SUPREME COURT OF QUEENSLAND

CITATION:	*R v CBN* [2015] QCA 224
PARTIES:	**R** **v** **CBN** (appellant)
FILE NO/S:	CA No 268 of 2014 DC No 147 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	13 November 2015
DELIVERED AT:	Brisbane
HEARING DATE:	4 June 2015
JUDGES:	Morrison JA and Mullins and Burns JJ 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 – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was charged on indictment with one count of indecent treatment of a child under 16, under care, and two counts of rape – where the complainant was the niece of the appellant – where the complainant gave evidence about a separate and uncharged act of indecent treatment by the appellant – where one count of rape was discontinued on the third day of trial – where the discontinued count and the uncharged act were relied on by the Crown as evidence of other discreditable conduct – where there were features of the complainant's evidence which compelled the giving of a *Robinson* direction to the jury – where the appellant was convicted of one count of indecent treatment of a child under 16, under care, and one count of rape – where the appellant appealed against conviction on the basis that the verdicts were unreasonable or insupportable having regard to the evidence – whether it was open to the jury to be satisfied beyond reasonable doubt of the guilt of the appellant CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – WHERE APPEAL DISMISSED – where the appellant also appealed on

the ground that the jury was misdirected as to the standard of proof required before they could act upon evidence of "other discreditable conduct" – where there was no application for redirections at the conclusion of the summing-up – whether there was any error in the directions given to the jury

Criminal Code (Qld), s 210(1)(a), s 210(4), s 349, s 668E(1)

Dhanhoa v The Queen (2003) 217 CLR 1, [2003] HCA 40, cited
HML v The Queen (2008) 235 CLR 334; [2008] HCA 16, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
Simic v The Queen (1980) 144 CLR 319; [1980] HCA 25, cited
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited

COUNSEL:	M Johnson for the appellant M B Lehane for the respondent
SOLICITORS:	Legal Aid Queensland for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **MORRISON JA:** I agree with the order proposed by Burns J and with the reasons given by his Honour.

[2] **MULLINS J:** I agree with Burns J.

[3] **BURNS J:** The appellant was charged on indictment with one count of indecent treatment of a child under 16 years of age who was under his care[1] (count 1) and two counts of rape[2] (counts 2 and 3). The complainant in the case of each count is the appellant's niece.

[4] The trial commenced in the District Court at Southport on 16 September 2014 and, on the third day, the Crown entered a nolle prosequi with respect to count 3. That notwithstanding, the act allegedly making up that offence was then relied on by the Crown as evidence of discreditable conduct going to the proof of the two remaining counts.[3] The Crown also alleged a separate and uncharged act for the same purpose. Thus, by the time the jury retired to consider their verdicts, the Crown case consisted of allegations concerning four separate incidents involving the appellant and the complainant.

[5] The jury commenced their deliberations on the morning of 19 September 2014 and, just prior to the luncheon adjournment, they asked for the complainant's evidence with respect to counts 1 and 2 to be read back to them. That duly occurred. A note was then received from the jury in the early afternoon advising that they had reached a verdict on count 1 but enquiring what would happen "if [they] can't reach a unanimous decision on count 2".[4] The learned trial judge gave the jury a *Black*[5] direction, after which the jury continued their deliberations. Approximately 40 minutes later, the jury returned guilty verdicts with respect to both counts.

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1 Sections 210(1)(a) and 210(4) of the *Criminal Code* (Qld).
2 Section 349 of the *Criminal Code* (Qld).
3 As to the basis for admissibility of such evidence, see *HML v The Queen* (2008) 235 CLR 334 at [4]-[7] per Gleeson CJ, [132] and [196] per Hayne J.
4 AR 225.
5 *Black v The Queen* (1993) 179 CLR 44.

[6] On the hearing of the appeal, two grounds were advanced on behalf of the appellant – that the verdicts were unreasonable or insupportable having regard to the evidence (Ground 1) and that the learned trial judge erred in law by "misdirecting the jury as to the standard of proof that the jury required before they could act upon evidence of other discreditable conduct" (Ground 2).

