SUPREME COURT OF QUEENSLAND

CITATION:	*R v Johnston* [2013] QCA 171
PARTIES:	**R** **v** **JOHNSTON, Stewart Walton** (appellant)
FILE NO/S:	CA No 310 of 2012 DC No 15 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Mackay
DELIVERED ON:	Orders delivered ex tempore 1 May 2013 Reasons delivered 9 July 2013
DELIVERED AT:	Brisbane
HEARING DATE:	1 May 2013
JUDGES:	Margaret McMurdo P, North and Henry JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Delivered ex tempore on 1 May 2013:** **1. The appeal is allowed.** **2. The conviction is dismissed.** **3. A verdict of acquittal is entered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – where appellant acquitted of rape involving digital penetration but convicted of indecent dealing with a child under 16 in the alternative – where appellant acquitted of rape involving penile penetration and unlawful carnal knowledge in the alternative – where appellant contended the verdicts were inconsistent – where appellant appealed against his conviction on the basis that the verdicts were unsafe, unsatisfactory and unreasonable having regard to the evidence – whether a jury acting reasonably could have returned such verdicts CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where the offending consisted of a single act charged as

two counts – where the appellant's trial counsel did not seek a *Markuleski* direction and one was not given – where the appellant contends that the failure to give a *Markuleski* direction occasioned a miscarriage of justice – where evidence concerning a text message sent by the complainant was led to attack her credibility – where the appellant's trial counsel did not seek and the primary judge did not give a direction as to the use that could be made of the text message – where the appellant contended that a failure to so direct the jury led to a miscarriage of justice – whether primary judge erred on either or both grounds – whether miscarriage of justice occurred

MacKenzie v The Queen (1996) 190 CLR 348; [1996] HCA 35, applied
R v LR [2006] 1 Qd R 435; [2005] QCA 368, cited
R v Markuleski (2001) 52 NSWLR 82; [2001] NSWCCA 290, applied

COUNSEL: J Allen for the appellant
M Cowen for the respondent

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

[1] **MARGARET McMURDO P:** I agree with Henry J's reasons for the orders made on 1 May 2013 allowing the appeal, quashing the conviction and directing a verdict of acquittal.

[2] I add only some brief additional observations as to Ground 5 although its determination is not critical to the outcome of the appeal in light of the Court's conclusion as to the inconsistency of the verdicts. This ground concerns the complainant's evidence, adduced by defence counsel in cross-examination to attack credibility, that the complainant sent a text message to her mother before the commission of the alleged offences to the effect that the appellant had touched her in a way that made her feel unsafe. The doctor who examined her after her complaint to police asked if there had been any previous touchings and she responded that there had been none. Defence counsel submitted to the jury that the complainant could not be believed in light of her evidence of the text message. The prosecution's response was that the previous touchings alluded to in the text message were associated, as the complainant explained in evidence, with the appellant's authorised massage of her arthritic legs. The appellant now contends that the judge should have explained to the jury that the evidence of the text message was relevant only to the complainant's credit and also warned them against propensity reasoning. Defence counsel at trial did not seek such a direction, no doubt wishing to avoid any connection in the jury's mind between the evidence of the text message and propensity reasoning. It is not suggested that the prosecution encouraged the jury to use the evidence wrongly. The judge clarified for the jury the competing contentions of counsel as to the inference to be drawn from this aspect of the complainant's evidence.[1] The jury would have been in no doubt that

[1] T3-56.41 to T3-57.51 (AB 248-249).

the evidence was relevant only to the complainant's credibility. For these reasons as well as those of Henry J, the direction now sought by the appellant was not essential in this case and its absence has not resulted in any miscarriage of justice.

[3] **NORTH J:** I have read the reasons of Henry J and agree with his Honour.

[4] **HENRY J:** The appellant was convicted by a jury in the Mackay District Court of one count of indecent dealing with a child under 16.

[5] On the hearing of his appeal against that conviction this court allowed the appeal, quashed the conviction and entered a verdict of acquittal, indicating it would publish its reasons.

Charges and verdicts

[6] The appellant was charged with two counts of rape. The charges related to a single episode of alleged offending initially involving digital penetration of the complainant's vagina followed directly thereafter by penile penetration of the complainant's vagina.

[7] Count 1 was particularised as a digital rape. On that count an alternative charge of indecent dealing with a child under 16 was left to the jury. The jury acquitted on the rape charge but convicted on the alternative charge of indecent dealing.

[8] Count 2 was particularised as a penile rape. On that count an alternative charge of unlawful carnal knowledge was left to the jury. The jury acquitted on both the rape charge and the alternative charge of unlawful carnal knowledge.

