SUPREME COURT OF QUEENSLAND

CITATION:	*R v McLucas* [2017] QCA 262
PARTIES:	**R** **v** **McLUCAS, James Cecil** (appellant)
FILE NO/S:	CA No 101 of 2017 DC No 144 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Ipswich – Date of Conviction: 13 April 2017 (Lynch QC DCJ)
DELIVERED ON:	7 November 2017
DELIVERED AT:	Brisbane
HEARING DATE:	31 August 2017
JUDGES:	Sofronoff P and Boddice and Flanagan JJ
ORDER:	**The appeal should be dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where, after a trial before a jury, the appellant was convicted of two counts of indecent dealing with a child under 16 (counts 3 and 4), one count of incest (count 6, but not guilty of the alternative charge of rape) and one count of exposure to an indecent act (count 8) – where, after a trial before a jury, the appellant was acquitted of one count of indecent dealing with a child under 16 (count 1), one count of exposing a child under 16 years to an indecent act (count 2), one count of sexual assault (count 5) and one count of rape (count 7) – where the events occurred when the complainant was 14, 18 and 20 years old – where the complainant was 24 years old at the time of trial – where the complainant was the grandson of the appellant – where the jury was directed to consider each count separately – whether the convictions on counts 3, 4, 6 and 8 were unsafe and unsatisfactory because of the inconsistency with the acquittals on counts 1, 2, 5 and 7 – whether the verdicts cannot be logically reconciled or stand together CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where there were some inconsistencies in the complainant's evidence to police and at trial – where there was

approximately 18 months between the complainant proving a statement to police and the trial – where the prosecution case did not rest solely on the evidence of the complainant - whether the guilty verdicts of the jury on counts 3, 4, 6 and 8 were inconsistent with the acquittals on counts 1, 2, 5 and 7 – whether this inconsistency renders the verdicts either unreasonable or unsupported by the evidence – whether it was reasonably open to the jury to be satisfied beyond reasonable doubt of each element of counts 3, 4, 6 and 8

Jones v The Queen (1997) 191 CLR 439; [1997] HCA 56, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
MacKenzie v The Queen (1996) 190 CLR 348; [1996] HCA 35, cited
R v Clapham [2017] QCA 99, applied
R v Conn; R v Conn; Ex parte Attorney-General (Qld) [2017] QCA 220, applied
R v GAW [2015] QCA 166, cited
R v Markuleski (2001) 52 NSWLR 82; [2001] NSWCCA 290, cited
R v Schafer [2017] QCA 208, cited

COUNSEL: J A Fraser for the appellant
G P Cash QC for the respondent

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

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

[2] **BODDICE J:** I agree with the reasons and proposed order of Flanagan J.

[3] **FLANAGAN J:** On 10 April 2017 the appellant pleaded not guilty to an eight count indictment. Each count concerned the appellant's grandson, NC ("the complainant").

[4] The eight counts related to four discrete incidents. Counts 1 and 2 alleged that on a date unknown between 24 February 2005 and 1 January 2007 at Ipswich the appellant indecently dealt with the complainant (count 1) and exposed the complainant to an indecent act (count 2). These counts concerned allegations that the appellant used his hand to touch the complainant's penis and expose the complainant to the appellant touching his own penis. Counts 3 and 4 alleged that on a date unknown between 24 February 2006 and 25 February 2007 at Ipswich the appellant indecently dealt with the complainant. The particulars to count 3 were that the appellant used his hand to touch the complainant's penis. The particulars to count 4 were that the appellant put the complainant's penis into his mouth. Counts 5, 6 and 7 are alleged to have been committed on a date unknown between 24 February 2010 and 25 February 2011 at G. These counts concerned the one incident in which the appellant is alleged to have sexually assaulted the complainant (count 5) and raped the complainant (counts 6 and 7). The allegation in relation to

count 5 was that the appellant touched the complainant's buttocks with his penis. The allegation for count 6 was that that the appellant used his penis to penetrate the complainant's anus. For count 7 the allegation was that the appellant used his penis to penetrate the complainant's mouth. Count 8 is a separate incident alleged to have been committed on a date unknown between 24 February 2010 and 25 February 2012 at B. The allegation in respect of count 8 is that the appellant exposed the complainant to the appellant touching his own penis.

[5] After a three day trial the appellant, on 13 April 2017, was convicted in the District Court at Ipswich on the following counts:

- two counts of indecent treatment, being counts 3 and 4;
- one count of incest, being the alternative verdict to the anal rape alleged in count 6; and
- one count of sexual assault, being count 8.

[6] The appellant appeals against these convictions on two grounds. First, the verdicts of guilty for counts 3, 4, 6 and 8 are inconsistent with the verdicts of not guilty for counts 1, 2, 5 and 7 such that the verdicts in relation to counts 3, 4, 6 and 8 are unreasonable. Secondly, the verdicts of the jury in respect of counts 3, 4, 6 and 8 are unreasonable and cannot be supported having regard to the evidence.

Both these grounds of appeal require a detailed consideration of the evidence.

The evidence at trial

[7] The Crown called six witnesses. The primary witness was the complainant. The Crown also called his mother, (EL), his father, (HC), and his father's new partner, DQ. A general practitioner, Dr Grant Elmer, who had a consultation with the appellant on 9 March 2011, was also called.

(a) The complainant's evidence

[8] The complainant was born on 24 February 1992. Prior to early 2006 he lived with his family, consisting of his mother and father and two siblings, at F Street in North Ipswich. The land at this address was subdivided. The appellant lived with his wife in H Street which was around the corner from the complainant's family home. Both houses, as well as a shed, were located on the subdivision.

