

SUPREME COURT OF QUEENSLAND

CITATION: *R v Saghir* [2026] QCA 194

PARTIES: **R**
v
SAGHIR, Omar
(appellant)

FILE NO/S: CA No 217 of 2025
DC No 216 of 2025

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: District Court at Brisbane – Date of Conviction: 22 August 2025 (Loury KC DCJ)

DELIVERED ON: 2 October 2026

DELIVERED AT: Brisbane

HEARING DATE: 7 September 2026

JUDGES: Mullins P, Bond JA, Davis J

ORDER: **Appeal dismissed.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – EFFECT OF MISDIRECTION OR NON-DIRECTION – where the appellant was tried on indictment on eight counts of advocating terrorism – where each count concerned publication of a video on a Facebook page maintained by the appellant – where the case primarily concerned the assessment by the jury of each of the videos – where there was no direction that the jury could use the evidence on one count as supporting other counts – where there was no direction that the jury could take into account a reasonable doubt held on one count as casting doubt on guilt of another count – where, after the summing up, a redirection was sought consistently with *Markuleski* – where the trial judge did not give such a direction – where the appellant was convicted of six counts and acquitted of two – whether the failure to give a *Markuleski* direction caused a miscarriage of justice

Criminal Code (Cth), s 80.2C
Criminal Code (Qld), s 668E
Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2024 (Qld)
Evidence Act 1977 (Qld), s 132B

Alford v Magee (1952) 85 CLR 437; [1952] HCA 3, cited
Brawn v The King (2025) 99 ALJR 872; [2025] HCA 20, cited
Fingleton v The Queen (2005) 227 CLR 166; [2005] HCA 34, cited
Huynh v The Queen (2013) 87 ALJR 434; [2013] HCA 6, cited
R v BEI [2024] QCA 71, cited
R v Ford [2006] QCA 142, followed
R v Holland [2017] QCA 69, cited
R v JL [2007] QCA 131, cited
R v LR [2006] 1 Qd R 435; [2005] QCA 368, cited
R v M [2001] QCA 458, cited
R v Markuleski (2001) 52 NSWLR 82; [2001] NSWCCA 290, considered
R v Mogg (2000) 112 A Crim R 417; [2000] QCA 244, cited
R v Rutherford [2004] QCA 481, cited
R v S (2002) 129 A Crim R 339; [2002] QCA 167, cited
R v WAC [2008] QCA 151, considered
RPS v The Queen (2000) 199 CLR 620; [2000] HCA 3, cited

COUNSEL: A M Hoare KC, with C W Wallis, for the appellant
 C M O'Connor for the respondent

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

- [1] **MULLINS P:** I agree with Davis J.
- [2] **BOND JA:** I agree with the reasons for judgment of Davis J and with the order proposed by his Honour.
- [3] **DAVIS J:** The appellant appeals against his conviction in the District Court on six counts of advocating terrorism against s 80.2C(1) of the *Criminal Code* (Cth).

Background

- [4] Between 12 March 2019 and 22 February 2020, the appellant posted eight videos on a Facebook page that he maintained. These videos all concerned the civil war which was then raging in Syria.
- [5] The appellant faced one charge in relation to each video he posted. The eight counts were:

Count 1: “On or about the twelfth day of March 2019 at Brisbane in the State of Queensland or elsewhere, Omar SAGHIR intentionally advocated the doing of a terrorist act, being reckless as to whether another person would engage in a terrorist act.”

Count 2: “On or about the thirteenth day of March 2019 at Brisbane in the State of Queensland or elsewhere, Omar SAGHIR

intentionally advocated the doing of a terrorist act, being reckless as to whether another person would engage in a terrorist act.”

- Count 3: “On or about the fifteenth day of March 2019 at Brisbane in the State of Queensland or elsewhere, Omar SAGHIR intentionally advocated the doing of a terrorist act, being reckless as to whether another person would engage in a terrorist act.”
- Count 4: “On or about the twentieth day of January 2020 at Brisbane in the State of Queensland or elsewhere, Omar SAGHIR intentionally advocated the doing of a terrorist act, being reckless as to whether another person would engage in a terrorist act.”
- Count 5: “On or about the second day of February 2020 at Brisbane in the State of Queensland or elsewhere, Omar SAGHIR intentionally advocated the doing of a terrorist act, being reckless as to whether another person would engage in a terrorist act.”
- Count 6: “On or about the fourth day of February 2020 at Brisbane in the State of Queensland or elsewhere, Omar SAGHIR intentionally advocated the doing of a terrorist act, being reckless as to whether another person would engage in a terrorist act.”
- Count 7: “On or about the fifth day of February 2020 at Brisbane in the State of Queensland or elsewhere, Omar SAGHIR intentionally advocated the doing of a terrorist act, being reckless as to whether another person would engage in a terrorist act.”
- Count 8: “On or about the twenty-second day of February 2020 at Brisbane in the State of Queensland or elsewhere, Omar SAGHIR intentionally advocated the doing of a terrorist act, being reckless as to whether another person would engage in a terrorist act.”

