SUPREME COURT OF QUEENSLAND

CITATION:	*R v Fanning* [2017] QCA 244
PARTIES:	**R** **v** **FANNING, Neville John** (appellant)
FILE NO/S:	CA No 97 of 2017 DC No 91 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Toowoomba – Date of Conviction: 4 May 2017 (Richards DCJ)
DELIVERED ON:	20 October 2017
DELIVERED AT:	Brisbane
HEARING DATE:	22 August 2017
JUDGES:	Sofronoff P and Morrison and McMurdo JJA
ORDER:	**The appeal is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellant was tried on two charges of indecent treatment of a girl under 16, under 14 – where the appellant was convicted of one count but acquitted on the other – where the appellant appeals against the conviction on the ground that the acquittal on count 2 is inconsistent with the conviction on count 1 to the extent that the verdicts cannot reasonably stand together – where the complainant and appellant both gave evidence and there was evidence of a preliminary complaint – where the complainant's case detailed the counts occurring on the same day but at two distinct times – where the appellant's case was that the offending never occurred and he did not remember the events – where the preliminary complaint evidence supported the complainant's account but there were inconsistencies in how and when count 2 occurred – where those inconsistencies may have led to inferences that count 2 did not occur in the way described by the complainant – whether the guilty verdict on count 1 is inconsistent with the acquittal on count 2 *MacKenzie v The Queen* (1996) 190 CLR 348; [1996] HCA 35, applied *Osland v The Queen* (1998) 197 CLR 316; [1998] HCA 75, cited

R v CX [2006] QCA 409, cited
R v SBL [2009] QCA 130, cited
R v Smillie (2002) 134 A Crim R 100; [2002] QCA 341, cited

COUNSEL: S Courtney for the appellant
P J McCarthy for the respondent

SOLICITORS: Butler McDermott Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of Morrison JA and with the order his Honour proposes.

[2] **MORRISON JA:** The appellant was tried on two charges of indecent treatment of a girl under 16, under 14. All of the counts arose out of the same event on an unknown date between December 1984 and July 1986. The counts were particularised as follows:

(a) count 1 – indecent treatment – the appellant was sitting in the front passenger seat of a utility vehicle and the complainant was sitting on his lap – the appellant touched the complainant on her breasts; and

(b) count 2 – indecent treatment – the appellant was sitting in the front passenger seat of a utility vehicle and the complainant was sitting on his lap – the appellant touched the complainant on the vaginal area on the outside of her clothing.

[3] The appellant was found guilty on count 1 and acquitted on count 2.

[4] He appeals against his convictions on the ground that the acquittal on count 2 is inconsistent with the conviction on count 1 to the extent that the conviction cannot reasonably stand with the acquittal on count 2.

Circumstances of the offending

Evidence of the Complainant

[5] The complainant was born in 1972. She met the appellant through his daughter, Q, in about grade 6, at school.[1] The complainant gave evidence about where the appellant's family lived and that she visited the appellant's property and stayed the night on two occasions.[2]

[6] The complainant gave evidence that on the second occasion that she stayed at the appellant's home she travelled twice in a utility vehicle to perform farm duties with the appellant and Q, on the second occasion with an unknown man as driver. The charged acts occurred on the second drive, which was to collect wood. Uncharged acts, where the appellant touched the complainant's knee when changing gears, occurred on the first drive, which was to the cattle yards. The complainant's evidence was that the appellant was driving, and each time he changed gears he would touch her knee by brushing it and then putting his hand on her knee. The complainant said it made her uncomfortable.[3]

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1 Appeal Book (**AB**) 16.
2 AB 16-17.
3 AB 18.

[7] The complainant's evidence as to the charged acts followed a similar pattern. The complainant, Q, the appellant and a man drove to collect wood in the utility. The vehicle had one bench seat, the man was driving, Q was sitting in the middle, and the appellant was on the passenger side with the complainant on his lap.[4] The complainant was wearing a t-shirt and pair of shorts which had an animal print on them. During the drive the appellant had his hands on the complainant's breasts and was moving them backwards and forwards over her clothing (count 1). At the same time, he was using his two smallest fingers to rub up and down over the complainant's vaginal area, also over her clothes (count 2).

[8] On the return drive, the complainant sat on the appellant's lap again, and he held her upper arm with one hand and her upper thigh with the other hand.[5]

[9] That night the complainant stayed at the appellant's property. The next morning, the complainant asked Q to help her called Mrs X, a family friend. The complainant asked Mrs X to collect her and she stayed with Mrs X's family for the remainder of the weekend. She never returned to the appellant's property.[6]

[10] In cross-examination, the complainant clarified that she first met Q in grade 6 and was friends until the relationship deteriorated after the events of counts 1 and 2.[7] It was put to her, and she denied, that she did not meet Q until year 8, and were friends until year 10. She was also confident that she was not confusing Q with another friend. The complainant was able to recount further details about the trip to collect wood, and the first trip which she said was to feed cows. She also recalled the appearance of the other man, that the wood was already cut, and that they passed the cattle yards when driving to collect wood.

