SUPREME COURT OF QUEENSLAND

CITATION:	*R v MCU* [2018] QCA 194
PARTIES:	**R** **v** **MCU** (appellant)
FILE NO/S:	CA No 67 of 2017 DC No 63 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Townsville – Date of Conviction: 16 March 2017 (Smith DCJ)
DELIVERED ON:	21 August 2018
DELIVERED AT:	Brisbane
HEARING DATE:	1 December 2017
JUDGES:	Fraser and Morrison JJA and Henry J
ORDER:	**Dismiss the appeal.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where a jury found the appellant not guilty of two offences and guilty of two offences of indecent treatment of a child under 16 years with the circumstances of aggravation that the child was under 12 years and was a lineal descendant – where the offending was said to have occurred over two weekends – where the complainant's evidence about the timing and order of the counts was inconsistent – where the appellant argued that the acquittals on counts 2 and 3 indicated that the jury had a doubt about the complainant's reliability – whether the differing verdicts of the jury could be reconciled – whether the guilty verdict was impermissibly inconsistent and unreasonable CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE AND INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellant argued that there were significant inconsistencies in the complainant's evidence, and between the complainant's evidence and the preliminary complaint evidence – where the complainant's evidence about the timing and order of the counts was inconsistent – where the appellant argued that the circumstances leading to the acquittals to counts 2 and 3 necessarily created a reasonable doubt also on counts 1 and 4

– whether the inconsistencies in the evidence made the guilty verdicts on counts 1 and 4 unreasonable

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 Clapham [2017] QCA 99, applied

COUNSEL: M Hibble for the appellant
J A Wooldridge for the respondent

SOLICITORS: Ruddy, Tomlins & Baxter for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** After a trial in the District Court, a jury found the appellant not guilty of two offences and guilty of two offences of indecent treatment of a child under 16 years, with the circumstances of aggravation that the child was under 12 years and was a lineal descendant. The particulars of each count on the indictment together with the verdicts of the jury are as follows:

Count	**Particulars**	**Verdict**
1	The defendant placed the complainant's hand on his penis whilst on the bed. (The incident when the accused showed the complainant "his ticklish spot")	Guilty
2	The defendant touched the complainant's vagina area on the inside of her clothing whilst on the ride on mower. (The ride on mower incident)	Not guilty
3	The defendant touched the complainant's vagina area on the inside of her clothing whilst in the shed. (The shed incident)	Not guilty
4	The defendant touched the complainant's vagina on the inside of her clothing whilst in his bedroom while Peppa Pig was on TV. (The Peppa Pig incident)	Guilty

[2] The appellant has appealed against his convictions on counts 1 and 4 on the grounds that they were unreasonable as they were inexplicably inconsistent with the acquittals on counts 2 and 3, and the guilty verdicts are otherwise unreasonable and cannot be supported having regard to the evidence.

[3] The appellant is the complainant's grandfather. The complainant was eight years old when the appellant was alleged to have committed the offences during two successive weekends in late April and early May 2015. Count 1 charged an offence on or about (Saturday) 25 April 2015 and count 4 charged an offence on a date unknown between (Friday) 24 April 2015 and (Monday) 4 May 2015, and counts 2 and 3 each charged an offence on (Saturday) 2 May 2015. The complainant made a video recorded statement to police two days after the second of the two weekends and she gave pre-recorded video evidence about a year later.

[4] A significant feature of the exculpatory evidence of the appellant and his wife was that the complainant's evidence of the alleged offence arose out of her habit of playing games with the appellant in which she pretended to be his teacher. At one point in cross-examination during the complainant's pre-recorded evidence the complainant agreed that she played games with the appellant in which she would make up stories about him, including a game in which the complainant pretended to be the teacher and she made up a story about the appellant doing the wrong thing. When it was put to the complainant that she had made up the story she had told her mother about the appellant doing the wrong thing, she answered "Wait, what do you mean?" Defence counsel put to the complainant that she and the appellant played games in which she made up things and this story was just a game they played. The complainant replied, "Yeah. But he did actually touch me on the private."

[5] Before referring to the evidence of the other witnesses, I will summarise material aspects of the complainant's evidence with reference to the count to which that evidence relates.

Count 4

[6] In the police interview, after the complainant answered some introductory questions she referred to telling her mother, and that her mother started crying "about this … I was over at my grandpas one day and he was tickling me and he thought my tickle spot was on my private and he started tickling there and I didn't like it and I kinda said stop but he kept doing it … And my grandma was outside cooking … We were first all playing and my sister was in there and my cousin and then umm they left to go out and help my grandma cook and then he started tickling me and then I didn't feel that it was the right place to be tickling me and I didn't like it so I like was saying stop stop and he didn't know what I was talking about but I thought he did and then he kept doing it and then I went out with my grandma and helped her cook because I didn't like how he was doing it."

[7] When the police officer asked the complainant to tell her more about when they were over at grandpa's house, the complainant referred to going on the "rider" (count 2) and the appellant having a shower. The complainant said, "and then I went into his room and my cousin was in there, just my cousin. My sister was out helping my grandma and … my cousin saw it and she went to do something but she didn't know what to do then … my cousin tried to help me by saying stop it pa but my grandpa didn't know what was going on. He thought maybe she was only trying to be silly." (Later in the interview, the complainant said that her cousin was trying to tell the appellant to stop "but my grandpa thought she was trying to be silly but she was actually being serious". But the complainant then said that her cousin was not in the bedroom when the appellant was tickling her but she came in and just left; and when asked whether anyone had seen the appellant tickling her on her fake tickle spot, the complainant said that no one had.)