[6] Each count on the indictment bore identical particulars in these terms:¹

“Particulars of Terrorist Act

An action done or threat of action made, namely engaging in armed conflict in the Syrian Arab Republic, with the intention of advancing a political, religious or ideological cause, namely the advancement of Islam through violence, and with the intention of:

- (a) Coercing or influencing by intimidation the Government of a foreign country or a part of a foreign country; and / or
- (b) Intimidating the public or a section of the public,

¹ Further particulars were later delivered.

in circumstances where the action, when carried out, would:

- (a) Cause serious harm that is physical harm to a person; and / or
- (b) Cause serious damage to property; and / or
- (c) Cause a person's death; and / or
- (d) Endanger a person's life, other than the person taking the action; and / or
- (e) Create a serious risk to the health or safety of the public or a section of the public;

and in circumstances where the action would not be advocacy, protest, dissent or industrial action, or alternatively would not be advocacy, protest, dissent or industrial action of a kind not intended to:

- (a) Cause serious harm that is physical harm to a person; or
- (b) To cause a person's death; or
- (c) Endanger the life of a person other than the person taking the action; or
- (d) Create a serious risk to the health or safety of the public or section of the public."

[7] Section 80.2C(1) of the *Criminal Code* (Cth) provides as follows:

"80.2C Advocating terrorism

- (1) A person commits an offence if:
 - (a) the person advocates:
 - (i) the doing of a terrorist act; or
 - (ii) the commission of a terrorism offence referred to in subsection (2); and
 - (b) the person engages in that conduct reckless as to whether another person will:
 - (i) engage in a terrorist act; or
 - (ii) commit a terrorism offence referred to in subsection (2).

Note: There is a defence in section 80.3 for acts done in good faith.

Penalty: Imprisonment for 5 years."

[8] The elements of an offence under s 80.2C(1) are:

- (a) the defendant advocated the doing of a terrorist act;
- (b) he did so intentionally; and

- (c) he did so being reckless as to whether another person would engage in a terrorist act.
- [9] At his trial, the appellant made various admissions including that he posted the videos. The only issue at trial was whether, by posting the videos, he intentionally advocated the doing of a terrorist act being reckless as to whether another person would engage in a terrorist act. That part of the case against him was completely circumstantial.
- [10] The Crown case consisted of only two witnesses, a Federal Agent who is a member of the Australian Federal Police, and Professor Gregory Barton, an expert in global Islamic politics.
- [11] The videos posted by the appellant were introduced into evidence through the Federal Agent. Professor Barton gave expert evidence which included evidence of the history of Islam and its development, the history of the Syrian conflict, and evidence explaining various terms and phrases and concepts which appeared in the videos.
- [12] The jury were provided with a document described as a “particulars document”.² That document identified statements within each of the videos upon which the Crown relied.
- [13] The appellant submitted at the close of the Crown case that there was no case to answer. That application was dismissed.
- [14] The appellant did not give evidence at his trial.
- [15] In final addresses each counsel invited the jury to determine the element of intention by assessing the contents of the videos against the background evidence of Professor Barton and with the assistance of the particulars document. Each barrister analysed each of the videos. The Crown submitted that the relevant intention was proved beyond reasonable doubt. Defence counsel submitted that the statements made on the videos were just emotional outbursts bereft of any intention to advocate the doing of a terrorist act.
- [16] The trial judge’s summing up, understandably, followed a similar pattern. Her Honour gave the standard directions as to the onus of proof, and standard of proof, the role of judge and jury, and other directions which are routinely given to juries. Her Honour gave a direction that each charge must be considered separately:
- “Now, there are eight separate charges. 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. The evidence in relation to the separate offences is different and so your verdicts need not be the same. Now, I’m going to move now to direct you about the elements of the offence, and you have the document that I gave you at the beginning of the trial.”
- [17] After explaining the significance of Professor Barton’s evidence, and identifying the various elements of the offences including that of proof of the relevant intention, her Honour summarised counsel’s submissions.

² Marked for identification B2.

