SUPREME COURT OF QUEENSLAND

CITATION:	*R v Koller* [2011] QCA 371
PARTIES:	**R** **v** **KOLLER, Steffen** (appellant)
FILE NO/S:	CA No 206 of 2011 DC No 1062 of 2009 DC No 1063 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	16 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	29 November 2011
JUDGES:	Muir, Chesterman and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction allowed.** **2. Conviction on Count 1 set aside.** **3. New trial ordered on Count 1.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where appellant convicted after trial of one count of indecent treatment of a child under the age of 16 with circumstance of aggravation that complainant was under 12 years, and acquitted of second count of indecent treatment – where appellant contended that he was denied a fair trial because primary court received inadmissible and prejudicial evidence that warranted the discharge of the jury – whether admission of this evidence amounted to a miscarriage of justice *Longman v The Queen* (1989) 168 CLR 79; [1989] HCA 60, cited *R v Bain* (2007) 23 CRNZ 71; [2007] UKPC 33, cited *R v Markuleski* (2001) 52 NSWLR 82; (2001) 125 A Crim R 186; [2001] NSWCCA 290, cited *R v Park* [2008] QCA 383, cited *R v Waring (No 2)* [1972] Qd R 263, cited

R v Weaver [1968] 1 QB 353, cited
Robinson v The Queen (1999) 197 CLR 162; [1999] HCA 42, cited

COUNSEL: F Richards for the appellant
S Vasta for the respondent

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

[1] **MUIR JA**: I agree that the appeal against conviction should be allowed, that the conviction on count 1 should be set aside and that there should be a new trial in respect of that count for the reasons given by White JA.

[2] **CHESTERMAN JA**: I agree with the orders proposed by White JA for the reasons given by her Honour.

[3] **WHITE JA**: The appellant was convicted on 28 June 2011 in the District Court at Cairns after a trial of one count of indecent treatment of a child under the age of 16 with the circumstance of aggravation that she was under 12 years. The appellant was acquitted of a second count of indecent treatment of the same child.

[4] The charges allege that the unlawful conduct occurred between 1 January 1980 and 31 December 1980 at Kuranda. The complainant became six years of age during that year. The complainant first went to police in 2008. She was aged 37 when she gave her evidence at the trial.

[5] The appellant was not sentenced after the verdicts were returned and was released on bail on 28 June by the trial judge and remained on bail when the appeal was heard in November 2011.

Grounds of appeal

[6] Mr F Richards, counsel for the appellant, sought and was granted leave to amend the grounds of appeal. As amended the grounds are:

> "The appellant was denied a fair trial because:
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> (a) The court received inadmissible and prejudicial evidence that warranted the discharge of the jury; and,
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> (b) A *Markuleski* direction was warranted but not given; and,
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> (c) A *Robinson* direction was warranted but not given; and,
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> (d) A general propensity warning was warranted but not given."

At the hearing Mr Richards did not press as a ground that a *Markuleski*[1] direction was warranted but not given.

Evidence at trial

[7] The appellant lived with his partner in bushland in the rainforest near Kuranda north-west of Cairns. It seems that there was a large parcel of land on which various people had erected their separate dwellings. About 300 metres away from

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1 *R v Markuleski* (2001) 125 A Crim R 186; [2001] NSWCCA 290 (inconsistent verdicts).

the appellant, the complainant child lived with her parents and older brother and sister and a young brother. They had moved there in the late 1970s. Other families lived in this area of the bush - ultimately about 10 families in all. They were not a commune as they lived independently. Many of the men worked elsewhere leaving the mothers and children during the day. The appellant was regarded as something of a 'hippie' and eccentric.[2] The complainant's mother described him as "a bit like a fairy godfather in the bush".[3] She said that the children went on bushwalks and hunted for crystals and generally had good adventures with the appellant. He was adept at fixing their bikes, the cars and helping with building work. The complainant, particularly, spent a lot of time with him. The complainant's sister recounted that the children were regularly at the appellant's house

> "[going] for bush walks, swimming in the dam, making candles. We spent a lot of our free time over there doing those sorts of things, having adventures …"[4]

[8] There were a number of dams in which everyone swam. The complainant's mother said that they usually swam naked – children and adults, at least while the children were fairly young. The complainant's sister confirmed that everyone who swam was naked and that the appellant often walked around his own property without clothes but sometimes would wear a sarong or a skirt.