[8] After making statements about count 2, the complainant answered a question about where the appellant was tickling her: "In his bedroom and on the ride on and sometimes in his shed, that was it". After further questions and answers mostly concerning the shed incident (count 3), the complainant was asked to tell the police officer about another time she had mentioned. The complainant referred to the bedroom: "I went into the bedroom and my sister and cousin were over that day and they were sorta playing and then they went out and I lied down and then we sorta talked … and then he started to tickle me and I sorta said stop and he thought I was

trying to be crazy but it was actually being serious". The complainant said that "the bedroom time" "was the next day and … after he tickled me, I went out to help my grandma cook". The complainant was asked to tell more about the time of the day that the bedroom time happened. She replied "well first when we went over there we were all playing in the backyard and then umm my grandpa sorta of called me into his room and I sort lied down with him and then he started tickling me and then I went back out and helped my grandma".

[9] The complainant said that the appellant turned his television on and they were watching her favourite show (which she said was Peppa Pig) "and then he started to tickle me and then I sorta didn't feel comfortable and then I sorta went out after one or two minutes and I didn't watch the rest of it". The complainant went out to play with her cousin and her sister. When asked to tell more about how the appellant was tickling her in the bedroom time, the complainant said that he "kept it in the one spot and he actually didn't start moving it he just kept it in the one spot … the part … The pee comes out of … he sort had his hand like there" for about three seconds "and then he like took it out because my grandma was coming in". The complainant was wearing a shirt and loose pants but not loose undies. She said the appellant was "actually touching it, like feeling my skin … Cause I could feel his hand in my skin."

[10] The complainant said she had told her mother, her mother had told her aunt, and then her mother had told her grandmother. The complainant had not talked about it to anyone else. Her conversation with her mother was on the last weekend and it was also then when they had to go and pick up the complainant's sister because her mother did not feel comfortable with her sleeping over.

[11] The complainant was asked to tell more about the time of day for the shed time, but she referred to the Saturday when the appellant "called me into his room and we started to watch the Peppa Pig and then he sorta started to tickle me and then I went outside it was sorta getting late and then I went out to play and then I sort of, after I played for 5 or 10 minutes I went back in and helped my grandmother cook".

[12] In the complainant's pre-recorded evidence she said she had watched the DVD of the police interview and everything she had told the police officer was the truth.

Count 2

[13] The second incident mentioned by the complainant in her police interview was that, "Well first again we went on the rider and then we were coming inside and he went for a shower and then I went into his room and my cousin was in there, just my cousin …". When asked to tell more about the appellant being on the ride on, the complainant said, "well they were mowing and at the end umm I went on the ride on with him and he said to turn the thing and then he started tickling me on the ride and I said yeah I've had enough and he stopped and I walked off". The complainant said the tickling made her feel "not the right place to be tickling me". The appellant tickled her on her private part, which was not for tickling. The complainant demonstrated how the appellant tickled her and said she showed her mother. She was wearing a t-shirt and her pants were a little loose and her undies were a little bit loose. He moved his hand around and then he just had it on the one spot and she did not like the place where she had it. The appellant's hand was inside her undies and actually touching her skin. He tickled her on the ride on "About maybe for ummm 3 minutes". The complainant then went to help her grandmother mow because she

didn't feel safe where the appellant was tickling her, and after that she went to help her grandmother cook.

[14] The complainant's grandmother was mowing on the other side. Subsequently in the interview, the complainant said that when she was "turning into the spot he sorta started to do it and I just sorta like I'd said stop I don't want to go on the ride on anymore and he stopped I got off the ride on and I went inside". It was in the morning because it was 9 o'clock when they started to mow.

[15] In cross-examination in the complainant's pre-recorded evidence, she agreed that the appellant mowed the lawn on the morning of the Saturday before she spoke to police. The complainant agreed that the appellant drove the ride on mower up the footpath and back down the driveway before stopping near the gates. The appellant drove her on the mower and went down the driveway. She did not get off the lawnmower at the shed but got off at the gate.

Count 3

[16] The complainant said in her police interview that she was in the shed with the appellant and was going to give him a flower, "and then he said I'm going to tickle you and he sorta like did it and then I sorta said stop and he stopped and then I ran outside of the shed and I went inside to my grandma and I just watched TV and that's all I did". When asked to tell the police officer everything about the shed time and start from the very beginning, the complainant gave the same account, with one exception. Instead of saying she went inside to her grandmother and just watched TV, she said that she went inside "and I started to sit down and stayed with my grandmother for the rest of the day because I didn't like it". She said that this was "last weekend". She described the shed time as being on Saturday. When asked how she knew that, the complainant said, "Saturday was the ride on and then the bedroom was Sunday".

[17] The complainant said that the appellant was putting his mower away "and then he just did it to me". The appellant "was like actually moving his hand around. He was wasn't stopping and doing that he kept moving it around and sorta had his hand like this tickling". The appellant thought her private was a tickling spot but it actually was not. The complainant thought that the appellant tickled her for "sixty seconds cause it wasn't a long time".

[18] When asked what she was wearing, the complainant said she was wearing "the same thing" and "Mum just quickly washed it". The complainant referred to shirt, loose pants and "loose undies, a little, well tight undies that time". The complainant said that the appellant's hand was on the inside of her shorts; "he always had it on the inside", and it was inside her undies. The complainant said that when she ran inside and tried to tell her grandmother she was too busy helping her sister doing some cooking.