- [18] The case as argued by the barristers, and as left to the jury by the trial judge was that the only element in issue was that of proof of the requisite intention and that was to be determined by assessment of the appellant's own words captured on the videos and viewed against the context of Professor Barton's evidence.
- [19] At the conclusion of the summing up, the appellant's trial counsel sought a redirection consistently with that proposed in *R v Markuleski*.³ The following exchange occurred:

“MR RYAN: It occurred to me, as to whether or not it is appropriate in the circumstances of this case to give what would be described as a Markuleski direction. That, of course, is no longer a direction that can be given in this State in relation to sexual offences, but I don't understand the law to be that it is precluded entirely from being given in other cases.

HER HONOUR: But why would I give a Markuleski-style direction in these circumstances? Because there's a perfectly logical explanation for why they might have a doubt about one charge which has nothing to do with another. Because there's a difference in the quality of the videos, I think, with respect to the first three and the last five.

MR RYAN: That – that's right. That's right.

HER HONOUR: So I don't see why it – I would say that to them if they have a doubt about – for instance, if they have a doubt about whether the prosecution's proved the case in respect of count 1, then they should take that into account in respect of count 5, for instance.

MR RYAN: Yes. Anyway, that – I just raise that, your Honour. Thank you.

HER HONOUR: Yes. All right. Did you want to be heard?

MR IHLE: We agree, with respect. There's no occasion in the circumstances of this case. The evidence for each count is contained within each video and - - -

HER HONOUR: Yes. And that ---

MR IHLE: --- your Honour's given a separate consideration direction. One does not, for want of a better word, pollute the other.

HER HONOUR: Yes. That's right. I think that's right. Particularly given that the first three were – are different to the last five.

MR RYAN: Yes. No, I ---

HER HONOUR: And at different times.

MR RYAN: I accept that. Yes.

HER HONOUR: And relate to completely different things going on ---

MR RYAN: Yes.

³ (2001) 52 NSWLR 82.

HER HONOUR: --- in the world, really.

MR RYAN: No. I – I accept – thank you, your Honour.

HER HONOUR: All right. Thank you. Thank you. All right. I'll await the verdicts."

[20] No *Markuleski* direction was given.

[21] The jury returned verdicts of guilty on counts 1, 2, 3, 4, 6 and 8. They returned verdicts of not guilty on each of counts 5 and 7.

[22] A notice of appeal was filed containing one ground namely that the guilty verdicts were unreasonable and could not be supported having regard to the evidence. That ground was abandoned and, by amendment, the following ground was added:

"The failure of the trial judge to direct the jury in respect of *Markuleski v The Queen* was an error of law that occasioned a miscarriage of justice"

[23] The ground added by amendment is the only ground now pressed.

Markuleski directions

[24] *Markuleski v The Queen*⁴ was a case which concerned allegedly inconsistent verdicts and the argument was that the acquittals threw doubt upon the convictions. It was a case where the substantive evidence came only from the complainant and the accused; described in the judgment as a "word against word case".⁵

[25] Against that background, Spigelman CJ observed:

"[186] In the light of the number of cases it is desirable that the traditional direction as to treating each count separately is supplemented in a word against word case. Some reference ought to be made to the effect upon the assessment of the credibility of a complainant if the jury finds itself unable to accept the complainant's evidence with respect to any count.

[187] Some form of direction assisting the jury in this respect should be given, to employ the terminology found in *Kilby* and *R v Davies* 'as a general rule'. Its absence is not necessarily fatal (as it was not in *R v Davies* itself). Furthermore, as the joint judgment in *Crofts* affirmed (at 451), the 'general rule' does not apply 'where the peculiar facts of the case and the conduct of the trial do not suggest the need for a warning to restore a balance of fairness'. (Footnote omitted).

[188] It is not necessary to specify any precise words for such a direction. That will depend on the circumstances of the case. It will often be appropriate to direct a jury that where they entertain a reasonable doubt concerning the truthfulness or reliability of a complainant's evidence in relation to one or more

⁴ (2001) 52 NSWLR 82.

⁵ At [186].

counts, that must be taken into account in assessing the truthfulness or reliability of the complainant's evidence generally.

[189] On other occasions it may be appropriate for a judge to indicate to the jury, whilst making it clear that it remains a matter for the jury, that it might think that there was nothing to distinguish the evidence of the complainant on one count from his or her evidence on another count.

[190] Or it may be appropriate to indicate that, if the jury has a reasonable doubt about the complainant's credibility in relation to one count, it might believe it difficult to see how the evidence of the complainant could be accepted in relation to other counts.

