SUPREME COURT OF QUEENSLAND

CITATION:	*R v JK* [2005] QCA 307
PARTIES:	**R** v **JK** (appellant)
FILE NO/S:	CA No 78 of 2005 DC No 419 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Beenleigh
DELIVERED ON:	23 August 2005
DELIVERED AT:	Brisbane
HEARING DATE:	29 July 2005
JUDGES:	McMurdo P, Williams and Jerrard JJA 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 - UNREASONABLE OR INSUPPORTABLE VERDICT - WHERE APPEAL DISMISSED - appellant charged with four counts of rape and one count of sexual assault with a circumstance of aggravation - found guilty after trial of two counts of rape and not guilty of one count of rape - jury unable to agree on one count of sexual assault and one count of rape - appellant contends convictions unsafe, unsatisfactory and unreasonable having regard to the inconsistency with the verdict of acquittal on one count and the inability to agree on two counts - whether guilty verdicts unsafe or unsatisfactory - whether jury's failure to reach a verdict on two counts whilst convicting on two counts constitutes a miscarriage of justice CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - MISDIRECTION AND NON-DIRECTION - defence counsel at trial requested the jury be directed that if they had a reasonable doubt about the veracity or reliability of the complainant's evidence in respect of one count then that doubt ought to be taken into account in assessing her

credibility or reliability on all other counts - defence counsel's request rejected by trial judge - trial judge directed the jury they needed to consider the reason why they had a reasonable doubt about a particular part of the complainant's evidence and to consider whether it affected the way they assessed the rest of the complainant's evidence - whether trial judge erred by not giving the direction requested

CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - MISDIRECTION AND NON-DIRECTION - PRESENTATION OF DEFENCE CASE AND CROWN CASE AND REVIEW OF EVIDENCE - GENERALLY - medical evidence that complainant had injuries consistent with penetration by a large object such as a penis or two adult male sized fingers - prosecutor during closing address said there was no suggestion the complainant had any other sexual experience other than that alleged at trial to explain her injuries - defence counsel submitted prosecutor's remarks inappropriate - trial judge directed jury as to the use to be made of medical evidence and prosecutor's comments - whether any miscarriage of justice arose from the prosecutor's comments

Criminal Law (Sexual Offences) Act 1978 (Qld), s 4

R v Allingham [1991] 1 Qd R 429, cited
R v Hughes [1998] QCA 279; CA No 161 of 1998, 18 September 1998, cited
MacKenzie v The Queen (1996) 190 CLR 348, cited
Osland v The Queen (1998) 197 CLR 316, applied
R v DAL [2005] QCA 281; CA No 74 of 2005, 12 August 2005, applied
R v Markuleski (2001) 52 NSWLR 82, considered

COUNSEL: K M McGinness for appellant
M J Copley for respondent

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

[1] **McMURDO P:** The appellant pleaded not guilty to one count of sexual assault with a circumstance of aggravation and four counts of rape. The complainant in each count was his daughter who was born in June 1988. Count 1 was alleged to have occurred when she was about 10 years old and the remaining counts when she was about 15 years old. He was convicted after a trial in the Beenleigh District Court in February this year of one count of penile rape on 1 July 2003 (count 3) and one count of digital rape on 6 August 2003 (count 5). He was found not guilty of one count of digital rape on an unknown date in June 2003 (count 2). The jury were unable to agree on an indecent assault count between September and November 1998 (count 1) and a further count of digital rape on 8 July 2003 (count 4).

[2] He appeals against his convictions on counts 3 and 5 contending that they were unsafe, unsatisfactory and unreasonable having regard to the inconsistency with the verdict of acquittal on count 2 and the inability of the jury to agree on counts 1 and 4. He also contends that the judge failed to properly direct the jury that if there was a doubt about the veracity or reliability of the complainant's testimony in respect of one count, that doubt ought to be taken into account in assessing her credibility or reliability on all other counts. His final contention is that the learned primary judge failed to adequately correct remarks made by the prosecutor in his closing address.

The evidence

[3] The prosecution case on each count turns on the complainant's evidence. The appellant gave evidence denying each allegation but did not call evidence.

