SUPREME COURT OF QUEENSLAND

CITATION:	*R v TZ* [2011] QCA 305
PARTIES:	**R** **v** **TZ** (appellant)
FILE NO/S:	CA No 225 of 2011 DC No 1404 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	28 October 2011
DELIVERED AT:	Brisbane
HEARING DATE:	18 October 2011
JUDGES:	Chief Justice, Fraser and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where appellant charged with three counts of indecent treatment of a child under the age of 12 and one count of indecent treatment of a child under the age of 16 – where jury unable to agree on verdict on count 1, appellant convicted by majority verdict on counts 2 and 3, unanimously acquitted of count 4 – where appellant appealed on ground that trial judge's discretion miscarried by failing to direct jury as to legal effect of evidence about appellant's prior good character – where no direction or redirection sought by counsel at trial – whether a miscarriage of justice occurred *Attwood v The Queen* (1960) 102 CLR 353; [1960] HCA 15, cited *Donaldson v The State of Western Australia* (2007) 176 A Crim R 488; [2007] WASCA 216, cited *Melbourne v The Queen* (1999) 198 CLR 1; [1999] HCA 32, considered *R v Hinschen* [2008] QCA 145, considered *Simic v The Queen* (1980) 144 CLR 319; [1980] HCA 25, considered

COUNSEL: M J Copley SC for the appellant
V A Loury for the respondent

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

[1] **CHIEF JUSTICE**: I have had the advantage of reading the reasons for judgment of White JA. I agree that for the reasons expressed by her Honour, the appeal should be dismissed.

[2] **FRASER JA**: I have had the advantage of reading the reasons for judgment of White JA. I agree with those reasons and with the order proposed by her Honour.

[3] **WHITE JA**: The appellant was charged with three counts of indecent treatment of a child under the age of 12 and one count of indecent treatment of a child under the age of 16 years. On 4 August 2011, on the ninth day of his trial in the District Court at Brisbane, the jury indicated that they were unable to agree on a verdict in respect of count 1 and were discharged from returning a verdict on that count; by majority verdicts they found the appellant guilty of counts 2 and 3; and unanimously acquitted the appellant of count 4. The appellant was sentenced to three months' imprisonment to be followed by probation for 18 months.

[4] At the commencement of the appeal leave was given to file an amended Notice of Appeal which has, as its sole ground, the following:

> "A miscarriage of justice occurred in that the jury was not directed about the use that could be made of evidence of the appellant's good character".

Mr M Copley SC, for the appellant, expressly abandoned the grounds of appeal in the original Notice of Appeal. There was no objection and leave was granted.

[5] Evidence of the appellant's good character with respect to children was given by his estranged wife who was the complainant's aunt. The admission of that evidence was not challenged by the prosecution. The judge gave the jury no direction about what use could be made of that character evidence. Neither counsel had sought such a direction prior to the judge commencing her summing up nor was there any application for redirection. Nonetheless, the appellant contends that not to have done so has led to a miscarriage of justice such that a new trial ought to be ordered.

[6] In summary, the prosecution case was that the complainant was indecently touched by the appellant on the vagina outside her underwear on four specific occasions relating to the four counts on the indictment when she was aged between eight and 14 years. The complainant also gave evidence that the appellant similarly touched her on 20 to 30 other occasions.

[7] The appellant gave evidence. He said he could not recall the particular occasions alleged; that if there were any touching, it was accidental or innocently incidental to games he was playing with the complainant, her siblings and cousins.

[8] The appellant and his wife, who had known him for over 20 years, had separated when these charges were laid in 2009 in a joint decision to protect their teenaged children. The relevant evidence which the wife gave was that she had known her

husband for "a long long time" and would trust him with children and had no reason to hesitate in making that assertion.[1] She had operated a community day care placement in her own home looking after children (up to six at a time) from babies to before and after school care at the relevant times. Her husband would assist if he were around although he was in part-time employment. In response to a question in chief whether their children had any issues with their father she answered "No, no, of course not".[2]

[9] The jury heard that the appellant had no criminal history.

[10] Evidence was given by a number of family members of a large extended family who visited each other.

[11] The complainant was born in March 1984. She was aged 27 at the time of the trial. She had had a number of challenges in her life including the suicide of her boyfriend when she was still a teenager, the termination of a pregnancy after his death, and the serious injury of her stepfather in a violent accident. She had been to a counsellor some years earlier in 2004 to discuss her many issues but had made no recorded complaint of this abuse.