[9] The conduct constituted by counts 1 and 2 was alleged to have occurred when the complainant was approximately 14. The complainant recalls staying one night at his grandparents' house at H Street. He recalls taking a bath and the appellant entering the bathroom and telling the complainant to get out of the bath. As the complainant dried himself he felt the appellant's hand "start fiddling" with his penis by "pulling it back and forth". The complainant believes he told the appellant to stop. The appellant's response was that he laughed and said to the complainant either, "don't tell your father" or "don't tell anyone". The complainant gave the following evidence in respect of count 2:

> "… I couldn't see what he was doing, but I could see his hand down his pants, and he was – like, you could see the hand actions, like, through – through his pants."[1]

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1 AB 47, T1-35, lines 10-14.

The complainant described "the hand actions" as a backwards and forwards motion.

[10] In cross-examination it was suggested to the complainant that when he was 13 or 14 he had been swimming in a creek or a river near A and had contracted an infection which caused his penis to become swollen. Initially the complainant refused to answer questions in relation to this incident on the basis that the topic was not covered in his written statement given to police.[2] Defence counsel requested the trial judge to direct the complainant to answer the questions. A *voir dire* was conducted and his Honour ruled that the evidence in relation to the incident was relevant. The complainant recalled his grandfather collecting him from an area south of A on the way to B. The complainant had been swimming in a river. He recalls having a bath at his grandparents' house and that his penis was at that time swollen. The complainant's recollection was that it was his grandmother rather than the appellant who assisted him in examining his swollen penis.

[11] As to counts 3 and 4, the complainant recalled an incident that occurred at the shed at F Street. He was around 14 years of age at the time. He was assisting the appellant with some loading. This occurred after school. The complainant was in his school uniform. He made a request to the appellant for some money which was refused. The appellant then offered the complainant money and told him to remove his pants and underwear. The appellant commenced to masturbate the complainant (count 3). The appellant then put the complainant's penis in his mouth and commenced sucking for approximately four to six minutes (count 4).

[12] The appellant gave the complainant a ten dollar note. A diagram, drawn by the complainant on 4 November 2015 was tendered. The diagram depicted the shed and the complainant had marked "X" where the incidents occurred in the shed.

[13] In cross-examination the complainant was questioned as to an inconsistency between his evidence-in-chief and his statement as to the position of the appellant when he was performing oral sex on the complainant. In his evidence-in-chief the complainant said his grandfather was sitting on a crate, whereas in his statement it is recorded that his grandfather was kneeling. The complainant rejected the suggestion that none of this conduct occurred.

[14] In early 2006 the complainant's family moved to a property at G. The appellant lived with his wife in a separate house on the same property. At the time the complainant moved to G he was about 14 years of age. The family business, called WG, was run from G. The appellant and the complainant's parents worked in the business. The complainant sometimes assisted the appellant in the business by helping with deliveries and some building work.

[15] As to counts 5, 6 and 7 in evidence-in-chief the complainant initially suggested that he was 15 years of age when these events occurred. Later in evidence-in-chief he identified his age at the relevant time as being 18. This was in accordance with his statement.

[16] The complainant's evidence was that the events occurred at his grandparents' house at G. His grandmother was not home. The appellant offered the complainant cigarettes saying words to the effect that he wanted to do things to the complainant

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2 AB 101-102, T2-37, line 35 to T2-38, line 32.

and wanted the complainant to do things to him.[3] The appellant said to the complainant "You can suck me off". The complainant performed the requested act (count 7). The appellant then went to the bathroom and came back with baby oil. He rubbed this on his penis and said words to the effect "I want to fuck you from behind". The complainant said "No". According to the complainant the appellant then commenced to rub his penis up and down the complainant's "bum crack" for approximately 30 seconds (count 5).[4]

[17] The appellant said to the complainant "Don't tell anyone"; "Don't tell your father."; "This is our little secret."[5] The appellant then inserted his penis into the complainant's anus (count 6). The complainant experienced pain and said "Stop". According to the complainant his grandfather did not stop and there was approximately four minutes of penetration. The appellant was masturbating the complainant at the time. The complainant kept telling the appellant to stop. The complainant heard a car door shut which was his grandmother returning. The complainant pushed the appellant away. According to the complainant the appellant gave him cigarettes. The complainant subsequently noticed that he was bleeding from his anus but did not seek medical attention. He marked "X" on a diagram of his grandparents' house at G where the events concerning counts 5 to 7 occurred.

[18] The complainant was cross-examined in relation to a number of inconsistencies between his evidence-in-chief and his statement. These included that in his statement the complainant recalled that the events commenced in the shed with his grandfather making an offer of money not cigarettes.[6] A further inconsistency was that in evidence-in-chief the complainant's version was that the appellant said "I want to fuck you from behind" whereas the words in his statement were "How do you feel about getting cock up the bum". A further suggested inconsistency was whether the appellant performed oral sex on the complainant or the complainant on the appellant. In cross-examination the complainant stated that the appellant forced him to his knees to perform oral sex. While in this position the appellant is alleged to have also masturbated the complainant. Neither of these allegations were in the complainant's statement. The complainant accepted there was "no possible way"[7] that the appellant could have masturbated the complainant while he was on his knees. Further the complainant's statement did not support his evidence that throughout the conduct constituting counts 5 to 7 he repeatedly said "No" to the appellant. He accepted in cross-examination that when he heard his grandmother return he pushed the appellant away, ran to the bathroom and ejaculated.[8] It was put to the complainant that none of the alleged conduct occurred. This suggestion was rejected by the complainant.[9]

[19] As to count 8 the complainant initially said he was 18 at the time but upon further questioning altered his age at the time to 20. After the complainant had been expelled from school he started doing deliveries with the appellant as part of the business of WG. The motor vehicle used for the deliveries was a FG white Falcon utility. The complainant's evidence was:

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3 AB 52, T1-40, line 11-13.
4 AB 56, T1-44, lines 24-25.
5 AB 55, T1-43, lines 43-44, AB 57, T1-45, line 25.
6 AB 82, T2-18, line 35 to AB 83, T2-19, line 40.
7 AB 98, T2-34, lines 10-35.
8 AB 100, T2-36, line 16-25.
9 AB 89, T2-25, lines 23-30.

