SUPREME COURT OF QUEENSLAND

CITATION:	*R v Harris* [2019] QCA 154
PARTIES:	**R** **v** **HARRIS, Jamie Winston** (appellant)
FILE NO/S:	CA No 137 of 2018 DC No 297 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Toowoomba – Date of Conviction: 8 May 2018 (Richards DCJ)
DELIVERED ON:	6 August 2019
DELIVERED AT:	Brisbane
HEARING DATE:	17 April 2019
JUDGES:	Gotterson and McMurdo JJA and Wilson J
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where the appellant was convicted of maintaining an unlawful sexual relationship and three counts of indecent dealing with the same complainant – where the jury acquitted the appellant on one count of indecent dealing with the same complainant and was unable to reach a verdict on two counts of rape against the same complainant – where the only evidence of the conduct the subject of the counts was the testimony of the complainant – whether it was open to the jury to regard the complainant's evidence as to the acquitted indecent dealing count and rape counts as relatively weaker or less credible than the counts on which a guilty verdict was reached – whether the circumstance where a jury finds a defendant guilty on one count but fails to reach a verdict on another count is open to a complaint on appeal of inconsistent verdict – whether the verdicts were inconsistent CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted of maintaining an unlawful sexual relationship and three counts of indecent dealing with

the same complainant – where the jury acquitted the appellant on one count of indecent dealing with the same complainant and was unable to reach a verdict on two counts of rape against the same complainant – where the only evidence of the conduct the subject of the counts was the testimony of the complainant – where it was open to the jury to regard the complainant's evidence as to the acquitted indecent dealing count and rape counts as relatively weaker or less credible than the counts on which a guilty verdict was reached – where the appellant made admissions in a pretext call that he had some romantic interest in the complainant and that call could be used as evidence that he was prepared to act on that interest – where there were reasonable explanations as to why the conduct went undiscovered despite the close proximity of others to that conduct – whether the verdicts were unreasonable or insupportable having regard to the evidence

M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
Osland v The Queen (1998) 197 CLR 316; [1998] HCA 75, followed
R v Baden-Clay (2016) 258 CLR 308; [2016] HCA 35, cited
R v DAL [2005] QCA 281, followed
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited

COUNSEL: The appellant appeared on his own behalf
N Rees for the respondent

SOLICITORS: The appellant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **GOTTERSON JA:** I agree with the order proposed by McMurdo JA and with the reasons given by his Honour.

[2] **McMURDO JA:** The appellant was tried in the District Court upon seven counts of sexual offending against the same complainant, a girl who was aged between seven and 10 years when the offences were said to have been committed. The complainant was aged 27 at the time of the trial.

[3] Count 1 charged the appellant with maintaining an unlawful sexual relationship with the girl, with the aggravating circumstances that, in the course of that relationship, he raped and unlawfully and indecently dealt with her. Counts 2 and 3 were charges of indecent dealing, which were particularised as the touching of the girl in the area of her vagina outside her clothing. Counts 4 and 5 were further charges of indecent dealing, but involving the digital penetration of the girl's vagina. Counts 6 and 7 were charges of penile rape.

[4] The jury was unable to agree upon verdicts for the rape charges. They convicted the appellant on count 1, with the circumstance that he indecently dealt with her as a child under the age of 12 years. They convicted the appellant on counts 2, 3 and 5, but acquitted him on count 4. The appellant, who is now without legal representation, appeals against his convictions upon the sole ground that the verdicts

were unreasonable and were unsupported by the evidence. For the reasons that follow, the appeal should be dismissed.

The evidence at the trial

[5] The appellant met the complainant's family at church. The complainant's family regularly hosted bible study groups from the church at their house. The appellant, who was in his late 20s at the time, was often there and became a friend of the family, which comprised the complainant's parents, the complainant, an older brother and a younger sister. Evidence was given by each of the family members, but only the complainant gave evidence of the occurrences with which the appellant was charged.

[6] The family house was on a farm. The location of the various rooms was important in the appellant's case, because much of the alleged offending, including one of the counts of digital penetration and one of the rape counts, was alleged to have been committed in the complainant's bedroom, which was adjacent to the lounge room, where the bible study groups usually met. Her room was also something of a pathway to her parents' room from the lounge room, as well as to the bathroom from her parents' room and to her sister's room. In essence, it was and is argued that the events which she described could not have gone unnoticed by a group in the lounge room.

[7] The complainant's evidence was that the offending began with the relatively less serious conduct of the touching of her vagina above the clothing, from which it became more serious and culminated in the alleged rapes. She said that the first event was when, aged seven or eight, she was sitting on the appellant's lap in a place outside the house under a pergola. She was wearing a skirt or a dress, and the appellant moved his hand up her inner thigh, stopping on her underwear. She said she then jumped off his lap, but there were subsequent occasions when he did the same thing. The complainant said that the touching happened every couple of times that he was over at her family's house. This first instance was the subject of count 2.