[12] In order to consider whether there is merit in the appellant's contention that the trial judge ought to have given a good character direction it is useful to consider the evidence about each of the counts and the issues in the trial.

Count 1

[13] The jury were unable to reach a verdict on count 1. The complainant recalled that when she was eight and living with her family in Toowoomba they visited the appellant and his wife either at the weekend or during school holidays at their house at New Farm. She was playing downstairs with her cousins who were much the same age. Her mother was upstairs with her aunt. The children were playing piggy back rides with the appellant. She climbed on to a retaining wall and thence on to the appellant's back. Instead of placing his hands on her bottom or legs to support her he put his hands between her legs. He touched her vagina by putting his hands under her skirt but outside her underpants. The touching took approximately 30 seconds; he was moving his fingers around feeling her vagina; "it was not nice". The complainant got off and her cousins had their turns. At the committal she said this touching could have been accidental. The complainant got back on the appellant's back for a second piggy back ride because she was not "100 per cent sure that what he did he did".[3]

[14] The complainant's cousins gave evidence that they recalled being at the appellant's house at New Farm but could not recall him giving the complainant piggy back rides or, indeed, playing with them. However the complainant's mother recalled all of the girls playing with the appellant various games such as hide and seek, piggy back rides and on swings.

Count 2

[15] By majority verdict the jury convicted the appellant of this count. It concerned the second piggy back ride referred to under count 1. The complainant again got on to the appellant's back from a position on the retaining wall. She said he touched her vagina again outside her clothes by rubbing it or caressing it for about 30 seconds.

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1 AR 415.
2 AR 414.
3 AR 254.

Count 3

[16] The jury by majority returned a guilty verdict to count 3. The complainant recalled another visit to the New Farm house when she was about eight playing downstairs with her cousins where there was a gymnastic weights set. She sat on it and the appellant picked her up so that her chest was on his chest and her head on his shoulder. Instead of supporting her with his hands under her bottom "they were cupping, like, [her] vagina"[4] for about 10 seconds.

[17] Neither of the complainant's cousins could remember the appellant hugging her on any occasion at that house although the older recalled the gym weights under the house.

Count 4

[18] The jury unanimously acquitted the appellant of this count. The complainant described this touching as being the last time that she could recall it happening. The appellant's family had moved to another house in a different suburb. The complainant was about 12 or 13 and identified the occasion as just after the appellant's son had been born. The family had travelled from Toowoomba for a barbeque. The complainant was sent downstairs while the meal was being prepared and the appellant's wife was getting ready to bath the baby. She sat on the gym weight set. The appellant came up to her and placed his hands "into [her] thighs".[5] She said "He went to touch my vagina again and I've got up and left".[6] When asked to explain further she said he "was pretty much touching my vagina" and she left. She could not recall if any of her cousins or siblings were downstairs. At the committal the complainant had said she was last touched when she was about 11. That was a mistake because she was able to relate the last occasion to a time shortly after her cousin had been born. His date of birth was established to be 1998. She would then have been 14. The prosecution cast its case on vaginal touching as the indecent act, not the touching of the inner upper thighs.

Other Discreditable Conduct

[19] In the course of her evidence the complainant said that this vaginal touching occurred some 20 to 30 times. At the committal she had estimated 10 to 20 times. She described an occasion of playing hide and seek in the New Farm house when she was nine, tripping over as she ran down a hallway, lying on her back on the floor while the appellant was on all fours over her breathing heavily into her neck.[7] She said his hands moved up the inner aspect of her upper thigh and she squirmed and ran away. She mentioned an occurrence in the car going to the shop or for a drive when the appellant's hand went into her thigh area. Her cousins and/or her siblings were in the back of the car. She was in the front seat.

Complaint

[20] When the complainant was about 18 and a half she told her boyfriend that when she was younger someone close to her had touched her. He said this conversation

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4 AR 103.
5 AR 107.
6 AR 107.
7 The appellant gave evidence that he had suffered from asthma for many years which affected his breathing.

occurred in 2002. After the complainant's daughter was born in 2007 she told one of her female cousins that the appellant used to do something sexual to her when he picked her up. A cousin recalled that conversation being in about mid 2007. She had a conversation with another cousin in January 2008 mentioning inappropriate conduct by the appellant. In July 2009 she gave more particulars to this cousin consistently with the evidence she ultimately gave. That information was conveyed to her mother who contacted her the following day. She told her mother that the appellant had touched her and "played" with her "between her legs". Her mother gave evidence that the complainant had said on that day that all the appellant had done was to touch her between the legs on three occasions.