Ground 1: Were the verdicts unreasonable or insupportable?

[7] The complainant was born in November 1996 and was 17 years of age at the time of the trial. She was aged 12 at the time of count 1 and a year or so older at the time of count 2. The count that was not proceeded with (count 3) was alleged to have occurred when the complainant was about 15 years of age and the uncharged act was said to have taken place at some time after that. The authorities became involved in November 2012 after the complainant protested to her paternal grandmother and, then, her sister about the appellant.

[8] The complainant gave evidence in person at the trial. In addition, her older sister, mother, paternal grandmother, school guidance officer and two investigating police officers all gave evidence in the prosecution case. The appellant neither gave nor called any evidence.

[9] The focus of the trial was very much fixed on the credibility of the complainant. It was strongly contended on behalf of the appellant that the jury could not be satisfied beyond reasonable doubt that the complainant had been truthful. In particular, it was argued that parts of the version she gave in the witness box could not be reconciled with the Crown opening, that other parts were inconsistent with her police statement and that her evidence was, in a number of important respects, confused, contradictory or inherently improbable. It was also argued that some aspects of the complainant's version were so at odds with other evidence in the case that her overall credibility was seriously affected and that there was, in any event, an absence of any independent evidence to support her account.

[10] The same arguments were, in substance, pressed in this Court. In short, it was submitted "on an assessment of the whole of the evidence, the jury should have at least entertained a reasonable doubt as to guilt on each count left to them for [their] consideration".[6]

Count 1 – Indecent treatment whilst under care

[11] According to the version that the complainant gave in evidence at the trial, the incident giving rise to count 1 occurred before her 13th birthday. Although she was at that time living with her mother on the Gold Coast, the complainant had travelled to Townsville to spend some time with her paternal grandmother whom, it is relevant to note, had once been in a de facto relationship with the appellant. Although that relationship had ended, the complainant's grandmother was living in a "granny flat" underneath a house occupied by the appellant and a male friend. One night during her stay, the complainant was watching television with the appellant and his friend. After a while, the appellant's friend went to bed and, soon after, the appellant invited the complainant into his bedroom to watch a movie. She agreed but, halfway through the movie, the appellant asked the complainant to "have sex" with him, to which she replied "no".[7] Undeterred, the appellant placed his hand inside her shorts and underwear and

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6 Paragraph 22 of the outline of submissions on behalf of the appellant.

7 AR 26.

touched the "top skin" of her vagina.[8] The complainant asked the appellant to stop and then tried unsuccessfully to push his hand away. When she realised that she could not make him stop, the complainant screamed. This caused her grandmother to call out and, with that, the appellant stopped. All told, the complainant said that the appellant "rubbed [her vagina] up and down" for two minutes.[9] The complainant's grandmother called out to her to come downstairs and, when she did, the complainant told her that the appellant had been "touching" her.[10] She was told by her grandmother to stay away from the appellant.

[12] When the complainant's grandmother gave evidence, she recalled being in the "granny flat" when she heard the complainant "whinging". She called out to her.[11] At first the complainant did not respond, so her grandmother called out to her again. When the complainant did respond, she came down to the "granny flat" and told her grandmother that the appellant had been "teasing her" and "touching her down there".[12] The complainant's grandmother then took her upstairs but, when she did, the complainant said that she had been "lying" and that the appellant had not touched her. The complainant also told her grandmother that she "knew what to say to get [the appellant] into trouble".[13]

[13] In cross-examination, the complainant was asked whether she had made the statements which were attributed to her by her grandmother and which, if made, effectively retracted the allegations she had initially made about the appellant. She denied having done so.[14]

Count 2 – Rape

[14] The incident which was relied on by the Crown to support count 2 was said by the complainant to have occurred at her mother's home on the Gold Coast when she "would've been in grade 8".[15] In addition to the complainant, her mother and her brother, the appellant was also living there at that time. One night when the complainant's mother was in hospital and her brother was not at home, the complainant was in her bedroom playing video games when the appellant walked in and sat beside her on the bed. The appellant asked the complainant to have sex with him, but she said "no".[16] The appellant then removed his work trousers, pulled the complainant's pants and underwear down and "slid his penis inside" her vagina.[17] The complainant tried to push the appellant away and was "telling him to stop".[18] The appellant did not stop but, instead, told the complainant that "it was okay".[19] The appellant moved "up and down"[20] for "five or 10 minutes",[21] during which time the complainant "felt scared".[22]

