SUPREME COURT OF QUEENSLAND

CITATION:	*R v Barrett* [2015] QCA 81
PARTIES:	**R** **v** **BARRETT also known as DUNROBIN, Shannon Rober**t (appellant)
FILE NO/S:	CA No 222 of 2014 DC No 1185 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Bundaberg – Unreported, 11 August 2014
DELIVERED ON:	12 May 2015
DELIVERED AT:	Brisbane
HEARING DATE:	6 March 2015
JUDGES:	Gotterson and Morrison JJA and Peter Lyons J 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 NOT AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where the appellant was convicted in the District Court of one count of rape – where the appellant was acquitted of the four other counts on the indictment – where the complainant was a young male – where the appellant was sentenced to four and a half years' imprisonment – where the trial judge directed the jury that "Count 1, the first one, was the strongest case…" – where defence counsel addressed on Count 1 in much more detail than the other counts – whether the trial judge erred when her Honour imputed to defence counsel a concession that Count 1 was the "strongest" of the counts on the indictment CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where the complainant gave evidence of many uncharged acts – where the learned trial judge in summing-up detailed the particulars of each of the five counts and provided a relatively brief

outline of other aspects of the evidence of the uncharged acts – where defence counsel did not specifically ask for a *Markuleski* direction – where the learned trial judge directed the jury as to a "domino effect on credibility" – whether the learned trial judge erred, or a miscarriage of justice was occasioned, by the failure of the trial judge to direct the jury in the terms of *R v Markuleski*

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where in the course of addresses, the prosecutor put to the jury that the appellant's denial that any sexual activity took place between him and the complainant at the Boundary Street address was a falsehood – where the prosecutor did not suggest that lying by the appellant could be used by the jury as evidence of a consciousness of guilt on his part – where the learned trial judge directed the jury that if they rejected what the appellant said in his record of interview, they should put it to one side and ought not reason automatically from the rejection that he was guilty – where no further direction was given on lies – whether the trial judge erred, or a miscarriage of justice was occasioned, by the failure of the trial judge to direct the jury concerning alleged lies by the appellant

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES NOT AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – where s 208(1) of the *Criminal Code* provides a person charged with rape may be convicted of unlawful sodomy if it is established by the evidence – where Count 1 alleged a rape of the complainant before his eighteenth birthday – where the jury were presented with the complainant's account of non-consensual penetration of his anus by the appellant's penis as the foundational evidence for Count 1 – where there was no alternative version in the evidence that the penetration occurred, but that it was consensual – where the appellant's account was that no sexual activity occurred between himself and the complainant at the Boundary Street residence and before the complainant's eighteenth birthday – whether the trial judge erred, or a miscarriage of justice was occasioned, by the failure of the trial judge to leave for the jury's consideration an alternative charge of unlawful sodomy

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where it was submitted that Count 1 was unreasonable in that it was based solely on the deficient evidence of the complainant whose evidence was rejected by the jury on the other four

counts and that it is likely to have been the result of an irrational compromise – where the complainant's account was less than uniformly consistent and in one respect exaggerated – where the jury provided a note that they could not agree on any of the counts – where a *Black* direction was given – where neither counsel objected to the form of the *Black* direction – whether the verdict of the jury was unreasonable

Criminal Code 1899 (Qld), s 208(1), s 578(1)

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, considered
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
R v Dunrobin [2013] QCA 175, cited
R v LR [2006] 1 Qd R 435; [2005] QCA 368, distinguished
R v Perussich [2001] QCA 557, cited
R v Markuleski (2001) 52 NSWLR 82; [2001] NSWCCA 290, considered
R v MBX [2014] 1 Qd R 438; [2013] QCA 214, considered
R v Mead [2010] QCA 370, cited
R v Nous [2010] 26 VR 96; [2010] VSCA 42, considered
R v SBL [2009] QCA 130, cited
R v WAC [2008] QCA 151, distinguished
R v Willersdorf [2001] QCA 183, considered

COUNSEL: J J Allen QC for the appellant
G P Cash for the respondent

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

[1] **GOTTERSON JA:** On 11 August 2014 at the District Court at Bundaberg, the appellant, Shannon Robert Barrett (also known as Shannon Robert Dunrobin) was convicted at trial on a count of rape. This count was Count 1 on a five count indictment presented on 4 August 2014. The trial took place over six days. At the conclusion of it, the appellant was acquitted of the four other counts, Counts 2 to 5. Counts 2, 4 and 5 were counts of rape. Count 3 was a count of unlawful assault occasioning bodily harm with an offensive instrument.

[2] The complainant for each count was a young male, RJ. On his evidence, he first met the appellant in 2009, about one month before his eighteenth birthday on 15 April 2009.[1] Count 1 alleged offending between 1 June 2008 and 9 April 2009. For Count 2, the period in which the offending was alleged to have taken place was between 7 April 2009 and 19 August 2009; for Count 3, the period was between 1 August 2009 and 2 December 2009; and for Counts 4 and 5, it was between 10 and 25 November 2009. In each count, the offending was alleged to have occurred at Bundaberg.

[1] AB19; Tr1-9 l28 – AB20; Tr1-10 l8.