[191] The precise terminology must remain a matter for the trial judge in all the particular circumstances of the specific case. The crucial matter is to indicate to the jury that any doubt they may form with respect to one aspect of the complainant's evidence, ought be considered by them when assessing the overall credibility of the complainant and, therefore, when deciding whether or not there was a reasonable doubt about the complainant's evidence with respect to other counts." (footnote omitted)

[26] By statutory enactment, the giving of a *Markuleski* direction is now prohibited in certain circumstances. Section 132B of the *Evidence Act 1977* namely provides:

"132B Prohibited direction in relation to doubts regarding truthfulness or reliability of complainant's evidence

- (1) In a criminal proceeding in which more than 1 offence is charged, the judge must not direct the jury that if the jury doubts the truthfulness or reliability of the complainant's evidence in relation to a charge, that doubt must be taken into account in assessing the truthfulness or reliability of the complainant's evidence generally or in relation to other charges.
- (2) Any rule of common law under which a judge is required or permitted to give the jury a direction mentioned in subsection (1) is abolished.
- (3) This section does not prevent a judge from making a comment on the evidence given in the proceeding that it is appropriate to make in the interests of justice."

[27] Section 132B appears in Part 8 of the *Evidence Act* headed "Miscellaneous" and not in those parts which specifically concern witnesses in sexual offence cases. Section 132B is not limited in its operation to cases where consideration of *Markuleski* directions usually arise; cases alleging criminal sexual misconduct where the evidence mainly comes from the complainant. However, that is the type of case which the section is mainly designed to address.

- [28] Section 132B in its current form was introduced through amendment by the *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2024*. The explanatory memoranda to the Bill makes clear that the section is one of a raft of provisions which are aimed at improving justice in cases of sexual misconduct. The section would though have operation beyond such cases.
- [29] What is prohibited by s 132B is a direction about the “truthfulness or reliability of the complainant’s evidence”. The term “complainant” is defined in the *Evidence Act* but not for the purposes of s 132B. The direction here does not concern the “truthfulness or reliability” of any witness. There was no prohibition here upon the trial judge giving a *Markuleski* direction.⁶
- [30] *Markuleski* does not establish any principle of law that a direction must be given in all cases of trial of a multi-count indictment that any doubt which a jury entertains in relation to one count may be considered in the assessment of other counts. There is no “binding rule of law or procedure” to that effect.⁷
- [31] Once it is understood that there is no inalienable principle requiring a direction consistent with *Markuleski*, any requirement to give such a direction must be founded in any particular case in the trial judge’s general duties.
- [32] A trial judge must “identify the real issues in the case and direct the jury on only so much of the law as they need to know in order to guide them to making a decision of whether guilt has been proved in relation to those issues”.⁸ The judge should identify the real issues in the case and relate the relevant legal principles to those issues.⁹ The overriding duty is to ensure a fair trial.¹⁰
- [33] In the context of *Markuleski* directions the discharge of the duty was explained by Keane JA (as his Honour then was) in *R v Ford*:¹¹

“As the reasons of Spigelman CJ in *R v Markuleski* show, the particular risk of unfairness, which needs to be addressed by the giving of a direction (which I shall refer to for convenience as a *Markuleski* direction) that any doubt which a jury ‘may form with respect to one aspect of a complainant’s evidence, ought be considered by them when assessing the overall credibility of the complainant and, therefore, when deciding whether or not there was a reasonable doubt about the complainant’s evidence with respect to other counts’, is a risk which arises especially in sexual assault cases (albeit not peculiarly in such cases) with multiple counts involving a single complainant and a single accused where a jury’s finding of not guilty on one or more counts is apt logically to damage the credibility of the complainant on other counts because there is ‘[i]mplicit in the ... acquittal ... a rejection of the complainant’s account of the events which were said

⁶ This was assumed to be the position in *R v BEI* [2024] QCA 71 at [20].

⁷ *R v JL* [2007] QCA 131 at [36] following *R v M* [2001] QCA 458 at [22]; and *R v Rutherford* [2004] QCA 481 at [19].

⁸ *Alford v Magee* (1952) 85 CLR 437; *Huynh v The Queen* (2013) 87 ALJR 434 at [49]; and *RPS v The Queen* (2000) 199 CLR 620; *R v Mogg* (2000) 112 A Crim R 417 at 427, [54].

⁹ *R v Mogg* (2000) 112 A Crim R 417 at [54].

¹⁰ *RPS v The Queen* (2000) 199 CLR 620 at 637, [41] and *Fingleton v The Queen* (2005) 227 CLR 166 at 196–198, [77]–[80].