[4] The complainant was 16 at trial. She gave police a statement on 15 August 2003 when she was 15 years old. She also gave evidence at the committal proceedings and at a pre-trial hearing on 2 December 2004.

[5] On 26 September 2003 she gave a statement to the appellant's solicitors to the effect that she lied in making complaints against the appellant and that he did not take part in any improper sexual activity with her. On 6 October 2003 she gave a similar statement to police withdrawing her complaint. She told police that she had first got the idea of making the allegations from K when K had said she (K) had been raped by her stepfather. The next day the complainant said she wished to proceed with the complaint. She said she falsely stated her allegations against the appellant were untrue because she "wanted [her] dad out of trouble and … to make [her] feel better and [she] didn't want him to go to gaol".

[6] The complainant's evidence on count 1, on which the jury were unable to agree, was as follows. In late November 1998 when she was 10 years old her mother was away visiting her great-grandparents to celebrate the great-grandfather's 80th birthday. The complainant had head lice. The appellant treated her hair with chemicals after school. She was wearing her underpants, a trainer bra and a towel. She felt sick from the head lice treatment and was lying on her bed with her knees to her chest. The appellant sat on the bed next to her and pulled her pants down, despite the complainant's efforts to pull them up. He put a finger in her vagina, up to his knuckle. She felt pain and tried to wriggle away. When he desisted she said she was thirsty and left the room. She told no-one because she was scared. She made no complaint about this episode until she gave a statement to police some years later about other counts. She had given differing versions as to which hand the appellant had used in penetrating her. On one occasion she gave evidence that the appellant's finger went into her vagina twice. The complainant's mother gave evidence that she did visit her grandparents at about this time when the complainant had head lice.

[7] The complainant's evidence on count 2, on which the jury acquitted, was as follows. Shortly before her birthday in June 2003 she was at home in her bedroom. Her brothers were in their rooms and her sister and mother were in the main bedroom. She borrowed some CD's from the appellant and was lying on her bed listening to them. He came in, sat beside her and talked about exchanging a $20 note for two $10 notes she had been given for her birthday. He put his hands into her clothes and then put his finger inside her vagina for about five minutes. She tried to wriggle away from him. He left to get his wallet and then exchanged the money. She did

not complain about this episode until she was cross-examined at the committal proceedings on 26 November 2003 when she said that he put his penis and then his finger into her vagina. In later evidence at the pre-trial hearing she said that only his finger penetrated her; when she had said that his penis went into her vagina she was not telling the truth. She also gave conflicting evidence as to whether he gave her a $20 note for two $10 notes or two $10 notes for a $20 note. Her evidence varied as to whether she knew her mother's whereabouts at the time of the alleged offence.

[8] The complainant's evidence as to count 3, on which they jury convicted, was as follows. On 1 July 2003 when her mother was at a prayer meeting and the complainant was watching the "Gilmore Girls" on TV, the appellant picked her up off the lounge, tickled her and took her towards his bedroom. She resisted but the appellant put her on his bed, closed and locked the door and continued to tickle her. He pulled off her underpants and pulled up her nightie. She unsuccessfully tried to pull up her pants. He held her wrists and straddled her so that she could not move. He removed his pants and placed his penis in her vagina whilst holding her wrists. His penis entered her vagina to a depth of about four centimetres. He said "I don't want to break the hymen". He moved up and down pushing his penis further into her vagina for about five minutes and keeping it there until her mother came home. He then quickly grabbed his pants, wiped her vagina with a towel, returned her underpants and went to the lounge room. She returned to the lounge room and sat next to him and they continued to watch the "Gilmore Girls". She felt sticky between her legs and later noticed a glue-like substance which she wiped from her vagina with toilet paper. During cross-examination she agreed that at the committal proceedings she had said she did not know where her mother was that night; she did not know the name of the TV show she was watching but it was a "girly" show; she did not know how far the penis had entered her vagina and she did not know or understand the word "hymen". When she first made a complaint about the appellant's conduct she did not say that the appellant had put his penis inside her.