[3] On 21 August 2014, the appellant filed a notice of appeal against his conviction.[2] The grounds of appeal on which the appellant ultimately relied are Grounds 1, 2, 4, 5 and 6 set out in a further amended notice of appeal for which leave to file was given at the hearing of the appeal on 6 March 2015.[3]

[4] The appellant was sentenced on 17 September 2014 to four and a half years' imprisonment. This sentence allowed for four years actually served following upon his conviction on 16 September 2011 on five counts of rape and one count of assault occasioning bodily harm whilst armed, all involving the same complainant.[4] During a succession of appeals which are summarised in *R v Dunrobin*,[5] a verdict of acquittal was entered on one of the rape counts and, on 12 July 2013, this Court ordered that the appellant be retried on the counts which are Counts 1 to 5 on the indictment to which I have referred.

Circumstances of the alleged offending

[5] The appellant is about 12 years older than the complainant. He had been a boxer prior to his meeting the complainant. Count 1 is alleged to have occurred prior to the complainant's eighteenth birthday. The complainant was, at that time, living an itinerant lifestyle, staying for short periods of time at different locations, usually the residences of friends or relatives. He met the appellant for the first time at the residence of AL and TC in Boundary Street, which he was visiting for what he thought was AL's birthday party. He stayed the night in one of the bedrooms, sleeping on a bed. The appellant slept in the same bedroom.

[6] On the following night, the appellant went to bed at about 9 pm in the same bedroom. He fell asleep. The complainant's evidence was that he was awoken and found the appellant on top of him. The complainant was lying on his stomach; the appellant grabbed the complainant's hands and pushed them under his stomach; then he pulled the complainant's pants down to his knees.

[7] According to the complainant, the appellant began rubbing his penis against the complainant's anus. The appellant was pushing the complainant's head into the pillow. The rubbing continued for about 10 to 15 minutes. The appellant's penis became erect. He stuck his fingers into the complainant's anus, then penetrated it with his penis. The appellant moved his penis "back and forwards" until he ejaculated over the complainant's anal area.

[8] In evidence-in-chief, the complainant said that he was unable to call out during this episode because his head was pushed into the pillow. After his head had been released, he did not call out because he was scared of the appellant who was "big" and "looked like a mean bloke". The appellant threatened to "bash" the complainant if he told anybody about what had happened.[6]

[9] As to the counts on which the appellant was acquitted, Count 2 consisted of an alleged penile penetration by the appellant of the complainant's anus in a room at

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2 AB380-382.

3 Ground 3 was abandoned at the hearing of the appeal: Appeal Transcript ("AT") 1-2 l25.

4 Allowing also for a further 125 days declared as time served, the learned trial judge fixed the date of sentence as the parole eligibility date. An application for leave to appeal against the sentence filed on 7 October 2014 was abandoned by the appellant.

5 [2013] QCA 175 at [3]-[5].

6 Complainant's evidence-in-chief: AB23; Tr1-13 l19 – AB28; Tr1-18 l12.

BK's residence in Smith Street. This event occurred after the complainant's eighteenth birthday, around 8 to 10 August 2009. In evidence, the complainant said that he tried to "struggle my shoulders and move my back … (so) he couldn't try to get on top". The appellant was heavier than he was and forced the complainant's back down. The alleged offending then occurred. The complainant said that he did not scream out "because (BK) believed that we were in a relationship".[7]

[10] The complainant's evidence for Count 3 was that the appellant "burnt off" the complainant's right nipple with an alight cigarette lighter and "burnt" the complainant's arm with a lit cigarette. The incident is alleged to have occurred at SD's residence on Normanby Square after the complainant had resisted the appellant's advances.[8]

[11] Count 4 concerned an alleged penile penetration of the complainant's anus by the appellant in a caravan which he and the appellant had parked on land adjacent to MN's residence in South Street and in which the two were staying on a temporary basis.[9] Count 5 also involved alleged offending in the caravan. The complainant's evidence was that one morning he woke up to find the appellant on top of him and his pants down to his knees. The appellant attained an erection and then penetrated the complainant's anus.[10]

[12] The complainant's evidence was that each of the acts of anal intercourse were non-consensual on his part. The appellant did not give or call evidence. However, a recording of a lengthy interview he had with police on 4 May 2010[11] was played to the jury.[12] The theme of the appellant's defence was that there was no sexual contact between him and the complainant before the latter's eighteenth birthday. The appellant acknowledged that mutual acts of oral and anal intercourse had taken place between them after the complainant had turned 18, but maintained that they were consensual and occurred within a loving non-violent relationship.

Grounds of appeal

[13] The five grounds of appeal on which the appellant relies are as follows:

Ground 1

The verdict of the jury was unreasonable in that it was:

(a) founded solely on the evidence of RJ, whose evidence was:

(i) specifically in respect of Count 1 – implausible and inconsistent – within itself, with other testimony sworn by him, and with other things said by him out of court.

(ii) as a general proposition – tainted by dishonesty, and demonstrably unreliable.

(iii) rejected by the jury on four other counts, including one of a completely different character.

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7 Complainant's evidence-in-chief: AB37; Tr1-27 l6 – AB38; Tr1-28 l37.
8 Complainant's evidence-in-chief: AB45; Tr1-35 ll5-22.
9 Complainant's evidence-in-chief: AB51; Tr1-41 ll31-43.
10 Complainant's evidence-in-chief: AB53; Tr1-43 ll21-32.
11 Exhibit 7.
12 AB244; Tr4-8 ll10-16.

(b) likely to have been influenced by the learned trial judge's imputation that it was the "strongest" Count.

(c) likely to have been given without consideration of those matters that should have been the subject of a direction by the learned trial judge in the terms of *R v Markuleski*.

(d) likely to have been the result of an irrational compromise, given that the jury had given a firm indication that they could not agree.

(e) likely to have been given without consideration of those matters that should have been the subject of a direction by the learned trial judge concerning alleged lies by the appellant.