[19] The police officer again asked the complainant to tell more about the time of day the shed time was. The complainant responded that it was on the same day as the ride on mower incident and after he finished. The complainant "went to give him a flower and umm he said thank you and then he started to tickle me and then I didn't like it and then I sorta said stop but he said I was joking again and then I ran straight out and then helped my grandmother."

[20] In cross-examination during the complainant's pre-recorded evidence, she agreed that when the appellant put the lawnmower back in the shed he cleaned it first, he put it back in the shed, and then he put the other things back in the shed like the car he had taken out to be able to get the lawnmower out. She remembered showing the appellant a flower she had got from a tree, she told him that she wanted to show him something in the tree, he went out with her, then she showed him a bird. The appellant then went back to cleaning the mower. She recalled the appellant using the compressor to clean the mowers and blowing the compressor at the complainant's grandmother; the complainant laughed at that because she thought it was funny. The complainant and her grandmother then went back inside. The complainant agreed this was on the Saturday. She said that the appellant touched her in the shed on the Saturday when he was putting the mower away after he had cleaned it.

[21] When it was put to the complainant that she had agreed that she and her grandmother left the appellant while he was cleaning the mower, the complainant said that she went inside and got bored, and she went back out. The appellant had finished cleaning and was putting the mower away. The complainant denied that the appellant came back into the house after cleaning the mowers without the complainant having gone out there to the shed. She said she remembered going back out.

Count 1

[22] Most of the police interview concerned occasions when the complainant referred to the appellant having "tickled" her. Towards the end of the interview the police officer asked the complainant whether there was anything else she wanted to tell her about those times. The complainant said that there was not. The police officer told the complainant that the complainant's mother had said that the appellant got her to touch his "ticklish spot". (The complainant had not previously referred to this kind of tickling and nor had she described the appellant having a "ticklish spot" which might be regarded as a reference to his penis.) When asked whether anything like that happened, the complainant said, "he only just said touch it and I only touched it for one second and I didn't do anything else … that was like later in the day and it just and then mum came to pick us up so we didn't eat tea and came to pick us up and I went straight to bed". The complainant elaborated: "He sorta grabbed my hand like he grabbed my hand an actually put it there and I why are you doing that? He said that's my ticklish spot and I just moved it was like for one second and then I just moved my hand because I don't want it to be there, I'd rather keep my hands to myself and then that was all".

[23] Subsequently the complainant referred to walking into the appellant's room and her sister being there but not knowing anything about it because she was "twisting and turning and all that". The complainant then referred to not remembering anything but just remembering that she lay down and the appellant asked her to do it and she didn't want to. The appellant told her that it was "his ticklish spot" and "don't tell anyone but I told mum and then mum didn't feel ok with that". The complainant explained that the appellant put her hand "On the same part where he was tickling me, private"; her subsequent description made it plain that this was the appellant's penis. In response to further questioning, the complainant said that the appellant "only just let me touch his shorts and I didn't want to so I just moved my hand away".

The complainant's other evidence about the order of the events

[24] The complainant made various other statements in which she sought to identify the day or weekend upon which the appellant engaged in the alleged conduct. After answering questions in the police interview about counts 2 and 3, she said that the shed time was "last weekend" (apparently the second weekend) and that nothing else happened on that weekend. They had spent two weekends at the appellant's house and the "shed time" was "The other day, not … umm Saturday"; Saturday was the ride on (count 2) and then the bedroom was Sunday (in context, apparently a reference to count 4 but it might also encompass count 1). The complainant also said that she went to the appellant's house on both days last weekend (apparently the second weekend).

[25] When asked in the police interview to identify the order in which the incidents occurred from the start of the weekend to the end, the complainant referred to the start being the ride on (count 2), and then the shed (count 3), and then the next day it was the bedroom (again apparently referring to count 4, although it might also have encompassed count 1). The complainant also said that the ride on was on Saturday and then the bedroom was on Sunday. In the context of questions about count 1 in the police interview, when asked to tell more about when that happened the complainant said that it was "not last weekend the other weekend". She agreed that it was not the same weekend as the ride on time and the shed time. The complainant said that it was the weekend before that (which would place count 1 on the first weekend). She did not answer a question about what day it was. The complainant said that it was just her and her sister, not her cousin who were at the appellant's house with her at the time. The complainant's grandmother was outside gardening and the appellant was in his room "again".

[26] In the complainant's pre-recorded evidence, defence counsel put to the complainant that she and her sister went to the appellant's house on the weekend before she spoke to the police officer, but they went there only on the Saturday. The complainant responded that, "I didn't really know, because I couldn't remember from – because I forgot all about it … couldn't really remember it. So I got mixed up with the day." The complainant also said in cross-examination that: the appellant getting her to tickle him (a reference to count 1) was on the same day that he did it to her (count 4); the first tickle occurred on the ride on lawnmower (count 2), the second tickle happened in the shed (count 3), and the tickle on the bed (count 1) happened on the next day; it was on the Sunday that the appellant got her to tickle him (count 1); that was after the appellant tickled her on the bed (count 4); the appellant tickled her on the bed (count 4) when Peppa Pig was on; and when the appellant asked her to touch his private (count 1), the complainant could not remember whether Peppa Pig was on but the TV was on and she wasn't paying any attention to it.

[27] The complainant agreed that the appellant did not tickle her on Anzac Day, but she then said that she could not remember Saturday 25 of April or if it was Anzac Day or something like that. The complainant then agreed that she remembered having to march in the Anzac Day Parade early on Saturday 25 April. Her grandmother watched the parade. Later that morning they went back to the appellant's place. She said she couldn't remember if she stayed over the next day but did not think that they had.

