. She was a friend and schoolmate of the appellant's daughter, B. On 7 December 2003, the complainant stayed overnight at the appellant's house. The complainant and B were sleeping on a mattress in the lounge room where they had fallen asleep while watching television.

[11] The complainant said that she was awakened when she felt something "poking" her on her bottom. She rolled over, saw the appellant and said: "Don't." The appellant was "leaning on the lounge and half on the mattress". As she started to watch TV again, the appellant began pulling her legs apart. She said that the appellant then pulled her underpants aside and that his fingers brushed her vagina. The complainant said she tried to pull her underpants back into place but that the appellant again pulled them aside and touched her vagina. Then he leant on top of her so that she could feel his stomach. She asked whether she could have a drink of water. The appellant agreed, and she got up and left the room.

[12] The complainant then went into the kitchen and drank some water. She then went to the toilet before she came back into the lounge room. The appellant grabbed her wrist and pulled her next to him. He moved his hand up underneath her skirt to her waistline and she said, "Can you not do that?" He replied, "Yeah, sure." She lay on the mattress while the appellant also "laid on the mattress for a while".

[13] While these two incidents of touching were said to have occurred, the appellant's daughter B was sleeping beside them on the mattress. The complainant said that after the second incident she lay on the mattress for a while before B woke up and said, "What the hell is my dad doing at the end of the mattress?" The complainant said that she replied: "I don't know." The complainant said that "a bit later [the appellant] got up and he went back to his room".

[14] B did not give evidence of waking up and talking to the complainant. She was not asked whether that specific incident had occurred although she did say in cross-examination that she had no recollection of waking up and speaking to the complainant at any stage during the night.

[15] In cross-examination, the complainant agreed that, at the committal hearing, she had denied that she had a conversation with B, and that she had said that she was "absolutely, positively certain" that such a conversation had not occurred.

[16] According to B's evidence, in the morning, the complainant said to her that while B had been asleep "your dad touched me".

[17] According to K, another school friend of the complainant, on the morning of 8 December, the complainant handed her a note which read: "I was raped at [B's] at 12 o'clock last night." In a later conversation with K, the complainant told K that the note was true. K said that the complainant was upset. In cross-examination, when K was asked if the complainant had said anything else, K replied: "Only that she was touched in the wrong way."

[18] On the same day, the complainant told LC, a teacher at her school: "That she had slept over at [B's] house and that [B's] father had tried to rape her."

[19] Later that day the complainant gave a written statement to a police officer. This was tendered and read to the jury pursuant to s 93A of the *Evidence Act* 1977 (Qld). In it the complainant said:

> "14. I can't remember what he said to me but he crouched down and he tried to open my legs by putting his hand on my shin area and pulled my legs outwards.
>
> 15. I was wearing a shirt and a skirt that I had been wearing all day.

> 16. As [the appellant] was pulling my legs open I was trying to pull my legs back together but he was too strong.
> 17. [The appellant] lent forward and I could feel his belly on me. He then pulled my underpants to the side of my private parts. He kept his hands to the side, holding my underpants and I put my hands over my private parts.
> 18. [The appellant] lent forward and his face was very close to mine. I felt like he was going to kiss me.
> 19. I said 'Can I get a drink of water?'
> 20. He said 'Yeah sure' and then he got off me.
> 21. I went into the kitchen and I saw that the clock said about 5 past midnight. I then went to the toilet to hide. I stayed in the toilet for a couple of minutes because I was hoping that [the appellant] would go back to his room and go to sleep.
> 22. I eventually went back into the lounge room. [The appellant] was still sitting on the mattress. I went to lie back down and [the appellant] grabbed my wrist and pulled me onto the mattress towards him.
> 23. [The appellant] then touched my upper left leg. He then put his hand on my private parts (when I say private parts I mean my Virgina [sic]).
> 24. I pushed his hand away and said 'I did not like that.'
> 25. He said 'Fine'.
> 26. [The appellant] then laid at the bottom of the mattress."

[20] At the committal hearing, the complainant did not mention that the appellant had touched her vagina in the course of the second incident. Her evidence-in-chief at trial did not suggest that he had touched her vagina in the course of this incident.

[21] In cross-examination at trial, the complainant said that after the appellant had touched her the second time, "he just started watching TV again". She also agreed that at the committal hearing she had said that "he got up and went to his room".