(f) given without consideration of an alternative charge of unlawful sodomy.

Ground 2

The trial judge erred when she imputed to defence counsel a concession that Count 1 was the "strongest" of the counts on the indictment.

Ground 4

The learned trial judge erred, or a miscarriage of justice was occasioned, by the failure of the trial judge to direct the jury in terms of *R v Markuleski*.

Ground 5

The learned trial judge erred, or a miscarriage of justice was occasioned, by the failure of the trial judge to direct the jury concerning alleged lies by the appellant.

Ground 6

The learned trial judge erred, or a miscarriage of justice was occasioned, by the failure of the trial judge to leave for the jury's consideration an alternative charge of unlawful sodomy.

[14] By paragraphs (b), (c), (e) and (f) thereof, Ground 1 captures the adverse impacts which the appellant claims the errors alleged in the other four grounds had on the jury's verdict. It is therefore appropriate to consider the viability of those four grounds first.

Ground 2

[15] In the summing-up, the learned trial judge referred to the evidence given in respect of each of the counts. As to the first count, her Honour said:

> "If we move now to count 1, which is the first incident at Boundary Street. RJ says this is the first time anything happened. It was at AL and TC's house in Boundary Street. You will see that, in that charge, there's a wide span of dates, from June of one year through to April of the following year. That seems to be as a matter of caution because there's some variation as to when they were both living at

> that house in Boundary Street. The accused's account is that nothing happened at that house, that they were only mates. There's evidence from AL and TC about a spooning incident at that address.
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> AL's evidence was that RJ came to the house on her birthday, which was in June of 2008, and that the accused came to stay at the house on AL's sister's birthday, which was on the 30th of August 2008. I think there was some evidence that there was a party at that time. RJ's evidence was that he met the accused at the birthday party. He thought it was AL's birthday party. The people at the house say that there was a birthday party for RT. Her birthday was at the end of August.
>
> RJ said that he was raped the second night, the night after the party. He woke up. The accused was on top of him. He said he was – he, RJ – was on his stomach. The accused put his hands under his torso, pulled his shorts down to his knees and started rubbing his penis against what RJ called "my anal." He said that the accused rubbed himself till he got hard. RJ heard someone go to the toilet, and he said the accused then stuck his penis in "my anal." He split RJ's cheeks apart and stuck his penis inside. RJ said that the accused was moving back and forwards until he ejaculated, he wiped RJ with something and then threatened to hurt him if he told anyone. RJ said he was scared, he was bigger– the fellow was bigger than him, and he had heard that he had been a boxer.
>
> He said initially, that the accused pushed his head into the pillow, that his head was in the pillow the whole time. He said that he had struggled a little, but that the accused was too strong. He said that he tried to scream during the rape, but he couldn't because his head was in that pillow. And you will remember in cross-examination he was asked about how the accused had stopped him from moving or calling out while he was pulling his pants down and so on, and RJ accepted that there was nothing holding his head into the pillow, I think, at that point, but he said he had just woken up or he was waking up from a heavy sleep.
>
> He initially said that the accused did not react to any outside noise, but then he was reminded of what he had said to JSin 2009 and I think again at the committal in 2011, and that was that he had said that the accused would get off him and go to the other bed when he heard people outside. His evidence was also that he felt pain, that the pain was at a high level, at about a seven or eight out of ten. There was evidence from the doctor who talked to him in 2011. The doctor said that he had asked him about whether he had ever had bruising or pain or damage to his genital region, and his answer in 2011 was, "No.""[13]

[16] After outlining the evidence on the other counts, her Honour referred to some matters raised in counsel's addresses. In the course of so doing, she said:

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13 AB267; Tr1-9 l24 – AB268; Tr1-10 l21.

> "…The accused's descriptions of the rapes, Mr Callaghan said, were a bold allegations (sic) without any detail, and he argued that it was an implausible story. Count 1, the first one, was the strongest case because the accused said he – because RJ claimed he was taken unawares as it had never happened before, and he was attacked in his sleep. But Mr Callaghan argued that that story, of the first rape, was riddled with holes. …"[14]

[17] The jury retired shortly thereafter. At that point, defence counsel, a very experienced senior counsel, raised several matters with her Honour. One of them concerned her use of the term "strongest case" in relation to Count 1. The following exchange occurred:

> "MR CALLAGHAN: … The other matter that concerned me was that, in the course of summarising my address, I think your Honour said that count 1 was the strongest case. I don't think I've made a concession in those terms, and - - -
>
> HER HONOUR: Well, maybe you didn't. But - - -
>
> MR CALLAGHAN: - - - and indeed – Sorry, your Honour.
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> HER HONOUR: But your argument – sorry, I just thought that that flowed from an argument that says you start with number 1, and if number 1 falls over then they all fall over, and I told them, didn't I, that your argument was that number 1 was riddled with inconsistencies and implausibility.
>
> MR CALLAGHAN: You did, I think. Yes.
>
> HER HONOUR: Well, I don't know that anybody would glean from that that you said it was a strong case.
>
> MR CALLAGHAN: No, I hope not. But, the concern about count 1, and is one that clearly I didn't want to dwell on because the defence case is clear that it didn't happen, but of course even on the version of the events given to JS by RJ, even if it was accepted that it didn't happen, there's still a – very much a – an issue as to consent and section 24 in particular. Because, as part of the preliminary complaint to her, he said that it happened, in effect, the night after they'd spent the night in bed together. Perhaps the spooning incident. That was the effect of what he'd told her, which was a fairly important inconsistency in his evidence. And, I suppose, my concern about count 1 is that if there was any thought that I – it was conceded that it was stronger because it might have happened, that RJ and the accused denied that it happened, there's still that dimension of JS's evidence to consider when assessing the – his honesty and reliability on that count.
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> HER HONOUR: Well, did he – didn't JS say that he woke up the first night with the accused on top of him. He was held down so he couldn't move, and that RJ told him to get off him, and eventually the accused did. But later the accused came and got beside him. It doesn't sound like a romantic evening.
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> MR CALLAGHAN: Well – except that he got back into bed and put his arm around him and they woke that way the next morning. That's 3-14.