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8 Ibid.
9 Ibid.
10 AR 27.
11 AR 138.
12 AR 138-139.
13 AR 140.
14 AR 98.
15 AR 28.
16 Ibid.
17 AR 30.
18 Ibid.
19 AR 31.
20 Ibid.
21 Ibid
22 Ibid.

When the appellant finally ceased, he told the complainant that "he would be very angry with [her] if [she] told anyone".[23] He then left the room.

The discontinued count

[15] The Crown entered a nolle prosequi with respect to count 3 because of variances between the evidence that the complainant gave in support of that count and what had been opened by the Crown prosecutor to the jury in that respect. These variances were such as to lead the trial judge to remark during exchanges with counsel in the absence of the jury that the event described in evidence by the complainant looked to be a "totally different occasion" to the one that had been opened.[24] The Crown prosecutor conceded that there seemed to be "a big problem with the date for that one".[25]

[16] Be that as it may, in evidence, the complainant described an incident which she said occurred when she was staying overnight at the home of the appellant. He was by then living with friends at a separate address, about a half hour drive from the complainant's home on the Gold Coast. The complainant said that, after dinner, she was laying on the bed in the appellant's bedroom watching television when the appellant walked in, sat on the bed and asked her to have sex with him. The complainant refused. According to the complainant, the appellant then "pulled [her] pants down and stuck his penis inside of" her.[26] She further described the appellant positioned on top of her with his penis inside her vagina.[27] The complainant tried to push him away, told him that what he was doing "was wrong"[28] and asked him to stop. The appellant continued for "about two minutes" and then left the room to take a shower.[29]

[17] In addition to the variances between the complainant's evidence at trial and the Crown opening with respect to count 3, there were also differences in at least peripheral detail between that evidence and portions of a written statement which had been taken by the investigating police from the complainant. These were put to the complainant when she was cross-examined but, in the case of each such difference, she denied that she had told the police anything to the contrary of the evidence she had given in chief.[30]

The uncharged act

[18] The uncharged act relied on by the Crown was said to have happened in New South Wales and for that reason, the jury was told, it had not been charged. However, when the complainant came to give evidence about it, she said that the relevant conduct occurred at a house in Logan where the appellant was residing with his girlfriend, Carol. Like the discontinued count, the complainant was staying overnight. She said that she was laying on a bed upstairs, playing games on her mobile telephone, when the appellant walked into the room and asked her to have sex with him. The complainant refused, but the appellant "put his hands down [her] pants" and touched the "top skin" of her vagina.[31] The complainant told the appellant "that if he didn't stop then [she] would ring the cops" and, when that was said, he removed his hand from her pants

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23 Ibid.
24 AR 164.
25 AR 176.
26 AR 35.
27 AR 36.
28 Ibid.
29 Ibid.
30 AR 102, 103, 109.
31 AR 40.

and proceeded to leave the room.[32] As he did so, he told the complainant that he would "be very upset" with her if she told anyone.[33]

[19] During cross-examination, parts of the written statement taken from the complainant by investigating police were put to her. According to that statement, the complainant had been to the appellant's girlfriend's "place a few times when [the appellant] went over there to fix her car", and the complainant agreed that she had said this to the police.[34] The complainant's statement also contained this:

> "I slept over at Carol's place once, but nothing happened to me there";

but the complainant denied having said that to the police.[35]

[20] The complainant was asked about the process which had been followed by the investigating police to take her written statement. She agreed that it was typed by the police officer as she gave her account and that it was then read back to her to enable her to "say whether there was anything [she] wanted to change or add".[36] She agreed that she was asked by the police officer to sign each page to signify her satisfaction with the accuracy of its contents, and that she did so.[37] However, it also emerged in response to a question from the trial judge that the complainant could not read.[38]

