SUPREME COURT OF QUEENSLAND

CITATION:	*R v TAB* [2013] QCA 34
PARTIES:	**R** **v** **TAB** (appellant)
FILE NO/S:	CA No 158 of 2012 DC No 1797 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	8 March 2013
DELIVERED AT:	Brisbane
HEARING DATE:	4 February 2013
JUDGES:	Holmes, Fraser and Gotterson JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Allow the appeal.** **2. Set aside the verdict of guilty and conviction on Count 3.** **3. Enter a verdict of acquittal.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – where the appellant was charged with one count of attempted indecent treatment and two counts of indecent treatment each with aggravating circumstance that the complainant was under 12 years of age – where the appellant was convicted of only one indecent treatment count – where the appellant appeals his conviction on the ground that the guilty verdict was unreasonable – where the appellant contends that the guilty verdict cannot be reconciled with the acquittals – where other evidence was inconsistent with the complainant's account – where there were other reasons for doubt as to the quality of the complainant's recollection – whether it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty – whether a miscarriage of justice occurred CRIMINAL LAW – EVIDENCE – MATTERS RELATING TO PROOF – STANDARD OF PROOF – DIRECTIONS TO JURY – REASONABLE DOUBT – PARTICULAR CASES – where the appellant was charged with one count of

attempted indecent treatment and two counts of indecent treatment each with aggravating circumstance that the complainant was under 12 years of age – where the appellant was convicted of only one indecent treatment count – where the trial judge directed the jury that if they had a reasonable doubt as to a particular count they should consider the reason for the doubt, whether it affected their assessment of the rest of the complainant's evidence and whether it caused a reasonable doubt as to her evidence on the remaining counts – where the appellant submits the learned trial judge erred in failing to make specific reference to the significance of such a doubt to the assessment of the complainant's truthfulness and reliability – whether the direction given was adequate – whether a miscarriage of justice occurred

M v The Queen (1994) 181 CLR 487, [1994] HCA 63, cited
MacKenzie v The Queen (1996) 190 CLR 348, [1996] HCA 35, considered
R v JK [2005] QCA 307, confirmed
R v Markuleski (2001) 52 NSWLR 82, [2001] NSWCCA 290, considered
R v Smillie (2002) 134 A Crim R 100, [2002] QCA 341, cited

COUNSEL: G M McGuire for the appellant
M R Byrne SC for the respondent

SOLICITORS: Russo Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **HOLMES JA:** The appellant was charged with one count of attempted indecent treatment and two counts of indecent treatment of his step-daughter, S, each with the aggravating circumstance that she was under 12 years of age. He was convicted only of one indecent treatment count. He appeals against his conviction on the grounds that the guilty verdict was unreasonable and that the learned trial judge erred in failing to give a direction, of the kind discussed in *R v Markuleski*,[1] as to the significance of a concern about the complainant's reliability in respect of one count for assessment of her evidence on another count.

[2] The three offences were alleged to have occurred between 1 May 2001 and 31 December 2004, a period during which S was between five and nine years old. The allegations underlying the charges were that the appellant had asked the girl to suck his penis (count 1, attempting to procure a child to commit an indecent act); that when she refused he had compelled her to watch her mother performing the same act on him (count 2, exposing a child to an indecent act); and that on a different occasion, while she lay in bed pretending to sleep, he had put his hands into her underwear and rubbed her vaginal area (count 3, indecent dealing).

The preliminary complaints

[3] S's first complaint of those incidents was made to her maternal aunt in mid to late October 2010, when she was just short of her 15th birthday. Her relationship with

1 (2001) 52 NSWLR 82.

the appellant before her teenage years had, S conceded in evidence, been a good one, and she had chosen to adopt his surname as part of hers. In her teenage years, however, the relationship had deteriorated, and it reached a nadir in 2010. Her relations with her mother were also difficult at that time. The week prior to her disclosures to her aunt, her mother had forbidden her to go to a friend's house for a sleep-over. She had nonetheless gone, although she was threatened with missing a skiing holiday in Canada if she did so.

[4] The following weekend, S stayed at her aunt's. The latter questioned her about her relationship with her step-father, asking if he was violent; which, according to S, he was: he had hit her in the past. Then, on S's evidence, her aunt asked "if he had done anything else". The aunt's account was of a more specific enquiry:

> "I specifically asked if anything else was going on; she said, 'Like what?' I said, 'Like, sexual abuse?' She said, 'Yes.' I said, 'Who?' She said, 'He did.'"

