

Separate Consideration of Charges – Single Defendant

Separate charges are preferred. You must consider each charge separately, evaluating the evidence relating to that particular charge to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved its essential elements. You will return separate verdicts for each charge.¹

The evidence in relation to the separate offences is different, and so your verdicts need not be the same.

Where the elements of the offences are different, add or substitute for this last sentence:

The elements of the offences are different, and so your verdicts need not be the same.

Markuleski direction

A *Markuleski* direction addresses the risk of unfairness that the accused will be denied the chance of acquittal on all counts, if given the state of the evidence, such a result ought reasonably to follow if the jury were to reject as unreliable any part of the complainant's evidence.² Where an acquittal on one count would appear to require an acquittal on another (as, e.g., where the acquittal necessarily reflects adversely on the reliability of a complainant whose evidence is central to the other count), the jury should be told so.³ Particularly in sexual cases, it will often be crucial to tell the jury that any doubt with respect to the complainant's evidence in connection with one count should be considered when assessing her overall credibility and, therefore, when deciding whether her evidence is reliable in relation to other counts. A *Markuleski* direction is not always necessary.⁴ Whether such a direction is necessary depends on the circumstances of the case. For example, the Court of Appeal has held that no prejudice arose from the absence of a *Markuleski* direction where there were two incidents that occurred over a short space of time.⁵ An appropriate warning may well be along these lines:

¹ In *R v Doolan* [2014] QCA 246 the Court of Appeal held that:

Almost invariably whenever charges are joined, it is incumbent on the trial judge to direct the jury to consider each charge separately and evaluate the evidence on that charge to decide whether each juror is satisfied beyond reasonable doubt that the prosecution has proved the elements of the charge. The jury should also be directed that the evidence in relation to each charge is different so the verdict need not be the same.

(McMurdo P at [39], Gotterson JA and Atkinson J agreeing).

Where there are separate charges involving different complainants and the evidence is not cross-admissible, the jury must be specifically directed that the evidence relating to one complainant cannot be used in support of the case in relation to the other complainant: *R v CBM* [2014] QCA 212.

² *R v Ford* [2006] QCA 142 at [124]-[125].

³ *Scott* (1996) 131 FLR 137, 148; *Patton* [1998] 1 VR 7, 24-25.

⁴ *R v Ford* [2006] QCA 142 at [124]-[125]; *R v GAW* [2015] QCA 166.

⁵ *Ashley* [2005] QCA 293 at [40]; see also *WAA* [2008] QCA 87 at [35]-[37]; *LAC* [2013] QCA 101 at [97]; *Johnston* [2013] QCA 171 at [32]; *R v GAW* [2015] QCA 166.

If you have a reasonable doubt concerning the truthfulness or reliability of the complainant's evidence in relation to one or more counts, whether by reference to her demeanour or for any other reasons, that *must* be taken into account in assessing the truthfulness or reliability of her evidence generally.⁶

The *Markuleski* direction draws attention to the point that the credibility of the complainant is a separate question from that of whether or not the defendant should be convicted on each separate count. Finding that the complainant is a credible witness generally should only lead to conviction if the evidence given by that complainant is sufficient to allow the jury to find beyond reasonable doubt that each offence was committed. It may be, that while a witness is regarded as generally credible, there are features of the totality of the evidence on a particular count which could rationally lead to a rejection of the witness' evidence on that count. It may also be possible, for example, for a jury to find that a complainant was a credible witness but also come to the view that the account given of a particular incident, while honest, did not amount to reliable evidence that the offence charged had actually been committed. One way in which considerations of this kind might be communicated to a jury is as follows:⁷

Your general assessment of the complainant as a witness will be relevant to all counts, but you will have to consider her evidence in respect of each count when considering that count.

Now, it may occur in respect of one of the counts, that for some reason you are not sufficiently confident of her evidence to convict in respect of that count. A situation may arise where, in relation to a particular count, you get to the point where, although you're inclined to think she's probably right, you have some reasonable doubt about an element or elements of that particular offence.

Now, if that occurs, of course, you find the defendant not guilty in relation to that count. That does not necessarily mean you cannot convict of any other count. You have to consider why you have some reasonable doubt about that part of her evidence and consider whether it affects the way you assess the rest of her evidence, that is whether your doubt about that aspect of her evidence causes you also to have a reasonable doubt about the part of her evidence relevant to any other count.

Evidence of each charged act as circumstantial evidence of other charged acts

In *R v Bauer (a pseudonym)* [\(2018\) 92 ALJR 846](#); [2018] HCA 40, the High Court said at [50]:

Since proof of an accused's commission of a sexual offence against a complainant on one occasion makes it more likely that the accused may have committed another, generally similar sexual offence against the complainant on another

⁶ *R v Markuleski* [\(2001\) 52 NSWLR 82](#); [2001] NSWCCA 290; cf *Doggett v The Queen* [\(2001\) 208 CLR 343](#); [2001] HCA 46 at [55]; *R v M* [\[2001\] QCA 458](#) at [17]-[22]; *R v S* [\(2002\) 129 A Crim R 339](#) at [8], [29].

⁷ See *R v LR* [\[2006\] 1 Qd R 435](#) at [67]; *R v JK* [\[2005\] QCA 307](#) at [19], [28], also *R v JL* [\[2007\] QCA 131](#).

occasion, at least where the two are not too far separated in point of time, where an accused is charged with a number of counts of generally similar sexual offences against a single complainant the several counts may ordinarily be joined in a single indictment and so tried together. In such cases, evidence of each charged act is admissible as circumstantial evidence in proof of each other charged act and, for the same reason, evidence of each uncharged act is admissible in proof of each charged act.

See also *R v M* [\[1996\] QCA 230](#) at pages 8-9.

Where it is appropriate, the following direction may be given:

As I have mentioned, the defendant is charged only with the ... offences in the indictment.

The Crown relies on the evidence of each charged act as evidence that the defendant had a sexual interest in the complainant and was willing to give effect to that interest.

If you are satisfied beyond reasonable doubt of a particular offence, that finding may make it more likely that the defendant committed other offences charged in the indictment.

If you are satisfied beyond reasonable doubt that the defendant committed a particular offence, then you must consider whether you can conclude that the defendant had a sexual interest in the complainant.

If you are so satisfied, you may use that finding in considering whether the defendant committed the other offences charged.

The evidence of each charged act must not be used in any other way. It would be completely wrong to reason that, because the defendant committed one offence, he/she is generally a person of bad character, and for that reason, must have committed the other offences.

If based upon a conclusion that the defendant is guilty of a particular offence, you are satisfied that the defendant had a sexual interest in the complainant, it does not inevitably follow that you would find him/her guilty of other counts on the indictment. You must always decide whether, having regard to the evidence relevant to a particular count, the offence charged has been established beyond reasonable doubt.