[21] When the police officer responsible for taking the statement gave evidence, she confirmed that its contents reflected what she had been told by the complainant. She also said that the statement was 140 paragraphs in length and that it had been taken over the space of two days, with a number of hours each day devoted to the exercise. The police officer confirmed that the complainant was at times "reluctant to speak and explain things" and had "difficulty trying to formulate the words" for the events in question.[39]

Other evidence

[22] Mention has already been made of the evidence from the complainant's grandmother regarding what occurred, and was said, in the immediate aftermath of the incident relied on by the Crown to support count 1. The complainant's grandmother also recalled another trip that the complainant made to visit her in Townsville. This occurred in November 2012. After collecting the complainant from the airport, the complainant announced that "she wanted it to stop".[40] The complainant then elaborated, telling her grandmother that the appellant "was having sex with her".[41] Her grandmother did not want "to get involved",[42] but she told the complainant to telephone her sister.

[23] When the complainant's sister gave evidence, she recalled receiving a text message from the complainant in late 2012 which prompted her to call. The complainant was crying. She told her sister that the appellant had raped her.[43] In a second telephone

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32 AR 41.
33 Ibid.
34 AR 105, 109.
35 Ibid.
36 AR 108.
37 Ibid.
38 AR 109.
39 AR 146.
40 AR 139.
41 Ibid.
42 Ibid.
43 AR 111.

call between them on the same day, the complainant told her sister that this happened "at home" and that, afterwards, the appellant "got up and went for a shower".[44] The complainant also told her sister that the appellant had "touched her once before" by grabbing "her in the private area".[45] She said this happened at her grandmother's house in Townsville when she was 12. The complainant was told by her sister to go to the police to "make sure that it didn't happen again and wouldn't happen to anyone else".[46] In the event, it was the complainant's sister who rang the police. They, in turn, made contact with the complainant's grandmother and arrangements were then made for police to speak to the complainant.

[24] The complainant's school guidance officer gave evidence about a meeting she had with the complainant and her mother in March 2012. According to the guidance officer, at this meeting, the complainant said that a male student had inserted his fingers in her vagina and that he had assaulted two other girls in the same manner. On another occasion, she told the guidance officer that her mother's boyfriend had raped her. The guidance officer agreed that it "took a while to get to the issues",[47] and that the complainant was reluctant to discuss the allegations.

[25] The complainant's mother had earlier confirmed in the evidence she gave at trial that she was at this meeting with the guidance officer and the complainant, however, her recollection was of the complainant saying that a male student had "stuck his hand up her dress" as opposed to her vagina having been actually penetrated by his fingers.[48] She was asked about the suggestion that her boyfriend had raped the complainant and said, "What boyfriend? I don't even have a boyfriend, and I didn't then either".[49] She agreed that she had attended the school on another occasion because of problems with the complainant's behaviour and that the complainant had been attention-seeking, but she denied saying to the guidance officer or anyone else at the school that the complainant makes up stories.

[26] The complainant was cross-examined about these matters. She denied telling the guidance officer that the male student had inserted his fingers in her vagina or touched her "sexually", but did say that he had hit her on the vagina.[50] She agreed that she had said that the same student had sexually assaulted two other girls. When asked whether she had alleged that her mother's boyfriend had raped her, she said, "I did not say my mother's boyfriend. I said my uncle".[51]

[27] The only other evidence of relevance for present purposes came in the form of an admission by the Crown to the effect that the complainant was medically examined on 18 December 2012, but that it was "not possible to say from the examination of her genitals whether her vagina has been penetrated sexually or not".[52]

Consideration

[28] Where a ground of appeal challenges a verdict of guilt as unreasonable or insupportable, s 668E(1) of the *Criminal Code* (Qld) is engaged. In any such case, it is necessary to

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44 AR 112.
45 Ibid.
46 Ibid.
47 AR 135.
48 AR 121.
49 Ibid.
50 AR 97-98.
51 AR 97.
52 AR 149.

consider whether, upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty and, in order to do so, the Court must make its own independent assessment of the evidence.[53]

[29] Here, there were obviously features of the evidence making up the prosecution case that warranted close scrutiny. First, what was said by the complainant to her grandmother in the aftermath of the incident relied on by the Crown to support count 1 required careful attention. Secondly, there was the feature that the evidence which the complainant gave in support of the discontinued count and the uncharged act was different in a number of respects to the contents of her police statement and what had been opened by the Crown prosecutor to the jury. Thirdly, the evidence given by the complainant, her mother and the guidance officer regarding what was discussed at the March 2012 meeting, as well as associated matters, needed to be carefully considered.