[9] The complainant was asked about the interaction between "the children on the property" and the appellant. She explained that there were about seven or eight children and said:

> "Well, he was our friend. He used to take us swimming and take us for bush walks through the forest and we all loved him – well, we used to go to his house and visit and things like that as well."[5]

She was asked to recall a specific occasion when she was about five or six swimming in the dam with the appellant. The complainant said:

> "I was swimming in the dam with some other kids, probably my brothers and sisters, and then finished swimming and got out of the dam and I went to [the appellant's] house with [the appellant] and he was piggybacking me. And we went along that bush track and out onto the road that joins his house and there was a lot of grass beside the road then. And then, as we were walking towards his house he – he just went off into the grass and walked into the grass a bit, and then took me off his back and put me on the ground. … I would've had undies on, yeah. Would be naked swimming in the dam but would've put clothes back on, yeah … [The appellant] would've been naked, yeah … Then, he just laid me on the grass and took my underwear off and sort of spread my legs apart with his hands, and then he performed oral sex on me … I think he was lying on his stomach, sort of leaning on one arm sort of, yeah, I think …"[6]

The complainant then described in detail how the appellant carried out that act and did not remember what happened thereafter. That incident constituted count one.

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2 AR 37-38.
3 AR 42.
4 AR 35.
5 AR 18.
6 AR 19.

[10] The other incident the subject of count two was described by the complainant as follows:

> "I remember being in his dam at his place and – just me – and he was in the water up to his waist and I was – he wrapped his legs around – I was sort of hanging on to him. And then he was moving me up and down on his – was holding his hands under my bottom and moving me on his penis … Just that he was naked and, yeah, rubbing his penis on my vagina basically … I don't think it was long, I – maybe five minutes or so … No, nothing was said."[7]

There was no witness to either incident.

Preliminary complaint

[11] When the complainant was about 17 and her older sister 19 they went with their mother to visit the appellant and his partner. The daughters had been living away from the property. He offered to pick some tomatoes for them to take home which were in a fenced garden. He picked the complainant up in his arms and climbed over the fence to pick the tomatoes with her. As they were walking home the sister said:

> "… and I asked sort of asked [the complainant], 'How can you let him help you after what he did to you?' And [the complainant] sort of told me to shut up. And then we walked home and sort of – we then had a conversation in the kitchen with my mother about – I thought that mum sort of knew that something had happened to [the complainant] when she was little and mum sort of cottoned on that something was going on that she wanted to be aware of and it sort of came out that he had touched her when she was little."[8]

[12] The mother said when she was talking about this with her daughters at home:

> "… then the story came out, not in detail, just more or less her age. And it was over a period of years afterwards that [the complainant] gradually unveiled and the story came out in – in more detail. But just the fact that [the appellant] had touched her and had wanted her to touch him."[9]

[13] A neighbour, who lived with her then husband on the same large block of land as the other families, recalled a conversation in the complainant's family's kitchen "many years later" when she was speaking with the complainant and her sister about "something sexual" involving the appellant and the complainant. She approached the appellant after hearing those allegations and put them to him. She related his response as follows:

> "Well, he was telling me that the children were quite sexual, you know, they – used to – he'd say they – they – they would come around with no clothes on and swim in the dam, and I said, 'They're children. They're not sexual', and he said, 'Oh, no, they were very sexual. They used to come and rub themselves against me', and I kept saying that they were children and they didn't know the difference, and – and he – he did say – I – I know that – because I was talking specifically about [the complainant] because she was

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7 AR 19-20.
8 AR 37.
9 AR 43.

> the one that had kind of said what had happened, and I said – he said, 'But I know it wasn't right and I stopped it and I went away. I know – I knew something wasn't right', and then [the complainant] and I talked about that, and – or I didn't talk about that, I didn't say, 'I went to [the appellant] and …', but she had said to me at one – at one stage as this unfolded that she didn't know how it had ended, and I remembered that [the appellant] had said to me, 'Oh, I – I knew it wasn't right so I went away', and I thought well that's how it ended for [the complainant]. She was too young to remember how it ended."[10]

[14] The complainant first reported these incidents to police in February 2008. She said she was prompted to do so after attending counselling associated with depression and a psychotic episode for which she was hospitalised. She was also experiencing nightmares which included the appellant after she went to live with her mother in her childhood home.

