# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v CCM* [2019] QCA 301 |
| PARTIES: | **R**<br>**v**<br>**CCM**<br>(appellant) |
| FILE NO/S: | CA No 68 of 2019<br>DC No 1828 of 2018 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Appeal against Conviction |
| ORIGINATING COURT: | District Court at Brisbane – Date of Conviction: 14 March 2019 (Moynihan QC DCJ) |
| DELIVERED ON: | 20 December 2019 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 28 October 2019 |
| JUDGES: | Fraser and McMurdo JJA and Henry J |
| ORDER: | **Appeal dismissed.** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where the appellant was convicted of two counts of rape and acquitted of two counts of rape – where the counts of which the appellant was acquitted occurred in a separate episode, and there were differences between this episode and the counts of which he was convicted – where the appellant was further convicted of attempting to pervert the course of justice, but acquitted of assault occasioning bodily harm – where the assault was said to have occurred on the same day as, and in relation to, the attempt to pervert the course of justice – whether the differing verdicts can be explained by the jury holding a reasonable doubt as to some of the counts but holding no such doubt as to others – whether the verdicts were inconsistent<br><br>CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the complainant was the appellant's de facto partner and complained to police following their separation – where after separation and prior to making a complaint the complainant sent text messages asking the appellant to return to the family home – where the appellant did not give evidence at his trial and the only two witnesses called were the complainant and her brother – where the appellant took |

issue with the quality of the evidence, including the supposed implausibility of the complainant wanting the appellant to return home if the alleged rapes had occurred – whether on the whole of the evidence it was open to the jury to conclude beyond reasonable doubt that the appellant was guilty of the charges – whether the verdict was unreasonable or could not be supported having regard to the evidence

*GAX v The Queen* (2017) 91 ALJR 698; [2017] HCA 25, cited
*MacKenzie v The Queen* (1996) 190 CLR 348; [1996] HCA 35, applied
*MFA v The Queen* (2002) 213 CLR 606; [2002] HCA 53, cited
*Morris v The Queen* (1987) 163 CLR 454; [1987] HCA 50, cited
*SKA v The Queen* (2011) 243 CLR 400; [2011] HCA 13, cited

COUNSEL: J Lodziak for the appellant
D Balic for the respondent

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

[1] **FRASER JA:** I agree with the reasons for judgment of Henry J and the order proposed by his Honour.

[2] **McMURDO JA:** I agree with Henry J.

[3] **HENRY J:** The appellant stood trial on a six-count indictment. The jury convicted him of three counts and acquitted him of three counts.

[4] In summary, the appellant was alleged to have raped his de facto partner on a number of occasions prior to their separation. After their separation and after she had complained to the police, he was alleged to have pressed her to drop the charges and assaulted her when she refused.

[5] The charges on the indictment and jury verdicts in respect of them were as follows:

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|---|---|---|
| Count 1 | Rape (vaginal) | Guilty |
| Count 2 | Rape (vaginal) | Not guilty |
| Count 3 | Rape (anal) | Not guilty |
| Count 4 | Rape (vaginal) | Guilty |
| Count 5 | Attempt to pervert the course of justice | Guilty |
| Count 6 | Assault occasioning bodily harm | Not guilty |

[6] He appeals his conviction on two grounds, namely:

1. The verdict of the jury is unreasonable, or cannot be supported having regard to the evidence.
2. The verdicts of guilty on counts 1 and 4 are inconsistent with the verdicts of not guilty on counts 2 and 3, and the verdict of guilty on count 5 is inconsistent with the verdict of not guilty on count 6.

**Ground 1 Verdict of jury unreasonable or cannot be supported**

*Introduction*

[7] Consideration of whether the verdict of the jury is unreasonable or cannot be supported having regard to the evidence requires analysis of whether, on the whole of the evidence, it was open to the jury to conclude beyond reasonable doubt that the appellant was guilty of the charges.[1] This requires an independent assessment of both the sufficiency and quality of the evidence.[2] As will be seen, the evidence was sufficient. The appellant's counsel took issue with its quality.

