SUPREME COURT OF QUEENSLAND

CITATION:	*R v Doolan* [2014] QCA 246
PARTIES:	**R** **v** **DOOLAN, Rosanna Felicity** (appellant)
FILE NO/S:	CA No 161 of 2014 DC No 1708 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	Orders delivered 26 September 2014 Reasons delivered 30 September 2014
DELIVERED AT:	Brisbane
HEARING DATE:	26 August 2014
JUDGES:	Margaret McMurdo P and Gotterson JA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Delivered 26 September 2014:** **1. The appeal against conviction is allowed.** **2. The guilty verdicts are set aside.** **3. A retrial is ordered on both counts.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO THE EVIDENCE – APPEAL ALLOWED – where the appellant was a civilian police prosecutor – where the appellant was in a relationship with Mr Roep – where Mr Roep was the defendant in a proceeding for common assault – where the appellant improperly accessed information on the Queensland Police Service (QPS) database in relation to the complainant in Mr Roep's criminal proceeding – where the appellant was not authorised to access the information – where the appellant improperly provided the information to Mr Roep's lawyer by way of email (count 1) – where the appellant applied to re-open Mr Roep's sentence proceeding after it was finalised – where the appellant put forward a version of events at the re-opened sentence proceeding that was not in accordance with the prosecution brief of evidence – where the appellant made

submissions at the re-opened sentence proceeding to reduce the fine and compensation orders (count 2) – where the appellant was found guilty at trial of two counts of misconduct in relation to public office – where the appellant was sentenced to one year imprisonment on count 1 and 18 months imprisonment on count 2 – whether the guilty verdict on count 1 was against the weight of the evidence – whether the jury could infer beyond reasonable doubt that the appellant provided the information to Mr Roep's solicitor by way of email with intent to benefit Mr Roep – whether the appeal against conviction should be allowed

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – NON-DIRECTION – where the learned trial judge did not direct the jury that they must consider each count separately and consider only the evidence on each count in relation to that count – where the appellant contends that the learned trial judge erred in failing to give a separate consideration warning – where counsel for the appellant did not ask for redirections at trial – whether there was a substantial miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – NON-DIRECTION – where the learned trial judge did not direct the jury that the evidence in support of one count must not be treated as tending to prove an inclination by the appellant towards the conduct alleged in the other count – where the learned trial judge did not direct the jury that the appellant's admission to accessing the QPS database without authorisation did not mean that she was guilty of either counts – where the appellant contends that the learned trial judge erred in failing to give a general propensity warning – where counsel for the appellant did not ask for redirections at trial – whether there was a substantial miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OR FINDING OF JUDGE – GENERAL PRINCIPLES – where the appellant contends that the learned trial judge erred in finding there was a case to answer – whether there was a miscarriage of justice – whether the learned trial judge erred

Criminal Code 1899 (Qld) s 92A, s 567, s 668E(1), s 668E(1A)

Fingleton v The Queen (2005) 227 CLR 166; [2005] HCA 34, cited
Harris v Director of Public Prosecutions [1952] AC 694, cited
KRM v The Queen (2001) 206 CLR 221; [2001] HCA 11, cited

Leary v The Queen [1975] WAR 133, cited
R v FJB [1999] 2 VR 425; [1999] VSCA 90, cited
R v T (1996) 86 A Crim R 293; [1996] VicSC 197, cited
Weiss v The Queen (2005) 224 CLR 300; [2005] HCA 81, cited

COUNSEL: A J Kimmins for the appellant
B J Power for the respondent

SOLICITORS: Gatenby Criminal Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** The appellant, Rosanna Doolan, was convicted on 28 May 2014 after an eight day trial of two counts of misconduct in relation to public office,[1] count 1 on 28 May 2012 and count 2 on 29 May 2012. She was sentenced to one year imprisonment on count 1 and 18 months imprisonment on count 2 with a parole release date fixed at 27 November 2014. She has appealed against her conviction and applied for leave to appeal against sentence on the following grounds:

> "1. The learned trial Judge erred in failing to give the jury:
>
> (a) a separate consideration warning; and
>
> (b) a general propensity warning.
>
> 2. The learned trial Judge erred in failing to allow a no case submission as to Count 1.
>
> 3. There has been a miscarriage of justice in that the guilty verdict on Count 1 was against the weight of the evidence and/or otherwise unsafe and unsatisfactory.
>
> 4. Sentence imposed is manifestly excessive."