¹¹ [2006] QCA 142 at [124].

to give rise to [the] count' on which the accused is convicted. This risk is apt to arise because, in such cases, '[t]here is nothing in the complainant's evidence or the surrounding circumstances which gives any ground for supposing that [the complainant's] evidence was more reliable in relation to [the counts on which the accused was convicted] than it was in relation to [the counts on which the accused was acquitted]'. In summary, the risk of unfairness which creates the occasion for the giving of the direction is the risk 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 account of what occurred." (footnotes omitted and emphasis added)

- [34] What is necessary is to identify the unfairness which would be occasioned if the direction was not given.¹² Questions concerning *Markuleski* directions arise typically in cases where the credit of a particular witness is in issue and historically, until the direction was banned, in cases alleging sexual impropriety. The unfairness in those cases is as explained in *R v Rutherford*.¹³
- [35] The question as to whether a *Markuleski* direction should have been given, or the effectiveness of such a direction when given, often arises in cases where an appellant alleges that the jury has reached inconsistent verdicts. As in the present appeal, the argument is mounted that the verdicts are inconsistent in that reasonable doubts entertained by the jury on counts 5 and 7 ought to have caused doubts as to the guilt of the other counts. It is submitted by the appellant that one of the contributors to the trial miscarriage was a failure to alert the jury that a doubt on one count could influence their consideration on another.
- [36] In *R v WAC*,¹⁴ a submission was made based on statements made in *R v Ford*¹⁵ and *R v S*¹⁶ that a miscarriage based on a failure to give a *Markuleski* direction would only be the concluded result where the different verdicts are proved to be irreconcilable. Holmes JA (as her Honour then was), although in dissent in the result of the appeal for other reasons, rejected that proposition.¹⁷
- [37] I agree with her Honour. There is no reason why there ought to be such a principle of law. The obligation of this Court is to determine on a case by case basis whether there has been a miscarriage of justice. Circumstances may no doubt arise where verdicts can be reconciled but where a failure to give a *Markuleski* direction may have caused a miscarriage.
- [38] However, assessment of the reasons why the jury may have delivered different verdicts can in my view be taken into account in the assessment of whether the failure to give a *Markuleski* direction rendered the trial unfair. In some cases there will be features of the evidence in support of one count which may give a rational reason why there has been an acquittal on that count. Consideration on appeal can be given as to

¹² *R v Holland* [2017] QCA 69 at [52], *R v WAC* [2008] QCA 151 at [49]–[57], *R v LR* [2006] 1 Qd R 435 at 454.

¹³ [2004] QCA 481.

¹⁴ [2008] QCA 151.

¹⁵ [2006] QCA 142.

¹⁶ (2002) 129 A Crim R 339.

¹⁷ *R v WAC* [2008] QCA 151 at [25].

whether those features are relevant to other counts. Where there are rational reasons why a jury may not have convicted on a particular count and those reasons bear no relevance to the counts upon which there have been convictions, it may be difficult to argue that the failure to give a *Markuleski* direction has caused a miscarriage of justice.

An error of law?

- [39] Section 668E(1) of the *Criminal Code* (Qld) describes the available grounds of appeal against conviction. They include an error of law or that there has been a miscarriage of justice. The current ground of appeal conflates those two grounds. It is alleged there is “an error of law” that “has occasioned a miscarriage of justice”.
- [40] Upon the application for redirection, Mr Ryan raised the desirability of a *Markuleski* direction. There were no submissions made to the trial judge at that point analysing the content of the videos. There was no identification of any feature of the evidence led on a particular count which might be said to undermine others.
- [41] Her Honour, faced with a submission in the most general terms, responded with a rhetorical question but then observed that the differing quality of the videos might explain different verdicts. That, with respect, somewhat misses the point. It is not that a factor could be identified that might explain different verdicts, but rather whether there is a factor concerning one count to which the jury should be alerted and which might lead them in their deliberations to have a reasonable doubt as to proof of some other count. Mr Ryan then agreed with her Honour and did not press the application further.
- [42] Her Honour did not make a ruling and has not made a “decision of any question of law”. Rather, the application was made by Mr Ryan, a comment was made by the trial judge, and the application was not pressed.
- [43] On appeal Mr Hoare KC conceded that he could not point to an error of law and confined his submissions in support of the ground of appeal to demonstrating a miscarriage of justice on the basis that the failure to give a *Markuleski* direction rendered the trial unfair. In context, that must mean that the failure to give a *Markuleski* direction was material in the sense that it could realistically have affected the jury’s reasoning.¹⁸

A miscarriage of justice?

- [44] The starting point is to identify the alleged unfairness.¹⁹
- [45] As already observed, the only real issue for the jury’s determination was the question of intention. The question was whether at the time of the posting of each video, the appellant intentionally advocated the doing of a terrorist act, being reckless as to whether another person would engage in a terrorist act. Also as already observed, it was put to the jury that their determination of that issue involved consideration of the appellant’s own statements on the videos against the context of Professor Barton’s evidence.