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14 AB288 ll25-30.

> HER HONOUR: So he has to keep saying, 'Get off me, get off me' for the accused to realise he's not consenting?
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> MR CALLAGHAN: Well, the evidence is what it is. At that 3-14 and 3-15, I won't – I can't take it any further, your Honour.
>
> HER HONOUR: I don't think that there's a chance that the jury would have overlooked those aspects of your argument, Mr Callaghan.
>
> MR CALLAGHAN: Thank you, your Honour."[15]

[18] The argument in defence counsel's address to which her Honour referred was framed in a way that concentrated on Count 1. Counsel spoke in detail about the alleged circumstances of the offending involved in that count, describing them and, in particular the complainant's account of them, as having hallmarks of implausibility, impossibility and inconsistency. He concluded that part of his address with these words:

> "So that's one down, and we can pick up some speed, in fact, the rest, you might think, fall like dominoes. Once you've got a reasonable doubt on – on one of these charges, you might think you should take that in to account in relation to the rest of them as well."[16]

[19] As formulated, this ground of appeal identifies as the error, the attribution to defence counsel of a concession that Count 1 was the "strongest" of the counts. In a significant respect this formulation is problematic. Defence counsel did not speak of himself as making a concession in such terms. Nor do I read her Honour as having stated expressly or by implication that he did. She did not use the word "concession" or a word with a meaning similar to it, let alone refer to defence counsel as having made a concession.

[20] To my mind, a fair reading of what her Honour did say is that defence counsel addressed on the basis that Count 1 was the strongest count. A question arises whether that was a misdescription. That is a question that can be answered only by reference to the context in which the statement was made.

[21] Defence counsel addressed on Count 1 in much more detail than the other counts. He spent as much time on them together as he spent on Count 1. His observation that now that Count 1 was "down", he could pick up speed, and that the rest would, they might think, "fall like dominoes", accorded primacy to that count. It also served to confirm an impression that the jury might well have had that because defence counsel had spent much more time on Count 1 than any of the other counts, there was more to it than to the others. Given this context, I do not consider that it was at all inaccurate for Honour to have said defence counsel addressed on the basis that Count 1 was the strongest count. This ground of appeal is not made out.

[22] I would mention that counsel for the appellant did not suggest that the term "strongest case" implied that there was a strong case on Count 1 or, more particularly, that her Honour had said that defence counsel had addressed on the basis that Count 1 was a strong case. Such a suggestion would not have been tenable having regard to the references made by her Honour to defence counsel's

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15 AB290 l30 – AB291 l32.

16 Supplementary appeal book ("SAB") 37 l45 – SAB38 l2.

descriptions of the complainant's account of the offending as "an implausible story" and "riddled with holes" at the very time that she spoke of Count 1 being the strongest case. In that context, her use of the term "strongest case" was apt to convey the rather pejorative connotation of "as strong as it gets".

Ground 4

[23] At trial, the complainant gave evidence of many uncharged acts. For present purposes, it is sufficient to refer to his evidence that after the Count 1 incident, he stayed at the Boundary Street residence for some weeks, as did the appellant. He said that the appellant would rape him nearly every day. The appellant would prise open the lock on the shower room and rape him there, or rape him in the bedroom. His estimate was that he was raped 63 times at the residence.[17]

[24] The summing-up began on the afternoon of the second last day of the trial.[18] The learned primary judge addressed the jury for a little over an hour and a half that afternoon. In the course of so doing, her Honour detailed the particulars of each of the five counts. She continued:

> "You also heard evidence about other sexual acts and allegations of violence that don't appear on the indictment or that aren't the subject of any specific charge. There is a limit as to how you can use those other general allegations, and I need to give you some directions about both the other general violence and general sexual activity. I will take the sexual activity first. There is no dispute in this trial that there was ongoing sexual activity. The dispute, as you know, is as to whether or not there was consent or mistake about it. RJ spoke in terms of the ongoing sodomy of him and some occasions where he masturbated or fellated or sodomised the accused. He estimated 63 times at Boundary Street. Another witness said he told her the sex was up to six times a day. RJ himself accepted that that would be an exaggeration."[19]

[25] A relatively brief outline of other aspects of the evidence of the uncharged acts was given. Her Honour then directed the jury as follows:

> "The first question in relation to these other general acts is whether you accept that these other sexual acts occurred, and that they happened without RJ's consent, or through intimidation or fear in the way that he says. If you don't accept them beyond a reasonable doubt, that may raise a reasonable doubt about whether any of RJ's allegations are true. In other words, it may raise a doubt about whether the charges are true, and a reasonable doubt, of course, means not guilty."[20]

[26] When the jury retired for the day, her Honour asked counsel if there were any matters they wished to raise. Defence counsel said that he had "three very minor points".[21] He elaborated:

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17 AB29; Tr1-19 l1 – AB30; Tr1-20 l34.