[2] As a consideration of ground 2 requires this Court to review the prosecution evidence, it is sensible to begin with a summary of the relevant prosecution evidence at trial.

The prosecution case

[3] It is common ground that in May 2012 Mr Roep was the appellant's boyfriend and that he was charged with the common assault of a woman complainant in a road rage incident on 5 September 2011.

[4] Count 1 alleged that the appellant "being a public officer, dealt with information gained because of public office with intent to dishonestly gain a benefit for Dax Eugene Roep". The prosecution particularised this count as the appellant improperly accessing and providing information to Mr Roep's solicitor on 28 May 2012 about the fact that the complainant in Mr Roep's charge had been involved in a domestic violence application, in order to benefit Mr Roep.

[5] Count 2 alleged that the appellant "being a public officer, performed a function of public office with intent to dishonestly gain a benefit for Dax Eugene Roep". The

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1 See s 92A *Criminal Code* 1899 (Qld).

prosecution particularised this count as the appellant applying to re-open Mr Roep's sentence hearing for common assault and putting forward a version of facts which was not in accordance with the prosecution brief of evidence and making submissions to reduce the fine and compensation orders.

[6] The appellant formally admitted the following under s 644(1) *Criminal Code* 1899 (Qld). She was employed by the Crown in her position as Queensland Police Service (QPS) prosecutor at the Gold Coast from 4 September 2006 until and including 29 May 2012. Whenever QPRIME, a QPS computer information management recording system, was accessed, the message "UN-AUTHORISED USE OR DISCLOSURE OF QPS COMPUTER INFORMATION IS PROHIBITED" appeared. She had access to information stored in QPRIME because of her public office. On 23 February 2012 she accessed documents relating to a domestic violence application of the complainant in the assault charge brought against Mr Roep. On 26 April 2012 she accessed a copy of that complainant's statement dated 5 September 2011 and a description of the complainant's injuries, both stored on QPRIME. On 10 May 2012 she accessed on QPRIME a copy of the complainant's statement dated 5 September 2011; another copy of a statement from the complainant and a document including a description of the complainant's injuries. She also admitted that her application to re-open Mr Roep's sentencing proceeding on 29 May 2012 and her making of submissions in that re-opened proceeding were both the performance of functions of her public office.

[7] The issues at trial were whether the appellant's actions in respect of each count were dishonest and, as to count 1 only, whether the jury could infer beyond reasonable doubt that she sent the information in an email to Mr Roep's solicitor on 28 May 2012 with intent to benefit Mr Roep.

[8] Senior Sergeant Lavonda Maloy gave evidence that in May 2012 she was the officer in charge of the Gold Coast Police Prosecution Corps where the appellant worked in the Arrest Court Module with responsibility for the Domestic Violence Court. At about 1.53 pm on 29 May 2012 another police prosecutor, Mr Falconer, phoned and asked her to meet him at a coffee shop near the court. As a result of what he told her, she made enquiries into Mr Roep's case and obtained the prosecution file. She noted that the matter was listed for a lengthy plea which would be prosecuted by officers in the Trial Module. She contacted Mr Roep's lawyer, Ms Allen.

[9] Senior Sergeant Maloy explained that all members of or in the employ of the QPS had access to QPRIME, with the level of access varying according to rank and responsibility. Officers could access QPRIME only if they had a lawful reason. The only people entitled to access QPRIME for information about the complainant in Mr Roep's case were the allocated prosecutor, the supervisor of the Trial Module or her as the officer in charge. As a matter of internal policy, the only people entitled to apply to re-open a sentence to vary the submissions or the facts on which the sentence was based were the allocated prosecutor, the Trial Module supervisor or her as officer in charge. She gave no permission to the appellant to be involved in any way in Mr Roep's case. The file notes showed that Ms Allen had made numerous submissions on behalf of Mr Roep but all had been rejected by QPS. To avoid any perception of conflict or bias, if a prosecutor was in a relationship with a defendant to a police prosecution, QPS policy was that the prosecutor must abstain from any dealing with the case. She spoke to the appellant on 30 May 2012 when the appellant was required to hand over her access keys to the Prosecution Unit and leave the office whilst enquiries were made into this matter.