¹⁸ *R v Ford* [2006] QCA 142 at [124].

¹⁹ *Brawn v The King* (2025) 99 ALJR 872 at [10] and see *R v Ford* [2006] QCA 142 at [124].

- [46] Neither the parties nor the trial judge invited the jury to engage in any type of propensity reasoning and the fact that there were different verdicts on different counts indicated that no such reasoning was adopted.
- [47] The alleged unfairness is that without an appropriate direction, the jury might not take into account, in their consideration of some counts, a reasonable doubt which they held in relation to the element of intention on other counts.
- [48] Neither in written submissions nor during the hearing of the appeal was any statement identified in either of videos 5 or 7 which was said to be relevant to whether a reasonable doubt existed on the element of intention in relation to any of counts 1, 2, 3, 4, 6 or 8.
- [49] The video which supported count 1, was published on 12 March 2019. The video which supported count 8 was published over 11 months later on 22 February 2020. The two counts where there were acquittals were counts 5 and 7 and the videos in support of those counts were posted on 2 and 5 February 2020, respectively.
- [50] Counts 1, 2 and 3 were committed by posting videos on 12, 13 and 15 March 2019, respectively. Count 4 was not committed until 20 January 2020, some 10 months later. It would be surprising if the jury, in their consideration of the appellant's intentions in March 2019, could obtain any assistance from what he said in February 2020.
- [51] The jury clearly understood, given their verdicts, that the element of intention had to be proved by the Crown beyond reasonable doubt in relation to each count. An examination of the videos discloses a rational basis upon which the jury concluded that they had a reasonable doubt in relation to counts 5 and 7 but not the other counts.
- [52] The particulars document identifies the following as the only relevant statements in video 5:
- “2. In the video, by encouraging others to:
- a. finish or destroy Russian army or Russia.”
- [53] Video 5 commences with a number of statements of a general nature about Almighty God, Muslims and non-believers and the work of God.²⁰ That is then followed by a number of disjointed statements and then Russia is mentioned:
- “[21] Soooo...also, concerning al-Sham, Syria and north Syria, [inaudible] very bad, aerial bombardment by the Russians, and ahhh...the Syrian army ahhh...is continuing, and is violent, particularly against the civilians...even, even, that means, it's been said that [inaudible] Omar bin Abdelaziz, God mercy be to him, ahhh, the nasty creature Abu Rashid, ahhh, the Fifth, Praise be to God, so they move, ahhh, and discussed with him, got him to Qatar, destroy it, and so on...
- [22] They destroyed the region, and moved it, and they did not do anything, nor, nor they [inaudible] Islam or Muslims, that means...ahhhh, [inaudible]...

²⁰ Paragraphs [1] to [9] of the transcript.

[23] So, those enemies of the Almighty God, they went back to their [inaudible]...such a [inaudible] of hatred...and ahhh... they went back to their origin...this is their origin...Sooo, ahhh...sometimes we...ahhh...from us, what they do, what is [inaudible], their faith...[inaudible]...for sure they will do that...and they utilise all methods, they use all methods, and are using this, this [inaudible] to cause fire, destruction and killing in this region...”

[54] That passage is followed by general statements about the Mujahidin, Almighty God and the war in Syria.²¹ The appellant then turned to a statement he had heard uttered by a member of the Mujahidin:

“I heard a say, I heard a beautiful say, but, but, praise be to Almighty God, from one of the Mujahidin, or from those present in north Syria...Syria...he was very motivated, and he said, praise be to Almighty God, he said ‘When the Russians got in Afghanistan, there was war in Afghanistan, the mujahidin, the battle and war did not end between Afghanistan and the Russians until the Russians were separated, defeated, and separated...he said ‘God willing, again, God willing, the Russian army, we will not finish here until Russia is finished and destroyed with Good willing’...” (emphasis added)

[55] The statement about Russia being finished and destroyed is a statement attributed to a member of the Mujahidin who the appellant is quoting.

[56] The video then goes on and the appellant calls for prayer.²² He also mentions “the jihad for God” but it is difficult to see any clear statement advocating violence.

[57] The particulars document identifies the following in relation to video 7:

- “2. In the video, by encouraging others to:
- a. do jihad by turning to violence against others;
 - b. go to Syria, arm themselves with a rifle or machinegun, and shoot Russians, Persians and on Bashar...”