[21] The complainant explained her failure to complain earlier as wishing to protect the appellant's wife or, at least, preserve family harmony. At the committal proceedings she had said the first person she had spoken to about the appellant had been a counsellor in as much as she said that someone close to her had touched her when she was a child. That counsellor, whom the complainant had consulted in 2004, gave evidence that she saw the complainant on four occasions; had taken detailed notes and they recorded no reference to sexual abuse; and she had no recollection of any such complaint.

Counsel's Addresses

[22] Both counsel referred to the character evidence given by the wife in their addresses to the jury. Defence counsel said the following:

> "I think one of the best parts of the evidence I would ask you ladies and gentlemen to look at carefully is the evidence of his wife. … she supports him. Would you trust this man around children? She had known him for – they had been married – they went to school together … years ago. They've been married for 20 – odd – they've been together for 23 – I don't know, it is quite a long time. Would you trust this man with children? Now, doesn't a wife know her husband better than anyone else, for all his mistakes, his errors and his good points? I submit a wife knows her husband in most of the community better than anyone else, better than his own mother. His own mother might be prejudiced to help him, but a wife knows her husband's failings and his assets and what does she say? She has no hesitation in trusting him with the children. That's what she said, his own wife. She's under oath. She vouched for the man. She spent most of their lives together.
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> Well, if he is a bit that way, she would have found out a long time ago, particularly if she's got children she minds, … ."[8]

[23] Towards the end of her address to the jury the prosecutor said:

> "Now, if I could turn to the accused and his wife's evidence, a lot has been made of the accused having no history and helping the community with his work. He's a good man. Well, it is commonsense, ladies and gentlemen, that there are no stereotypes as to what a sex offender should look like or could look like. Sure they can act and look like monsters. They can be priests, teachers and even members of a victim's family. They can even be someone's

[8] AR 463.

> uncle, like in this case. The defendant in his evidence conceded there could have been times when he did take care of his nieces and nephews, he could have given them piggy back rides but said he wouldn't have picked them up and he could have touched them on the vagina, but only accidentally, but he can't recall any specific incident. He didn't even want to accept [the nieces] were there frequently, a lot, but then said it is possible. He said he could have touched the complainant indecently, but it would only have been in an accident and not deliberately with any intention."[9]

A little later she said:

> "His wife concedes she wasn't around her husband and [the complainant] when [she] visited the whole time, so she wouldn't know because she wasn't there, but she certainly wouldn't suspect that or have any reason to think that and you might think if they are separated, because they don't want their kids involved, there is this loyalty to her husband and who would want to accept a person that she was married to all this time could do all these things? My learned friend made a point that, well, a wife would know. Well, just – again, your worldly knowledge and what you know, cheating wives, cheating husbands, usually it's their partner is the last to know and why – sex offences, like any crimes, why would the offender parade their crimes? They would do their upmost [sic] to avoid detection. Why should it be any different here?"[10]

[24] In a lengthy and thorough summing up about which there is no complaint save for the failure to give a good character direction, the primary judge made few references to the wife's evidence. She mentioned the defence calling evidence, reminding them that the burden of proof had not shifted as a consequence and said of the wife's evidence:

> "… you heard from his wife [her evidence] was simply added to the evidence that was called by the prosecution in [sic] all those witnesses. It just goes into the same pool … of evidence."[11]

Her Honour explained to the jury that cases are often described as "word against word"[12] but emphasised that it was not a question of making a choice between the evidence of a prosecution principal witness or witnesses and the evidence of the defendant or his witness. Her Honour said:

> "The proper approach is for you to understand that the Prosecution case depends upon you, the jury, accepting the evidence of the Prosecution's principal witness, in this case [the complainant], which is both true and accurate beyond reasonable doubt. That is even despite any evidence that was given by the defendant and/or his wife."[13]

[25] Her Honour emphasised the need for the jury to be satisfied beyond reasonable doubt that the complainant was giving a truthful and accurate account of the

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9 AR 479.
10 AR 480.
11 AR 491.
12 AR 491.
13 AR 491.

relevant evidence. She explained, consistently with the model direction in the Supreme and District Court Bench Book, how to approach their task of assessing evidence when the defence has given evidence. After giving careful attention to the elements of the offence her Honour dealt with the complainant's evidence of generalised and uncharged indecent acts of touching her on her vagina. Her Honour mentioned the incident of tripping in the hallway as an incident with sexual activity which was not the subject of any charge. Her Honour directed the jury that they could only use evidence of uncharged acts to assist in a finding of guilt if they accepted that evidence beyond reasonable doubt. The primary judge gave a standard direction to the jury about assessing a witness's credibility, referring particularly to the evidence of the complainant, preliminary complaint, and how that evidence might be used.