18 That part of the summing-up as is referred to in the discussion of Ground 2, occurred on the last day of the trial.

19 AB272; Tr1-15 ll12-22.

20 AB273; Tr1-15 ll1-6.

21 AB280; Tr1-22 l23.

> "I didn't ask specifically for a so-called *Markuleski* direction. You have effectively given them that in respect of uncharged acts, but not in respect of the counts themselves."[22]

Her Honour agreed. The following exchange ensued:

> "MR CALLAGHAN: That's not something I press for, but if - - -
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> HER HONOUR: I did tell them that if they had a - well, I said if they have a reasonable doubt about the allegations of - any sexual allegations that might translate to a reasonable doubt in relation to the charges, didn't I?
>
> MR CALLAGHAN: I think in the - as I recall it, that was in the context of your uncharged acts direction.
>
> HER HONOUR: Yes, but - - -
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> MR CALLAGHAN: And, look, I'm not pressing it if - - -
>
> HER HONOUR: Is there any - I know I said it in that context or at that time when I was looking at the general acts, but is there any way in which the jury could reasonably miss that it would follow?
>
> MR CALLAGHAN: Not really. And, again, it was part of my argument that there was a domino effect and if your Honour intended on repeating that, I don't suggest that you have to direct them as a matter of law.
>
> HER HONOUR: No."[23]

[27] On the following day, the learned primary judge repeated defence counsel's argument concerning a domino effect. She told the jury:

> "Mr Callaghan argued that you could not believe (the complainant). If he was not credible on Count 1 that would raise a reasonable doubt about all of his allegations. Of course there is a domino effect on credibility. If he was not guilty of one you would have a reasonable doubt about all of the charges and acquit him of everything."[24]

[28] It may be accepted that her Honour did not, in terms, state to the jury that a reasonable doubt on their part with respect to any one of the counts might raise a reasonable doubt with respect to others of them. This ground of appeal contends that by not giving a direction in those terms, her Honour erred or a miscarriage of justice was occasioned. I am unpersuaded that her Honour erred. In my view, the directions that were given overall were sufficient in the circumstances. I say this for the following reasons.

[29] Her Honour directed the jury that if they did not accept the complainant's evidence as proving the uncharged acts beyond reasonable doubt, that might raise a reasonable doubt whether any of the complainant's allegations were true. In all likelihood, the jury would have appreciated that a corresponding outcome would result in relation to other counts where they did not accept the complainant's

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22 AB281; Tr1-23 ll10-12.
23 AB281; Tr1-23 ll16-37.
24 AB288 l45 – AB289 l2.

evidence as proving a particular count beyond reasonable doubt. That is so because of the course that addresses and the summing-up took.

[30] When speaking of the domino effect, defence counsel had said to the jury: "Once you've got a reasonable doubt on one of those charges, you might think you should take that into account in relation to the rest of them as well." Then, having taken up defence counsel's suggestion of repeating his argument concerning the domino effect, her Honour did so in a way that endorsed it as applicable to credibility. Significantly, she did so in a context where she was speaking of a lack of credibility on the complainant's part with respect to a **count**.

[31] In the result, the substance of a *Markuleski*-type direction was given in the contexts of rejection by the jury of both charged acts and uncharged acts. This case is distinctly different from *R v WAC*[25] and *R v LR*,[26] to which counsel for the appellant referred and in which the trial judge failed to give a *Markuleski* direction.

[32] I also consider that there was no miscarriage of justice. This Court has recognised that where the substance of a *Markuleski* direction may have been apparent to the jury from the directions that were given, a direction in the terms suggested in that case may not be necessary.[27] At the very least, that occurred here.

[33] Accordingly, this ground of appeal cannot succeed.

Ground 5

[34] In the course of addresses, the prosecutor put to the jury that the appellant's denial that any sexual activity took place between him and the complainant at the Boundary Street address was a falsehood. He said:

> "Now, the first point is this, that the defendant says that nothing happened at that Boundary Street address. Now, that is a complete fiction, I'd suggest to you. He says at the Boundary Street address they were just mates. That was it. Nothing happened. No cuddling. Nothing. Never showered together. And he draws the line that when things happened is after RJ's 18th birthday. You might think that that's a very convenient place at which to draw the line, and not really very plausible. That – he says that nothing happened until after they were not living together or living in the same room. And, again, a very convenient place to draw the line, at after he turned 18. It just so happens to coincide with the – this arbitrary legislative date which says that it's then legal for people to commit sodomy after the age of 18."[28]

The prosecutor also referred to the evidence of AL and TC that they saw the appellant "spooning" the complainant when the two were both living at the Boundary Street residence and at some time before the complainant's eighteenth birthday.[29] Ms AL's evidence was that when confronted over it, the complainant "brushed it off and said, no, it's all right" and the appellant said it was "cold".[30]

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25 [2008] QCA 151.
26 [2005] QCA 368; [2006] 1 Qd R 435.
27 *R v SBL* [2009] QCA 130 per Applegarth J at [41], Chesterman JA and Wilson J concurring.
28 SAB20 l43 – SAB21 l5.
29 SAB21 ll31-34.
30 AB130; Tr2-67 ll17-35.

[35] The prosecutor, at no point, suggested that lying by the appellant could be used by the jury as evidence of a consciousness of guilt on his part. Her Honour directed the jury that if they rejected what the appellant said in his record of interview, they should put it to one side. They ought not reason automatically from the rejection that he was guilty.[31]

[36] Later, at the commencement of the last day of the trial and in the absence of the jury, the prosecutor, out of an expressed abundance of caution, raised for consideration whether any redirection was needed with respect to lies. He evidently was alluding to an *Edwards* direction.