[9] The learned trial Judge observed of the conclusion reached by the jury:

> "I can't quite see how they reached that conclusion, quite frankly."[2]

Background

[10] The appellant lived with the 15-year-old female complainant, her siblings and her mother. He had formerly been in a relationship with the complainant's mother and was, to an extent, a father figure to the children.

[11] On the night of the alleged episode the complainant's mother was away staying at a mine site, although her boyfriend, a large man, was staying at the home. The complainant and her brother were sleeping in the lounge room because their bedrooms were being renovated.

[12] The complainant fell asleep on an armchair in the lounge. She was awoken around midnight being touched on the leg by the appellant. He was wearing a towel. He allegedly rubbed outside her vagina and put his fingers in her vagina for five to 10 minutes. He then pulled her underwear to the side and inserted his penis into her vagina, moving in and out for about 10 minutes. She did not know if he ejaculated.

[13] The complainant alleges the appellant rubbed her legs for a short while afterwards. She eventually moved to her mattress on the floor and he left the room.

[14] Throughout the entirety of the episode the complainant's brother was asleep on a mattress on the lounge room floor, one to one and a half metres from the armchair

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[2] R260 L40.

where the events allegedly occurred. He recalls at one stage waking to see the appellant lying on the same mattress as him wrapped in a towel. He saw or heard nothing of the alleged episode.

[15] The complainant gave evidence of telling her mother and brother what had occurred the following morning.

[16] The complainant and her mother each alleged the complainant had sent her mother a text message two days before the episode asking her to get the appellant to move out because he kept touching her and she did not feel safe. However no such text message was brought to the attention of police during their investigation.

[17] On genital examination of the complainant no evidence of trauma was detected. Semen was not detected on the high vaginal, low vaginal or vulval swabs. DNA testing of the vulval swab indicated a mixed partial DNA profile indicating the presence of DNA from two contributors but there was insufficient information to determine if the appellant could have contributed DNA to that profile. Mixed DNA profiles consistent with DNA from both the complainant and the appellant were found and taken from the complainant's shorts and underwear. The towel worn by the appellant on the night was also found to have mixed DNA profiles consistent with the DNA of both the appellant and the complainant. Expert evidence was given that it is not possible to say when individual transfers of DNA in a mixed DNA profile have occurred, however epithelial cells from a person could be deposited on clothing through the process involved in laundering them.

[18] The appellant gave evidence that on the night of the alleged offences he was masturbating in his bedroom when the complainant opened the bedroom door and saw him. He ejaculated into the towel he was allegedly seen wearing. He denied the offences and denied touching the complainant inappropriately at any time. He admitted to having massaged the complainant's legs on occasions because of her arthritis.

Grounds of appeal

[19] There are five grounds of appeal:

1. The jury's alternative verdict of guilty on one count of indecent treatment of a child under 16 years is unsafe and unsatisfactory in circumstances where mistake of fact regarding consent (count 1 – rape) was against the weight of the evidence when considered as a whole.

2. The jury's alternative verdict of guilty of one count of indecent treatment of a child under 16 years is unsafe and unsatisfactory in circumstances where the jury returned a verdict of not guilty to rape on count 2 and not guilty to the statutory alternative of unlawful carnal knowledge on count 2 when the digital penetration was alleged to have been followed shortly thereafter by penile penetration.

3. The verdict of the jury is unreasonable and cannot be supported having regard to the evidence.

4. A miscarriage of justice occurred as a result of the learned trial Judge's failure to direct the jury in the terms of *R v Markuleski* (2001) 52 NSWLR 82.

5. A miscarriage of justice occurred as a result of the learned trial Judge's failure to direct the jury as to the use they might make of evidence concerning a text message allegedly sent by the complainant to her mother on 10 January 2011.

Grounds 1, 2 & 3: Inconsistent verdicts

[20] The fundamental complaint underlying the first three grounds is that the verdicts of the jury were inconsistent and that no jury acting reasonably could have returned such a mix of verdicts.

[21] In *MacKenzie v The Queen*[3] Gaudron, Gummow and Kirby JJ summarised the principles relevant to determining whether a reasonable jury could have arrived at different verdicts. The test is one of logic and reasonableness. An appellate court's task is not to substitute its opinion of what the appropriate verdicts were and it should not interfere if the verdicts can be reconciled in a way consistent with the jury performing its function as required. In that context allowance must be made for the requirement that each individual count must be proved beyond a reasonable doubt. There may be variations in the jury's perceptions of the force of the evidence in respect of different counts and the jury may take a more merciful view of the strength of the evidence on one count as distinct from another. However appellate intervention will be warranted where the different verdicts represent "an affront to logic and commonsense which is unacceptable and strongly suggests a compromise of the performance of the jury's duty".[4]