According to S's aunt, the girl went on to say that the appellant had asked her "to suck his –"; but she would not finish the sentence. S said that when she refused to comply, he had made her mother do "it" while she watched. S's other allegation was that the appellant "would put his hands down her pants to check she was asleep". S told her aunt that she did not want her mother to know of the allegations; S explained in evidence that this was because she did not want to spoil their intended Canadian holiday.

[5] On 15 November 2010, S made a similar allegation to her general practitioner of being asked by the appellant to perform an unspecified sexual act on him and forced to watch as her mother did so. The context was that she was seeing the general practitioner for depression and had described a breakdown in her relationship with the appellant. The doctor had asked her whether there had been "any inappropriate sexual contact" from the appellant. The doctor referred S to a psychologist, to whom, in December 2010, she gave an account of being asked to suck the appellant's penis, refusing and then being asked by him to hide while her mother did so; and of the appellant on another occasion touching her vagina while she pretended to be asleep.

[6] The psychologist made a note that S said she had not told her mother about the incidents because the appellant had threatened to kill her mother if she did so. That allegation was not made at any other time, or to any other person who spoke to S about the matter. At the end of January 2011, S and her mother returned from the Canadian holiday and S's mother was then informed of what S had told her aunt. Once that had happened, the psychologist advised S's mother that she (S's mother) had to report the matter to the police, and she did so.

S's account in her s 93A statement and under cross-examination

[7] S was interviewed by a police officer on 31 January 2011. She said that, to the best of her recollection, when the appellant asked her to suck his penis, the words he used were, "Do you want to suck Daddy's willy?" It was night when the appellant made the approach which was the subject of count 1, and she and her younger brother were in bed in their separate bedrooms. She was lying awake in the top bunk of her bunk bed. She could hear her mother, who, S said, had been drinking wine, in the living room, singing. When the appellant entered her room, he was wearing only a towel; he appeared to have just come from the shower.

[8] S said that she said "No" to the appellant, who responded, "Come see mum do it then." He took her into the living room, where he positioned her next to a cupboard or shelving. Her mother was sitting in the living room with her bottom on the floor. The appellant removed his towel and S's mother, still sitting in that position, proceeded to suck his penis. Although S could see her mother side-on, she did not think her mother could see her. S said that she ran back to her bedroom crying and got back into bed. Later, the appellant came in and asked her what was wrong, but she did not answer him.

[9] The interviewing police officer asked S what made her think that the incident happened in the particular residence she identified, and S answered:

> "'Cause I remember like, the scene. I can remember like, I've had bad dreams about it, and I see it there."

The police officer asked her if she had a "free memory" of what had happened independent of the bad dreams, and she said that she did.

[10] In cross-examination, S agreed that the living room was about 3.4 metres by just over three metres in dimension and that standing where she was she would have been two or three metres from her mother. She said that her mother would not have heard the appellant instructing her to stand at the cupboard because there was loud music playing. She conceded that she did not know if her mother had been drinking that night, but it was the latter's practice to have a glass of wine in the evening. Her observation of what had occurred between her mother and the appellant was very brief.

[11] In her interview with the police officer, S described another occasion which, she said, might have been before or after the one which was the subject of counts 1 and 2. On this occasion, she was lying in her bunk bed at night. She was pretending to be asleep, because it was late, and she would get into trouble if the adults realized she was still awake. Someone came into the room and put their hand down the front of her pyjamas and underpants, rubbing her vaginal area. That person left the room, saying as they did so "Oh, she really is asleep". S remarked:

> "But I don't know, if that means it's him or not, but I'm pretty sure it was…Well I'm presuming it's [the appellant], like I'm quite certain it is, but."

Later she said that the voice was a man's, "quite low", and she thought it was the appellant's.

[12] S was unable to say precisely where the person had touched her. It was "further than the wee hole" and she thought it was outside her labia. Her legs were "probably shut". In cross-examination, S said that when this incident occurred, she had been in bed for "probably a couple of hours". She did not know whether she was wearing a nightgown or a pyjama top and pants, and had no idea what time of year it was. She had not opened her eyes and did not know whether her mother was present. The incident was brief.

[13] The police officer asked S if she had always remembered that "this [apparently a reference to both incidents] had happened". S's response was,

> "Well when I was younger I guess I just didn't understand what it was, 'cause I used to get along with him really well, but, I just guess

> when I finally understood what happened, it just sort of clicked that it wasn't really right."

The evidence of S's mother

[14] S's mother gave evidence which was generally in accord with S's as to the deterioration of the relationship between the girl and her step-father and her own difficulties in dealing with S in the year 2010. She said that the word "willy" was not used in the family. Oral sex (she was not more specific than that) had occurred between her and her husband in the lounge room at their residence, but only when the children were staying with their grandparents.