[58] Video 7 commences with some general statements about God²³ and then there were a number of assertions about China’s treatment of Muslims.²⁴ The appellant then turned to the position in Syria and also Lebanon, Turkey, Iraq and Saudi Arabia and said “we have to do jihad against those tyrants, and that we fight against them through big jihad...”²⁵

[59] Russia is then mentioned:

“[16] so, those, God, with glory to His Almighty, [inaudible] are trying to push Muslims in this region, and, ahh, glory to God, to hit them, and, ahh, and they try, that means, to force them to

²¹ Paragraphs [24] to [29] of the transcript.

²² Paragraph [32].

²³ Paragraphs [1] to [6] of the transcript.

²⁴ Paragraphs [7] to [13] of the transcript.

²⁵ Paragraph [15].

surrender ahh...the region, and, ahhh, the Province of Idlib North, and Aleppo as well...so,, glory to God, [inaudible] they are hitting Muslims hard from the air, with them are the Russians, and the supportive Persian militias as well, and, ahh, those will not have mercy towards the Muslims, and also, we, we are many, in the nation of [inaudible] we are capable...don't say 'I can, or I cannot', rather we can, we are capable...

[17] those tyrants, with injustice, are fighting for injustice...so, God willing, we are people of truth, and, ah, we are people of justice God willing, and, ah, we are capable, which means, oh Muslim, oh believer everywhere, what is the barrier against us going to the Land of al-Sham, particularly to the Syrian north, to support your brothers, your brothers there...to carry a rifle and a machinegun, and say 'In the name of the Great God' and shoot the Russians, [inaudible], and Persians, and on, and on Bashar, and, ah, those..." (emphasis added)

[60] There is no clear, unequivocal statement directing members of the appellant's audience to inflict violence. The closest he comes is to pose the question "what is the barrier against us going to the Land of al-Sham...to carry a rifle and a machinegun ... and shoot the Russians, ... and Persians and on Bashar...". While it might be thought somewhat generous not to interpret that as a call to violence, it is easy to understand why the jury would have entertained a reasonable doubt. The statement is made during what can be described as emotional ramblings. The jury were not satisfied beyond reasonable doubt of the requisite intention.

[61] In each of the other videos, clear and unequivocal calls to violence can be identified.

[62] In video 1, various enemies of Islam are identified and then the appellant says, "We have to attack them, yes attack them".²⁶

[63] Later this is said:

"[22] Open up battle grounds, support your brothers, attack them, from Baij, and other places, there's Al Hassaka, other than Al Hassaka, and other places, in Northern Syria, there are many of these militias who, Sobhan Allah, are against God and His Prophet, and we as an Ummah in general terms are not capable of that." (emphasis added)

[64] In video 2, various enemies of Islam are identified as is "Menbej" which is a city in Syria and this is said:

"[30] The Umma must unite in Menbej (not clear) We all must unite on Menbej and target, to attack Menbej yes attack Menbej." (emphasis added)

[65] Video 3 concerns, amongst other things, the Christchurch massacre in 2019 when a mosque was attacked. However, the video primarily concerns the war in Syria. These things are said:

²⁶ Paragraph [19].

“[18] And if we don’t support our brothers to victory and if we don’t move to arms, and give support our brothers in the battlefields, Allah Sobhano wa Taala (All praise be to Him) will punish us ruthlessly.” (emphasis added)

And

“[21] Stop them now, we are able now to support our brothers to victory and provide them with supplies, whether it be in Idlib or in Al-Baghrouz, especially in Al-Baghrouz since they are, Sobhan Allah, under pressure.”

And

“[27] Whoever can support the brothers in Al-Baghrouz, then move forward and support your brothers in Al-Baghrouz.

[28] If you can’t go to Al-Baghrouz itself, then go to somewhere close or in the vicinity and open fronts, Sobhan Allah, it will impact on these militias whether from Arabs or Kurds, or YPG or others.” (emphasis added)

[66] Video 4 concerns various perceived enemies including the Houthis. The appellant said in the video:

“[44] We will get to, get to ah...ah, to the south, the south of Syria, al-Sham, and we will launch battles personally God willing, and the answer we will be there if God willing.” (emphasis added)

And later:

“[60] We have to prepare the tools, prepare, and prepare the armies so we fight for the God and expel the enemies from north and south, from this area, so we break their spike, with God willing.

[61] These Houthis will not surrender as long is this [?] is present, they will not surrender, they will not surrender, they have ambition, and they, praise be to God, they are blind and deaf because they are Houthis, praise be to God.