[28] The complainant said in answer to a question which was not leading that the appellant got her to touch his ticklish spot on the same day that she told her mother. She said that was the day when her sister went sleeping over but she couldn't remember what night that was. The complainant agreed she told police about the time she had been tickled "the weekend that had just gone". When asked directly whether the appellant got her to tickle him on that same weekend, she responded "Yes. It was on the same day that he done it to me." In response to leading questions, she agreed that the first tickle occurred on the ride on lawnmower, the second tickle happened in the shed, and the tickle on the bed happened on the next day. When asked when the appellant got her to tickle him "in relation to those", she responded "On the – on the day that he – that he tickled – like, on the next day, that he – on the bed day, that he tickled me." She agreed with a leading question that it was on Sunday that the appellant got him to tickle him. She gave a very uncertain answer about whether it was the day before or the day after the Peppa Pig incident. She said that they were "still in the room, because he got my hand and put it on his private."

Other evidence at the trial

[29] The complainant's cousin gave evidence. She was 17 at the time of the alleged offences and 19 when she gave evidence about a year later. The appellant and his wife were her mother's parents. She marched in the Anzac Day Parade in 2015. After the parade had finished she went to her grandparent's house with the complainant and her sister. They were driven by her aunt (the complainant's mother), who dropped them off at the house. The complainant's cousin saw the complainant go with the appellant into the shed. No one else went with them into the shed. She and the complainant's sister and their grandmother made some snacks whilst the appellant and the complainant were still in the shed.

[30] She, the complainant and her sister, and their grandmother, ate some food. After they finished eating, she, the complainant's sister and their grandmother went to one room to lie down and the appellant and the complainant went into the appellant's and his wife's bedroom. She saw the appellant and the complainant go into that room together. She did not see anyone else go into the room. The complainant's cousin, the complainant's sister and their grandmother lay in the spare bedroom discussing what to have for dinner for about 15 minutes. After that the four of them got up to cook the meal. The complainant's cousin thought that the complainant's sister went to get the complainant to ask if she would like to help with dinner. The complainant's cousin saw the complainant's sister go into the bedroom where the complainant was but could not see into that room. The complainant's cousin did not go back to that house on the following weekend and had not been back there since Anzac Day.

[31] In cross-examination the complainant's cousin adhered to her evidence. She agreed that she did not go into the appellant's room at any time or call out to him to tell him to stop.

[32] The complainant's mother gave evidence. After the Anzac Day Parade on 25 April 2015, the complainant's mother drove her daughters and their grandmother and cousin to the appellant's house and left them there at around 12.30 pm. The girls were wearing their school uniforms. She collected the complainant and her sister at about 5 or 5.30 pm and took them straight home. She remembered taking the

children for a drive on the following day but couldn't remember if she took them to the appellant's house. She thought the children were with her for the whole day. On that Sunday whilst they were in the car, they complainant said, out of the blue, "[the appellant] told me he's got a ticklish spot, but I'm not allowed to tell anyone". The complainant's sister got upset because she wanted to know the secret and the complainant did not say any more about the topic.

[33] On the following Saturday, 2 May, the complainant's mother took the complainant and her sister back to the appellant's house because they wanted to visit. The complainant went in the morning and her sister went after an activity she attended in the morning. The complainant's mother dropped the complainant at the house just before 9 am. Later in the morning she took the complainant's sister to the house. She returned to the house at around 5.30 or 6 pm and thought she had dinner at the house with her daughters and her parents. After dinner she took the complainant home with her, leaving the complainant's sister at the house. The complainant's mother and the complainant had a shower together. The complainant said that she had forgotten to tell her where the appellant's ticklish spot was. When the complainant's mother asked where, the complainant said that it was his private part. The appellant had told her that was where her ticklish spot was too.

[34] The complainant's mother asked the complainant whether the appellant had ever "asked her to touch her there". She said yes. The complainant's mother asked the complainant to show her how and the complainant put her hand in front of her private part and rubbed it. (Subsequently, the complainant's mother was asked about the complainant's action and said that the reference to "private part" was to a penis.) The complainant's mother asked whether the appellant had ever touched her in her ticklish spot. She said "yes"; the appellant would put his hand down her pants and then put his fingers up. The complainant's sister was with their grandmother at the time getting a massage. The complainant tried to ask the appellant to stop but couldn't so she just sat there and said nothing. The complainant said that she did not think it was appropriate. During these disclosures, the complainant's mother was crying. The complainant asked her mother whether she was angry with her for what she had told her. The complainant's mother replied that she was not angry at the complainant but for what the appellant had done. The complainant then told her mother that she hated her and was not going to tell her any more secrets. The complainant asked to go to the appellant's house for breakfast the next morning and the complainant's mother refused.

[35] The appellant gave evidence. He denied that he had sexually touched the complainant, that he had touched her on the private spot, or that he had ever asked her to touch him on his private spot. The appellant said that on Anzac Day 2015 the complainant, her sister and their cousin arrived at the house at about 2.30 pm. He gave a detailed account of what happened that day. The complainant and her sister also came to the house on the following day, 26 April, but their cousin did not come. The appellant again gave a detailed account of what happened that day. The appellant gave evidence that on 25 and 26 April he did not at any stage go into the shed with the complainant and he was not at any stage on the mower with the complainant. The complainant was dropped at his house on 2 May. The children did not go into the shed and they were not allowed into the shed at all.