[8] The only two witnesses called at trial were the complainant and her brother. The appellant was not alleged to have made any confessions. He elected not to give evidence at his trial.

[9] The parties joined in some admissions of fact. A number of exhibits were placed before the jury. They included screenshots of text messages between the complainant and appellant, subsequent to their separation but prior to her complaint to the police.

[10] The appellant's counsel in the appeal submitted the complainant's testimony was inconsistent, contradictory and implausible. The issues actually identified in support of that submission were of minor or neutral significance. Most emphasis was placed upon issues connected with the complainant's desire to resume the relationship even after separation.

*Background*

[11] At the time of the alleged offences the complainant and appellant were aged in their forties. They had met at high school on Thursday Island and had occasional contact thereafter. They commenced a sexual relationship when, in 2013, the appellant, who was based in Weipa, visited the complainant, who was based in Brisbane. The relationship ended within a few months but the complainant had fallen pregnant to the appellant during it.

[12] The complainant heard briefly from the appellant after their baby daughter was born in December 2013. There was no contact thereafter until November 2016, when the complainant travelled to Thursday Island to visit relatives and met up with the appellant there. They recommenced an intimate relationship from that point, with the appellant visiting the complainant in Brisbane in visits of increasing duration before he finally moved into the complainant's home in Brisbane at the start of June 2017.

[13] They shared a bedroom and enjoyed what the complainant agreed was a normal de facto relationship. That changed after about a month when the appellant announced he would be sleeping in a separate room. The complainant testified of that announcement:

> "He said he wanted abstain himself from woman, lust after women, and he wanted to do – he was doing a spiritual walk with God."

[14] The complainant testified the appellant thereafter became aggressive towards her, would call her names, insult her if she did not do things according to how he wanted them done and, if she did not prepare food according to his liking, would throw it

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1 *SKA v The Queen* (2011) 243 CLR 400, 409.

2 *Morris v The Queen* (1987) 163 CLR 454, 474; *MFA v The Queen* (2002) 213 CLR 606, 615; *GAX v The Queen* (2017) 91 ALJR 698, 702.

away. Once, within a week or two of him moving into the other room, the appellant pushed the complainant, in response to her standing up to him in an argument. The appellant also argued with the complainant about her work, telling her she could not go to work to do extra shifts when her employer asked her to do so.

[15] The complainant testified she did not have consensual sex with the appellant between the time that he moved into the other room and their eventual separation. She described three separate episodes during that time when he raped her.

[16] The first episode, count 1, which was an instance of penile vaginal rape, occurred about two weeks after the appellant moved into the spare room. The second episode, counts 2 and 3, which involved one instance of penile vaginal rape and one instance of penile anal rape, occurred a week or two later. The third episode, count 4, which involved penile vaginal rape, occurred another few weeks later in August 2017.

*First episode of rape (count 1)*

[17] The first episode commenced with the appellant walking into the complainant's bedroom when she was lying on her bed. He told her, "I want a fuck". He took out his penis and went straight to the complainant, pushing his penis into her face. He told her, "When I tell you to open your leg, you need to be submissive to me. I'm the only head in the house." He removed the complainant's pants and put his penis into her vagina, penetrating her. He said, "You are my sex slave. You are my bitch." He repeated words like that, including "I just use you for sex", until he ejaculated. He then left the room.