[10] Solicitor, Ms Jodi Allen, gave evidence that she knew the appellant who arranged for her to defend Mr Roep on his assault charge. The prosecution relied on the appellant's email to Ms Allen of 28 May 2012 to establish count 1. It relevantly stated:

> "I spoke with [the police prosecutor on Mr Roep's case] again and he was agreeable to amending the facts tomorrow based on a guilty plea and a lack of independent witnesses.
>
> Also there turns out not to be any photographs or medical records concerning allegations of 'redness' or any marks to the complainants face as suggested in the QP9- so that can be removed along with any suggestion of a slap.
>
> The only evidence is a very short, poor quality statement from the complainant- I'll fax it through.
>
> The poor quality of the statement may be related to the defendant speaking very broken English;
>
> There is a court record from several years ago indicating that a Russian interpreter was ordered by the court for a domestic violence application hearing she was to give evidence in. She was the aggrieved in that matter and the record indicates no orders were made. (The allegation she made in that matter was her ex husband punched her once in the chest causing redness).
>
> (Her husband then went on to get a 2 year full protection order against her).
>
> I just thought these were all relevant things to make sure you know!"

[11] Robert Falconer, a barrister, gave evidence that he and the appellant worked together as civilian prosecutors in the QPS. She spoke to him about Mr Roep's matter at the door of the prosecution office at the Gold Coast some days before 29 May 2012 when Mr Roep was sentenced. She explained her relationship with Mr Roep and that he had been charged with assault. Mr Falconer agreed to prosecute Mr Roep but he thought that the case had been allocated to him anyway. Before he went into court on 29 May, he spoke with the appellant on the third floor outside the court room and told her not to come in. At the Bar table inside the court room, Ms Allen asked him to confirm the basis on which the sentence was to proceed. He read the file and stated that it would proceed on the basis that Mr Roep slapped the complainant. He explained that Ms Allen's submission to proceed on a different factual basis had been considered by another police prosecutor and been rejected. The proceedings commenced and Mr Roep pleaded guilty. The magistrate fined him $1,500, in default 15 days imprisonment and ordered him to pay $1,000 in compensation, in default 10 days imprisonment with two months to pay. There was no conviction recorded and no suspension of Mr Roep's licence.

[12] He later saw the appellant outside court. She appeared angry and told him that the sentence should not have proceeded on that basis as the slap could not be proved. She said something about going back to change the sentence. He advised her to leave it alone and that the sentence was a good outcome for Mr Roep. He had no conversation with the appellant prior to the sentence about accepting a plea on a different factual basis. He did not give her permission to re-open Mr Roep's sentence.

[13] At lunchtime he saw Ms Allen in the street. She told him that the appellant had returned to court and re-opened Mr Roep's sentence. He telephoned a senior officer and met with her to discuss the matter. He did not give the appellant any authority to disclose any domestic violence information pertaining to the complainant in Mr Roep's assault charge. He was unaware of any domestic violence information concerning the complainant until the time of Mr Roep's sentence.

[14] The DVD recording[2] and the transcript[3] of Mr Roep's re-opened sentence proceeding conducted by the appellant were tendered. They record the appellant informing the magistrate that Mr Roep's plea of guilty was to agreed facts which included that he did not slap the complainant's face and only pushed her right shoulder. The magistrate should not have been told he slapped her face; this was not the prosecution case. The appellant told the magistrate that the appellant originally had the file but it changed hands a number of times and there was a miscommunication. The prosecution accepted that the complainant drove badly and cut off Mr Roep immediately prior to the assault. The magistrate enquired whether the prosecution was starting the whole proceeding afresh. The appellant responded that there were many more mitigating features than were placed before the court. The magistrate asked as to the whereabouts of the original prosecutor, Mr Falconer. The appellant stated that he needed to phone his son and had no issue with her re-opening the matter.

[15] The DVD and transcript also recorded that Ms Allen told the magistrate that four different prosecutors had dealt with the matter and that an agreement was reached that the basis of Mr Roep's guilty plea was that his assault was a push to the complainant's shoulder. This was because there was no independent evidence to support the complainant's allegation that she was slapped to the face. This information was not passed on to Mr Falconer and was not on the file. The appellant submitted that a fine of about $500 was appropriate and no compensation was sought.

[16] The magistrate observed that in a road rage situation like this, a $500 fine was inadequate punishment, whether Mr Roep slapped the complainant's face or pushed her shoulder. A deterrent penalty was warranted. The appellant asked the magistrate to moderate the sentence in light of the different factual basis of the plea. The magistrate declined to vary the sentence but reduced the compensation award from $1,000 to $500.