[37] No further direction was given on lies. This ground of appeal contends that in the absence of an *Edwards* direction, there was a real risk of the jury reasoning impermissibly that the accused had lied because of a consciousness of guilt of Count 1.

[38] Consideration of this ground of appeal is assisted by reference to the following exchanges between counsel and the learned trial judge after the matter was raised by the prosecutor:

> "HER HONOUR: You also said at one point that – or suggested that there was a deliberate denial – or fixing of the age over 18.
>
> MR BAIN: Yes.
>
> HER HONOUR: But because there is no charge for sodomy itself or alternative charge being left, I didn't think that the reasoning could be twisted into a consciousness of guilt kind of reasoning. Unless either of you want me to go further with that direction, I'm not inclined to because I have said a number of times to the jury if they don't believe him, they need to put what he says to one side. I recall the second time that I spoke to them which was closer to – perhaps later in the summing up yesterday, they all nodded.
>
> MR BAIN: Yes.
>
> HER HONOUR: As if they were recalling what I'd said earlier.
>
> MR BAIN: Yes.
>
> MR CALLAGHAN: I appreciate my learned friend's caution, but I submit that no further direction on the topic is necessary."[32]

[39] It is apparent that an *Edwards* direction was not given because it was common ground at trial that, insofar as the appellant may have lied in claiming that no sexual activity took place before the complainant's eighteenth birthday, such a lie could have revealed, at most, a consciousness of guilt of an offence which, as an element, required the complainant to have been under eighteen years of age; relevantly, an offence of sodomy. Since sodomy was not charged in the alternative, it was accepted that there could be no risk of the jury reasoning to a conclusion of guilt from the lie.

[40] In oral submissions, counsel for the appellant proposed that there was a broader risk, namely, that the jury would reason "that any lie was through a consciousness

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31 AB261 ll25-37.
32 AB284 ll26-46.

of guilt of count 1".[33] Counsel did not elaborate upon the proposition by explaining how the jury might have developed such a path of reasoning. Nor is it apparent to me, as it was not apparent to her Honour, how they might have so reasoned. The proposition cannot be accepted in absence of a persuasive explanation.

[41] This ground of appeal must also be rejected.

Ground 6

[42] A person charged with rape may be convicted of unlawful sodomy[34] if it is established by the evidence.[35] Count 1 alleged a rape of the complainant before his eighteenth birthday. This ground of appeal contends that the learned trial judge erred, or a miscarriage of justice was occasioned, by a failure to leave for the jury's consideration an alternative charge of unlawful sodomy on Count 1.

[43] It has been held by this Court in *R v Willersdorf*[36] that there is a duty to leave an alternative verdict to a jury if it "fairly" arises for consideration on the whole of the evidence. Elaborating upon that test, Applegarth J (with whom Fraser JA and Jackson J agreed) said in *R v MBX*:[37]

> "There must be a real chance that the jury may convict the accused of the lesser offence, and such an offence will not fairly arise for consideration on the whole of the evidence if there is no evidence upon which a conviction for the alternative offence could safely be based."[38]

The question posed by this test is whether on the whole of the evidence, there was a real chance that the jury may have safely convicted the appellant of unlawful sodomy such that fairness required it to be left to them.

[44] The jury were presented with the complainant's account of non-consensual penetration of his anus by the appellant's penis as the foundational evidence for Count 1. There was no alternative version in the evidence that the penetration occurred, but that it was consensual. The account of the "spooning" incident observed by Ms AL and Mr TC did not support such an alternative. Their evidence was that it occurred "one morning", sometime after the complainant and the appellant had been living at the Boundary Street residence.[39] The appellant's account was that no sexual activity occurred between them at that residence and before the complainant's eighteenth birthday.

[45] In the absence of any evidential support at all for a finding of consensual sodomy, the prospect that the jury may properly have been satisfied beyond reasonable doubt that the penetration described by the complainant occurred, but that it was consensual, can only be regarded as remote. Fairness did not require that the alternative count be left to the jury in my view.

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33 AT1-21 ll11-13.
34 *Criminal Code* s 208(1).
35 *Criminal Code* s 578(1).
36 [2001] QCA 183 at [20]. See also *R v Perussich* [2001] QCA 557 and *R v Mead* [2010] QCA 370.
37 [2013] QCA 214; [2014] 1 Qd R 438.
38 At [48].
39 Mr TC said that it was sometime within the first couple of weeks of Ms AL's birthday: AB153; Tr2-90 ll39-42.

[46] It is of relevance to this ground of appeal that the following exchange occurred in discussions between the learned trial judge and counsel prior to addresses:

> "MR CALLAGHAN: No. With respect, I couldn't really see a sensible basis on which it could be left on the complainant's evidence.
>
> HER HONOUR: Well, the complainant – the complainant's evidence is that he was raped out of the blue - - -
>
> MR CALLAGHAN: Yes.
>
> HER HONOUR: - - - while he was asleep.
>
> MR CALLAGHAN: Yes.
>
> HER HONOUR: Once you start to – start telling the jury that it could still be consensual, it just seems absurd.
>
> MR CALLAGHAN: It does."[40]

[47] In *MBX*, Applegarth J adopted[41] the observation of the Court of Appeal in Victoria in *R v Nous*[42] that a forensic decision to leave the jury with "a stark choice between conviction on the more serious offence and complete acquittal will weigh heavily against any submission that the accused was deprived of a chance of acquittal of the more serious offence because the opportunity of a conviction on the lesser offence was not left to the jury". That observation is pertinent here. A forensic decision was deliberately made not to request that unlawful sodomy be left to the jury. The appellant has not advanced a persuasive argument that counters the heavy weight to be given to counsel's decision.