[9] The complainant's evidence on count 4, on which the jury could not reach a verdict, was as follows. On the next Tuesday, 8 July 2003, her mother was again attending a prayer meeting. She shared her bedroom with her sister who was asleep in bed whilst the complainant was again watching the "Gilmore Girls" with the appellant. During a break she checked on her sister. The appellant followed her into the bedroom and pushed her onto her bed. He held her hands down, removed her underpants and took off his own shorts and underpants. She resisted saying "Stop, don't do it Dad … it's hurting Dad, don't do it". He pushed up her nightie and put his penis into her vagina for about five minutes "just like last time". He hurt her. When he stood up he wiped her vagina with a rainbow coloured towel. She again felt sticky in her vaginal area. He returned to the lounge room. She went to the toilet. Her vagina was sore. She then returned to the lounge room and watched TV with the appellant before going to bed. Her mother returned home later. At the committal proceedings she said in cross-examination that her mother had come home while they were still watching TV.

[10] The complainant's mother, who at trial had reconciled with the appellant, gave the following evidence relevant to count 4. She stopped attending prayer meetings in June 2003. She said that the "Gilmore Girls" was not on television in July 2003.

[11] Mrs P gave evidence that she knew the complainant's mother through their common church. The mother was baptized in February 2003 and from then until July 2003

she attended Tuesday night prayer meetings from about 7.30 to 8.30 pm. The complainant's mother did not attend prayer meetings after about July and attended in all about five prayer meetings.

[12] The evidence as to count 5, on which the jury convicted, was as follows. On 6 August 2003 the complainant was in her room listening to music whilst her sister was reading a Courier Mail RNA show bag catalogue. Their mother was watching TV. The appellant came into the bedroom and gave the girls a taste of a new blue Sprite soft drink. He told the sister to take the glass to the kitchen. He then put his hand inside the complainant's school clothes and put his finger inside her vagina, moving it around. The complainant asked him if she could have some show bags. He responded "Will you have it with me?". She did not answer him. He told her to "grow up". He removed his finger when the sister returned to the room and he left. The complainant began to cry and went into the lounge room. She said to her mother "You won't believe me either, but Dad's been doing things and touching me". Her mother followed her to the girls' bedroom. In her statement she said she told her mother he put his finger and then his "thing" in her. When she was cross-examined, she referred only to a complaint to her mother of digital penetration. The complainant and her mother confronted the appellant who denied any wrongdoing. In cross-examination the complainant agreed that the next morning in response to her mother's question, "Has Daddy tried to have sex with you?", she said he had not. Later when her mother repeated the question she answered that the appellant had had both sex and oral sex with her only after her mother gave her an explanation of oral sex. The following day she also made a complaint, that the appellant had been fingering her, to two friends, K and J. The complainant was aware that K was attending court over allegations K had made of sexual abuse of K.

[13] The complainant's mother said that on 6 August 2003 the complainant came to her while she was watching TV. The girl was angry and upset because her father told her she had to earn money to buy show bags. The mother supported the father, reminding her daughter that they could not afford to buy show bags. The mother followed the complainant into the bedroom asking her what was wrong. After five or 10 minutes the complainant said "Dad's been touching me". Her initial complaint was of digital penetration only. She questioned her daughter further the next morning. The complainant denied that her father had tried to have sex with her. Later that morning the mother explained what oral sex was and she asked if the appellant had had oral sex or full sex with the complainant. The girl replied "Oh, yeah, that too" in a "very blasé" way. The complainant appeared confused and did not seem to understand the content of the conversation.

[14] A number of witnesses gave evidence of the reported complaints of the appellant's conduct. K noticed when the complainant was talking to K's sister, J, at school that the complainant was upset. She would not say what was wrong. The next weekend the complainant said "I've been molested by my Dad". K asked her "Did he put his penis in you?". The complainant replied "I'm not sure".

[15] J saw the complainant at school on Thursday, 7 August 2003. The complainant was upset but would not say why. Later in the day she asked the complainant "if her Dad put his penis in her vagina". She said "I don't know". J then asked her if her father had been hurting her. The complainant said that "her Dad has been raping her since she was 10 years old". J had been a victim of sexual abuse and that was why

she asked the complainant these questions. The complainant did not say her father had put his penis in her vagina until a few days after J first asked her.