[22] The complainant made a further statement to the police on 14 December 2003. It was also tendered in evidence and read to the jury. That statement contained the following:

> "(In relation to paragraph 21 [of her earlier statement]) When I went to the toilet I saw the clock said about 5 past midnight. The clock I was looking at was a wall clock. It has 'Holden Lion' symbol on it. I could read the clock because one of the lights was on in the toilet. I went to the toilet but I didn't actually go to the toilet. I flushed the toilet so [the appellant] would think that I did.
> (In relation to paragraph 23) I can't describe in words what it felt like when [the appellant] put his hands on my vagina but I was scared . . ."

[23] In cross-examination, the complainant acknowledged that at the committal hearing she said that she was able to see the clock because it was illuminated by a light on the next door neighbour's back veranda. In cross-examination at trial, she said that the clock was illuminated by the light from the toilet.

[24] The appellant's daughter S gave evidence that she was awake and wandering about the house around the time the offences were alleged to have occurred. She saw and heard nothing untoward. The appellant does not now seek to attach any particular significance to this evidence.

The appellant's case at trial

[25] The appellant's case was that the jury could not be satisfied beyond reasonable doubt that he committed the offences with which he was charged. The appellant did not give evidence; but he called evidence from the appellant's other daughter D and his wife, Mrs A. D gave evidence that she was awake at about the time when the offences were said to have occurred and gave an account which suggested that she saw and heard nothing unusual. She was challenged about her account in cross-examination. The appellant does not now seek to place any particular significance on her evidence.

[26] There was other evidence from Mrs A and D which was not challenged. According to D, on the night in question, apart from the appellant, his wife and the complainant, there were six other people sleeping in the appellant's house. D gave evidence, which was not challenged, that the layout of the house was such that a light in the toilet cannot illuminate the kitchen. D's evidence as to the configuration of the house was confirmed by Mrs A.

The appeal

[27] It is convenient to deal first with the appellant's complaints about the learned trial judge's directions to the jury. The appellant's principal complaints in this regard are that the learned trial judge failed adequately to put his case to the jury[1] and, in this regard, "minimized" to the jury the inconsistencies in the complainant's evidence during the course of his summing up.

[28] The learned trial judge made it clear that it was for the prosecution to establish the appellant's guilt beyond reasonable doubt. He also made it clear to the jury that they were the sole judges of fact and that they were entitled to disregard any comments made in relation to the evidence.

[29] The learned trial judge said:

> "In considering these matters sometimes questions of consistency are important. Some inconsistency in a witness is to be expected. It is natural for people who are asked to recount events on a number of occasions to give slightly different versions on each occasion. The important thing, you may think, is whether the core matters of the events alleged remain the same and only details are changing or whether there are more serious departures from the original story.
> But if anybody is asked to recount events on two or three different occasions, it is almost inevitable there will be some difference in the recital on those three occasions. And in the same way if a number of people are asked to given an account of a particular event, it is almost inevitable that you will get a number of different versions of that event. And that is not being dishonest, that is just behaving as human beings behave. And, in fact, perfect consistency is not something that you would ever come across normally and, if you

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1 Cf *R v Lock* [2001] QCA 84 at [16] - [17], [30] - [36]; (2001) 121 A Crim R 219 at 222, 224 - 226.

> ever did come across it, it would be as much a cause for suspicion as for anything else.
> So, it is up to you to decide. There were some consistencies [sic]. I think there is no doubt about that. There were inconsistencies pointed out in the evidence of the complainant between what she said at various times when she was giving her evidence. There were inconsistencies pointed out in what [B] said about certain things. There were inconsistencies pointed out in what [D] had to say about the night in question. And I don't know that there were inconsistencies pointed out in [Mrs A's] evidence, but it was pointed out that she had seen [D's] statement and she had glanced at some transcript of evidence of [B].
> All those matters you may consider relevant and, as I say, this is a very difficult matter and it is a matter on which the Court really cannot help you. The Court cannot give you any sort of formula that you can apply to determine whether you will believe a witness or not or how much you will believe of [what] that witness said or whether you will reject any evidence as being unreliable or whether you will accept it. They are difficult questions and, unfortunately, they are left for you to resolve."

[30] In relation to this passage it may be noted that the resolution of the inconsistencies of the witnesses referred to was said to be "a difficult matter". His Honour was clearly not minimizing the significance of these inconsistencies insofar as they bore on the central issue, which was whether the jury were satisfied beyond reasonable doubt of the appellant's guilt on the two counts in question.