[18] When asked whether she had told the appellant he could have sex with her, she responded:

> "No, I did not give him any permission. … I told him to stop when he first pushed his penis into my face, that I was uncomfortable. I did not give him any consent to do any sexual thing to me."[3]

[19] When asked whether she tried to resist the appellant or push him away she responded, "I couldn't. He is a big person."[4]

[20] The appellant's counsel submitted the complainant's evidence about how long the act of penetration took was suggestive of unreliability. The following relevant exchange occurred immediately after the complainant testified that the appellant continued to make denigrating comments to her "until he ejaculated":

> "Okay. So how long did that whole thing go on for?---I'm not too sure.
>
> Okay. Was it – are you able to say if it was a matter of seconds or minutes or - - -?---Probably a few seconds.
>
> Okay. And – sorry – I just need to be – I'll be clear about that. From the time he first put his penis into your vagina until the time that he ejaculated, are you able to say how long that went for?---Maybe about a minute."[5]

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3 AR Vol 2 p 109 LL18-22.
4 AR Vol 2 p 109 L40.
5 AR Vol 2 p 109 LL6-13.

[21] That exchange does not suggest unreliability. The complainant was asked how long "that whole thing" went on for immediately after she said the appellant ejaculated. It appears likely she thought she being asked how long the process of ejaculation took in responding that it probably took a few seconds. Once the questioner clarified she was being asked how long penetration went on for she responded that it may have been about a minute. Considered in context her answers, which were in any event only estimates, were not inconsistent.

[22] There was nothing inherently implausible about the complainant's account of count 1. It was not inherently unlikely that a man who had moved to another bedroom on the premise of abstaining from women and lust and thereafter been increasingly contemptuous of the complainant might then conduct himself in such a demeaning way to the complainant.

*The second episode (counts 2 and 3)*

[23] The second episode commenced when the complainant was sitting in the lounge and the appellant came home. They had been arguing the night before. He demanded she go to the bedroom, telling her, "You need to be treated like an animal." The complainant testified that when the appellant first "commanded" her to go into the room, telling her she needed to be treated like an animal, she knew what he meant but did not know what he was going to do.

[24] She gave the following account of what followed:

> "We went into the bedroom. He told me to – I took off half of – the bottom half of my clothes. He told me to bend over on the bed and he put his penis into my vagina, then he took it out and put it into my anus and I moved away from him."[6]

[25] While penetrating her he told her to repeat things to the effect, "That I'm his bitch, his slut; he's just using me for sex".[7] The complainant testified that after ejaculating in her anus he left the room.

[26] The following exchange occurred when the learned Crown Prosecutor clarified the topic of consent in respect of this episode during evidence-in-chief:

> "After he told you to go into the room, I think you mentioned you weren't sure what was going to happen; is that correct?---Yes, that's correct.
>
> Right. Can I ask you why did you take all your pants off in the room or your bottom half of your clothes, I think you said?---I knew what he wanted to do and I told him I didn't want to do those things, those sexual acts.
>
> Okay. And did he say anything in response?---He said to just listen to what he's saying.
>
> Okay. So you told him you didn't want to do those things. Is that before he put his penis in your vagina?---Yes … I told him I didn't want to do that, those things, when he spoke to me when I was sitting

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6 AR Vol 2 p 110 L17.
7 AR Vol 2 p 110 L28.

> on the lounge … [b]ut he forced me to go into – by the voice. He forced me by - - -"[8]

[27] It may have troubled the jury, who acquitted in respect of this episode, that the complainant was not specific about the topic of consent in describing the second episode until specifically taken to it by the prosecutor following her description of what had occurred. She also went from initially saying she did not know what he was going to do as she entered the bedroom yet later explained she had removed her clothes because she knew what he wanted to do. Until the questioning backtracked to the issue of consent her description of the episode's physical events had, on the face of it, described physically co-operative behaviour by her. While these aspects may have prompted jury caution on counts 2 and 3 it was not so adverse to the complainant's general credit and reliability as to compel the conclusion that a reasonable doubt about those counts meant there must be a reasonable doubt in respect of the other counts.

*The third episode (count 4)*

[28] The third episode occurred against a background of the appellant's discontent at having to look after their daughter when the complainant would be at work. It commenced when the appellant insisted that the complainant have sex with him "as a payment" to look after their child so the complainant could go to work. The complainant testified the appellant commanded her to go into the room and she complied because she was in fear. However, she also testified that she said to him, "I don't want to do those things."