> "Driving back from B, and he asked me to play with him. And I turned around and said no, because I knew it was the wrong thing to do at that time. And I was in shock – still mortified from what happened previously. So granddad ended up masturbating himself on the drive back from B … He pulled his pants down to his knees while he was driving."[10]

[20] In cross-examination the complainant accepted he had been driven by his grandfather on numerous occasions (at least 100). This was the only occasion when his grandfather had exposed his penis while in the car. The complainant had a vague recollection of informing the Crown Prosecutor in a conference held on 5 April 2017 that "Every time he's in the car driving, he used to pull himself".[11] In cross-examination it was suggested to the complainant that the episode never happened. This was rejected by the complainant.[12]

[21] According to the complainant the first time he complained about the appellant's conduct was to a person called BD. This occurred when the complainant was 21 or 22 and five months prior to him telling his parents. It is not readily apparent from the evidence when or how his father found out about the allegations. According to the complainant his father reacted by hitting him saying words to the effect "Are you calling my Dad a paedophile?" The complainant described his emotional state at this time as follows:

> "I was crying, scared … I was a big mess."[13]

[22] The following day or that afternoon in a conversation with his mother the complainant told her that his grandfather had "molested and raped" him.[14] When speaking with his mother the complainant was concerned that she would not believe him.[15]

[23] After telling his parents they went and spoke to the appellant. The complainant was not present at this confrontation. Soon after this confrontation however the complainant's grandparents moved out of the G address. In the words of the complainant "Dad kicked them out".[16]

[24] In early October 2015 the complainant went on a holiday to Rainbow Beach with his father and his father's new partner, DQ, his siblings and their partners. Near the end of the holiday he was around a camp fire with his father when his father asked whether "Everything was OK?" The complainant responded by saying "No, it's not". His father asked "Why?" The complainant responded "Because your father raped me". The complainant was crying. His father also started to cry. DQ then joined the conversation. The complainant told her that the appellant "Had physically put his penis inside of my anus".[17]

[25] Subsequently on 16 October 2015, the complainant, accompanied by his father, attended a counselling session at Headspace in respect of his grandfather's sexual abuse. In the course of this and further counselling sessions the complainant

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10 AB 59, T1-47, lines 34-41.
11 AB 77, T2-13, lines 17-19.
12 AB 101, T2-37, lines 19-34.
13 AB 66, T2-2, lines 31-32.
14 AB 61, T1-49, line 10.
15 AB 66, T2-2, lines 35-37.
16 AB 61, T1-49, line 30.
17 AB 62, T1-50, lines 10-25.

admitted to being a user of both methylamphetamine and alcohol. He insisted however that at the time of the holiday to Rainbow Beach he had been clean for a year.[18]

[26] In cross-examination the complainant accepted that he had been expelled from high school in Grade 10. He had set another boy's school bag on fire.

[27] The complainant from a young age was diagnosed and treated for Attention Deficit Hyperactive Disorder ("ADHD"). The complainant admitted that from time to time he had lied to his parents. In May 2011 he was fined $400 in the Magistrates Court for an improper use of an emergency call service. He tried to get his uncle into trouble by making a false allegation of domestic violence.

[28] The complainant also accepted in cross-examination that he would regularly spend time at his grandparents. He did not accept however, that he would readily spend time with his grandfather at the shed.

(b) The mother's evidence

[29] Ms EL gave evidence both in relation to the complainant informing her and his father of the appellant's conduct:

> "… he told us that grandad had been doing things to him … [a]nd he said it was, like, because he wanted money and smokes and things like that, so Grandad made him do things to him in lure of money."[19]

[30] This conversation took place in the complainant's bedroom at the G property. According to Ms EL the complainant told them "a couple of things, but he didn't elaborate too much". The complainant stated that his grandfather used to "suck him off". She confirmed that the complainant's father reacted by yelling at the complainant and hitting him. She heard the complainant saying "I'm not lying, daddy. I'm not lying." She described the complainant at the time as being very scared and that he "was crying and crying and crying and crying". Thereafter Ms EL, the complainant's father and the complainant's uncle confronted the appellant. He was asked if he had "touched NC" to which he replied "yes". The appellant also stated that "NC wanted smokes and money all the time. So he made NC do things to him for money." HC told the appellant to "pack their stuff and get out".[20] At this confrontation there was a suggestion that the appellant should seek help. The appellant was crying. He explained that he had also been abused as a child. According to Ms EL the appellant would flinch when her husband moved his hands. She recalls the appellant saying "Oh, why don't you just flog me? Why don't you just flog me and get it over and done with?"[21]

[31] Ms EL, with other family members, accompanied the appellant to a consultation with Dr Elmer. The appellant told Dr Elmer that he needed help for something which he had done. He asked Dr Elmer if any mention was made of children would he get into trouble. Dr Elmer explained if children were involved he was required to report the matter. The appellant informed Dr Elmer that he had been abused as a

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18 AB 80, T2-16, lines 5 to 14.
19 AB 114, T2-50, line 45 to T2-51, line 10.
20 AB 116, T2-52, lines 10-25.
21 AB 119, T2-55, lines 9-10.

child and that is why he required help. The appellant was crying throughout this consultation.

(c) The father's evidence

[32] HC recalled a conversation he had with the complainant in his bedroom at G. The complainant told him that his grandfather had been touching him in different ways. HC reacted by punching his son. He recalls his son saying that he was not lying. According to HC the complainant was adamant that his grandfather had touched him.

[33] As a result of this conversation HC decided to confront the appellant. This confrontation took place at the appellant's house at G. It was either the afternoon or the next day following his conversation with his son. HC's evidence as to this conversation with the appellant was as follows:

> "'How can you do such a thing? I've just basically nearly knocked my kid out over what you've done to him', and he just broke down crying and said he was sorry and he didn't know what to do and he said, "It looks like I've lost my sons". And he said he doesn't know why it all happened, but it just reflected back to when he was a kid I suppose and – well, I suppose he did. He reflected back to when he was a kid and said that his – that he was tormented by all his family doing sexual stuff to animals and I just said – after that I said, 'I just can't believe you just done such a thing'.
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> … I just told him he was – he needed help, to go and sort this stuff out."[22]

[34] The appellant was crying and shaking throughout this confrontation. In cross-examination HC accepted that he was angry when he confronted his father. He denied however raising his hands to hit his father.