[36] The appellant said that on 2 May the complainant asked if she could have a ride on the mower. The appellant drove her on the mower from the corner of the house up

the driveway, out on the footpath, and back inside the gate. He was holding his left arm around the complainant and holding onto the steering wheel with the other hand. The appellant's hand did not go anywhere near her private spot. His wife was standing at the gate and held up her hand for him to stop when she arrived. The appellant drove the mower to the shed. The complainant got off and went back to the appellant's wife. The complainant went with the appellant's wife into the house and the appellant put the mower away and locked up the shed.

[37] The appellant gave evidence that he did not at any stage call the complainant into his bedroom; the children did not go into his bedroom when they were at the house; he did not like them in there; and he had a bench full of medication and did not want them in the room. He did not at any stage watch Peppa Pig with the complainant in his bedroom. He did not know what the show was about and had never seen it.

[38] The appellant gave evidence that he had not at any stage told the complainant that his "tickle spot" was his "private" and he had never discussed a tickle spot with her. In the appellant's next answer, he referred to the complainant shocking him when she said, in the presence of the complainant's sister, "you've got a tickle spot". The appellant told the complainant that he did not have that (a "tickle spot") and she knew that. The appellant gave evidence that he put his hand on his left knee and said that it was his tickle spot. The complainant put her hand there and pretended to tickle him. The appellant denied that he had kept any secrets with the complainant. On 3 May there were no grandchildren at the house.

[39] In cross-examination, the appellant denied the prosecutor's suggestions to the effect that he had engaged in the conduct of which the complainant gave evidence. The appellant gave evidence that the complainant and her sister were having a massage with the appellant's wife, "and then I was laying across the end of the bed, and they came in, both [the complainant and her sister] and they wanted to have a lay down on the bed". The appellant said that he stayed there and they jumped up and down on the bed. His wife called out to the children to have a rest. That was on Sunday 26 April. The telephone rang while they were in the bedroom and the complainant's sister spoke on the telephone to her father for a couple of minutes. When the telephone rang the complainant had left the room. The appellant agreed that on Saturday 2 May he did the mowing while the complainant was there. The complainant's sister arrived later in the morning.

[40] The appellant's wife (the complainant's grandmother) gave evidence. On Anzac Day 2015 she went with her daughter and her two grandchildren to the Anzac Day Parade. The appellant's wife's recollection was that her daughter dropped herself, the complainant and her sister, and their cousin, at her home at about 2.40 or 2.45 pm that day. She cooked dinner with the help of her three granddaughters. The complainant's mother joined them at about 5.25 to 5.40 pm and they ate at about 5.45 pm. The complainant's mother took the three children home shortly after dinner, at around about 6.20 to 6.30 pm.

[41] On the following day (26 April 2015), the complainant and her sister visited again. The complainant's mother dropped them off at around 8 am. The appellant had gone to lie down whilst the children were eating lunch. After lunch the complainant and her sister went to lie down with the appellant in his bedroom. The appellant's wife saw the children go into that room. The appellant's wife went to her bedroom. She returned after about five minutes and saw that the appellant was lying in the

middle of the bed and the children were lying either side of him telling stories. The appellant was speaking with them. The appellant's wife returned to her room. She heard the three talking and she heard laughing. The appellant told the complainant to settle down.

[42] The appellant's wife said that the complainant did not go and lie with the appellant in his bedroom as a rule but that it was not unusual. After the appellant told the complainant to settle down, the appellant's wife called out to her. After about ten minutes she went and stood at the door. The appellant was on one side of the bed, the complainant's sister was in the middle and the complainant was closest to the door. The two girls were asleep. She did not know whether the appellant was asleep. The phone beside the appellant's bed rang about 15 minutes later and the appellant answered it. The appellant's wife heard the complainant's sister talking to her father on the telephone. The complainant's sister came into the appellant's wife and said that she wanted to lie with her. The appellant's wife told the complainant's sister to lie down, went to the door, and saw the appellant was still on the far side of his bed and the complainant was still on the side nearest the door. The appellant's wife assumed that they were asleep. The complainant then asked the appellant's wife to give her a massage. The children did not stay for dinner and their mother picked them up a bit after 5 pm.

[43] The next time when the complainant was at the appellant's wife's house was on Saturday 2 May. The complainant arrived a little before 9 am and the complainant's sister arrived at about 11.20 am. When the complainant arrived the appellant's wife and the appellant were in the process of getting the mowers ready to start the yard. The appellant's wife used the push mower and the appellant used the ride on mower.

[44] After some time the appellant's wife saw the complainant on the ride on mower with the appellant. That was only for a short time, whilst the appellant went down the driveway, out the front, around on the footpath, and back up to the front. The appellant's wife walked over and pretended to push a horn and the complainant laughed. The appellant took the complainant on the mower up to the shed and the complainant got off and came down to the meet the appellant's wife. The complainant stayed with the appellant's wife while she emptied the catcher and shut the gates. The complainant then went down to outside the shed and brought the appellant back up to a tree near the gate to show him something. The appellant then went back to cleaning the mowers. As the appellant's wife and the complainant were walking back inside the house the appellant used a compressor to blow air at them. The appellant's wife and the complainant then went inside. A little later, the complainant went outside and returned with a flower, which she gave to the appellant. The appellant was then still cleaning the mower outside the shed.

[45] After that the complainant and the appellant's wife were together upstairs in the house whilst the appellant was downstairs. After the complainant's sister arrived, all of them, except the appellant, ate lunch together. The effect of the appellant's wife's evidence was that for the rest of the afternoon and evening before the complainant was collected by her mother at about 6.15 or 6.30 pm, the appellant's wife had the complainant under observation and the complainant was not at any point alone with the appellant in his bedroom or in the shed.