[30] For the appellant, it was argued that the aggregation of these features ought to have given rise to a reasonable doubt in the minds of the jurors as to the appellant's guilt. It was submitted that this should have been especially so where, as here, the complainant's account was not supported by any independent medical or other evidence. The Court's attention was particularly directed to the evidence of the complainant's grandmother which, if accepted by the jury, meant that the complainant had retracted her allegations concerning count 1 almost as soon as she had made them and, furthermore, had admitted to lying to cause trouble to the appellant. It was also submitted that the evidence which the complainant gave as to the place where the uncharged act occurred (at the home of the appellant's girlfriend in Logan) was concerning because, not only was that different to the place opened by the Crown prosecutor (in New South Wales), but the complainant's police statement expressly disavowed that anything untoward had occurred there.

[31] One difficulty with the appellant's arguments in support of this ground is that the evidence which the complainant gave in relation to the counts which were left to the jury for their consideration, and on which the appellant was convicted (counts 1 and 2), was not capable of being criticised for the sorts of inconsistencies or contradictions which were said to affect the evidence which she gave in relation to the discontinued count or the uncharged act. Indeed, the appellant's counsel accepted as much.[54] Her evidence was also supported by the complaints made to her grandmother (on two separate occasions), to her sister and, if the complainant's evidence as to what she told her school guidance officer was accepted,[55] to the guidance officer. In the case of the complaint made to her sister, the complainant said that she had been raped at her home on the Gold Coast and been "touched … in the private area" at her grandmother's house in Townsville when she was 12. Those statements could only have been referable to counts 1 and 2 respectively and, as such, their making was alone enough to distinguish those counts from the discontinued count and the uncharged act.

[32] As to the first of the complaints made to her grandmother, it was argued for the appellant that the jury should have accepted her grandmother's evidence to the effect

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53 *M v The Queen* (1994) 181 CLR 487 at 493-494 per Mason CJ, Deane, Dawson and Toohey JJ; *MFA v The Queen* (2002) 213 CLR 606 at 615 per Gleeson CJ, Hayne and Callinan JJ, 622-624 per McHugh, Gummow and Kirby JJ; *SKA v The Queen* (2011) 243 CLR 400 at 409 per French CJ, Gummow and Kiefel JJ.

54 Paragraph 23.9 of the outline of submissions on behalf of the appellant (where it was submitted that the "evidence in respect of counts 1 and 2 … was not greatly damaged or inconsistent"); T. 1-3 (where it was submitted that the complainant's "evidence about the two counts upon which convictions were recorded was reasonably consistent").

55 That she had been raped by her uncle.

that the complainant withdrew her allegations with respect to the incident giving rise to count 1 and had admitted lying to get the appellant into trouble. But the jury was not obliged to do so, it being open to the jury to accept the complainant's account (denying that she had withdrawn her allegations or said that she had lied to get the appellant into trouble) in preference to the evidence offered by her grandmother on that point. Alternatively, the jury may have accepted the grandmother's evidence but concluded that, by taking the complainant upstairs with her after the initial complaint was made, she placed the complainant in an invidious position. The complainant was, in effect, being required to confront the very person she complained had just abused her and this was, of course, someone who had previously been in a relationship with her grandmother. In such circumstances, the jury may well have found it unsurprising that a 12-year-old girl recanted her allegations, but it by no means follows that those allegations were untrue.