[31] The learned trial judge also directed the jury:

> "Some of the evidence, and I am referring particularly to the evidence of [LC] and [K] and most of the evidence of [B] is not what we call probative evidence. The evidence related to the making of what is called a preliminary complaint, that is to say a complaint before a formal statement is made to a police officer.
> There was obviously a preliminary complaint made in this case. There was one that you may think was made to [B] and there seems to have been one made to [K] and there seems to have been one made ultimately to [LC]. That evidence isn't probative of the offence. It doesn't go to prove the commission of the offences alleged.
> What it does is it goes to the question of credit of the complainant [B]. And the reason it goes to her credit, which is to say credibility or believability, the reason it goes to that is that it shows consistency of conduct. If a young girl was treated in the way in which she alleges she was in this case, then it would be consistent with that that she would, at an early opportunity usually, as is alleged to have happened in this case, she would complain to someone about it.
> And the fact that she did, if you believe the evidence to that effect, you can use as assisting her credit. You can regard her as a more believable witness because she has made the complaint. And in the same way, if no complaint were made, it reduces or may be treated by you as reducing the credibility of the witness. But that is a special sort of evidence. As I say, it goes only to credit because it shows

> consistency of conduct and it doesn't, in itself, amount to any step or any basis upon which you can reason towards the proof of the offence. It has nothing logically to do with proving the offence."

[32] It may be noted that in these comments the learned trial judge did not advert to the possibility that inconsistencies or differences in the terms of the complaint may detract from the credibility of the complainant, and to the differences in the terms of the complaint in this case in relation to the complaint of "rape" to K. So far as the terms of the complainant's note to K are concerned, it may well be that, as the respondent contends, the jury would regard the use of the word "rape" by a 13 year old girl in a technically incorrect sense as not inconsistent with her reliability as a witness. Nevertheless, it is true that was an issue for the jury to which they were not directed. The more important point, it seems to me, and one which deprives this criticism of the learned trial judge's direction of any force it might otherwise have had, is that the complainant was not asked to explain what she understood by the word "rape" and the evidence of K was to the effect that, when the complainant wrote of "rape", she must have meant intimate touching. Further, the evidence of B confirmed that the complainant's complaint to her was entirely consistent with an incident of indecent touching. In my view, the appellant was not prejudiced by the absence of a more elaborate and detailed direction by the learned trial judge because it would necessarily have involved emphasis on the point that the complaint was about indecent touching and that it was made very soon after the alleged event.

[33] The learned trial judge went on to direct the jury in the following terms:

> "You can convict an accused person upon what's called the uncorroborated testimony of the complainant. In this case, there is really no support in other evidence for the complainant's story. There is only her evidence. **You are entitled to convict simply upon her evidence but you should be very conscious of the fact that there is nothing else in the case that can confirm to you that what she said happened did happen. The other evidence in the case, generally speaking, is to the contrary. The evidence about the clock, for example, and whether it was lit and could be seen is, generally speaking, contrary to what she said.** And of course the evidence of [D] and [Mrs A] tends to suggest that these things could not have happened at midnight or around about midnight which seems to be the time in question because of the reasons they give about getting up and doing things and seeing things and the accused's sleeping habits, et cetera.
>
> So you need to be very careful before you convict the accused. You need to be very careful to be satisfied beyond reasonable doubt that the complainant . . . was a truthful witness, a witness you could believe, and very careful that her evidence was sufficiently reliable for you to act upon it in convicting this man.
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> There's nothing much an accused person can do in a case like this except deny the allegation and adduce evidence of surrounding circumstances to cast doubt upon the allegation, and that's basically what the accused has done in this case. In the absence of supporting evidence you should be very, very careful not to convict unless you're satisfied of the credibility and reliability of the complainant . . . to the point where you have no reasonable doubt that the accused did these things.

So it is a serious matter for you and you will need to consider that very closely.

The defence case points principally to various inconsistencies in [the complainant's] evidence and there were inconsistencies. I think, that's probably incontestable. Some of the inconsistencies, you may think, were not terribly important. Inconsistencies such as the order in which events happened; whether he was leaning over her with his stomach on her and his hands beside her head where apparently he should have been pulling her panties aside at some point. The order - that sort of thing, the question there is whether, you think, mistakes of that kind or difficulties of that kind can arise in cases where traumatic events are occurring and they are occurring to a young girl aged 12 who might easily be then confused and upset as to some of the details.