[15] Evidence was given by a psychologist who first saw the complainant in late 2007, referred by the Commonwealth Rehabilitation Service, to assist the complainant into work. The witness said she took brief notes of the consultations of which there were four. During the second consultation, in response to the prosecutor's question:

> "… if you could tell us what [the complainant] said to you about the molestation when she was quite young?"[11]

she responded:

> "Well, she said to me that there was a man living up the road that was well-known within the community that they lived in in Kuranda, that had molested her from the age of five until she was around eight, nine years of age. And that was in relation to her incident. *She also told me other information that was not related to herself personally but to other children*."[12] (emphasis added)

No objection was taken by counsel at the time to the receipt of that evidence which is the subject of the first ground of appeal.

[16] That counsellor referred the complainant to another psychologist who specialised in sexual assault matters. The second psychologist gave evidence that she saw the complainant in several consultations from the end of 2007. She had written in her notes taken at the consultation "he definitely abused her at age five or six" and "he would go down on the client and masturbate at the same time", "She claims to have been having oral sex".[13] The witness recalled that at a later session she was given more details by the complainant. Her notes recorded:

> "I remember [the appellant] piggy-backing me, then taking me off the road and into the grass where he performed oral sex on me. I was six years old (1980 to 1981) … I have vague, shadowy memories of [the appellant] rubbing his penis on my vagina in the water, but it's hazy and I'm not sure of this memory. The first memory of mine is very clear. I even know exactly where off the road it occurred."[14]

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

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10 AR 48-49.
11 AR 57.
12 AR 57.
13 AR 59.
14 AR 60.

Ground 1(a) – The admission of inadmissible and prejudicial evidence

[18] Defence counsel did not seek to have the jury discharged when the first psychologist said "She also told me other information that was not related to herself personally but to other children". In his summing up to the jury the primary judge made no reference to it. His Honour referred to the body of evidence about recent complaint, mentioning "the two psychologists" and that their evidence and that of the complainant's mother, sister and neighbour could only be used as it related to the complainant's credibility.[15] That body of evidence, if accepted, could be taken into account as possibly enhancing the likelihood that the complainant's testimony was true,

> "… but you cannot regard the things that she said in those out of Court statements as proof of what actually happened."[16]

[19] His Honour directed the jury about how they should use evidence of other sexual acts[17] but those warnings related only to acts of a sexual nature relating to the complainant. Whilst reminding the jury of the salient points of the respective cases his Honour said:

> "I remind you again that [the appellant] could be convicted only of something that he is charged with. He mustn't be convicted on the basis of speculation that he may've done other things."[18]

[20] After the jury returned the verdicts the primary judge mentioned the now challenged passage in the evidence to counsel. Defence counsel said that he had not objected to that evidence, taking the view that it might have been a reference to a boy of the same age as the complainant, X, about whom some evidence had been given. [19]

[21] The appellant contends that this evidence was not only irrelevant and thus inadmissible but was highly prejudicial because the jury may, impermissibly, have allowed that evidence to intrude into their proper consideration of the admissible evidence against the appellant. The risk was that the jury would have reasoned that the appellant was sexually interfering with other children in the group.

[22] Mr S Vasta, for the respondent, submitted that the impugned evidence was capable of many interpretations. He supported trial counsel's explanation for failing to seek the discharge of the jury, that the jury may have understood this to be a reference to sexual activity with the boy X. In cross-examination the complainant had agreed that she had had "some sexual contact with X"[20] who was about her age. It defies commonsense to suggest that the evidence "she also told me other information that was not related to herself personally but to other children" was a reference to children's sex games with X and not giving rise to an inference that the appellant had sexually interfered with other children.

[23] Mr Vasta also contended that the jury would have reasoned that this impugned evidence was referable to the evidence of the neighbour who recounted that when she confronted the appellant he had said "the children were quite sexual …" It would, thus, have been no more adverse to the appellant than that admissible evidence.

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15 AR 75.
16 AR 76.
17 AR 77.
18 AR 81.
19 AR 96.
20 AR 28.