[11] The complainant was asked to explain how she was sitting in the utility. She said she was sitting on the appellant's lap with her knees facing the dash and her back against the appellant's chest. She confirmed her police statement, that it was the appellant's left hand which touched her between her legs in the vaginal area. The complainant said that she had wanted Q to sit on the appellant's lap, but Q refused. It was put to her that she never had that conversation with Q, which she denied.[8]

[12] It was put to the complainant, and denied by her, that: (i) the appellant did not touch her in the ways described; (ii) she never sat on the appellant's lap. The complainant expanded on her evidence about what happened when Mrs X collected her, saying she was upset, felt numb and Mr X was asking her what was wrong. She also confirmed that about two years after the event she told her father and brother that the appellant had touched her inappropriately.[9]

[13] As cross-examination progressed it was put to the complainant, and denied by her that: (i) she had never stayed the night at the appellant's property; (ii) she had never been in a utility with the appellant; (iii) the appellant had never touched her sexually; (iv) if there was any contact it "was not of a lingering kind"; and (v) that perhaps at some point there was some momentary touching between the appellant

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4 AB 18.
5 AB 20.
6 AB 20.
7 AB 24.
8 AB 31.
9 AB 35.

and her, that was not sexual but over the years had turned into something it was not.[10]

Evidence of Mrs X

[14] Mrs X was a friend of the complainant's family. She also knew the appellant, and had known him for more than 50 years. Mrs X gave evidence that the complainant would often stay at her home on a small beef cattle property in the 1970's and 1980's.[11] Her evidence was that on one occasion, she drove the complainant to visit the appellant's property and picked her up the next day.[12] Mrs X said she collected the complainant because she phoned her and was in a "hysterical state", "a mess", "crying and shaking".[13]

[15] Mrs X gave evidence of preliminary complaint. She said the complainant told her that she had sat on the complainant's lap in a utility vehicle and that the appellant's "hands were all over her".[14] Mrs X said the complainant explained that the appellant's hands:[15]

> "were up her shirt and up her leg and too high up her leg to be comfortable. They were on her pants."

[16] In cross-examination Mrs X said that the complainant told her, when she was picked up, that "she wanted to get out of there, the quicker the better and she wasn't going back".[16] Mrs X confirmed what she had said in her police statement of 19 October 2014. That is, that the appellant had touched the complainant's leg while she was sat in the middle seat of the vehicle on the trip out to the paddock, and on the trip back when the other man drove she was sitting on the appellant's lap and he touched her chest. Mrs X said the complainant told her that the appellant's hands were "up her shirt".[17]

Evidence of the appellant

[17] The appellant said he did not remember the complainant at all. He said he did own utilities but could not say when. He said he never had a child on his lap who was not his own child. He denied touching the complainant. He could not recall the complainant ever visiting.

Evidence of Q

[18] Q said she had no recollection of the complainant visiting or staying the night, nor could she recall a time when they were together in a utility on the property. She said there was a family utility on the property.

Evidence of the appellant's wife

[19] The appellant's wife said she knew of the complainant's mother, Mrs X, but not the complainant.

Inconsistent Verdicts

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10 AB 43-44.
11 AB 47.
12 AB 48.
13 AB 48-49.
14 AB 49, lines 15-16.
15 AB 49, lines 21-22.
16 AB 49 line 34.
17 AB 53.

Legal principles

[20] In *MacKenzie v The Queen*[18], Gaudron, Gummow and Kirby JJ held that the test where inconsistency is alleged is one of "logic and reasonableness":

> "… if there is a proper way by which the appellate court may reconcile the verdicts, allowing it to conclude that the jury performed their functions as required, that conclusion will generally be accepted. If there is some evidence to support the verdict said to be inconsistent, it is not the role of the appellate court, upon this ground, to substitute its opinion of the facts for one which was open to the jury."[19]

[21] Various matters of principle have been settled about the assessment by an appellate court of the issue of inconsistent verdicts. They include:[20]

(a) the appellate court must be persuaded that the performance of the jury's duty has been compromised by verdicts which are an unacceptable affront to logic and common sense, or which suggest confusion in the minds of the jury, or a misunderstanding of their function, or an uncertainty about legal differences between the offences, or a lack of clarity in the instruction on the applicable law;

(b) as the test is one of logic and reasonableness, the question is whether a reasonable jury, who had applied their minds properly to the facts in the case, could have arrived at the various verdicts;

(c) if there is a proper way by which an appellate court can reconcile the verdicts, appellate courts should accept the jury as having performed its function and be reluctant to accept a submission that verdicts are inconsistent;

(d) different verdicts may be a consequence of a jury correctly following instructions to consider each count separately, and to apply the requirement that all elements must be proved beyond reasonable doubt;

(e) different verdicts will show the required inconsistency where a verdict of acquittal necessarily demonstrates that the jury did not accept evidence which needed to be accepted to lead to the other verdict of guilty;[21]

(f) a jury may decide that it would be oppressive to convict on all charges and give a 'merciful verdict';[22]

(g) a jury might find the quality of a crucial witness's evidence variable, even though it is accepted as generally truthful; some aspect of the evidence might point to faulty recollection on some points, or exaggeration on others, or an inherent unlikelihood about some aspect of the evidence, all of which casts doubt on the accuracy in those respects, but not of the witness's general honesty;

(h) in some cases it is possible that in respect of some counts there might be contradictory evidence which does not apply to other counts, and thus explains the variation in the verdicts; and

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18 (1996) 190 CLR 348; [1996] HCA 35.