[33] Accepting, then, the consistency of the account the complainant gave in relation to each of counts 1 and 2, it should follow that it was open to the jury to be satisfied beyond reasonable doubt of the truthfulness and reliability of the complainant's evidence in relation to those counts and, having been so satisfied, to return guilty verdicts. However, for the appellant, it was submitted that the complainant's evidence with respect to the discontinued count and the uncharged act was so implausible, contradictory and inconsistent as to "fatally taint her evidence overall".[56] Of course, whilst it may be accepted that it was possible for the complainant's credit or reliability with respect to counts 1 and 2 to be called into question in that way, that would only be if the difficulties said to be associated with her evidence on the discontinued count and the uncharged act were accepted by the jury as having that effect. It should also be kept in mind that the jury was not obliged to accept all of the complainant's evidence or to find that all of her evidence was reliable. Rather, the only parts of her evidence that the jury was obliged to be satisfied about beyond reasonable doubt before convicting was the evidence the complainant gave in support of each of counts 1 and 2.

[34] That is not to say that the other evidence which the complainant gave, whether with respect to the discontinued count, the uncharged act or more generally, was to be put to one side by the jury and ignored. To the contrary, the jury was required to consider that evidence along with all of the other evidence in the prosecution case. Indeed, because of the features to which I have referred,[57] the jury was obliged to carefully consider what the complainant said in evidence regarding such matters as the discontinued count, the uncharged act and the meeting with the guidance officer and to then evaluate that evidence in the light of the other evidence in the case, including what had been attributed to the complainant in her police statement.

[35] There is no reason to think that the jury failed to approach their task in other than this way. Each of the arguments advanced on behalf of the appellant in this Court was canvassed in the addresses of counsel and then summarised by the trial judge in the summing-up.[58] Importantly, the trial judge directed the jury that, if they did not accept the complainant's evidence in relation to the discontinued count and the uncharged act, they must take that into account when considering her evidence in relation to counts 1 and 2.[59] Her Honour also directed the jury about the use to which inconsistencies might be put in the assessment of the credit of the complainant or the

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56 T. 1-9.
57 At [29]-[30].
58 AR 208-211.
59 AR 206.

reliability of her account.[60] Further, and in recognition of the arguments that had been advanced on behalf of the appellant concerning the quality of the evidence in the prosecution case, the trial judge gave a *Robinson*[61] direction to the jury. It was in the following terms:

> "Now, remember I said earlier I am going to give you a specific warning in relation to this particular trial. In this case, you will need to scrutinise the evidence of the complainant with great care before you could arrive at a conclusion of guilt. This is because of a number of circumstances, including the delay between the time of the second incident, at least, and when a complaint was finally made to police and, in fact, the delay between the first complainant and when the defendant was informed, because this means that there was a lack of opportunity for the defendant to be able to investigate things to see whether he could find evidence to disprove the allegations. For example, the defendant coming up with an alibi for a particular date or proving that something couldn't have happened because the complainant wasn't staying over on a particular occasion.
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> The other matters that give concern are the difference between the account the complainant has given in her evidence and what the prosecution told you in his opening that he expected her evidence to be, the denials by the complainant that she told police - the police officer certain things. For example, she denied that she had ever told the police officer that the defendant had never touched her at Carol's place.
>
> This is inconsistent with the police officer's evidence and that you might think that the police officer was a witness who was independent. The other matters are the other inconsistencies and denials by the complainant about things the officer gave sworn evidence about that the complainant had told the officer which had been placed in a statement at the time she went to police originally. There may be other matters as well that I haven't touched upon, but that doesn't mean that they are not relevant.
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> Now, I direct you that you should not only act on the complainant's evidence after considering it carefully and that it would be dangerous to convict unless you scrutinised her evidence and were convinced of its truth and accuracy".[62]

[36] It follows that the jury, so warned, must be taken to have carefully considered the same arguments that have been put in this Court against the acceptance beyond reasonable doubt of the complainant's evidence in support of each of counts 1 and 2, and rejected each of them. In this, the jury of course had the advantage of seeing and hearing the complainant give evidence. They were entitled, for example, to conclude that any differences between the complainant's evidence with respect to the discontinued count or the uncharged act and the contents of her police statement or what had been opened by the Crown prosecutor were not such as to give rise to a reasonable doubt about the truth and accuracy of the evidence she gave with respect to the counts which were left to them for their consideration. In the end, it was open

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60 AR 207.