[24] Mr Richards submitted that where a case is finely balanced as this was, it was important that highly prejudicial evidence be excluded. Where the jury was exposed to it, albeit inadvertently, the judge ought to have discharged the jury. There was no identified forensic reason for failing to do so. The factors which Mr Richards identified as tending to underline the doubt which the jury likely experienced were:

- the offending conduct occurred 30 years prior to the trial and 28 years before the complainant first gave a detailed account of it;
- no corroboration[21] of any kind;
- the complainant was a very young child at the time of the alleged misconduct; and
- the complainant's mental health problems of depression and, at least, one psychotic episode which hospitalised her.

Discussion

[25] In *R v Weaver*[22], expressly followed by the Court of Criminal Appeal in *R v Waring (No 2)*[23], the English Court of Criminal Appeal, considering the discretion to discharge a jury after prejudicial evidence has inadvertently been admitted said:

> "It follows, as has been repeated time and again, that every case depends on its own facts. It also, as has been said time and again, thus depends on the nature of what has been admitted into evidence, the circumstances in which it has been admitted and what, in the light of the circumstances of the case as a whole, is the correct course. It is very far from being the rule that in every case where something of this nature gets into evidence through inadvertence the jury must be discharged."[24]

[26] The evidence of the complainant, her sister, her mother and the neighbour all referred to the fact that a number of children spent a lot of time with the appellant and engaged in numerous activities with him; and that he was often naked, even when not swimming. The complainant gave, albeit vague, evidence of discreditable sexual misconduct with her by the appellant over some years when she was young. The neighbour's evidence that the appellant said "the children were quite sexual" takes on a stronger colour when allied with the challenged evidence "she also told me other information that was not related to herself personally but to other children".

[27] The respondent submitted that the acquittal on count two demonstrates that the jury were not impermissibly influenced by the inadmissible evidence but in my view it does nothing of the sort. The evidence on the count upon which the appellant was acquitted was very vague (particularly as recalled by the second psychologist) while the evidence of the complainant on count one had an air of precise recollection. Any doubt about the appellant's guilt which the jury might have had, bearing in

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21 Mr Vasta submitted that the appellant's statement to the neighbour when confronted by her that "it wasn't right and I stopped it and I went away" was corroborative. It was not identified as corroboration at the trial.

22 [1968] 1 QB 353.

23 [1972] Qd R 263.

24 At 359-360.

mind the matters identified by Mr Richards[25], was at risk of dilution by reference to the real possibility that this appellant had engaged in unlawful sexual conduct with other children.

[28] There was no direction which the primary judge could have given[26] (which his Honour recognised), which would not have highlighted the prejudicial nature of the inadmissible evidence. Rather than expunging it from their consideration any direction might have emphasised it. The warning which his Honour, in retrospect, thought that he was giving as a veiled warning[27] urging the jury to consider only the evidence about each charge; did not serve to eliminate the potential prejudice. Neither did his Honour's direction that evidence of recent complaint went only to credit.

[29] The potential tainting of the jury by this inadmissible evidence is of such a magnitude the appellant has been denied a fair trial.

Ground (c) - *Robinson*[28] direction

[30] Although the trial judge gave a strong *Longman*[29] direction concerning the prejudice to the appellant of the long delay, there was no identification of other weaknesses in the complainant's evidence which, in the absence of corroboration the appellant submits were required to be drawn to the jury's attention to ensure he had a fair trial. In view of the conclusion on ground 1(a) it is unnecessary to reach a firm decision on this ground but, on the whole, in a case of this kind, those features did need to be identified to assist the jury.

Ground (d) – A general propensity warning

[31] The primary judge directed the jury adequately with respect to other sexual activity involving the complainant and the appellant. It did not call for a propensity reasoning warning.

Conclusion

[32] The appellant has not had a fair trial according to law. The appeal should be allowed and a new trial ordered.[30]

[33] The orders which I propose are:

1. Allow the appeal.
2. Set aside the conviction on Count 1.
3. Order that there be a new trial on that count.

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25 Set out at [24].
26 *R v Weaver* [1968] 1 QB 353 at 360.
27 AR 81.
28 *Robinson v The Queen* (1999) 197 CLR 162.
29 *Longman v The Queen* (1989) 168 CLR 79.
30 *R v Park* [2008] QCA 383 at [29] per Keane JA citing *R v Bain* (2007) 23 CRNZ 71 at [115].