[15] The appellant did not give or call evidence.

The Markuleski ground

[16] The learned trial judge gave this direction in respect of S's evidence:

> "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 that respect of that count. In relation to a particular count you may get to a point where although you think she is probably right, you have some reasonable doubt about an element or elements of that particular offence. If that occurs, you find him not guilty on 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."

That direction appears in the Queensland Supreme and District Courts Benchbook.[2]

[17] The appeal ground relating to the judge's direction was in these terms:

> "The learned trial judge failed to direct the jury that a reasonable doubt about one aspect of the complainant's evidence ought to be taken into account in assessing her evidence on other matters."

It is difficult to understand that ground in light of the last sentence of the passage from his Honour's directions set out above. However, counsel for the appellant asserted that the direction should have been in the form of another warning suggested in the same section of the Benchbook as the direction given:

> "If you have a reasonable doubt concerning the truthfulness or reliability of the complainant's evidence in relation to one or more counts, whether by reference to her demeanour or for any other reasons, that *must* be taken into account in assessing the truthfulness or reliability of her evidence generally."[3]

The direction given was deficient in the circumstances, it was said, because it did not contain any reference to assessment of truthfulness and reliability.

---

2 No. 34 Separate Consideration of Charges – Single Defendant at 34.2.

3 At 34.1.

[18] Directions of the kind given and proposed here have their source in *R v Markuleski*, in which the New South Wales Court of Criminal Appeal advocated the supplementing, in appropriate cases, of the traditional direction to juries that they should treat each count separately. The contemplated supplementary direction concerned the significance for the complainant's credibility generally of the jury's finding that it could not accept his or her evidence with respect to a particular count. Spigelman CJ observed:

> "It will often be appropriate to direct a jury that where they entertain a reasonable doubt concerning the truthfulness or reliability of a complainant's evidence in relation to one or more counts, that must be taken into account in assessing the truthfulness or reliability of the complainant's evidence generally.
>
> On other occasions it may be appropriate for a judge to indicate to the jury, whilst making it clear that it remains a matter for the jury, that it might think that there was nothing to distinguish the evidence of the complainant on one count from his or her evidence on another count.
>
> Or it may be appropriate to indicate that, if the jury has a reasonable doubt about the complainant's credibility in relation to one count, it might believe it difficult to see how the evidence of the complainant could be accepted in relation to other counts.
>
> The precise terminology must remain a matter for the trial judge in all the particular circumstances of the specific case. The crucial matter is to indicate to the jury that any doubt they may form with respect to one aspect of the complainant's evidence, ought be considered by them when assessing the overall credibility of the complainant and, therefore, when deciding whether or not there was a reasonable doubt about the complainant's evidence with respect to other counts."[4]

Wood CJ at CL expressed some concern that such a comment should not be elevated by expression in mandatory terms to the status of a principle of law. The strength of the comment appropriate would depend on the extent to which it was evident that the witness' reliability or credibility had been seriously undermined.[5] Grove J also cautioned against language which might be interpreted as mandatory.[6]

[19] The present case was one in which a direction of the kind discussed in *Markuleski* was desirable, since all counts depended solely on the testimony of the complainant. But (as is evident from the references in the preceding paragraph) nothing in *Markuleski* requires that any particular form of words be used. The formulation which the learned trial judge adopted was approved by this court in a "word against word" case of sexual offences involving a child complainant in *R v JK*.[7] More to the point, it was adequate in the circumstances of this case to convey to the jury that they should consider the implications of a view reached in assessment of the complainant's evidence on one count for conclusions on another count. And the

---

4 (2001) 52 NSWLR 82 at 122.
5 At 135.
6 At 138.
7 [2005] QCA 307.

direction was also apt to convey that the nature of the concerns held on one count would determine the way another was regarded: it was implicit that if those concerns related to the complainant's credibility and reliability in respect of a particular count, that was to be taken into account in assessing other counts.

[20] The direction given met its purpose of alerting the jury to the need to consider the larger significance of doubts about S's evidence in relation to counts 1 and 2. The appeal ground in respect of it is not made out.

The 'unreasonable verdict' ground

[21] The appellant submitted that the verdict was unreasonable as inconsistent with the acquittals on the other counts. There was no basis, it was contended, on which the jury could have distinguished the incident involving the oral sex allegation from that involving the touching, in respect of which the appellant was convicted. The acquittal on the oral sex counts necessarily involved a rejection of S's evidence; accordingly the acceptance of her evidence of the fleeting incident which the remaining count involved was an "affront to logic and commonsense" (the term used in *MacKenzie v The Queen*[8]).