There were problems about the clock and the toilet light and as to whether or not it could be visible at about midnight without the kitchen light being on. There was one other point which may be - you may think, is of some significance. That is to say, what happened after she stopped him from holding his hand near her vagina? That was - which was subject to count 2 and, on one version, she apparently said that he left the room and, in another version, he remained on the mattress and that led to [B] asking what the hell her dad was doing there at some point when she woke up. Things like that, you may think, are of greater importance.

There were problems too with the evidence of [D]. She had given inconsistent evidence, to some extent, as to what she had done that night, as to when she got up, when she was in bed, who was up at the time? That sort of thing. Inconsistency; she said that she was upset at the time of giving her statement and, no doubt, that is true.

I don't think inconsistencies were actually established in relation to the evidence of [Mrs A] and **the defence also says that it is inherently improbable that this sort of thing would happen in the house that was so full of people at the time and while the complainant was lying next to the accused's daughter in the lounge. His wife was in the bedroom. One of his daughters and her partner were in another bedroom. There was an exchange student somewhere and there was somebody else and his son, who were friends of the family.**

It was obviously a very full house and the defence suggests too that it's very unlikely that the accused would behave himself in such a way in a situation like that. Well, that is a matter for you, whether or not that argument has any persuasive effect.

In the end, as I say, it is dependent really upon your accepting the evidence of the complainant, notwithstanding the other evidence of the case - the other evidence in the case accepting [the complainant's] evidence, in its essentials, as being true and accurate and upon your being convinced by that evidence beyond reasonable doubt that each of the elements in the offences has been established and in that case it's your duty to return the verdict of guilty.

> If you are not in a position of being satisfied beyond reasonable doubt with respect to any of the elements charged and really the issue is what actually happened, the factual issue, what really happened? If you are not satisfied beyond reasonable doubt about any element then it is your duty to acquit." (emphasis added)

[34] In relation to this passage, it can be seen that the learned trial judge expressly put the defence case as to the unreliability of the complainant and the "improbable" aspects of her account to the jury. Nevertheless, the appellant makes a number of complaints about these directions. First, it is said that the difficulty in the complainant's evidence about being able to read the kitchen clock is not relevant merely to showing when the incidents of which the complainant gave evidence occurred or the order of events, and that the learned trial judge should have emphasized that it bears strongly upon the reliability of the complainant's evidence generally. In this regard, the learned trial judge's direction did, in my respectful opinion, clearly identify the significance of this difficulty for the credibility of the complainant's version of events. He went so far as to refer to "the evidence about the clock" as being "contrary to what she said" in the context of warning the jury that they had to be aware that only the complainant's evidence "and nothing else in the case" could justify a conviction.

[35] Secondly, the appellant complains that the complainant's stark denial, on an occasion prior to the trial, of her conversation with B after the second incident was not mentioned by the learned trial judge. I would agree that, if this complaint by the appellant accurately reflected the learned trial judge's directions, to leave the jury with the implication that this inconsistency was not "of importance" would minimize an issue which is significant in relation to the complainant's reliability. But the jury's attention was squarely drawn to the accounts given by the complainant of the events relating to count 2, including the complainant's account of her conversation with B. In my opinion, the appellant's prospects of an acquittal were not prejudiced by the absence of a more fulsome direction on this point.

[36] Thirdly, the appellant complains that the learned trial judge did not advert to the difference in the complainant's evidence in relation to the first count between the evidence given at trial and her statement to the police of 8 December 2003. In her evidence-in-chief at trial, the complainant was emphatic that the appellant pulled her panties across twice. She had not previously said that he did this twice. This seems to me to be the kind of difference which a jury might not regard as significantly detracting from the credibility of the complainant's evidence. In his direction to the jury in relation to the evidence relevant to the first count, the learned trial judge said:

> " . . . so far as count 1 is concerned the evidence of the complainant was that there was some poking feeling on her bottom, that her legs were pulled apart, that her panties were pulled aside, that the accused's hand brushed against her vaginal area in the course of doing this, and then she asked if she could go and have a drink, so she says, and that brought to an end the episode which is the subject of count 1."

[37] It is, in my view, wrong to regard this direction as apt to mask or minimize the difference in the complainant's evidence as to whether the appellant pulled her panties aside once or twice. The jury had only recently heard the evidence. There

was no chance that they were not aware of the point. What they should make of it was a matter for them. It may well be that they did not think much of the point for the reason that, in her original statement to the police, the complainant, while not saying that the appellant had pulled her panties aside twice, had not said that he only did it once.