[46] In cross-examination the appellant's wife said that she did not see the appellant touch the complainant in the private area.

Inconsistent verdicts

[47] The appellant argued that the present case was of a kind falling within the second category described by McHugh J in *Osland v The Queen*[1]:

> "When an appellate court sets aside a jury's verdict of guilty on the ground that it is inconsistent with a verdict of acquittal, it usually does so for one of two reasons. First, the verdict of acquittal may necessarily demonstrate that the jury did not accept evidence which they had to accept before they could bring in the verdict of guilty. Second, in acquitting the accused on one count, it may follow that the jury must have accepted evidence that required them to acquit on the count on which they convicted the accused. Sometimes, however, the verdicts may include that, if the jury did accept the evidence, it has misapplied or misunderstood the directions of law that it was given."

[48] In the appellant's submission, an explanation for the acquittal on counts 2 and 3 was that the jury had a doubt about the complainant's reliability even though those counts were corroborated by others – the complainant's cousin saw the complainant and the appellant enter the shed (count 3) and the appellant's wife saw the complainant on the ride on mower with the appellant (count 2) – and the doubt as to reliability should also have resulted in acquittals upon counts 1 and 4.

[49] That argument should not be accepted. The jury could readily find that the complainant's recollection of the days upon which events occurred was unreliable, although honest. But as the respondent submitted, the jury could also readily find from the complainant's evidence that Anzac Day was not a point of reference at all for the complainant; her point of reference was that count 4 occurred when the complainant's cousin was at the appellant's house with the complainant and her sister. The complainant's evidence was that the ride on mower incident and the shed incident happened on the same day and those incidents happened whilst only the complainant, the appellant, and the appellant's wife were present. The evidence of the complainant's cousin was to the effect that no mowing occurred on the day she was there. That was consistent with the evidence of all of the adult witnesses. Thus, although the complainant's cousin's evidence that the appellant and the complainant went into the shed alone could be regarded by the jury as undermining the credibility of the appellant's denial that he had ever been in the shed with the complainant, the jury could treat the complainant's cousin's evidence as not being at all corroborative of the complainant's evidence upon the shed incident (count 3).

[50] Accordingly, the complainant's cousin's evidence was not a factor capable of giving rise to any inconsistency between the acquittals on counts 2 and 3 and either of the convictions on counts 1 and 4. Similarly, the jury was not obliged to regard the evidence of the appellant's wife as corroborating the complainant's account of the ride on mower incident; overall, the effect of the appellant's wife's evidence was to confine the time available to the appellant to commit an indecent act of the kind alleged in the ride on mower incident or the shed incident.

---

1 (1998) 197 CLR 316 at 356-357 [116]. I have omitted citations.

[51] Those are sufficient reasons to reject the appellant's argument that the verdicts are inconsistent, but many other factors point in the same direction. Most importantly, the verdicts are logically reconcilable by the jury simply having complied with the trial judge's direction to consider each charge separately, evaluating the evidence relating to the particular charge to decide whether the jury was satisfied beyond reasonable doubt that the prosecution had proved the essential elements.

[52] There were many differences in the evidence given as between counts 1 and 4 on the one hand and counts 2 and 3 on the other. One obvious difference relates to the dates of the alleged offences. After addresses from counsel, the jury sent a note asking for clarification about the date for count 4. The trial judge then commenced the summing up by directing the jury that: count 1 charges an offence on or about 25 April 2015 and count 4 charges an offence on a date unknown between 24 April 2015 and 4 May 2015, whereas counts 2 and 3 each charge an offence on 2 May 2015. (In the summing up the trial judge initially directed that count 2 charged an offence on 2 May 2015 but the trial judge also referred to the same count charging the offence on 6 May 2015. The trial judge corrected the mistake in a redirection immediately after the summing up, explaining that the reference to 6 May was an error and that the second count referred to 2 May 2015). The trial judge directed the jury that the date was not material and the important matter to consider was whether the act happened. Relevantly to the inconsistent verdicts ground of appeal, the trial judge added that if the complainant was confused about the dates that was a matter relevant to her credibility and reliability which the jury should take into account.

[53] Plainly enough, the jury could regard the complainant's evidence about the timing of the ride on mower incident and the shed incident as being particularly confusing, in addition to being difficult to reconcile with the body of evidence that the appellant mowed only when the complainant was present only on the Saturday of the second weekend, and take that into account, as the trial judge had directed they might, in finding a reasonable doubt that those alleged offences occurred.

[54] On the other hand, the jury could regard it as significant that in the complainant's police interview the first touching to which she referred was the appellant touching her on her vagina (count 4) in the appellant's room, after her sister and her cousin had left the room to help their grandmother cook. As I have mentioned, the jury could regard the presence of the complainant's cousin as a reliable point of reference in the complainant's evidence. The evidence of the appellant, the appellant's wife, the complainant's mother, and the complainant's cousin confirmed that there was an occasion when the complainant was at the appellant's house with her sister and her cousin on 25 April 2015. The complainant's cousin gave evidence that the complainant lay down on the appellant's bed with him in his room on an occasion during the same day. And in relation to count 1, the jury could regard it as significant that when, towards the end of the police interview, the complainant first mentioned that the appellant had moved her hand onto his "ticklish spot" (count 1), the complainant explained that it had happened "not last weekend the other weekend", which identified count 1 as occurring on the Anzac Day weekend. She explained that the appellant told her not to tell anyone. The complainant also then agreed that it was not the same weekend as the ride on mower incident and the shed incident but was before that weekend and the complainant said that this event, like count 4, occurred in the appellant's bedroom. Although the complainant made other statements to different effect, the jury could regard the credibility of the part of the complainant's account that this incident (count 1) also happened on the Anzac Day

weekend as being supported by its consistency with the complainant's mother's evidence that on the Sunday afternoon following Anzac Day the complainant said "just out of the blue" that "Pa told me he's got a ticklish spot, but I'm not allowed to tell anyone".