[48] This ground of appeal must be rejected.

Ground 1

[49] Beyond the matters already discussed, this ground of appeal contends that the verdict on Count 1 was unreasonable in that it was based solely on the deficient evidence of the complainant whose evidence, it was submitted, was rejected by the jury on the other four counts; and that it is likely to have been the result of an irrational compromise. In developing the argument for unreasonableness, counsel for the appellant identified aspects of the complainant's evidence which, it was argued, displayed inconsistency or implausibility. In this exercise, counsel isolated both internal inconsistency in the complainant's testimony and inconsistency between it and what the complainant had testified at the appellant's committal hearing or what others testified he had told them or they had observed.

[50] The complainant's evidence at trial was that the Count 1 incident occurred on the second night he stayed at the Boundary Street residence.[43] However, he conceded in cross-examination that at the committal hearing, he had said that it occurred on the night of Ms AL's birthday party,[44] the night before.

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40 AB249; Tr4-13 ll27-42.
41 At [50].
42 [2010] 26 VR 96 at [50].
43 AB57; Tr1-47 ll14-15.
44 AB57; Tr1-47 ll16 – AB58; Tr1-48 l33.

[51] The complainant agreed that there was no door to the room in which the incident occurred,[45] and that Ms AL and Mr TC were in the house and could be heard moving about.[46] He said that the sexual penetration continued notwithstanding but that, at times, the appellant would "get off" him when noises of movement by others could be heard.[47] When the appellant did so, he would get up from the complainant's mattress, hold him and then wait until the occupant who was making the noise had returned to their bedroom.[48] In cross-examination, the complainant said that the appellant would not return to his own mattress when he got off the complainant. He first agreed, and then denied, that he had told a police liaison officer that on those occasions, the appellant would go back to his own mattress.[49] A little later, he said he did not remember what he had told the officer about that as the conversation had taken place three or four years before.[50] The police liaison officer testified that the complainant had made the statement put to him.[51]

[52] With regard to the pushing of his head into the pillow, the complainant's evidence-in-chief was unclear. He first said that the appellant was pushing his head into the pillow while the penetration was occurring.[52] Later, he said that his head was not actually pushed into the pillow then[53] and that the pushing did not occur until the appellant had "finished".[54]

[53] The complainant's aunt, BL, gave evidence as a preliminary complaint witness. In cross-examination, she acknowledged that she asked the complainant when the appellant had started to rape him and that the complainant had said that it began when he, the complainant, was staying with BN.[55] BN is a person with whom the complainant lived after moving out of the Boundary Street residence.[56] In cross-examination, the complainant denied having told her that.[57] Dr Ivan Kamenoff, a government medical officer, gave evidence that he examined the complainant in August 2011. In cross-examination, he said that in answer to his question to the complainant whether there had been any injury to his anogenital region, the complainant had denied ever having bruising, pain, discomfort or bleeding from that area.[58]

[54] The appellant submits that these aspects of the evidence in relation to Count 1 rendered the complainant's evidence on the count implausible and inconsistent. He could not be accepted as an honest and reliable witness. It followed that it was not open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offence alleged in the count.[59]

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45 AB66; Tr2-3 ll39-40.
46 AB67; Tr2-4 ll30-34.
47 AB67; Tr2-4 l44 – AB68; Tr2-5 l35.
48 AB69; Tr2-6 ll3-12.
49 AB69; Tr2-6 ll8-30.
50 AB69; Tr2-6 ll32-41.
51 AB187; Tr3-14 ll36-37.
52 AB26; Tr1-16 ll22-24.
53 AB27; Tr1-17 ll32-33.
54 AB28; Tr1-18 ll1-5.
55 AB216; Tr3-41 ll36-45.
56 AB20; Tr1-10 ll25-29.
57 AB73; Tr2-10 ll23-24.
58 AB227; Tr3-52 ll31-36.
59 Appellants' Outline of Argument, paragraph 24.

[55] A consideration of those aspects to which the appellant refers, ought, in my view, be undertaken on a footing that the complainant's account of the offending was not inherently fanciful. Indeed, the appellant does not suggest that it was.

[56] The appellant is justified in questioning why it was that the complainant did not call out given that there were others present in the house and his head was not pushed into the pillow. A person in a situation of the complainant who resisted the appellant might be expected to have done so. A similar question may be asked in respect of the absence of any attempt by the complainant to flee through the open doorway. A plausible response to both questions is that the appellant was much bigger and older than the complainant and that he had made threats to the complainant.

[57] There are inconsistencies in the complainant's evidence as to whether the appellant removed himself from the complainant and his mattress when noise by others was heard. That, to my mind, is of secondary significance because had the appellant gone to his own mattress, it would, at most, have provided an opportunity for escape, of which the complainant would have been unable to take advantage without imperilling his own safety.

[58] The divergence between the complainant's evidence and that of Ms BL is of a similar level of significance. The jury may well have gained the impression that she had misheard or misunderstood the complainant. The independent evidence of the spooning "incident" observed by Ms AL and Mr TC was consistent with sexual activity between the appellant and the complainant at the Boundary Street residence and could have served to confirm such an impression. The evidence of Dr Kamenoff on the subject to which he spoke was brief. It is not at all clear that the doctor's question to the complainant was understood by the latter as being directed to his experiences during anal penetration by the appellant. The complainant was not cross-examined about that.