[8] Count 3 was said to have occurred in her bedroom. She said that he would usually leave the group to come into her room as she was going to bed, in order to say goodnight. But after about six months, he entered her room and this time put his hand under the sheets, as he crouched next to the bed. He stroked her hair with one hand, whilst touching the outside of her underwear and saying statements like "this is special, I love you." The complainant said that this came to be a regular occurrence: it happened on most occasions when he visited the house. This first incident in the bedroom was the subject of count 3.

[9] Count 4, upon which the appellant was acquitted, was said to have occurred in this way. The family was on a camping holiday one September at Rainbow Beach or Stradbroke Island. There were others in the group, including the appellant who had his own tent. On one occasion, when the appellant and the complainant were alone near a toilet block or another building within the camping ground, the appellant was said to have crouched down beside her, put his hand underneath her underwear and inserted his finger into her vagina. She said that this was the first occasion in which this digital penetration occurred.

[10] A few weeks after that incident, the complainant said, the appellant came into her bedroom at the family home, apparently to say goodnight to her, when he again digitally penetrated her vagina. This incident was the subject of count 5.

[11] Subsequently, when the appellant was again on a camping holiday with her family and the appellant was also there, there was an occasion where he led her to a place behind some sand dunes, towards a dugout toilet. She said he then removed her swimming togs, exposed and stroked his penis and then guided her hand to do so, before inserting his penis into her vagina whilst she was standing. She said this rape continued for one or two minutes, before he withdrew and ejaculated. That incident was the subject of count 6.

[12] Count 7 was said to have occurred when the family was hosting a New Year's Eve party at the family home. When she was going to the bathroom, the appellant was said to have led her to her room, where he lay her on the bed, took off her underwear and raped her.

[13] Further, she said, throughout the relevant period for the charge of maintaining an unlawful relationship, there were other occasions when he touched her on the vagina, inserted his finger into her vagina and had sexual intercourse with her.

[14] Evidence was given by a woman, who through a church as a counsellor, was consulted by the complainant in late 2008. She recalled that the complainant told her that something had happened to the complainant, which raised in her mind the possibility of sexual abuse. It appears that the witness was called by the prosecutor solely at the request of defence counsel, who cross-examined the witness to the effect that, over some eight sessions of counselling, the complainant did not describe any of the occurrences the subject of the charges.

[15] Another witness did give preliminary complaint evidence, relaying a conversation in June 2009 when the complainant said that "she remembered having to sit on a man's lap … and he touched her." She provided the man's first name (which is that of the appellant) and told this witness that she had met him through the church. The complainant told her that this man had said to her to "keep it a secret and not tell anybody."

[16] Another witness, who had become a close friend of the complainant, recalled a conversation with her in 2011, in which the complainant said that she experienced sexual abuse when she was a child. The witness recalled that "the word rape was used in the discussion", from which it was the understanding of the witness that "the abuse was something of that nature … not limited to … inappropriate touching or something like that, but more serious." The witness recalled the complainant saying that the man was "known to the family somehow".

[17] After the complainant commenced university studies, she saw other counsellors and described to at least one of them more of the alleged offending than she had provided to others. Eventually the complainant went to police in 2015, who arranged a pretext telephone call to the appellant, which occurred in November of that year.

[18] In that call the complainant began by saying to the appellant that "stuff happened between us and I just kind of wanted to understand why." He replied "I just don't really understand it meself". She said "so you remember when you used to … come

into my room and touch me and … on camping trips and stuff and all the stuff that went on?". He replied "yeah I, I really don't understand it either". She then became more particular, claiming that he had raped her and "fingered" her numerous times. He immediately responded by denying that anything of that kind had happened, and saying that the only physical contact was by his touching her chest. Over the course of the conversation, which took 40 minutes, he consistently rejected any suggestion that the physical contact with them had gone beyond touching her chest, but he said that he should not have done that. At one point she said "did you think you loved me, 'cause that's what I thought." To which he replied "yeah I did, yep." At a later point, he again agreed with her suggestion that he had fallen in love with her, at which point she asked "but I was a kid. Like how does that work?" To which he replied "I don't know, but yeah." He apologised for touching her as he agreed he had done.

[19] There was only one incident recalled by any of the complainant's family which suggested any misconduct by the appellant. The complainant's father recalled an evening when, as he and his wife were cleaning up after dinner, he looked into the lounge room and saw the appellant sitting on the edge of a sofa and the complainant sitting in front of him on the floor, between his legs. He said that the appellant was "stroking her neck intimately". He immediately confronted the appellant, asking him what he was doing, requiring him to leave the house, and saying that he never wanted to see him doing that to his daughter again. The appellant responded with something like "I've been meaning to talk to you about it". The father said that the appellant was not seen around the area again, save for an occasion at the wedding of the appellant's brother. The father said that, after this incident, he asked each of his children whether the appellant had done anything to them, and each answered in the negative.