[29] She went into the bedroom and took off half her clothes and lay on the bed. He put his penis into her vagina, penetrating her until he ejaculated. While this was happening she testified he told her to "repeat those things that I'm just his sex slave and … he is just using me for sex and I'm his bitch".[9] When asked if she had told him at any stage on this occasion that he could have sex with her, she responded:

> "I told him I didn't want to do any sexual thing. I don't want to do those things. And I did not give him any permission to do those things."[10]

[30] There was nothing inherently implausible about this account of the third episode.

*Disclosure to brother*

[31] It is noteworthy in connection with count 3 that in about September 2017 (likely after the final separation dealt with hereunder) the complainant disclosed what had been happening to her brother. Her brother testified the complainant told him that there were times the appellant had had sex with her against her will and she was upset with that. He testified his sister disclosed the appellant would insist she pay him with sex when she needed him to look after their daughter because she was at work. This provided some evidence of consistency, particularly regarding count 3, in the account of the complainant.

[32] The appellant's counsel in the appeal highlighted an inconsistency of recollection as between the complainant and her brother regarding whether the disclosure was by

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8 AR Vol 2 p 110 L34 – p 111 L4.
9 AR Vol 2 p 112 L15.
10 AR Vol 2 p 112 L23.

text or in person. It is hardly a concerning inconsistency, particularly bearing in mind the probability of any text on this topic prompting following up discussion as between brother and sister.

[33] The appellant's counsel also emphasised the following exchange in cross-examination of the complainant's brother as evidencing inconsistency with the complainant's evidence:

> "Now did she also tell you in that phone call that H was sometimes sleeping in a different bedroom but that there were times when they had consensual sex together and were living together as a couple?--- Yes. She did tell me that."

The notion that this evidenced inconsistency was misconceived. It seemed to be premised on the above evidence meaning that consensual sex occurred in the era after the appellant was sleeping separately from the complainant. However, the proposition with which the witness agreed did not in terms assert the complainant had said consensual sex occurred when they were sleeping in separate bedrooms. It was at best for the appellant an ambiguous question, making it impossible to credibly allege inconsistency from the answer.

*Separation and complaint*

[34] The appellant moved out of the complainant's home on 10 September 2017. This followed an argument that day after he had indicated a female pastor wanted him to be a worship leader in her ministry. The complainant, who on an earlier occasion had smelt perfume on the appellant when he had returned home, accused him of being a womaniser. She told him that if he wanted to be committed to the female pastor he should leave. He left.

[35] There was some criticism of some of the complainant's answers regarding her claimed uncertainty as whether the appellant was deeply religious and whether she believed the appellant was having an affair with the female pastor. On the whole of the complainant's evidence these answers likely reflected no more than caution in the complainant's responses.

[36] The appellant's counsel particularly emphasised the supposed implausibility of the complainant asking the appellant to leave when she considered him to be a womaniser but not when she knew him to be a rapist. This overlooks the complexity of human relationships. It is important to appreciate much trouble had been involved in bringing the appellant and complainant together from opposite ends of the state, at the complainant's home, where she had been raising their child – a child the complainant was otherwise likely to be left to raise on her own. It is well known that persons may stay with their abusive partners for a mix of reasons. The complainant's desire to maintain her fledgling family unit, despite the appellant's appalling behavioural degeneration towards her, may have caused her to hold out hope that the appellant's behaviour would improve in time. However, it is also conceivable the force of that desire was, in the heat the moment, outweighed by anger about the appellant's attraction to the company of the female pastor. Indeed, after her anger had cooled she sent text messages to the appellant, discussed further below, inviting him to return home. Fluctuating feelings about terminating or maintaining relationships, even objectively doomed relationships, are part of the human condition.