[38] In my respectful opinion, the appellant's complaints that the learned trial judge was "dismissive" of aspects of the defence case seem to boil down to a complaint that the learned trial judge did not duplicate the role of defence counsel as an advocate for the appellant by emphasizing matters of the evidence which might be apt to persuade the jury to acquit. There is no suggestion that the discrepancies and inconsistencies in the complainant's evidence were not addressed vigorously by the appellant's counsel. The learned trial judge put these points fairly before the jury as matters to which they should have regard in deciding whether they were satisfied beyond reasonable doubt of the appellant's guilt. The proper discharge of his Honour's function did not require emphasis or repetition.

[39] Further, in my respectful opinion, the appellant's complaints about the learned trial judge's directions to the jury do not suffice to raise a likelihood that the appellant was denied a fair chance of acquittal. The appellant's complaints have an air of unreality about them in that they fail to recognize that the learned trial judge expressly made the point to the jury that the evidence in the case was "generally speaking, to the contrary" of the complainant's evidence.

[40] Also exhibiting an air of unreality is the appellant's contention that the learned trial judge erred in failing to direct the jury to the effect that a reasonable doubt with respect to the complainant's evidence on any count ought to be taken into account in the assessment of the complainant's evidence generally in the terms recommended by the New South Wales Court of Appeal in *R v Markuleski*.[2] While it may desirable in some cases for the jury to be directed in these terms it is not a "binding rule of law or procedure" in this State that such a direction must always be given.[3] In any event, the absence of such a direction could be significant on appeal only where the jury has convicted on some counts while acquitting on others. As Spigelman CJ said in *R v Markuleski*:[4]

> "In the light of the number of cases it is desirable that the traditional direction as to treating each count separately is supplemented in a word against word case. **Some reference ought to be made to the effect upon the assessment of the credibility of a complainant if the jury finds itself unable to accept the complainant's evidence with respect to any count**." (emphasis added)

In this case, of course, the jury convicted on all counts contained in the indictment placed before them. Further, having regard to the nature of the complaint in this case, that is, of two incidents which occurred within a short space of time and to the

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

3 *R v M* [2001] QCA 458; CA No 126 of 2001, 26 October 2001 at [22]; *R v Rutherford* [2004] QCA 481; CA No 295 of 2004, 17 December 2004 at [19] - [21]. It may be noted that appellate courts in Victoria and Western Australia have recently questioned whether there is any utility at all in such a direction because of the possibility that it may undermine the directions to the jury to consider each count separately and lead to propensity reasoning: See *R v PMT* [2003] VSCA 200 at [6], [31] - [32]; (2003) 8 VR 50 at 52, 58 - 59; *Lefroy v The Queen* [2004] WASCA 266 at [31] - [32]; (2004) 150 A Crim R 82 at 88 - 89.

4 *R v Markuleski* [2001] NSWCCA 290 at [186]; (2001) 52 NSWLR 82 at 121.

directions given to the jury as to the crucial importance of the complainant's credibility, there is, in my respectful opinion, no reason to think that the appellant was prejudiced by the absence of a *Markuleski* direction. It is significant in this regard that no redirection was sought by counsel for the defence at trial.

[41] I turn now to the appellant's first ground of appeal. In my view, it cannot be said that the evidence was such that a conviction would necessarily be unreasonable. Upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt.[5]

[42] In this regard, the complainant's evidence was uncontradicted. It was consistent with complaints made promptly after the alleged offences occurred. There was no reason for her to fabricate her allegations against the appellant who was the father of her friend. The jury were entitled to regard the inconsistencies and discrepancies in her evidence as relatively insignificant in relation to her reliability in respect of the factual core of her complaints.

[43] The jury may have regarded these discrepancies as being of greater significance had the complainant not impressed them as being an essentially reliable witness. But it is precisely because the assessment of the complainant's reliability was a matter for the jury that, in accordance with the decision of the High Court in *MFA v The Queen,*[6] this Court would not be justified in interfering with the verdict as one which was not open to the jury.

Conclusion and order

[44] The appeal should be dismissed.

[45] **WILSON J:** I have read the reasons for judgment of Keane JA and those of Williams JA. For the reasons given by their Honours, I consider that the appeal should be dismissed.

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5 Cf *MFA v The Queen* [2002] HCA 53 at [25], [60] - [61]; (2002) 213 CLR 606 at 614 - 615, 624.

6 [2002] HCA 53; (2002) 213 CLR 606.