[35] According to HC his parents moved out of the G Street property not long after this confrontation. He recalls that in the course of this confrontation the appellant told him to "kill him, knock him out".

[36] HC's evidence as to the conversation he had with the complainant at Rainbow Beach was that the complainant told him that his grandfather made him have oral sex with him and vice versa. The complainant was very emotional at this time and crying. Soon after DQ joined the conversation.

(d) DQ

[37] Ms DQ's recollection of her conversation with the complainant at Rainbow Beach was that the complainant told her that he had been forced "to touch his grandad". He also said that his "grandad had touched him". He stated that the appellant had forced him to give him oral sex.[23]

[38] In cross-examination Ms DQ recalled a later conversation she had with the complainant on 12 November 2015 which is recorded in her police statement:

> "NC phoned me and he sounded like he needed to get something out – finish it off. He spoke very quickly and told me that Jim (the

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22 AB 137, T2-73, lines 24-36.

23 AB 166, T3-6, lines 41-45.

> appellant) had also raped him. He told me, 'You know when you asked me if Jim had done anything else? I lied. He did. He raped me'. I told him he needed to tell his dad and the police …"[24]

(e) Dr Elmer

[39] According to Dr Elmer when the appellant attended a consultation on 9 March 2011, he presented as quite distressed and unable to verbalise why he was there. Dr Elmer could not get any information from the appellant.[25]

[40] One of the family members who was also present at this consultation was the appellant's son YC. According to Dr Elmer, YC asked if Dr Elmer was compelled to inform authorities if any information was revealed in the course of the consultation which was of an illegal nature. Dr Elmer informed those present that he would be required to communicate any illegal activities to the authorities. YC said words to the effect that they would not be saying anything further at the consultation. Dr Elmer was however concerned about the state the appellant was in and gave him an antidepressant and valium. According to Dr Elmer the appellant was "totally incoherent and sobbing".[26]

[41] In cross-examination Dr Elmer agreed that the complainant had been a longstanding patient. He had treated the complainant as a child for ADHD and had prescribed various medications. The complainant was referred by Dr Elmer to Dr Shaun Dickson, psychologist, with regard to possible conduct disorder. The evidence does not reveal if the complainant was actually assessed for possible conduct disorder.[27]

[42] The appellant did not give or call evidence.

The summing up

[43] The learned trial judge gave the usual direction as to the separate consideration of each count. His Honour explained that the evidence in relation to the separate counts was different and so the jury's verdicts need not be the same. His Honour further explained the direction in the context of the jury's general assessment of the complainant:

> "Your general assessment of the complainant as a witness will be relevant to all counts, but you will have to consider his evidence in respect of each count when considering that count. Now, it may occur, in respect of one of the counts, that for some reason you are not sufficiently confident of NC's evidence to convict in respect of that count. The situation may arise where, in relation to a particular count, you get to the point where you have some reasonable doubt about an element or elements of that particular offence. Now, if that occurs, of course, you find the defendant not guilty in relation to that count. That does not necessarily mean you cannot convict of any other count. You have to consider why you have some reasonable doubt about that part of NC's evidence and consider whether it affects the way you assess the rest of his evidence, that is, whether your doubt about that aspect of his evidence causes you also to have

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24 AB 170, T3-10, line 39 to T3-11, line 4.
25 AB 140, T2-76, lines 36-40.
26 AB 141, T2-77, lines 28-29.
27 AB 143 to AB 144.

> a reasonable doubt about the part of his evidence relevant to any other count."[28]

[44] His Honour then dealt with counts 1, 3 and 4 on the basis that each of those counts concerned indecent dealing and had similar elements. The issue identified was whether the things the complainant alleged had occurred at all:

> "The focus of your deliberations, therefore, in relation to these charges will be whether the prosecution have proved beyond reasonable doubt that these things actually occurred."[29]

[45] As to count 2 his Honour emphasised that the prosecution had to prove that the appellant deliberately exposed the complainant to the act of himself, that is, the appellant, masturbating. His Honour reminded the jury of the evidence that the appellant did so inside his own pants and without exposing his penis. His Honour explained that if the jury were to be satisfied beyond reasonable doubt that that act occurred, they would also need to be satisfied beyond reasonable doubt that the act was done with the intention of the complainant seeing:

> "If it was possible that occurred for the defendant's sexual gratification, rather than to expose NC to seeing it, you could not convict of that offence. Again, the real issue is, of course, whether that occurred."[30]

[46] His Honour identified the defence case as being that these acts did not occur.[31]

[47] The learned trial judge drew a distinction between counts 1, 2, 3 and 4 and counts 5, 6, 7 and 8 in relation to the issue of consent. His Honour instructed the jury that as the complainant was under 16 at the time of the alleged conduct referable to counts 1, 2, 3 and 4 that no issue of consent arose. This was to be contrasted with counts 5, 6, 7 and 8 where the complainant's consent was at issue. His Honour emphasised that the real issue was whether the acts occurred at all.

[48] His Honour instructed the jury that in respect of count 6, the allegation of anal rape, that there was an alternative charge of incest. His Honour explained that the difference between the two is that the charge of incest does not require consent.

[49] As to the requirement of consent in respect of counts 5, 6, 7, and 8 his Honour explained to the jury as follows:

> "The allegation in respect of those counts is that no consent was given. That's what NC said. He said he didn't consent. However, you have to have regard to all of the evidence, and there is some other evidence which came from NC that he did, at times, say that he would consent to things. For example, at times he said he was bribed or that he gave in and agreed to do things for cigarettes or money. In addition, you've heard his description of events in relation to the allegation where the rapes are supposed to have occurred, and that description of events included that he did not resist – physically resist – although shortly after, he did physically resist and push him away when he said – when he heard his grandmother come home.