[26] The primary judge gave detailed instructions to the jury about inconsistencies in the complainant's evidence.

[27] On the second day of her Honour's summing up she referred to the competing evidence between the complainant and the appellant; the law about accident; the disadvantages of a long delay in making the complaint; a suitable warning about the dangers of convicting on the complainant's evidence alone; and the frailties of childhood memories. In summarising counsel's addresses her Honour did not mention the character evidence aspect of their addresses.

Discussion

[28] Mr Copley submitted that the primary judge ought to have directed the jury that:

> "[The wife] gave evidence that she would trust the defendant to behave with propriety towards children and that in all the years she had known the defendant she was never aware of any occasion when he had acted inappropriately towards a child. You are entitled to take this evidence into account in considering whether a person with the trait the defendant is said to have could have committed the acts alleged by the prosecution and in assessing whether the defendant's evidence was apt to raise a reasonable doubt about whether he behaved as alleged."[14]

In *Attwood v The Queen*[15] the High Court said:[16]

> "The expression 'good character' has of course a known significance in relation to evidence upon criminal trials; for it denotes a description of evidence in disproof of guilt which an accused person may adduce. He may adduce evidence of the favourable character he bears as a fact or matter making it unlikely that he committed the crime charged."

[29] The continued admission of good character evidence is said to be "anomalous" and to rest on legal history and not logic. In *Melbourne v The Queen*[17] McHugh J said:[18]

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14 Written outline of submissions at paragraph 10.
15 (1960) 102 CLR 353; [1960] HCA 15.
16 At 359.
17 (1999) 198 CLR 1; [1999] HCA 32.
18 At [47], 20.

> "The unconditional right of an accused person to tender good character evidence must be regarded as an indulgence granted to the accused which continues to be maintained for historical reasons. The basis of the rule for admitting evidence of good character is not logic but the 'policy and humanity' of the common law."

[30] Evidence of good character can be used in several ways – to demonstrate the improbability of the accused having committed the subject offence, or to assess the credibility of the accused in his denial of culpability; or both; or, neither. Mr Copley submitted that both were operative no doubt because the evidence of the wife entailed the unexpressed further opinion that this offending was out of character and it was therefore improbable that the appellant did the impugned acts; and the proposition, that when the appellant said he did not offend as charged, because she did not doubt him with children, he should be believed. Evidence of that kind is true character evidence and not reputational evidence.[19]

[31] In *Simic v The Queen*[20] Gibbs, Stephen, Mason, Murphy and Wilson JJ said:[21]

> "There is no rule of law that in every case in which evidence of good character is given the judge must give a direction as to the manner in which it can be used. … No doubt, speaking generally, it is right to add … that if such a direction is asked for it would be wise to give it."

[32] Mr Copley relied upon the following passage in the judgment of Hayne J in *Melbourne*:[22]

> "When is there an issue about the use of character evidence that will call for judicial direction of the jury? The simplest example is, of course, if prosecution and accused make contrary submissions to the jury about whether evidence of prior good character can be used by the jury in assessing the probability of the accused committing the offence charged or in assessing whether the accused should be accepted as having sought to tell the truth in statements he or she has made in or out of court. Clearly, in such a case the judge must tell the jury what is the true position in law: that the previous good character may be used in either or both of these ways."

Mr Copley noted that there were "contrary" submissions to the jury about whether evidence of prior good character could be used in assessing the probability of the appellant committing the offence or having told the truth in his evidence.

[33] It is worthwhile to consider what immediately follows the passage just quoted:[23]

> "And even if there is no conflict between the parties in their submissions to the jury about how the evidence may be used, there may be occasions where it may be wise for the trial judge to draw the matter to the attention of the jury."