61 *Robinson v The Queen* (1999) 197 CLR 162.

62 AR 207-208.

to the jury, on the whole of the evidence, to be satisfied beyond reasonable doubt of the appellant's guilt. For these reasons, Ground 1 must fail.

Ground 2: Was there a misdirection?

[37] The argument in support of Ground 2 was based on what was said to be contradictory directions regarding the standard of proof to be applied by the jury before acting on the evidence placed before them regarding the discontinued count and the uncharged act.[63] The jury could only use this evidence as a step towards inferring guilt if they were persuaded of its truth beyond reasonable doubt.[64] It was argued for the appellant that, although the trial judge gave directions about other discreditable conduct which were largely in accordance with the Benchbook,[65] those directions were preceded by a direction which might have given the jury the misleading impression that they did not need to be satisfied beyond reasonable doubt about the truth of that evidence before acting on it.

[38] The passages from the summing-up which are engaged by this argument – with the words about which criticism is made emphasised – were as follows:

> "Now, you may recall that the prosecution opened certain incidents in his opening to you, for example, one over the border down in New South Wales and when the complainant gave evidence, some of those things we didn't hear about and then we heard about new things that the prosecution hadn't opened. **All right, and, so, anything that the complainant gave evidence about, apart from those two counts, all right, is what the courts refer to as discreditable conduct. So you don't have to – you're not here to decide beyond reasonable doubt whether any of those things occurred.** All right. Conversely, what that means is, that even if you thought some of those other things occurred, but you weren't satisfied beyond reasonable doubt that the indecent treatment happened up in Townsville and you weren't satisfied beyond reasonable doubt that this other rape offence happened, you must acquit the defendant of those two counts, because they are the ones that you are considering. So that's the first thing I wanted to say.
>
> The second thing I wanted to say is that – and I'm basically just repeating what I said – that you have to consider count 1 separately and count 2 separately and if you find you do have a reasonable doubt about an essential element of either of those two charges, you must find the defendant not guilty of those charges. What do you do with the other evidence that you have heard about other incidents?
>
> [The trial judge then summarised the complainant's evidence regarding the discontinued count and the uncharged act]
>
> Now, all that other evidence about those other incidents, you must treat as follows: you can only use that evidence if you accept beyond reasonable doubt that those other acts occurred on these other occasions. If you do not accept the complainant's evidence beyond reasonable doubt that those other acts occurred, then that finding will bear upon

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63 Paragraph 30 of the outline of submissions on behalf of the appellant.

64 *HML* at [41] per Gummow J, at [63] per Kirby J, [132], [196] and [247] per Hayne J and [506] per Kiefel J.

65 Supreme and District Court Benchbook Direction No. 66.1: "Evidence of other Sexual (or violent) Acts or other 'Discreditable Conduct'".

> whether or not you accept the complainant's evidence in relation to the two actual charges before you beyond reasonable doubt."[66]

[39] There was no application for redirections at the conclusion of the summing-up. Thus, unless it is demonstrated on behalf of the appellant that there was a reasonable possibility that the direction in question affected the verdict, this ground cannot succeed.[67] I am, in any event, not persuaded that there was any error in the directions that were given to the jury.

[40] Viewed in context, the words emphasised in the first paragraph of the passages extracted above did no more than identify the offences in relation to which the jury were required to return a verdict. On the other hand, the trial judge's directions in the last paragraph were unmistakably devoted to the standard of proof required – beyond reasonable doubt – before any use could be made of evidence of other discreditable conduct. There was nothing contradictory about these directions. Nor could it be sensibly thought that the jury was left with a misleading impression that some lesser standard of proof was to be applied by them in the assessment of the evidence which was led in support of the discontinued count and the uncharged act. Ground 2 must also fail.

Disposition

[41] For the above reasons, I would dismiss the appeal.

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66 AR 204-205.

67 *Simic v The Queen* (1980) 144 CLR 319 at 332; *Dhanhoa v The Queen* (2003) 217 CLR 1 at [38], [49] and [60].