[22] The learned trial Judge in summing up the case to the jury explained that they needed to consider each charge separately and said:

> "The evidence in relation to the separate offences is somewhat different, so your verdicts need not be the same, but I would have thought, considering the real issues in this case, that the verdicts are probably the same for each count."[5]

[23] On count 1 the learned trial Judge explained the need to prove the absence of consent and to exclude any honest and reasonable mistake about that. He left the alternative verdict to the jury in the event they had a reasonable doubt about those matters. However he suggested to the jury that the real issue in relation to the charge was whether they were satisfied beyond reasonable doubt that the actions of the defendant as described had occurred at all.[6]

[24] In leaving the alternative verdict of indecent dealing to the jury on count 1 the learned trial Judge did not do so on the basis that there may have been touching but not digital penetration. The nature of the dealing was the same physical act relied upon in respect of the rape charge, namely digital penetration.

[25] The jury's acquittal of the count 1 rape but conviction on the alternative charge of indecent dealing means they harboured a reasonable doubt as to whether or not the complainant consented or whether there was an honest and reasonable mistake about that on the part of the appellant. It could not logically be the product of any doubt about the complainant's description of the physical act involved.

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3 (1996) 190 CLR 348, 366-368.
4 Ibid 368.
5 R206 L38.
6 R209 L24.

[26] As to the physical act in count 2 there was no room on the complainant's account for any doubt in her mind that penile penetration had occurred. She described the appellant moving his penis in and out of her vagina for about 10 minutes. However the jury's acquittal, of both the charge of rape involving penile penetration and the alternative charge of unlawful carnal knowledge, indicates not merely that they harboured a reasonable doubt as to the element of consent but that they harboured a reasonable doubt as to whether penile penetration had occurred at all.

[27] The jury's reasonable doubt about the complainant's assertion that penile penetration had occurred reflects a very significant concern about her reliability on a critical issue. It is difficult to understand how the jury could have harboured a reasonable doubt as to that issue yet not harboured a reasonable doubt as to the digital penetration which the complainant alleged had occurred only a short time earlier.

[28] The inconsistency is not explained by evidence additional to that of the complainant. There was no other evidence lead in the case that could have bolstered the complainant's reliability in respect of the allegation of digital penetration in any additional way to her allegation of penile penetration.

[29] In the circumstances the jury's apparent rejection of the reliability of the complainant in respect of the act of penile penetration and their acceptance of her reliability in respect of the alleged act of digital penetration only a short time earlier is irreconcilable.

[30] The verdicts of the jury were inconsistent and no jury acting reasonably could have returned such a mix of verdicts. The outcome bespeaks a compromise of the performance of the jury's duty. The conviction should be quashed to prevent the possible injustice inherent in that compromise.

Ground 4: No *Markuleski* direction

[31] While the learned trial Judge expressed his opinion to the jury that he thought their verdicts would probably be the same he did not give them a *Markuleski* direction.[7] In the circumstances of this case such a direction would have instructed the jury in the event they were not satisfied of the complainant's reliability in respect of one count to take their reasons for that concern into account when considering her reliability in respect of the other count.

[32] The need for and form of a *Markuleski* direction will depend upon the circumstances of the case. This was a straightforward case involving a single episode of alleged sexual offending charged as two counts. It is unsurprising given the nature of the case that a *Markuleski* direction was not sought. Such a direction was not mandatory.[8] That is not to say it is inappropriate to give a *Markuleski* direction where charges relate to a single episode. In this case such a direction may also have assisted the jury's understanding of why the learned trial Judge observed that their verdicts would probably be the same given the issues in the case. However it was reasonable to expect in this case that a jury acting reasonably would take into account a reasonable doubt about one count when considering the other. Error by the jury does not bespeak error by the learned trial Judge. The learned trial Judge did not err in not giving a *Markuleski* direction.

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7 *R v Markuleski* (2001) 52 NSWLR 82.

8 *R v LR* [2005] QCA 368, [64].

Ground 5: Use of text message evidence

[33] The essence of the complaint about the learned trial Judge's directions in respect of the use of the text message evidence was that he ought to have warned the jury against propensity reasoning in considering that evidence.

[34] The evidence about the text message was introduced by the defence to undermine the credibility of the complainant and to a lesser extent her mother. It related only to credibility. To the extent it referred to any physical acts they were of a kind well removed from those relied on to sustain the charged offences. The evidence was not of such a kind as to call for a warning against the danger of propensity reasoning. There is no substance to this ground.

Conclusion

[35] The orders already given by this Court were necessary for the reasons given above in respect of Grounds 1, 2 and 3.

[36] The orders were:

1. Appeal allowed.

2. Conviction dismissed.

3. Verdict of acquittal entered.