[55] The differing verdicts are readily reconcilable in a way which is consistent with the jury complying with the trial judge's directions. There is no relevant inconsistency between the verdicts, much less an inconsistency of a kind giving rise to the necessity for an appellate court to intervene to prevent any possible injustice.[2]

Unreasonable verdicts

[56] Counsel for the appellant referred to the summary in *R v Clapham*[3] of the principles to be applied in determining whether a verdict of a jury is unreasonable or cannot be supported having regard to the evidence:

> "[4] 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:
>
> > "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."
>
> [5] 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

---

2 See *MacKenzie v The Queen* (1996) 190 CLR 348 at 367–368.

3 [2017] QCA 99. Citations omitted.

> 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'."

[57] The appellant acknowledged that in the circumstances of this trial, and particularly having regard to the circumstance that the complainant was only eight years old at the time of the alleged offending and when she participated in the police interview, and she was only nine years old when she gave her pre-recorded evidence, it was to be expected that there would be discrepancies in sequence, dates and times in the child's statements. The appellant argued that nevertheless, those kinds of issues infected all four counts on the indictment; when, in essence, the issue in dispute was whether the appellant indecently touched the complainant, the circumstances leading to the acquittals to counts 2 and 3 necessarily created a reasonable doubt also on counts 1 and 4. The appellant argued that there was a contradiction in the evidence in so far as the complainant stated that the mowing incident and the shed incident occurred on the weekend when she was at the appellant's house for both days (which was only the Anzac Day weekend) and she also said that count 4 occurred on the next day. Alternatively, if the jury acted on the complainant's evidence in cross-examination to the effect that both count 4 and count 1 occurred on 26 April that was inconsistent with the evidence of the complainant's cousin that she was present at the appellant's home only on 25 April. In the appellant's submission, the convictions on counts 1 and 4 are necessarily unreasonable on that approach because upon the complainant's evidence her cousin was present and she and the complainant's sister were assisting their grandmother to prepare dinner when count 4 was committed, which, on the evidence, could only have occurred on 25 April. The appellant also referred to the complainant's evidence in cross-examination that her sister slept over (which, upon the complainant's mother's evidence was on 2 May), that was again inconsistent with the uniform evidence to the effect that the complainant's cousin was present. Whichever approach was adopted, upon the appellant's submission the jury must have rejected the complainant's evidence about her cousin being present and the children assisting with dinner, which was the case put to the appellant in cross-examination. The appellant submitted, therefore, that the presence of the complainant's cousin was fundamental to the factual matrix.

[58] That logic cannot be accepted, essentially for the reasons given in relation to the first ground of appeal. In short, it was reasonably open to the jury to conclude that the complainant's evidence upon counts 1 and 4 was more compelling than was her evidence on counts 2 and 3. It cannot be known precisely how the jury resolved the inconsistencies in the evidence about the order in which the alleged offences occurred and the days upon which they occurred. One way in which the jury might have resolved them was to regard the complainant's repeated references to her cousin being present on the day when count 4 occurred as establishing that it must have occurred on Saturday 25 April; and the jury could have concluded, particularly with reference to the complainant's mother's evidence of what the complainant said on 26 April, that count 1 must have occurred on 25 or 26 April. Upon that basis, the jury could reasonably conclude that the complainant must have been mistaken in the evidence she gave in cross-examination that the act charged in count 4 occurred on the day following the ride on mower incident and that the mowing and shed incident occurred on the weekend when she stayed at the appellant's house on both days (when she was present for both days only on 25 and 26 April).

[59] However the inconsistencies upon those topics were resolved, the jury could readily find that the evidence given by the complainant of the acts of the appellant constituting count 1 and count 4 was clear and consistent throughout her police interview and her pre-recorded evidence. She adhered to that evidence of those offences during an extensive cross-examination. In addition, the jury could conclude that the general consistency of the complainant's evidence of the acts charged in counts 1 and 4 and the statements by the complainant to her mother, as recorded in her mother's evidence of what the complainant said to her on Sunday 26 April and on Saturday 2 May, added to the complainant's credibility in those respects. The period of about a year that elapsed between the complainant's statement to police and when she was cross-examined in her pre-recorded evidence, together with her young age, could explain the various inconsistencies about the circumstances in which the offences occurred and their timing as between her police statement and her pre-recorded evidence. As I have mentioned however, her statements in the police interview about the appellant's conduct charged in counts 1 and 4 were substantially consistent with her statements upon the same topics in her pre-recorded evidence.

[60] On the other hand, in considering whether or not the prosecution proved the appellant's guilt on counts 1 and 4 beyond a reasonable doubt notwithstanding the exculpatory evidence, most importantly the evidence given by the appellant denying the offences, the jury could take into account the following matters:

(a) The appellant's denial that the complainant had been in his bedroom, which he elaborated upon by stating that he did not want children in his room and they did not go into his room, was inconsistent with other evidence: his own evidence given shortly afterwards in cross-examination that on Sunday 26 April the complainant and her sister rested in his room with him; the evidence given by the complainant's cousin that she saw the complainant and the appellant lie down together in the appellant's bedroom whilst the complainant's cousin and the complainant's sister were in their grandmother's room talking about what they would make for dinner; and the evidence of his wife that the complainant was in the appellant's bedroom with him, initially with her sister and subsequently by herself, and that, although the complainant did not lie down with the appellant "as a rule", that was "not unusual".