[22] The test for consistency is one of "logic and reasonableness",[9] with proper respect being given to the jury's verdict. If the verdicts may properly be reconciled they should be upheld;[10] such a reconciliation may be arrived at by having regard, for example, to differences in the quality of the evidence, the existence of contradictory evidence which does not necessarily damage the witness' credibility, or the absence of supporting evidence on some counts. On the respondent's argument, this case falls into the second of those categories. Counsel submitted that the difference in verdicts could be explained by the evidence of S's mother which appeared to contradict S: that she and her husband did not engage in oral sex in the living room when the children were in the residence.

[23] The question was whether the conflict in the evidence simply amounted to a discrepancy which could be explained as mistake warranting a doubt as to guilt, or whether it actually undermined the witness' credibility;[11] in the respondent's submission, the former was the case. The conflict between S's evidence and her mother's evidence was not such as to destroy S's credibility. All her complaints had been consistent, and there was no suggestion that in making her initial complaint she had been overborne by her aunt. It was of some importance that the jury were given an appropriate warning as to the significance of a doubt about some counts for their conclusion on others, and they were also told that it would be dangerous to convict without scrutinising the complainant's testimony with great care. In addition, the jury had asked for the replaying of evidence which they had had trouble hearing, suggesting, counsel for the respondent contended, that they were diligent in their approach.

[24] But there were reasons other than the apparent inconsistency with her mother's evidence for the jury to be wary in accepting S's testimony as reliable in relation to the events underlying counts 1 and 2. They included her allusion to having seen the "scene" in bad dreams; the circumstances of conflict in which her recollection came

---

8 (1996) 190 CLR 348 at 368.

9 *MacKenzie v The Queen* (1996) 190 CLR 348 at 366.

10 *MacKenzie v The Queen* (1996) 190 CLR 348 at 367.

11 *R v Smillie* (2002) 134 A Crim R 100 at 106.

to light and its eliciting by her aunt's direct question; as well as oddities inherent in her account: the position she described her mother as adopting and her mother's apparent obliviousness to her presence only a couple of metres away. Those matters would not necessarily require a rejection of other evidence given by S, but, taken with some features of her evidence in relation to Count 3, they raise significant concerns about whether her memories, while they may be honest, are authentic.

[25] S's version of the events underlying Count 3 had the peculiar feature that she identified the person assaulting her only by his voice, thanks to the circumstance that he chose to say out loud "Oh, she really is asleep". Since nothing suggested that her mother was present for him to make the comment to, it seems that if it were the appellant, he was, somewhat strangely, talking to himself. S's rapid transition in her account to the police from not knowing whether the person was the appellant to being "pretty sure" to "quite certain" is also such as to raise some question as to how clearly she recalled what she was describing.

[26] Taken with the context, that the incident was said to have occurred as the child lying in her bed at a time when she should have been asleep, there is cause for concern as to whether the strange and fleeting event described was a genuine memory rather than a dream or a trick of the imagination. Added to those aspects are the long interval between its alleged occurrence and S's complaint and its coming to light as the result of direct questioning about sexual assault and in the context of friction with the appellant. There is, in my view, a real risk that the incident S described was the product of imagination or distorted recollection rather than a real event.

[27] Given the content and context of S's evidence on all three counts, I do not think that it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of Count 3. To put it another way, I consider that there is a "significant possibility that an innocent person has been convicted",[12] so that the verdict should be set aside.

Orders

[28] I would make the following orders:

1. Allow the appeal
1. Set aside the verdict of guilty and conviction on Count 3
2. Enter a verdict of acquittal.

[29] **FRASER JA:** I have had the advantage of reading the draft reasons for judgment of Holmes JA, with which I respectfully agree. I would add only these brief additional reasons. Accepting, as I do, that the complainant's evidence may have seemed credible and may have been honest in fact, nevertheless, the record suggests that her evidence in relation to the count of which the appellant was guilty was apparently less persuasive, or at least no more persuasive than, the evidence upon the two counts upon which the jury acquitted the appellant. When it is also borne in mind that the complainant's evidence concerned times which were many years before she made any complaint, the period during which it was alleged that the offences occurred spanned more than three years, and the complainant was unable to tell the investigating police officer in what order counts 1, 2 and 3 occurred and what, if any, time separated those two occasions. In these circumstances, it is difficult to reconcile the guilty verdict on count 3 with the not guilty verdicts on counts 1 and 2.

---

12 *M v The Queen* (1994) 181 CLR 487 at 494.

[30] I agree with the orders proposed by Holmes JA.

[31] **GOTTERSON JA:** I agree with the orders proposed by Holmes JA and with the reasons given by her Honour.