Ground 2: the no-case submission

[17] It is convenient to deal first with the appellant's contention that the trial judge erred in failing to allow a no-case submission as to count 1.

[18] At the end of the prosecution case the defence contended there was no case to answer. The prosecution case on count 1 was that the appellant, having obtained information without authority from QPRIME, emailed that information to Ms Allen with the intent that it be used to benefit Mr Roep. The evidence established that the appellant had breached procedural rules in accessing the information, but did not establish that she intended to dishonestly gain a benefit for Mr Roep. She was merely disclosing information which the prosecution should have disclosed.

[19] The prosecution submitted that the only purpose in the appellant supplying the information was to discredit the complainant. As Mr Roep had not pleaded guilty at

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2 Ex 5.

3 Ex 5A.

that stage, the credibility of the complainant was in issue. In giving that information to Ms Allen, the appellant was acting dishonestly to gain a benefit for Mr Roep.

[20] The judge rejected the defence contention and found that it was open to the jury to infer that by sending the unlawfully obtained material to Mr Roep's solicitor, she did so with an intent to dishonestly benefit him.[4]

The appellant's contentions

[21] In this appeal, the appellant's counsel contended that on 28 May 2012 it was at least possible that neither the appellant, QPS, Mr Roep nor Ms Allen contemplated that there would be a contested plea of guilty the following day. According to the appellant's email to Ms Allen, the prosecution had agreed that the guilty plea would proceed on the basis that Mr Roep had pushed the complainant to the shoulder, not slapped her face. There was therefore no reason for the appellant or anyone else to consider that the complainant's credibility was in issue. There was no possible benefit to Mr Roep in his lawyer knowing at that time that the complainant had been involved in a prior domestic violence application. Further, the information was of a kind that should have been disclosed by a prosecutor; the appellant was doing nothing that the prosecutor should not have done so that Mr Roep did not obtain a benefit. It followed that there was insufficient evidence from which a jury could infer that the only rational inference was that the appellant was guilty of count 1. The judge erred in not upholding the no-case submission.

Conclusion on this ground of appeal

[22] The contentious aspect of count 1 at trial was whether the appellant sent the email to Ms Allen with an intent to dishonestly gain a benefit for Mr Roep. To prove this element of the charge it was not necessary to establish that she did in fact gain a benefit for him, merely that she *intended* to gain a benefit for him. The appellant does not contend that there was insufficient evidence to establish that she acted dishonestly. The prosecution case established that, as Mr Roep was her boyfriend, she should have had nothing to do with the prosecution of his assault charge. Knowing that, she unlawfully obtained information about the complainant's earlier domestic violence application by unauthorised access to QPRIME. A prosecutor was not obliged to inform Ms Allen about the complainant's earlier and completely unrelated domestic violence application. She emailed this information to Mr Roep's solicitor on 28 May, the day before his sentence, stating the "these were all relevant things to make sure [Ms Allen knew]". A jury could conclude that the only rational inference from these facts was that the appellant emailed the information to Mr Roep's solicitor on 28 May intending that it would benefit him in his case. It follows that the trial judge correctly rejected the no-case submission.

The defence case

[23] In discussing ground 3, that the guilty verdict on count 1 was against the weight of the evidence, this Court must consider all the relevant evidence at trial.

[24] The appellant gave the following evidence. She was admitted as a lawyer in December 2004 and commenced as a civilian police prosecutor in January 2005. She and Mr Roep started going out in October 2011. On 14 November 2011 she

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4 AB 380, T5-38.

learned that he had been charged with common assault. They spoke about the incident and she listened to his police interview which, he assured her, was true. Her tendered email contact with Ms Allen[5] was an accurate record of her involvement in the case.

[25] When she learned that Mr Falconer was prosecuting Mr Roep's matter, she explained to him that Mr Roep was her boyfriend and that he would plead guilty. She emphasised that Mr Roep explained to police that he pushed the complainant on the shoulder. The complainant alleged he slapped her face but he adamantly denied this. She pointed out there was no doctor's report or photographs to support the complainant's account, despite what was said in the QP9.[6] Mr Falconer agreed to look at the case. She contacted Ms Allen and told her of her conversation with Mr Falconer. At about 2.30 pm on 28 May, the day before Mr Roep's sentence, she asked Mr Falconer if he was accepting the amended facts plea. He said that should be fine.