[20] The father described the family's camping trips, refreshing his memory from a diary. The sequence of those trips, according to the diary, did not correspond with the complainant's evidence, and the inconsistency was described by the trial judge in her summing up.

[21] The father's version, by reference to his diary, was that the first of the trips was to Fraser Island, and then to Stradbroke Island almost immediately afterwards. The complainant said that the first incident of digital penetration occurred on a camping trip where there was toilet block or showers, and other evidence showed that this could not have been where the family camped on Fraser Island, where there was only a pit toilet. The complainant's evidence, as I have said earlier, was that the first time she was raped by the appellant was on Fraser Island, in an area behind some sand dunes behind a dugout toilet. And she said that the episodes of digital penetration preceded the occurrences when she was raped.

[22] The complainant's mother said that the first camping trip was on Fraser Island and Stradbroke Island, with a later trip to Mudjimba Waters and a third trip to Tannum Sands. That accorded with her husband's evidence. The complainant's brother also said that the first trip was to Fraser Island and Stradbroke Island and that there was a second trip to Tannum Sands. The complainant's sister said that there were two camping trips: one to Fraser Island and one to Stradbroke Island.

[23] If the family went first to Fraser Island, and it was there that the first rape occurred, it displaced the complainant's version of where and when the first act of digital penetration had occurred. The trial judge said to the jury that they might think that

if the father's evidence was accurate, with the benefit of his diary, then "that actually seriously affects the reliability of the complainant's evidence".

[24] Another witness, who regularly attended the house as a member of the bible study group, recalled an occasion when the appellant was sitting on the couch next to the complainant and "they were in deep discussion [which] struck me as being out of place." But he did not say anything to the appellant at the time. He also recalled an occasion on a camping trip at a beach, where the appellant was taking photographs of the complainant, who was posing for the photos as if it was some kind of "photoshoot". Again, the witness took no action at the time, which he explained by saying that on this occasion the complainant's mother was also there.

[25] The appellant neither gave nor called evidence.

[26] The jury was provided with a document which set out the prosecutor's particulars for each count. For count 1, it was alleged that the unlawful sexual relationship involved more than three sexual acts, the nature of which included the appellant touching the complainant over her clothing in the area of her vagina, touching her there under her clothing, touching his penis in front of her, inserting his finger into her vagina and inserting his penis into her vagina. There was no claim that the acts included touching the complainant on her chest. Consequently, the appellant's admission, in the pretext telephone call, that he had touched her on the chest was not an admission of a sexual act upon which the prosecution relied for count 1. Instead, the prosecution relied upon that admission, together with the appellant's statement that he had loved the complainant, as evidence of a sexual interest in the complainant upon which he had been prepared to act, making it more probable that he had done so in the ways which were charged.

[27] The particulars of count 4, of which the appellant was acquitted, were that the incident had occurred at a camping trip "at Rainbow Beach or elsewhere". And the particulars of count 6 were that it occurred on a camping trip "at Fraser Island or elsewhere".

The appellant's arguments

[28] The appellant argues that the complainant's evidence was not to be believed because the alleged incidents at the house would have been heard or noticed by at least someone from a group of adults meeting in the next room.

[29] He also relies upon the jury's verdict, which acquitted him on count 4, as well as the jury's inability to agree on the two counts of rape, to suggest an error by the jury in convicting him on the other counts.

[30] The appellant says that the pretext call was misunderstood by the jury, because, in saying to the complainant that he thought that he loved her, he was meaning to convey that he loved her as he loved her parents and siblings. However, his professed love for her was something which, more than once, he told her in the call he had been unable to understand. The interpretation which the appellant now suggests was not open.

[31] The appellant claims that, when he referred to touching her on the chest, this was the incident for which he had been confronted by the complainant's father. He says that his recollection was that the father telephoned him to confront him about touching the complainant's chest, when he had been tickling the complainant and

had not realised that her shirt had ridden up. The immediate difficulty with this claim is that it was not the subject of any evidence.

Consideration

[32] Section 668E(1) of the *Criminal Code* requires the Court to allow an appeal against conviction if the Court is "of [the] opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence". Upon this ground of appeal, the Court is required to make its own assessment of the sufficiency and quality of the evidence at the trial and to decide whether it was reasonably open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offence (or offences) of which he was convicted.[1] An appellate court may experience a doubt about the appellant's guilt, but, where a jury's advantage in seeing and hearing the evidence is capable of resolving that doubt, the Court may conclude that no miscarriage of justice has occurred.[2]

[33] It is true, as the appellant submits, that the events which were said to have occurred in the complainant's bedroom would have occurred in close proximity to the group of adults regularly meeting in the complainant's family's house. However, the group, most particularly the complainant's parents, may have been unconcerned that the complainant was going into her room, thinking that he was simply saying good night to her. On the complainant's evidence, this is how his visits to her room for months commenced, before he began to assault her. Moreover, these incidents which she described in the room, and upon which the jury convicted, would not have been a suspiciously long period of time in which he was in her room.