19 *MacKenzie* at 367; internal footnotes omitted.

20 *R v CX* [2006] QCA 409 at [33]; *R v Smillie* (2002) 134 A Crim R 100; [2002] QCA 341 at [28]; *R v SBL* [2009] QCA 130 at [28]-[34].

21 *Osland v The Queen* (1998) 197 CLR 316 at 356-357.

22 *R v Smillie* [2002] QCA 341 [28].

(i) it may be in some cases that the different verdicts are explicable on the basis that there was corroboration in respect of some counts, but not others.

Submissions

[22] The appellant's case is that while the jury received the appropriate direction to consider each count separately, the verdicts cannot be reconciled because the issue arising from the evidence was whether the complainant ever sat on the appellant's lap and was touched on the vaginal area and chest *at the same time*. Counsel for the appellant relied on the fact that the trial prosecutor did not distinguish the Crown's case on count one from count two, and the evidence said to prove each count, was the same and had the same weight.

[23] The respondent's submissions sought to explain the jury's verdict by comparing the evidence of Mrs X to that of the complainant. This Court was urged to do the same, having regard for the historical nature of the case. The respondent's contention was that having regard to complainant's own evidence and the preliminary complaint evidence, the jury may have reached the conclusion that the appellant's conduct fell short of that described on count 2 of the indictment. The respondent highlighted the evidence of what the complainant told from Mrs X, that "his hands were all over her", "*up her leg*, too high up her leg to be comfortable. They were *on her pants*". That, it was submitted, may have led the jury to conclude that there was doubt about the touching on the vagina, which was the essence of count 2.

Discussion

[24] The jury were confronted with an inconsistency in the evidence as to where the complainant was touched, other than on her breasts. Her evidence was that the appellant used his two little fingers on the left hand to touch on the vaginal area. The complainant's explanations to Mrs X were different: "his hands were all over her", "**up her leg**, too high up her leg to be comfortable … **on her pants**". Those inconsistencies were matters for the jury to weigh. The quality of the evidence also had the feature that the preliminary complaint to Mrs X was at the time, whereas the complainant's complaint to police was not until 2013 and the evidence at trial was more than 30 years after the event. They may well have reasoned that those factors were enough to raise a doubt about count 2.

[25] However, the reverse was the case for count 1, where the preliminary complaint evidence supported the complainant's trial evidence. In my view, the evidence supporting each count could have been attributed different weight by the jury and they could have reasoned that the corroboration on count 1 was not present when they came to consider count 2.

[26] The preliminary complaint evidence was therefore consistent with count 1 but not count 2. The appellant's submission, when challenged with that contention, was that the complaint evidence was not necessarily consistent with either count 1 or count 2. However, the preliminary complaint evidence clearly described the appellant as having his hands **up** the complainant's shirt, thereby corroborating the complainant's trial evidence that he had touched her breasts.

[27] It is reasonably logical that the jury could conclude that while there is a distinction between the upper leg and the vagina, touching **up the shirt** suggests touching of the breasts. The distinction between the upper leg and the vagina becomes

particularly relevant when one considers how the complainant was sitting, namely facing forward, knees together facing the dash, and with her back to the appellant. Sitting as she was, it is difficult to see how touching of the vagina and upper leg could be described in the same way, thus revealing how the jury could reject the evidence on count 2.

[28] A further reasonable and logical explanation for the jury's approach to the evidence arises from the complainant's description of a third time that the appellant touched her while travelling in the vehicle. The complainant said that when they returned from collecting wood she again sat on the appellant's knee and he had a hand on her upper thigh.[23] This may have led the jury to infer that Mrs X's evidence did not support the complainant's evidence on count 2 at all, and that her reference to the appellant's hands being on the complainant's leg was instead describing what occurred on the return trip from having gone to collect firewood. This would leave the complainant's evidence completely uncorroborated on count 2, whereas the touching "up the shirt" as described by Mrs X may have been accepted by the jury, despite the inconsistencies between the two versions of evidence, as supporting count 1 as described by the complainant.

[29] In this particular case, there were variations in the evidence that support the jury's verdict. Given the lack of clarity and specificity in both the complainant and the preliminary complaint evidence about count 2, the case is not one where the acquittal on count 2 demonstrates a rejection of the complainant's evidence in entirety. Given the delay in bringing this case to trial, a lack of detail was to be expected and the jury were directed to have regard for the credibility and reliability of the evidence in light of that delay.[24]

[30] In my view, there is a logical explanation for the jury's verdicts, which is consistent with the principles outlined in paragraphs [20] and [21] above.

Disposition of the appeal

[31] For the reasons given above I would dismiss the appeal.

[32] **McMURDO JA:** I agree with Morrison JA.

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23 AB 20, lines 5-7.

24 AB 111, line 29.