*Complaint to police*

[37] About a week after the appellant had left her home, the complainant went to the police and reported what had been happening. A joint admission was made at trial that on 5 November 2017 the appellant was charged with offences of rape pursuant to a complaint received from the complainant on 17 September 2017.

*The text messages*

[38] It emerged in cross-examination of the complainant that a number of text messages had been exchanged by her and the appellant between their separation on 10 September 2017 and her complaint on 17 September.

[39] Eventually the parties agreed upon a bundle of screenshots of text messages being exhibited by consent. It was not entirely clear on what date some of the texts were sent and the complainant was uncertain. Setting aside some, which might have been sent earlier in August, most were likely sent in September 2017 after the separation.

[40] Text messages probably sent on 10 September 2017 included a photograph of the complainant and her daughter, captioned, "We love u". That was followed a few hours later by logistical messages about where the complainant had left the appellant's possessions for his collection and for his return of the house keys.[11]

[41] In subsequent text messages the complainant made comments indicating she understood the appellant was pursuing a relationship with the female pastor. One such exchange between the complainant and appellant was as follows:

> Complainant – "Well, I guess u a happy with u life with your prophetess."
>
> Appellant – "Amen. U destroy urself with ur attitude. Please don't forget that. She is helping me find place. That's what friends do. I don't need u or any other woman rite na I have God shalom blessings"[12]

[42] The ensuing exchanges included a text from the appellant, referring, in an unspecified way, to how she had treated him the previous day, to which the complainant responded:

> "U treated me worse then an animal. I still forgave u"[13] (emphasis added)

[43] After a few further exchanges which included a text from the appellant which ended with him wishing her "a merry life", the complainant sent the following three text messages:

> "H please come home"[14]; and
>
> "I promise never to treat u like that again. I love u so much."; and
>
> "Please can u thing about still looking after R for me so I could work to pay off my loan. I could lose every thing. Please consider."[15] (emphasis added)

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11 AR Vol 2 pp 191-192.
12 AR Vol 2 p 194.
13 AR Vol 2 p 195.
14 AR Vol 2 p 196.
15 AR Vol 2 p 197. First names in the text messages have been substituted in these and other quoted extracts with initials.

[44] After a few further exchanges the appellant texted:

> "I want u to come home and be with me and R";
>
> "I'm willing to change, respect honour u".[16]

[45] After further text exchanges in which the appellant accused the complainant of having been jealous and having told him to pack his things and go and "stay with her",[17] the complainant texted she was not jealous and asked him to come home and be with her and their daughter.[18] There were further text messages of a similar theme.

[46] The appellant did not return home as the complainant had pleaded him to and the complainant made her complaint to the police. The appellant's counsel argued these messages, in the interim between the separation and the complaint to police, undermined the credibility and plausibility of the complainant's testimony.

[47] The credibility point was that before the text messages were introduced into evidence the complainant had in cross-examination agreed she was happy for the appellant to leave, made no attempt to get him to stay and was happy to be rid of him. It may be accepted there is some arguable inconsistency between those answers and some of the text messages. However, it is of minor significance because there was also some ambiguity in the timeframe being referred to in the questions attracting the complainant's agreement. At the time the appellant left it appears the complainant was angry and wanted him to go, not stay, whereas her subsequent texts to him were attempts to get him to return. Her obviously conflicted emotions in this era meant at different times she held different attitudes to the prospect of trying to continue the relationship.

[48] The plausibility point is the supposed improbability, if the appellant had committed the rapes, of the complainant seeking the return of the appellant rather than complaining to police once the appellant left the home. This argument again encounters the obstacle already identified that it is not inherently unlikely that, despite the appellant's appalling behaviour, the complainant would have had conflicted feelings about the appellant as well as about being left alone to raise their child. Her feelings included, as explained in cross-examination, being "emotionally bound to the controlling power" the appellant had in her life.[19] They also included an obvious financial concern about the consequences of the separation; hence her text message request for him to still look after their daughter so she could work to pay off her loan and not "lose everything".