His Honour gave an example of an accused of previous undoubted honesty in money matters being tried for an offence of fraudulently obtaining financial advantage. In

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19 See discussion by McHugh J in *Melbourne v The Queen* (1999) 198 CLR 1 at 15; [1999] HCA 32 at [33].

20 (1980) 144 CLR 319.

21 At 333.

22 (1999) 198 CLR 1 at 56; [1999] HCA 32 at [156].

23 At 56-57, [156].

such a case, his Honour observed, the judge may think it appropriate to draw the attention of the jury to the fact that prior good character may be thought to make it less likely that the accused acted with dishonest intent. However, his Honour added,[24]

> "But even in such a case, if no more is known than the bare facts of the case as I have described them, there is no requirement for the judge to give such a direction. Or, to put the matter another way, the absence of such a direction does not lead to the conclusion that the trial miscarried."

His Honour added further:[25]

> "… there is no rule of law that in every case in which evidence of good character is given the judge must give a direction as to the manner in which it can be used. Of course, if a direction is given, it must be accurate. Ordinarily, however, unless the evidence that is led about the character of the accused has an immediate and obvious connection with an issue in the case, it is better that the judge say nothing of how the jury may use such evidence in reasoning to its conclusions beyond any restatement of counsel's arguments that may be though necessary or desirable."

[34] In *R v Hinschen*[26] counsel for the appellant had referred to those statements. Extensive character and reputation evidence had been led for the appellant in a murder trial where the killing was particularly violent that the appellant was a young man of gentle disposition. He had confessed to the crime earlier but argued it was a false confession. The prosecutor had invited the jury to put that evidence to one side and to focus upon the facts of the crime itself. Defence counsel had characterised the killing as the work of a psychopath inconsistent with the evidence concerning the appellant's character but consistent with that of another person of interest. Fraser JA explained the passage from Hayne J's judgment in *Melbourne* set out above:[27]

> "That statement has no application here. It concerns a case in which the prosecution contends that evidence of prior good character cannot be used by the jury in assessing (relevantly) the probability of the accused committing the offence charged. … Here it was not submitted on behalf of the prosecution that good character evidence could not be used by the jury in that way. Rather, the effect of the prosecutor's submission was that the jury should discount the value of the good character evidence and attribute more weight to the evidence as to what the appellant had done and his motives for doing it."[28]

Here, similarly, the prosecution accepted the wife's understanding of her husband's character but suggested to the jury that in committing the acts charged the appellant would have been at pains to keep his conduct from his wife.

[35] In *Hinschen* Fraser JA observed:[29]

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24 At 57, [156].
25 At 57, [157].
26 [2008] QCA 145.
27 At [30].
28 At [63] – [64].
29 At [66].

> "Had the prosecutor submitted that the jury was not entitled to use the evidence of the appellant's good character in assessing the probability of the accused committing the offence, it would have been necessary for the trial judge authoratively to inform the jury that the evidence could be used by the jury for that purpose. In such a case, anything short of a direction by the trial judge would have been insufficient. A jury is entitled to ignore the trial judge's comments on the evidence and the trial judge is required so to inform the jury. A direction would have been required, to give the judge's imprimatur to the law the jury was obliged to heed." (footnotes deleted)

The reasons of Fryberg J are to similar effect.[30]

Conclusion

[36] The trial judge had a discretion whether or not to give a good character direction.[31] She was not asked to do so. Detailed consideration was given to the directions in discussions between her Honour and counsel in the absence of the jury. Failure to seek such a direction could not be said to be, on the facts of this case, a forensic decision. The most likely explanation is that it was not thought necessary. The issue of credibility was central to the case and was clearly and competently identified in appropriate directions. It would have been plain to the jury, without a direction, that the good character evidence given by the wife and his want of criminal convictions was relevant to the likelihood of the appellant having committed the offences with which he had been charged. It would also have been plain to the jury, without a direction, that that body of evidence was relevant to the appellant's credibility when assessing his denial of wrongdoing.[32] To have given a good character direction would not have been inappropriate but it might have been thought by the jury to be stating the obvious. Not to have done so did not give rise to a miscarriage of justice.

[37] I would dismiss the appeal.

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30 At [89] – [91].

31 *Simic v The Queen* (1980) 144 CLR 319.

32 *Donaldson v The State of Western Australia* (2007) 176 A Crim R 488; per Buss JA at [84], 517; [2007] WASCA 216.