[16] Dr Culliford, who heads the Forensic Medical Sexual Assault Services in Ipswich, Gold Coast and Logan, examined the 15 year old complainant on 15 August 2003. The complainant told her that the appellant had put his finger into her vagina since she was 10 years old and had effected partial penile penetration many times over the past year, the last time being a Tuesday at the end of July; she denied sexual experience with anyone else. Dr Culliford performed a genital examination and noted that the hymen was tubular shaped with a complete cleft down to the vaginal wall suggesting that the hymen had been stretched beyond its capabilities, torn and then subsequently healed. The injury was consistent with penetration by a large object such as a penis or two adult male sized fingers.

Inconsistent verdicts

[17] The appellant concedes that the complainant's evidence was capable of acceptance and if accepted was sufficient to support the guilty verdicts in counts 3 and 5. The appellant argues, however, that there is no rational basis for the differing verdicts and as a result the guilty verdicts are unsafe. The appellant contends the jury's verdict of acquittal on count 2, and to a lesser extent their failure to reach a verdict on counts 1 and 4, demonstrates that they did not accept the complainant as a credible witness on those counts and, as a result, the verdicts of guilty on count 3 and count 5 are an affront to logic and common sense and must be overturned on appeal: *MacKenzie v The Queen.*[1]

(a) Relevant judicial directions

[18] In determining this issue it is useful to first consider the relevant judicial directions given to the jury. The learned primary judge correctly instructed the jury that they were considering five charges and they must consider each charge separately and on its own evidence. He then identified for the jury the elements of each offence and the evidence relating to it and instructed them that only if they were separately satisfied on the evidence of all the elements beyond reasonable doubt on each count could they find the appellant guilty of that count.

[19] Importantly, his Honour also told the jury that the prosecution case turned on the complainant's unsupported evidence and they must scrutinize her evidence carefully before being satisfied of guilt beyond reasonable doubt; whilst they need not believe every word of her evidence they need to consider whether they can rely on it sufficiently to establish the elements of any of the offences. His Honour continued:

> "Your general assessment of her as a witness will be relevant to all counts, but you will have to consider her evidence in respect of each count when considering that count.
>
> Now, it may occur in respect of one of the counts, that for some reason you are not sufficiently confident of her evidence to convict in respect of that count. … a situation may arise where, in relation to a particular count, you get to the point where, although you're inclined to think she's probably right, you have some reasonable doubt about an element or elements of the offence, that particular offence.

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1 (1996) 190 CLR 348.

> Now, if that occurs, of course, you find the accused not guilty in relation to that count. That does not necessarily mean you cannot convict of any other count. You have to consider the reason why you have some reasonable doubt about that part of her evidence and consider whether it affects the way you assess the rest of her evidence, that is whether your doubt about that aspect of her evidence causes you also to have a reasonable doubt about the part of her evidence relevant to any other count."

[20] The learned judge fairly put the respective cases to the jury. In summarizing the defence case he referred to many of the inconsistencies revealed in the complainant's evidence during an effective cross-examination; to what defence counsel said were inherent improbabilities in the complainant's evidence; and to the evidence that the complainant had earlier said her complaints against the appellant were false and wanted to withdraw them.

(b) The acquittal on count 2

[21] The appellant was acquitted on count 2. The complainant made no complaint in respect of count 2 until she was cross-examined at the committal hearing on 26 November 2003. Her apparently flippant explanation then for not reporting the matter to police was that she was "just too lazy". The verdict of acquittal on count 2 and the guilty verdicts on counts 3 and 5 do not represent an affront to logic and common sense suggesting a compromise of the performance of the jury's duty. To the contrary, the verdict of acquittal on count 2 suggests the jurors undertook their task with a full understanding of their onerous responsibilities as explained in the judge's careful directions and that they were simply not prepared to convict because of the unsatisfactory way in which the complaint emerged. This did not mean the jury could not accept the complainant's evidence on counts 3 and 5 where there was no such difficulty.

(c) The failure to reach verdicts on counts 1 and 4

[22] The jury's inability to reach verdicts on counts 1 and 4 cannot amount to inconsistent verdicts with the guilty verdicts on counts 3 and 5; there has been no verdict on counts 1 or 4. The distinction is significant. The failure to reach a verdict cannot be equated to a verdict of acquittal: see the observations of Callinan J in *Osland v The Queen*[2] discussed recently by this Court in *R v DAL*.[3] An inconsistent verdict on one count will only render a guilty verdict on another count unsafe if it discloses a miscarriage of justice.