(b) The appellant's evidence that he did not watch television in his room, which was related to his denial of knowledge that the complainant's favourite television show was Peppa Pig, appeared to be inconsistent with his subsequent evidence about watching television in his bedroom.

(c) The appellant's denial that children were ever allowed in the shed was inconsistent with the complainant's cousin's evidence that she saw the complainant go into the shed with the appellant on Anzac Day.

[61] The appellant argued that there was a significant inconsistency between the evidence of the complainant's cousin in cross-examination that she did not go into the appellant's room, call out to the appellant to stop, or say anything to the appellant that day (Anzac Day) in any context of telling the appellant to stop, and the evidence of the complainant (relating to count 4) that her cousin tried to help her by saying "stop it pa". The complainant's evidence mentioned in that submission was given by way of answers to questions by the police officer to tell everything about

the time the complainant went to the appellant's house, and then to tell the police officer more about when she was at the appellant's house:

> "We were first all playing and my sister was in there and my cousin and then umm they left to go out and help my grandma cook and then he started tickling me and then I didn't feel that it was the right place to be tickling me and I didn't like it so I like was saying stop stop and he didn't know what I was talking about but I thought he did and then he kept doing it and then I went out with my grandma and helped her cook because I didn't like how he was doing it.
>
> …
>
> Well first again we went on the rider and then we were coming inside and he went for a shower and then I went into his room and my cousin was in there, just my cousin. My sister was out helping my grandma and then ummm my cousin saw it and she went to do something but she didn't know what to do then and umm my cousin tried to help me by saying stop it pa but my grandpa didn't know what was going on. He thought maybe she was only trying to be silly."

[62] It should be noted that the complainant's first statement is to the effect that both her sister and her cousin were in the room and the appellant started touching her after they left the room to help their grandmother to cook. That there was such an occasion is suggested by the appellant's wife's evidence. Notwithstanding that the complainant's cousin was considerably older than the complainant, the jury could reasonably accept the evidence of the complainant upon this point, having regard in particular to the circumstance that, whereas the complainant's cousin gave her evidence about two months short of two years after the Anzac Day weekend of 2015, the complainant made her statements in the police interview within ten days of the events of which she spoke. Furthermore, it is quite unclear upon the complainant's statement exactly what it was that she thought that the cousin had seen and was trying to stop. The jury were not obliged to treat this discrepancy in the evidence as requiring them to doubt the complainant's clear and consistent evidence that the appellant had touched her on her vagina and caused her to touch him on his penis.

[63] It is appropriate to refer also to some other inconsistencies within the evidence, although these have a less apparent significance than those upon which the appellant placed most emphasis.

[64] When the complainant was asked in her police interview what she was wearing at the shed time, she replied that she was wearing "the same thing" (apparently a reference to what she said she was wearing during the ride on mower incident), and that, "Mum just quickly washed it". The respondent acknowledged that if this was understood as meaning that the complainant's mother had washed her clothes between when the complainant rode with the appellant on the ride on mower and when the complainant went with the appellant into his shed on Saturday 2 May, that could not possibly be correct; upon the evidence of all the witnesses, the complainant's mother was not present when either event could have occurred. However in the context of the complainant's young age, her statement about her

mother quickly washing her clothing does not necessarily convey that this was done between the ride on mower incident and the shed incident.

[65] The appellant also referred to a statement made by the complainant in response to a request to say what the appellant's house looked like:

> "Umm it's got these big blinds and lots of plants outside of it and umm it's got 8 on it and it's got security, this property is by security cameras and I don't know. Pa sometimes goes into the security thing and he sometimes sees his hand close to me and he goes oops but I don't think he is being serious with that".

[66] Upon the evidence of the complainant's mother and the complainant's cousin, there were no security cameras at the house. The appellant relied upon the complainant's reference to there being "security cameras" and the appellant seeing his hand close to her and saying "oops" as a suggestion by the complainant that a security camera might have caught some type of sexual conduct on film. As the appellant pointed out, the investigating police officer gave evidence in cross-examination that she did not attend the offence location to ascertain whether security cameras were in the house.

[67] In cross-examination during the complainant's pre-recorded evidence, the complainant agreed with a suggestion by defence counsel that her grandmother and the appellant did not have security cameras at the house. It was not suggested to the complainant, however, that her remark in her police interview concerned sexual conduct. It is far from being obvious that it did concern sexual conduct. Nor is it clear that the complainant intended to convey that there was a security camera directed towards the appellant's house or yard. Nor was the complainant asked what she saw and characterised as a security camera. It is a curiosity that the complainant referred to the property being "by security cameras" and the appellant going "into the security thing", but, upon its face this evidence has no real significance for the credibility or reliability of the complainant's evidence upon counts 1 and 4.

[68] Having regard to the significance of the jury being the fact finding tribunal, none of the points made by the appellant, whether assessed individually or cumulatively, made it unreasonable for the jury to accept the complainant's evidence of the acts the subject of counts 1 and 4 as proving beyond reasonable doubt that the appellant committed those offences. The guilty verdicts were reasonably open to the jury upon the whole of the evidence.

Order

[69] I would dismiss the appeal.

[70] **MORRISON JA:** I agree with the reasons of Fraser JA and the order his Honour proposes.

[71] **HENRY J:** I have read the reasons of Fraser JA. I agree with those reasons and the order proposed.