[26] After court on 29 May, she met with Mr Roep and Ms Allen. They told her that Mr Falconer did not accept the amended facts plea. The appellant told them she would get him to sort it out. She met Mr Falconer on the street outside the court house and asked what happened. He told her the information on the file did not support the amended facts plea. She reminded him that he had agreed to it the previous day. He responded that it was a good outcome as Mr Roep did not lose his licence. She told Mr Falconer that they needed to fix it and he agreed. She asked him to return to court. He was holding his mobile phone and looked worried. He said he had to call his son. She returned to court. She told Mr Roep and Ms Allen that Mr Falconer was phoning his son and had said she could appear and place the amended facts before the magistrate. Mr Roep was not concerned about the penalty imposed as he was pleased he did not have a conviction recorded or lose his licence.

[27] In cross-examination, the appellant maintained that she apprehended that Mr Falconer was happy for her to return to court and to re-open the sentence on the basis of the amended facts.

[28] The appellant also called evidence from psychiatrist, Josephine Sundin, but her evidence is not relevant to the appeal against conviction.

Ground 3: Is the verdict against the weight of the evidence?

[29] It is logical to deal next with the appellant's contention that there has been a miscarriage of justice in that the guilty verdict on count 1 was against the weight of the evidence and/or otherwise unsafe and unsatisfactory. This may be taken as a contention that under s 668E(1) *Criminal Code* the guilty verdicts should be set aside as unreasonable or not supported by the evidence.

[30] For the same reasons as put forward on ground 2, the appellant contended that the whole of the evidence relevant to count 1 could not sustain a guilty verdict. The appeal against conviction should be allowed, the guilty verdict on count 1 set aside and a not guilty verdict entered.

Conclusion on this ground of appeal

[31] After reviewing the whole of the relevant evidence on count 1, including the appellant's evidence, I am satisfied the jury were entitled to conclude that the only

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5 Exs 6-12, 14 and 15.

6 A form on the prosecutor's file which provides a summary of an alleged offence.

rational inference was that the appellant sent the information in the email to Ms Allen intending that it would benefit Mr Roep. The evidence supported the appellant's conviction on count 1. The guilty verdict was not unreasonable and was supported by the evidence. This ground of appeal is not made out.

Ground 1: The trial judge's directions to the jury

The appellant's contentions

[32] The appellant contended that the trial judge erred in failing to direct the jury that they must consider each count separately and consider only the evidence on each count in relation to that count. The judge should have instructed the jury that if they convicted on one count they should put that conviction out of their mind when considering their verdict on the other count, as proof of guilt on one count was irrelevant to the question of guilt on the other count and the evidence supporting one count did not go to prove the other count. The appellant submitted that the judge should also have directed the jury that the evidence in support of one count must not be treated as tending to prove an inclination by the appellant towards the conduct alleged in the other count. The judge should also have directed the jury that although the appellant admitted to obtaining information through unauthorised access to QPRIME, they must not reason that she was guilty of either offence. These directions were necessary to prevent the jury from engaging in impermissible reasoning.

The respondent's contentions

[33] The respondent concedes that these directions were not given. The directions, however, identified the real issues in the case for the jury as required by *Fingleton v The Queen*.[7] The facts on the two counts were inter-related and the judge explained in his summing-up which evidence related to which count. A propensity warning was not needed as the counts were closely connected and there were no uncharged acts.

Conclusion on this ground of appeal

[34] The trial judge did not give the directions which counsel for the appellant now contends should have been given. It is concerning that counsel for the appellant, who was also counsel at trial, did not ask for redirections at trial of the kind which he now says should have been given. Counsel have a duty to listen carefully to the judge's directions to the jury and to try to ensure that all necessary directions are given. Counsel's failure to ask for an essential jury direction, however, will not be fatal to the success of a ground of appeal if the failure to give the direction amounts to an error of law or has resulted in a miscarriage of justice: s 668E(1) *Criminal Code*.

[35] The only potentially relevant directions touching on these issues were at the commencement of the trial when the judge told the jury that they were responsible for determining whether the appellant was guilty or not guilty on the

> "two charges, so there'll be two verdicts. A defendant in a criminal trial is presumed to be innocent. So before you could return a verdict of guilty, the prosecution must satisfy you that [the appellant] is guilty of the particular charge you're considering and satisfy you of that beyond reasonable doubt."[8]

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7 (2005) 227 CLR 166, 196.