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28 AB 199, line 39 to AB 200, line 4.
29 AB 201, lines 40-43.
30 AB 202, lines 15-25.
31 AB 217 at 40-43.

> So you have regard to his description of events, including the way that he said he was anally raped. It being in the open. Him being not confined in any way or forced against something which would have prevented him from simply stepping forward, or doing something like that to avoid what happened. So you have to have regard to all of that evidence in deciding whether it's proved beyond reasonable doubt that he did not consent to any of those acts. That's an issue – an element of each of those offences that has to be proved beyond reasonable doubt. It's not an element of the alternative offence of incest."[32]

[50] His Honour instructed the jury as to the application of s 24 of the *Criminal Code* (Qld) in relation to the issue of consent:

> "So in respect of each of those counts 5, 6, 7 and 8, there is an additional thing that the prosecution will have to prove beyond reasonable doubt before you could convict. They will have to prove beyond reasonable doubt that this possible defence of mistake of fact did not apply. Only if you are satisfied that an act or acts occurred and that NC did not consent to those act or acts, but that it occurred in circumstances where the defendant may have honestly and reasonably believed he was consenting, you would find the defendant not guilty in respect of that act. That is because the defendant is not criminally responsible to any greater extent than if the real state of things had been such as he believed to exist."

[51] His Honour continued:

> "Finally, I emphasise again that there is no burden on the defendant to prove that he made a mistake of fact. The prosecution must satisfy you beyond reasonable doubt that he did not do so. If the prosecution has failed to satisfy you that the defendant did not act under an honest and reasonable mistake of fact, you should find the defendant not guilty. So if the Crown proves to your satisfaction beyond reasonable doubt either that the defendant did not honestly hold the relevant mistaken belief about NC consenting, or that the belief was not reasonable in the defendant's circumstances, then you would find that the defence of mistake of fact did not apply."[33]

[52] His Honour identified the relevant evidence of preliminary complaint and instructed the jury that that evidence may only be used as it relates to the complainant's credibility. His Honour also gave the usual direction in relation to the alleged admissions made by the appellant.[34] His Honour discussed the confessional evidence in detail both in relation to whether the admissions were made and whether they were true.

[53] His Honour also gave the jury a warning about acting on the evidence of the complainant. His Honour identified a number of aspects of the complainant's evidence in giving this warning. These issues included the question of the long delay in the complainant reporting the incidents and a number of inconsistencies in the complainant's account. One of these inconsistencies included the complainant's concession that his description of count 7 was physically impossible and could not

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32 AB 216, lines 8-16.
33 AB 217, lines 14-38.
34 AB 225.

have occurred.[35] His Honour directed the jury to scrutinise the complainant's evidence with great care and that they could return different verdicts on different counts.[36]

[54] His Honour identified the complainant's evidence relevant to each count.

[55] In summarising the rival contentions of the prosecution and defence his Honour specifically identified those contentions relevant to the jury's assessment of the complainant's evidence:

> "Ms Robinson submitted that the Defence assertion that he was not reliable because of his behaviour over time, or that he had lied in the past or had been mischievous, was not a reason to reject his allegations, that the – she suggested that those matters were simply nitpicking, the inconsistencies and reliance on those things in his background. She suggested that there was not established on the evidence that he suffered from any conduct disorder."[37]

> "He (Defence counsel) reminded you of his false complaint to the police – he had someone else in trouble – that reflected adversely on his credit generally. He reminded you of the details of the letter – the referral letter from Dr Elmer in seeking another assessment because of his behaviour. Mr Kissick suggested, in light of all those things, you would find his behaviour antisocial. He was eventually expelled from school for setting fire to someone else's bag and used drugs and alcohol, and even his manner of giving evidence, for example, when referred to the statement and his refusal to answer, all impacted on how you would regard his evidence."[38]

Ground 1 – Inconsistent verdicts

[56] The appellant submits that on the evidence the verdicts cannot be logically reconciled or stand together. As all counts largely relied on the evidence of the complainant, there was nothing to distinguish between the counts so as to explain the differing verdicts.

[57] In respect of counts 1, 2, 3 and 4 the appellant submits that the defence was that the events constituting these offences did not happen. As there was nothing to distinguish both sets of counts the verdicts cannot be logically reconciled or stand together.

[58] Similarly, on an evidentiary basis there was nothing to distinguish the primary allegation in respect of counts 2 and 8, namely that in each instance the appellant had touched his penis in front of the complainant.

[59] As to counts 5, 6 and 7 the appellant submits that if the jury had a reasonable doubt in respect of counts 1 and 2 they should have had the same doubt in respect of count 6. The appellant submits that there are real difficulties with the complainant's evidence especially in relation to count 7. The complainant accepted that his description of this incident was a physical impossibility.

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35 AB 234, lines 1-7.
36 AB 234 and AB 199.
37 AB 264, lines 18-24.
38 AB 266, lines 6-15.

[60] The appellant further submits that the verdicts of not guilty in respect of counts 5, 6 (rape) and 7 are not reconcilable with the verdict of guilty on count 8. If the jury were not satisfied beyond a reasonable doubt in respect of consent in relation to counts 5, 6 and 7 then such doubt should have been entertained in respect of count 8.

[61] As the verdicts cannot be reconciled or classified as merciful verdicts, the appellant submits that there is a real possibility that the guilty verdicts were entered as a result of compromise.

[62] The respondent submits that the acquittals on counts 1 and 2 are explicable by reference to the cross-examination of the complainant concerning the incident in which the complainant's penis was swollen after swimming in a creek or river. The jury could have accepted the appellant touched the complainant's genitals while entertaining a reasonable doubt that such conduct amounted to an offence. Counts 3 and 4, as submitted by the respondent, were not affected by such evidence. The appellant submits, however, that the evidence of the complainant having a swollen penis does not account for the jury's verdict of not guilty in respect of count 2.