[23] The jury may well have had some doubts in respect of count 1 because it allegedly occurred in 1998 when the complainant was only 10 years old and she made no complaint of it for many years. By contrast, counts 3 and 5 on which the jury convicted occurred not long before she complained of them.

[24] As to count 4, the indictment alleged that it occurred on 8 July 2003 and the jury were instructed they must be satisfied it occurred on that date. The jury's inability to reach a verdict on count 4 may have related to their inability to be satisfied beyond reasonable doubt that the offence occurred on that date when the complainant's mother was attending a prayer meeting. The complainant originally

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2 (1998) 197 CLR 316, 406.

3 [2005] QCA 281; CA No 74 of 2005, 12 August 2005.

said in her statement that the offence occurred on 8 August 2003. The evidence from Mrs P and the complainant's mother as to the dates of the prayer meetings attended by the complainant's mother may have caused a juror to have a doubt about the charged date in July. They may have collectively been satisfied beyond reasonable doubt of one incident in July (count 3) but a juror may have had a doubt about the date of the later incident in July (count 4). Another basis on which a juror may have had a doubt about the complainant's evidence on count 4 was that the complainant said her sister was asleep in the room when the complainant verbally and physically resisted the appellant; by contrast counts 3 and 5 on which the jury convicted were not committed in the sister's presence. A doubt by perhaps only one juror on either of these bases on count 4 does not mean the jury must reject the complainant's evidence on counts 3 and 5.

[25] The appellant has not demonstrated that, on the evidence set out earlier in these reasons, the jury's failure to reach verdicts on counts 1 and 4 whilst convicting on counts 3 and 5 constitutes a miscarriage of justice. The evidence and the judge's directions to which I have referred, suggests not a miscarriage of justice but that the jury conscientiously applied the judicial directions on the law to the evidence in reaching their verdicts on counts 3 and 5, giving the benefit of any doubt to the appellant.

[26] This ground of appeal fails.

Was the judicial direction as to the complainant's evidence adequate?

[27] The appellant contends that this case was, like *R v Markuleski*,[4] one where the judge should have directed the jury that if they found a reasonable doubt as to the complainant's evidence on one count, then they would also have a reasonable doubt about her evidence on the other counts. Defence counsel at trial requested such a direction on three occasions.

[28] *Markuleski*, and the many cases in which it has been cited, recognize that the appropriate directions to be given to a jury will vary in each case.[5] The learned primary judge's directions set out above[6] adequately, fairly and helpfully alerted the jury to the need for care before accepting some points of her evidence whilst rejecting other parts. This ground of appeal also fails.

Were the judge's directions on the prosecutor's statement in his closing address adequate?

[29] Defence counsel asked the learned trial judge to correct a statement made repeatedly by the prosecutor during his jury address, apparently relying on a portion of Dr Culliford's evidence to which defence counsel had not objected.[7] It seems that the prosecutor said "… there is no suggestion in this trial that [the complainant] has had any other sexual experience, that is, other than what is alleged in the trial, to explain … the injury". He then repeated that there was no evidence of her having any sexual experience so that it was difficult to understand how she could have explained the sexually graphic detail of the incidents she described in her evidence. At the end of his address he described her as an "otherwise sexually inexperienced girl". Defence counsel at trial submitted that this was particularly inappropriate

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4 (2001) 52 NSWLR 82.
5 Above, 120 - 122.
6 See these Reasons [19].
7 See these Reasons [16].

bearing in mind the complainant was over 15 years old when examined by Dr Culliford.