[62] So, we have to fight against them with the black flag, with the flag of Mohammed, God’s prayer and peace be upon him until punishment is inflicted on them, then we head north to the land of al-Sham [Syria], to the people of al-Sham, toward Horan, we head toward Horn if God willing, soon, ah..ah.. also, we will raise the black flags, we will also fight for the God.” (emphasis added)

[67] In video 6:

“[11] God, glory to his almighty, herein, mentions to us what is good for us in this world and the afterlife...the good is that we progress with subsidence and heaviness, [inaudible] with subsidence and heaviness towards jihad, towards battles, to confront the enemy, with subsidence and heaviness...this work, God, glory to his almighty, loves it, and also, God, glory to his almighty, he mentioned that it has a lot of good, and we have to

do jihad with our money and ourselves, and God, glory to his almighty, mentioned that, mentioned that, mentioned that the money because it's lighter than the selves, that means, first to do jihad and it's lighter, then it's the best or more expensive, and it's in the selves and souls..." (emphasis added)

And

"[15] God, glory to his almighty, mentions subsidence and heaviness...that means all, if anyone who can carry weapon, goes ahead, travels, and, that means, glory to his Almighty, confronts the enemy, within this Aya [Koranic verse]...and God, glory to his Almighty, did not leave this [inaudible] unless he promised and mentioned that in it there is considerable good..."

And

"[32] This issue. needs big effort, equipment and ammunition, and, glory to God, ahhh, consultation and plans to support these... we mentioned that we are going, God willing, to open the major front, God willing, at the south of Syria...and we are acting with God willing, we are acting with God willing...we are acting on this line...

[33] If God willing, when we are ready, we will come to it...God knows, I will go in person, God willing, and I will go to Horan, and get to know, to know some sheiks and people there, may investigate and explore the area... and possibly [inaudible] ...but in all cases, we, God willing, will not abandon this, and we will, we will come to the Land of al-Sham with God willing, and to Horan, and we open the new front, God willing, the main one against those supporters, and ahhh...fight to liberate ahhh Damascus and the whole Land of al-Sham, God willing." (emphasis added)

[68] As to video 8:

"[21] and also, regarding al-Sham and Iraq, also, work is continuing there, ah, neither Hassan nor Bashar, ahh, will continue...we are coming, Islam will be victorious, ah, on the Land of al-Sham, and other than the Land of al-Sham, God willing, but we have to adhere to God, glory be to His Almighty, and we all fight for God, as he said, as God, glory to His Almighty, said...ahh, if there are people, brothers, interested, believers, and want victory for Islam, particularly there is, ahh, in the heart of the nation, at the Land of al-Sham, so, ahh, I advise all, that means, to go there, and, ah, and, that means, get through the borders, and, and, leave your countries, and, and migrate, migrate for God, and, ah, carry the weapon, and fight for God, support your brothers, whether in Idlib, in, in Horan, and in Deir al-Zour, in Hasaka, in, ah, in Iraq, in, ah, Fallouja ..." (emphasis added)

And

“[41] God willing, the Russians, Chinese, Iranians, Shiite militias...God willing...let us gather, God willing, and glory to His Almighty, ahh, with the group, ahhh, God willing, ahh, with these words I suffice, ahhh, and [inaudible] Muslims... [inaudible] polytheists...destroy the enemies of religion ...[inaudible] ...on the Land of al-Sham, [inaudible] in Iraq, in Yemen, oh God support your soldiers in the east and west, Oh God, [inaudible] Coronavirus...Oh God, [inaudible] China...Oh God, hit China...shake the ground under the Chinese...Oh God, affect their economy...destroy their houses, destroy, ahh, trades... and, and airports...Oh God, [inaudible] ...Oh God, [inaudible] ... Oh God, [inaudible] ...Oh God, [inaudible] ... Oh God, [inaudible] [background noise] ... Oh God, [inaudible] ...and God’s peace be upon you.” (emphasis added)

- [69] The issue put to the jury was whether the statements in the videos evinced the relevant intention (the Crown’s position) or whether they were emotionally charged statements accompanied with no particular intention. The jury convicted in relation to those counts where the videos contained a clear statement of a call to violence. The jury acquitted in the two counts where no such unambiguous statement could be identified.
- [70] In the premises of this trial, at best for the appellant the making of a *Markuleski* direction might have explicitly conveyed to the jury that they could take into account any doubts which they had as to proof beyond reasonable doubt of the element of intention in relation to particular counts when they were assessing whether that element had been proved beyond reasonable doubt in relation to other counts. Given (1) the differences between each count; (2) the differences between the matters which were relevant to the assessment of proof of the element of intention in relation to each count; and (3) the way in which the trial was conducted, I can see no basis upon which it could be concluded that the failure to give such a direction could realistically have affected the reasoning of the jury to the verdicts of guilt which they returned.
- [71] The fact that the jury were not told that a doubt they may entertain on one count might cause them to doubt guilt in others, has not here caused any miscarriage of justice. The trial was not unfair.
- [72] The appeal ought to be dismissed.