[63] As to counts 5, 6 and 7 the respondent submits that the jury's verdicts, including that of guilty to incest as the alternative to count 6 alleging anal rape, are readily explicable by reference to the issue of consent, in the event the jury was satisfied that the sexual acts occurred but had a reasonable doubt about consent. The jury was, consistent with the directions, obliged to acquit the appellant on counts 5 and 7 while convicting of incest on count 6.

[64] The respondent further submits that the verdicts of the jury concerning counts 1 to 7 can be understood as not involving a rejection of the complainant's testimony that the physical acts occurred. Understood this way the respondent asserts that there is no inconsistency with the conviction on count 8.

[65] In *R v GAW*[39] Philippides JA (with whom Margaret McMurdo P and Holmes JA (as the Chief Justice then was) agreed) by reference to *M v The Queen*,[40] *Jones v The Queen*[41] and *MacKenzie v The Queen*[42] summarised the principles concerning inconsistent verdicts as follows:

> "[19] The principles concerning inconsistent verdicts are well-established. Where alleged inconsistency arises in the jury verdicts upon different counts affecting an accused, the test is one of 'logic and reasonableness'; that is, whether the party alleging inconsistency has satisfied the court that the verdicts cannot stand together because 'no reasonable jury, who had applied their mind properly to the facts in the case could have arrived' at them.
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> [20] However, respect for the jury's function results in a reluctance in appellate courts accepting a submission that verdicts are inconsistent in the relevant sense, so that:

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39 [2015] QCA 166 at [19]-[22].
40 (1994) 181 CLR 487.
41 (1997) 191 CLR 439.
42 (1996) 190 CLR 348.

> '... 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.'

[21] In that regard, 'the view may be taken that the jury simply followed the judge's instruction to consider separately the case presented by the prosecution in respect of each count and to apply to each count the requirement that all of the ingredients must be proved beyond reasonable doubt'. Alternatively, the appellate court may conclude that the jury took a merciful view of the facts on one count; a function which has always been open to a jury.

[22] It is only where the inconsistency rises to the point that the appellate court considers intervention is necessary to prevent possible injustice that the relevant conviction will be set aside. While it is impossible to state hard and fast rules, the following provide examples of relevant inconsistency; where the different verdicts returned by the jury are an affront to logic and common sense which is unacceptable, and strongly suggests a compromise in the performance of the jury's duty, or which suggests confusion in the minds of the jury, or a misunderstanding of their function, or uncertainty about the legal difference between specific offences, or a lack of clarity in the instruction on the applicable law."

[66] In *R v Conn; R v Conn; Ex parte Attorney-General (Qld)*[43] Sofronoff P (with whom Fraser JA and North J agreed) observed that it is not irrational for a jury to accept a witness's evidence in relation to some events while holding a reasonable doubt in respect of other events sought to be proved by the same witness, particularly when that witness is the only witness to prove all issues. Juries are invariably directed to consider each count separately by reference to the evidence applicable to that count.[44] Sofronoff P further stated:[45]

> "Frequently, the argument that a miscarriage of justice has occurred and can be demonstrated by what is said to be an irreconcilable inconsistency of verdicts is raised in cases in which the sole evidence implicating an accused is the uncorroborated evidence of a complainant. There will often have been a delay in the making of any complaint. Commonly it can then be said that there is no apparent difference in the character or quality of the evidence given by a complainant to prove each of the counts. However, it cannot be maintained that these factors alone would justify a conclusion that there has been a miscarriage of justice in any case in which a jury has convicted on some counts and acquitted on others. That is so because the significance

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43 [2017] QCA 220.

44 At [44] citing *R v Markuleski* (2001) 52 NSWLR 82 at [31]-[34] per Spigelman CJ.

45 At [45].

> of features like these will also depend upon the facts of a particular case, the way the trial has been conducted by the prosecution and the defence and the content of the Judge's directions to the jury."

[67] Importantly for present purposes Sofronoff P observed:

> "It must constantly be borne in mind, when considering such a ground of appeal, that it is not for the Crown to justify or to rationalise verdicts of conviction and acquittal. Differing verdicts are inherent in trials of multiple counts, particularly when a jury is warned against propensity reasoning. It is for an appellant to demonstrate a miscarriage of justice by showing, by reference to the facts, the evidence, the witnesses and the conduct of the trial, that the differing verdicts are actually irrational or repugnant to each other and not merely that they might be."[46]

[68] In the present appeal the appellant has failed to demonstrate that the differing verdicts are actually irrational or repugnant to each other.

[69] Any assessment of the complainant's evidence in relation to count 1 was affected by the incident concerning the complainant having a swollen penis. Although the complainant insisted that it was his grandmother rather than his grandfather who assisted in examining his penis, both versions had common elements. Both versions, for example, involved the complainant having a bath at his grandparents' house at H Street.

[70] The jury, in assessing the quality of the complainant's evidence in relation to count 1, would have observed that the complainant initially refused to answer any questions concerning his penis becoming swollen after swimming. It was only after the trial judge ruled that the evidence was relevant that the complainant answered questions in relation to the incident. The evidence of this incident permitted the jury to have a reasonable doubt that any touching of the complainant's penis by the appellant on this occasion was indecent. After explaining the meaning of the word "indecent" the learned trial judge instructed the jury in the following terms:

> "Indecency must always be judged in the light of time, place and circumstance, that is, you look at the context in which the touching occurred."

[71] In applying this instruction, the jury may have formed a reasonable doubt as to this element of the offence on the basis that any touching by the appellant of the complainant's penis was for the purpose of assisting his grandson with a medical condition.