[30] The learned primary judge gave the following relevant directions. After summarizing the relevant aspects of Dr Culliford's evidence for the jury he said:

> "… the significant thing to bear in mind is that … there's nothing in Dr Culliford's evidence which prove [sic] who it was who was responsible for the state of the complainant's hymen. Now, … the usefulness of this depends on whether you, as the sole judges of the fact, consider that it is unlikely that there would be any other explanation for the state of her hymen, other than the account that she gave in the course of her evidence to you.
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> The only relevant evidence as to this is the evidence of her age; that at the time of the examination she was a little over 15 years of age. There is no evidence one way or the other about any other sexual experience and you shouldn't speculate about evidence you haven't heard. If you think that she was as likely to have her hymen in this state for some other cause, then this cannot be evidence tending to support her account. It is merely evidence which is not inconsistent with it.
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> I should also warn you that there is no onus on the accused to establish or even suggest any other explanation for the state of her hymen and it would be wrong for you to reason in a way which had the effect of placing on the accused some onus in relation to that or indeed, any other matter in the trial. So, you need to consider the evidence, consider very carefully, the evidence of Dr Culliford and whether you really feel that it is something which provides independent support to the complainant's account.
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> The other matter relied on was the … complainant's knowledge of the seminal fluid. Now, you will recall when the statement was being read and you were reminded of this by the Crown Prosecutor, the description of what would have been seminal fluid on the basis of her description of it. Now, as to that, the remarks I just made are really much the same. They really apply as well and if her hymen got into that state for reasons other than the actions of the accused, then you might think that she would be likely to have some familiarity with seminal fluid anyway. So, it really depends on the extent to which you think that it will be unlikely that she would have had sexual experience in any other way at that age. So, that's another matter for you to make up your own mind about."

[31] The evidence of the complainant's sexual inexperience came from Dr Culliford without objection by defence counsel. Strictly speaking, such evidence should have been the subject of an application under s 4 *Criminal Law (Sexual Offences) Act* 1978 (Qld). Had such an application been made it would probably have been successful. No doubt that was why defence counsel did not object to its admission. His Honour's directions on that evidence adequately and fairly directed the jury as to how they should treat both the evidence and the prosecutor's submissions about it. In the end, the appellant's counsel did not seriously contend to the contrary. In the light of his Honour's subsequent directions, I am not persuaded that there has been a miscarriage of justice arising from the prosecutor's comments. This ground of appeal also fails.

[32] It follows that the appeal against conviction must be dismissed.

Order
Appeal against conviction dismissed.

[33] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of the President and I agree that for those reasons the appeal against conviction should be dismissed. I merely add some brief additional observations.

[34] The failure of the jury to agree upon a verdict with respect to counts 1 and 4 cannot be said to be inconsistent with the verdicts of guilty on counts 3 and 5 so as to render the convictions unsafe and unsatisfactory. I agree with all that has been said by both McPherson JA and Keane JA in *R v DAL* [2005] QCA 281 on that issue.

[35] Adopting the approach approved of by the High Court in *MacKenzie v The Queen* (1996) 190 CLR 348 the verdict of acquittal on count 2 does not have the consequence of rendering the convictions on counts 3 and 5 unsafe and unsatisfactory because the verdicts can be reconciled on a rational basis. As pointed out by the President in her reasons, no complaint was made with respect to the conduct constituting count 2 until the complainant was being cross-examined at the committal hearing with respect to the other counts.

[36] Contrary to the submissions made by counsel for the appellant I am of the view that the learned trial judge here gave a full and proper direction which dealt with the issues raised by the reasoning in *R v Markuleski* (2001) 52 NSWLR 82. In his direction in this case the learned trial judge told the jury they had to "consider the reason why you have some reasonable doubt about that part of her evidence" before that conclusion could have any significant impact upon their deliberation with respect to other counts. That is an extremely important qualification which is often overlooked when it is contended that a not guilty verdict on one count should affect the complainant's credibility with respect to other counts.

[37] Finally, given the reasoning in *R v Allingham* [1991] 1 Qd R 429 and *R v Hughes* [1998] QCA 279, I am by no means certain that what the prosecutor said in his closing address with respect to the complainant's virginity was erroneous. But in any event the passage from the summing up quoted in the reasons for judgment of the President was clearly appropriate, and it cannot be said that by reason of the closing address of the prosecutor there was a miscarriage of justice.

[38] As already noted, I am of the view that the appeal against conviction should be dismissed.

[39] **JERRARD JA**: In this appeal I have read the reasons for judgment of the President, and respectfully agree with those and that the appeal should be dismissed.