[59] There is inconsistency in the complainant's evidence as to whether the Count 1 incident occurred on the first or the second night of his stay at the Boundary Street residence. However, the inconsistency is limited to timing. How it might be reasoned that such inconsistency impaired, in a significant way, the reliability of the complainant's evidence of the conduct by the appellant constituting the Count 1 offence, is not apparent. To these aspects of the evidence may be added the complainant's evidence of 63 encounters of sexual penetration by the appellant at the Boundary Street residence. That, evidently, was an estimate based upon the number of days in the month of March and an average of two encounters per day.[60] There was conceded exaggeration in a frequency of up to six times a day reported by the complainant to the police liaison officer.[61]

[60] Overall, the evidential aspects to which the appellant refers exposed the complainant's account as one that is less than uniformly consistent and in one respect exaggerated. They do not, however, expose the complainant as a person who is mendacious or whose evidence is so inconsistent or overstated as not to be believed.

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60 AB73; Tr2-10 l47 – AB74; Tr2-11 l4.

61 AB74; Tr2-11 ll6-11; AB185; Tr3-12 ll1-4.

[61] In placing reliance upon the acquittals on the other four counts, the appellant seeks to infer from them that the jury must have rejected the complainant's evidence on those counts. I do not accept that such an inference is open for the following reasons. For the same reasons I also do not accept that the acquittals and the conviction on Count 1 bespeak an irrational compromise incapable of reasonable explanation.

[62] With regard to the rape counts, the complainant's evidence-in-chief was comparatively brief. This was reflected in defence counsel's focus upon Count 1 in his address to the jury. The jury may have accepted the complainant's evidence that the anal penetration of him by the appellant occurred many times after the Count 1 incident. They may have even been satisfied that, at times, the appellant was insistent that his sexual urges be satisfied when he desired. The complainant's evidence with respect to Count 2 was that he did not scream out because Ms BK believed that he and the appellant were in a relationship. That evidence suggests that, by then, he was participating in an outwardly-apparent sexual relationship with the appellant to which he did not object. Drawing on that evidence and the complainant's descriptions of their encounters during the relationship, the jury may also have taken the view that the sexual relationship was one that, at times, involved a degree of physical vigour which was mutually tolerated.

[63] On the basis of such a view, the jury may not have been satisfied that the prosecution had negatived beyond reasonable doubt an honest and reasonable belief on the part of the appellant that the complainant consented to the anal penetration, the subject of Counts 2, 4 and 5. To have acquitted on that basis would not have involved a rejection of the complainant's evidence of the appellant's conduct.

[64] I accept that the acquittal on Count 3 implies that the jury regarded the complainant's evidence on the count as at least unreliable in a significant respect. In cross-examination, the complainant conceded that he had gone through a phase where he would burn himself with a cigarette lighter.[62] The jury may not have been satisfied beyond reasonable doubt that the lighter burn mark observed by Dr Kamenoff on the complainant's right nipple was inflicted by the appellant, allowing for the concession and the doctor's evidence that he could not put an age on the burn mark.[63]

[65] Unreliability in the complainant's evidence of the Count 3 conduct would suggest that the jury were to be alert to potential unreliability in the complainant's evidence of the Count 1 conduct. However, given the very different nature of the conduct alleged to have constituted each of these two counts, it did not compel the jury to regard the complainant's evidence of the Count 1 conduct as unreliable.

[66] The appellant seeks to draw an inference of an irrational compromise from the fact that the jury verdict had been preceded by a note from them that they could not agree on any of the counts. Relevantly, the jury retired to consider their verdict at 10.22 am on the last day of the trial.[64] At 2.16 pm, the learned trial judge reconvened the court to advise counsel of the note. Her Honour asked them if they wished her to give a *Black* direction. Both counsel answered in the affirmative.[65]

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62 AB96; Tr2-33 ll37-42.
63 AB224; Tr3-42 l35 – AB225; Tr3-50 l14.
64 AB289.
65 AB292 ll12-24.

The jury returned; the *Black* direction was given; and the jury retired at 2.21 pm.[66] The jury returned at 3.40 pm and the verdicts were then given.[67]

[67] To my mind, this sequence of events does not give rise to an inference of irrational compromise. It is apt to suggest no more than that the jury followed the *Black* direction, the form of which was not the subject of any objection by counsel, and over about an hour and a quarter of discussion, arrived at unanimity on all counts.

[68] For these reasons, I am unpersuaded that the matters advanced by the appellant under this ground of appeal, taken singly or some or all of them taken collectively, render the jury's verdict unreasonable. In terms of the test formulated in *M v The Queen*[68] upon the whole of the evidence, I consider that it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt on Count 1. This ground of appeal also fails.

Disposition

[69] As none of the grounds of appeal have succeeded, this appeal must be dismissed.

Order

[70] I would propose the following order:

1. Appeal dismissed.

[71] **MORRISON JA:** I have had the advantage of reading the reasons of Gotterson JA and agree with those reasons and the order his Honour proposes.

[72] **PETER LYONS J:** I have had the advantage of reading in draft the reasons of Gotterson JA, with which I agree. I also agree with the order proposed by his Honour.

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66 AB292 l34 – AB293 l28.

67 AB295 l32 – AB296 l46.

68 (1994) 181 CLR 487, per Mason CJ, Deane, Dawson and Toohey JJ at 493, cited by Gleeson CJ, Hayne and Callinan JJ in *MFA v The Queen* [2002] HCA 53; (2002) 213 CLR 606 at [25].