[72] Count 2 was alleged to have occurred at the same time as count 1. It was open to the jury to reason that as the complainant was mistaken as to the circumstances concerning count 1, he may be similarly mistaken in relation to count 2. Even if one accepts the appellant's submission that the swollen penis incident does not fully explain the jury's verdict in relation to count 2, there is a further rational basis for the verdict of not guilty. By reference to the evidence quoted in [9] above for count 2, it is apparent that there was no allegation that the appellant exposed his penis to the complainant. As submitted by the respondent, there was a "vagueness" to the

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46 At [71].

description given by the complainant of the appellant's actions.[47] His Honour specifically reminded the jury that the alleged act of masturbating involved the appellant doing so inside his own pants and without exposing his penis. There was a real issue as to whether the jury was satisfied beyond reasonable doubt that the act was done simply for the appellant's sexual gratification rather than to expose the complainant to seeing him masturbate. This is to be contrasted with the complainant's evidence concerning count 8. The complainant was approximately six years older at the time. Count 8 involved the appellant masturbating himself with his pants pulled down to his knees while he was driving.

[73] Similarly the quality of the complainant's evidence in relation to counts 3 and 4 may be contrasted with that in relation to counts 1 and 2. Although the appellant was the same age as he was for counts 1 and 2 his evidence in relation to counts 3 and 4 was more detailed. On the complainant's version, there could be no doubt that the appellant's conduct constituted indecent dealing with the complainant. The conduct occurred in the context of the appellant offering and giving the complainant a $10 note. The complainant was able to provide details of where and when the conduct occurred, namely in the shed at F Street and after school. The complainant could also recall that he was wearing his school uniform. A rational basis for the verdicts in respect of counts 3 and 4 is that the jury accepted the evidence of the complainant.

[74] The verdicts for counts 5, 6, 7 and 8 are readily explicable by reference to the issue of consent. These four counts all required proof of an absence of consent. The appellant's submission that if the jury were not satisfied beyond a reasonable doubt in respect of consent for counts 5, 6 and 7 then such doubt should also have been entertained in respect of count 8 should be rejected. The evidence relevant to the issue of consent was significantly different for counts 5, 6 and 7 as compared to count 8. First, the complainant was two years older when count 8 was committed. In his own words the complainant "knew it was the wrong thing to do at that time". Secondly, the complainant's evidence was that he had refused the appellant's request "to play with him" prior to the appellant masturbating. Further, the complainant's evidence was that he was in shock and still mortified from what had happened previously. Thirdly, unlike counts 5, 6 and 7, count 8 did not involve any offer of reward, such as money or cigarettes. Fourthly, there was specific evidence in respect of counts 5, 6 and 7 relevant to consent. This included the following facts. The complainant did not resist. He only pushed the appellant away when he heard his grandmother arrive. The complainant then ran to the bathroom and ejaculated. The complainant was not confined. The complainant's statement did not support his evidence that throughout the conduct constituting counts 5, 6 and 7 he repeatedly said "no" to the appellant.[48]

[75] The appellant's submission that if the jury had a reasonable doubt in respect of counts 1 and 2 they should have had the same doubt in respect of count 6 should also be rejected. The quality of the evidence for count 6 is different to that for counts 1 and 2. At the time of the commission of count 6 the complainant was four years older. Count 6 was not affected by the incident concerning the complainant having a swollen penis. Count 6, unlike counts 1 and 2 involved an offer of cigarettes in exchange for sexual acts. There was also Ms EL's evidence that when confronted the appellant admitted

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47 Court of Appeal, T1-9, line 17.

48 See [16] and [47] above.

that he had done things to the complainant "because he wanted money and smokes".[49] The complainant's description of the circumstances and conduct in respect of count 6 as outlined in [16] to [18] above was more detailed than the evidence he gave for counts 1 and 2.

[76] As to the inconsistencies in the complainant's evidence as to how count 7 occurred, these inconsistencies were specifically identified to the jury by the learned trial judge. Given that the complainant was giving evidence close to 18 months after providing a statement to police, some discrepancies were likely to arise. The jury was properly instructed to scrutinise the complainant's evidence with great care in light of these inconsistencies.

[77] Ground 1 fails.

Ground 2 – Are the verdicts in respect of counts 3, 4, 6 and 8 unreasonable and unsupported having regard to the evidence?

[78] The relevant principles in relation to this ground were recently identified by Fraser JA (with whom Gotterson and McMurdo JJA agreed) in *R v Clapham*:[50]

> "The principles to be applied in determining whether a verdict of a jury is unreasonable, or cannot be supported having regard to the evidence, are collected in *SKA v The Queen*. The question is not whether there is as a matter of law evidence to support the verdict. Even if there is evidence upon which a jury might convict, the conviction must be set aside if 'it would be dangerous in all the circumstances to allow the verdict of guilty to stand'. The Court is required to make an independent assessment of the sufficiency and quality of the evidence at trial and decide whether, upon the whole of the evidence, it was reasonably open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offence of which he was convicted. In considering this ground of appeal the 'starting point … is that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, and the jury has had the benefit of having seen and heard the witnesses', but:
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> > 'In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred.'
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> In *R v Baden-Clay* the High Court emphasised that the jury is 'the constitutional tribunal for deciding issues of fact' and observed that, 'the setting aside of a jury's verdict on the ground that it is "unreasonable" … is a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial', 'a court of criminal appeal is not to substitute trial by an appeal court for trial by jury', and 'the ultimate question for the appeal court "must always be

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49 See [27] above.

50 [2017] QCA 99 at [4]-[5].

> whether the [appeal] court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty".'"

[79] The issue is whether this Court, as an appellate court, is of the opinion that the verdicts of the jury should be set aside on the ground that they are unreasonable, or cannot be supported having regard to the evidence pursuant to s 668E(1) of the *Criminal Code* (Qld).[51]

[80] In *R v Conn; R v Conn; Ex parte Attorney-General (Qld)*[52] Sofronoff P identified the following principle from *M v The Queen*:[53]

> "In *M v The Queen* the plurality emphasised the kind of case in which an appellate court might conclude that a reasonable jury ought to have entertained a doubt. Their Honours said:
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> > 'If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence.'"