8 Supplementary transcript, 5 lines 21-25.

[36] In his directions to the jury at the conclusion of the case, his Honour also said:

> "In respect of each charge you must try to reach a unanimous verdict, and that means a verdict on which each of you all agree, whether it's guilty or not guilty."[9]

[37] As the respondent contends, the judge adequately explained to the jury the respective prosecution and defence cases and the live issues on each count. But nowhere did the judge tell the jury to consider each count separately; to consider only the evidence on each count; that they could return separate verdicts; and that, if they convicted on one count, they should not take that into account in considering the other count.

[38] Ordinarily, every criminal charge should be charged and tried separately. Joinder of charges is permitted, however, under s 567 *Criminal Code* which relevantly provides:

> "(1) Except as otherwise expressly provided, an indictment must charge 1 offence only and not 2 or more offences.
>
> (2) Charges for more than 1 indictable offence may be joined in the same indictment against the same person if those charges are founded on the same facts or are, or form part of, a series of offences of the same or similar character or a series of offences committed in the prosecution of a single purpose. …"

[39] The appellant understandably does not contend that these charges were not properly joined. They formed part of a series of offences of similar character and were closely connected, temporally and in subject matter, and so were properly joined. 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 that charge.[10] The jury should also be directed that the evidence in relation to each charge is different so the verdict need not be the same. See *Harris v Director of Public Prosecutions*;[11] *KRM v The Queen*;[12] *Leary v The Queen*;[13] *R v T*[14] and Queensland Supreme and District Court Bench Book, 34.1. The trial judge did not direct the jury in those terms and his failure to do so was an error of law.

[40] A propensity warning, however, is not required merely because an accused person is charged with a number of counts containing the same or similar offences.[15] The particulars made clear that count 1 and count 2 concerned separate and discrete incidents but aspects of the evidence on one count was cross-admissible on the other count and to the elements of intent and dishonesty. The appellant's unauthorised access to QPRIME was directly relevant to prove that the appellant had misused her

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9 Summing-up, 2 lines 39-40.

10 An exception may be where defence counsel requests the judge for forensic reasons to omit the direction. See *R v T* (1996) 86 A Crim R 293, Southwell AJA, Callaway JA and Smith AJA agreeing, 299; and *R v FJB* [1999] 2 VR 425, Charles JA, Winneke P and Buchanan JA concurring, [25].

11 [1952] AC 694, 711-712.

12 (2001) 206 CLR 221, McHugh J, 234.

13 [1975] WAR 133, Jackson CJ (Jones J generally agreeing) 136, and Lavan J 138-139.

14 (1996) 86 A Crim R 293, 299.

15 *KRM v The Queen* (2001) 206 CLR 221, McHugh J, 234.

public office on each count and to the elements of intent and dishonesty. I am unpersuaded that any propensity warning was necessary in this case. It was unlikely to have assisted the defence and there were sound forensic reasons for defence counsel not to seek one.

[41] The fact remains that although the counts were properly joined, the trial was effectively two trials, each one involving one count. The appellant was entitled to have the jury consider the evidence on each count separately and to return different verdicts. The jury retired to consider their verdicts at 3.48 pm on the seventh day of the trial. At 8.26 pm the jury asked for redirections and to go to their homes for the evening. The uncontroversial redirections were given at 10.04 am on the eighth day of the trial. They returned with their guilty verdicts on both counts at 11.47 am that day. This suggests the jury did not find their task entirely straightforward. The absence of directions from the judge as to how to correctly approach their deliberations concerning two counts in the one trial left open the real possibility that the jury may have considered that, because they found the appellant was guilty on one count, she must have been guilty on the other count as well.

[42] The judge's error in law in not giving directions of this kind means that, under s 668E(1) *Criminal Code*, the appeal against conviction must be allowed unless, under s 668E(1A), this Court considers that no substantial miscarriage of justice has actually occurred. The respondent did not contend that s 668E(1A) could have application in this case if this ground of appeal was successful. The evidence against the appellant on both counts was strong, but this case falls into the category of cases discussed in *Weiss v The Queen*.[16] The failure to give the direction as to how to approach their deliberations on a trial of two counts has denied the appellant a procedurally fair trial according to law so that s 668E(1A) can have no application. It follows that I would allow the appeal against conviction, set aside the guilty verdicts and order a retrial on both counts.

[43] **GOTTERSON JA:** I agree with the orders proposed by the President and with the reasons given by her Honour.

[44] **ATKINSON J:** I agree with the reasons of the President and with her Honour's proposed orders.

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16 (2005) 224 CLR 300, [45].