[34] Her evidence that she was frequently raped in the room was less credible and clearly some of the jury was unpersuaded by it. But that did not mean that the jury was obliged to reject all of her evidence.

[35] The jury was not persuaded by the appellant's evidence about the incident of digital penetration on the camping trip, which was said to have been the first of that kind. Yet they were persuaded to accept her evidence that, not long after the return from the holiday, an act of the same kind occurred in her bedroom. The effect of the appellant's submission is that there was an inconsistency between those two verdicts. The question then is whether the two verdicts can stand together, in that no reasonable jury who had applied their mind properly to the facts in the case could have arrived at the conclusion of guilt on count 5, having acquitted on count 4. If the jury could not have reasonably done so, then the conviction on count 5 cannot stand.[3] However, if there is a proper way by which verdicts may be reconciled, allowing a conclusion that a jury performed their functions as required, that conclusion will generally be accepted.[4] A judge might find it difficult to reconcile verdicts, but it must be acknowledged that "[J]uries cannot always be

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1 *SKA v The Queen* [2011] HCA 13; (2011) 243 CLR 400 at 405 – 406, [11] – [14].

2 *M v The Queen* [1994] HCA 63; (1994) 181 CLR 487 at 494, cited in *SKA v The Queen* at 405 [13]. See also *R v Baden-Clay* [2016] HCA 35; (2016) 258 CLR 308 at 329 – 330 [65] – [66].

3 *MacKenzie v The Queen* [1996] HCA 35; (1996) 190 CLR 348 at 366.

4 *MacKenzie v The Queen* at 367.

expected to act in accordance with strictly logical considerations and in accordance with the strict principles of the law which are explained to them".[5]

[36] In my view there is a way in which the verdicts may be reconciled, which comes from the relative weakness which the jury may have seen in the complainant's testimony about the camping trips. I have set out the tension between the complainant's evidence, as to the sequence of the camping trips, and the evidence of her father and other witnesses on the question. As the jury was told by the trial judge, if they accepted, in particular, the complainant's father's evidence as to the sequence of the camping trips, the reliability of her testimony was affected. The jury may have been satisfied that there was conduct in the nature of digital penetration which occurred in the house, on one or more occasions, whilst considering that her recollection of what happened on the camping trips was less reliable such that they should be left in doubt about those events. There was also evidence from family members that strict rules were placed upon the children when they were camping, such as not going to other tents and remaining in the vicinity of the family tent, and that evidence may have contributed to a doubt about whether there was an event as charged by count 4.

[37] The appellant suggests that the Court could have regard to the jury's failure to reach verdicts on counts 6 and 7. However a disagreement on one count would not be inconsistent with a conviction on another, as an acquittal might have been.[6] Some of the jury may not have been persuaded to convict on count 6, because of a perception that the complainant's evidence was relatively unreliable about the camping trips. Some may have been in doubt about count 7, because it was relatively less likely that an act of penile rape would occur next to where the adults were meeting in the lounge room, compared with a momentary incident of digital penetration.

[38] The evidence of the pretext telephone call was more harmful than helpful to the appellant's case. The appellant made unambiguous admissions that he had had some kind of romantic interest in the complainant, which had caused him to touch her in a way which he admitted was inappropriate. The jury was able to use that evidence to find that he had a sexual interest in her upon which he was prepared to act, thereby increasing the probability that he had done so by other conduct. On the other hand, he consistently and forcefully rejected any suggestion that his physical conduct had gone beyond touching the girl on the chest. The jury may have been persuaded by that evidence, to doubt that anything more occurred. But the jury did not have to reason in that way; it was open to them to reject that claim.

[39] In my view, any doubt which might be experienced by this Court is capable of being resolved by recognising the jury's advantage in hearing and seeing the evidence of the complainant, as it was given. In my conclusion, it was open to the jury to convict on each of these four charges.

[40] I would order that the appeal be dismissed.

[41] **WILSON J:** I agree with McMurdo JA.

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5 *R v Kirkman* (1987) 44 SASR 591 at 593 per King CJ, quoted with approval in *MacKenzie v The Queen* at 367-368.

6 *Osland v The Queen* [1998] HCA 75; (1998) 197 CLR 316 at 406; *R v DAL* [2005] QCA 281 at [8] and [23].