[81] In the present case the complainant gave evidence in person. He was 24 at the time of giving his evidence, recounting events alleged to have taken place when he was 14, 18 and 20 years of age. The allegations all concerned his paternal grandfather. He was cross-examined for approximately two and a half hours. The jury therefore had the benefit of having seen and heard the complainant.

[82] The present case was not one where the prosecution rested solely upon the evidence of the complainant. There was the confessional evidence of the appellant given by the complainant's mother and father outlined in [30] and [33] above. These admissions included the appellant agreeing that he "touched NC", a reference to the complainant wanting smokes and money and the appellant stating that he made the complainant do things to him for money. There was also evidence of the appellant referring to sexual abuse when he was a child and of the appellant saying he was sorry. The jury also heard evidence of the emotional state of the complainant when he made his preliminary complaints in his bedroom at the G property and subsequently at Rainbow Beach. The jury also heard evidence of the appellant's distressed state when confronted and being "totally incoherent and sobbing" at the consultation with Dr Elmer.

[83] The appellant's admissions supported the complainant's evidence particularly in respect of counts 3, 4 and 6 involving as they did an offer of money (counts 3 and 4) and cigarettes (count 6).

[84] The appellant submits that there are a number of features which render the verdicts in relation to counts 3, 4, 6 and 8 unreasonable and ones that cannot be supported having regard to the evidence. The first is the lengthy delay in the complainant

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51 See *R v Schafer* [2017] QCA 208 at [131] per Philippides JA.

52 [2017] QCA 220, [24].

53 (1994) 181 CLR 487 at 494 per Mason CJ, Deane, Dawson and Toohey JJ.

reporting the appellant's conduct to police. Associated with this feature is the lack of timely complaint coupled with the lack of medical and forensic evidence. The effective delay may readily be explained by the fact that the allegations concerned the complainant's paternal grandfather. The complainant was fearful that he would not be believed. This fear was confirmed by his father's reaction when the complainant raised the issue, which was to physically assault the complainant and accuse him of lying.

[85] Another feature relied on by the appellant is the complainant's evidence that he spent considerable time with his grandparents. As submitted by the respondent however, the fact that the complainant continued to spend time with his grandparents despite the abuse is not itself a remarkable feature. It can be assumed it is very difficult for a young person to complain immediately of abuse by a trusted family member. The fact that the complainant spent time with his grandfather is not inconsistent with the complainant having been sexually abused.[54]

[86] The appellant also points to the behaviour and characteristics of the complainant including the diagnosis of ADHD, his drug use, his expulsion from school and the false complaint he made to the police in relation to his uncle. All these matters were mentioned by the learned trial judge in the course of his summing up when dealing with the Defence contentions.[55] It was for the jury to determine how each of these matters would be taken into account in assessing the evidence of the complainant. None of these matters either separately or taken together support a conclusion that the complainant's evidence was so unreliable that it was incapable of supporting the verdicts in respect of counts 3, 4, 6 and 8. The false allegation against his uncle, for example, did not involve any allegation of sexual abuse. The complainant's expulsion from school was referrable to an incident where he set another student's schoolbag on fire. As to the complainant's drug use, his evidence was that he had been clean for approximately one year prior to discussing the appellant's sexual abuse with his father and Ms DQ at Rainbow Beach.

[87] The appellant also refers to the inconsistencies between the complainant's evidence-in-chief and his statement to police. These inconsistencies are outlined in [18] to [20] above. In particular the appellant relies on the fact that there was no preliminary complaint of anal rape or anal sex. The complainant's own recollection of his conversation with his mother was that he informed her that his grandfather had "molested and raped" him.[56] His mother's evidence was not as specific. Her evidence was that the complainant told her that "Grandad had been doing things to him".[57] Ms EL did recall the complainant saying that his grandfather "used to suck him off".[58] According to HC the complainant told him that his grandfather had been touching him in different ways. Irrespective of whether in his preliminary complaint to his parents the complainant conveyed that the appellant had anally raped him, he did convey sufficient details to his father so as to trigger a violent reaction from his father. This reaction included physically assaulting the complainant, calling the complainant a liar, accusing the complainant of alleging that his grandfather was a paedophile and ultimately resulting in his parents confronting the appellant.

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54 Submissions on behalf of the Respondent, [30].
55 AB 265, line 45 to AB 266, line 15.
56 AB 61, T1-49, line 10.
57 AB 114, T2-50, lines 44-45.
58 AB 115, T2-51, lines 18-19.

[88] The inconsistencies in the complainant's evidence were the subject of a specific direction by the trial judge and also constituted part of his summary of the Defence contentions.[59] As summarised by his Honour, the Defence contention was that by reference to these inconsistencies the jury should conclude that the complainant was "entirely unreliable". As I have already observed however, this was not a case where the prosecution was wholly dependent on the reliability of the complainant's evidence. Further, the complainant's evidence in relation to counts 3, 4, 6 and 8 as discussed above was more detailed than his evidence for counts 1 and 2. The offer of money, namely $10, for counts 3 and 4 and of cigarettes for count 6 was generally supported by the appellant's admission that the complainant "wanted smokes and money all the time" and that the appellant made the complainant "do things to him for money".[60]

[89] As to count 8, while there was an inconsistency in the complainant's evidence identified in [20] above the complainant, who was 20 years of age at the time of the commission of this offence, rejected any suggestion that the episode never happened. It was a matter for the jury to assess the complainant's evidence in respect of count 8 in light of this inconsistency. It cannot be said that this inconsistency renders the verdict either unreasonable or unsupported by reference to the evidence.

[90] I consider that upon the whole of the evidence it was reasonably open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of counts 3, 4, 6 and 8.

[91] Ground 2 fails.

Disposition

[92] The appeal should be dismissed.

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59 AB 234 and AB 266, line 23 to AB 267, line 28.

60 See [28] above.