[49] Given the rapes occurred in the course of a relationship it is not implausible that the complainant would have engaged in emotional and variable responses to the ending of that relationship before eventually complaining of the rapes to the police.

[50] An additional relevant aspect of the text messages was that they included a message in which the complainant accused the appellant of having treated her "worse than an animal". This was hardly helpful to the defence. It was consistent with the particularly demeaning aspects of the rapes described by the complainant.

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16 AR Vol 2 p 198.
17 AR Vol 2 p 199.
18 AR Vol 2 p 200.
19 AR Vol 2 p 163 L7.

*Attempt to pervert course of justice/AOBH (counts 5 and 6)*

[51] After the complainant went to the police there was a prolonged period of no contact between her and the appellant.

[52] Then, on 30 March 2018, the appellant contacted the complainant from a petrol station. She travelled to the petrol station where the appellant asked her to drop all charges, explaining that she needed to have compassion for him.[20]

[53] She then drove him to his home. Later the same day he contacted her again, saying that he wanted to talk to her and she and their daughter travelled to his home. He again asked her to drop the charges.[21] After that, the complainant testified:

> "He took – took a photo of R and myself and said to me that I had no choice – I had no choice – I need to settle the matter now – I have a choice, to settle the matter now or he will expose me. And he said to me, "Let me fuck you, so you can have no resentment or anger towards me, and you can drop the charge"."[22]

[54] The complainant responded she was going to the beach and the appellant indicated he was coming.[23] She testified the appellant went with them to the beach and that when they returned she announced she would not drop the charges. He allegedly punched her arm in response, causing a bruise.

[55] The complainant testified of having gone to the police but it is not clear how long after these events she did so.

[56] A photograph taken of an apparent bruise to her left bicep when she went to the police became an exhibit before the jury.

[57] The jury acquitted of the charge of assault occasioning bodily harm but convicted of the charge of attempting to pervert the course of justice. The appellant's counsel on the appeal did not dwell on these two counts in submissions on the unreasonable verdict ground. In any event there is nothing in the evidence about them to compel the conclusion it was not reasonably open to convict the appellant on count 5. It is true count 6 related to the events of the same day but, for reasons explained in considering ground 2, the different verdict outcomes are rationally explicable. The acquittal in respect of count 6, additional to the acquittals in counts 2 and 3, does not compel the conclusion the jury ought to have so doubted the complainant's reliability regarding the other counts as to have also harboured a reasonable doubt about them.

*Conclusion*

[58] The appellant's overarching argument on ground 1 relied on the accumulation of matters raised. The difficulty with that argument is the lack of force attending each of the matters raised. In substance the matters raised were of a kind defence counsel could raise and argue about in closing submissions before a jury but they were not

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20 AR Vol 2 p 117 L11.
21 AR Vol 2 pp 117 L23.
22 AR Vol 2 pp 117 L28.
23 AR Vol 2 pp 117 L33.

of such a kind, even considered collectively, as to suggest conviction was not reasonably open to the jury.

[59] The foregoing analysis of the whole of the evidence demonstrates that, having regard to the sufficiency and quality of the evidence, it was well open to the jury to conclude beyond reasonable doubt that the appellant was guilty of counts 1, 4 and 5. It follows ground 1 must fail.

**Inconsistent verdicts**

*Introduction*

[60] Ground 2 complains of inconsistent verdicts in two contexts. The first is that the verdicts of guilty on counts 1 and 4 are said to be inconsistent with the verdicts of not guilty on counts 2 and 3. The second is that the verdict of guilty on count 5 is said to be inconsistent with the verdict of not guilty on count 6.

[61] Where a jury's verdicts on different counts are said to be inconsistent, the test of whether an appellate court should intervene was said by Gaudron, Gummow and Kirby JJ in *MacKenzie v The Queen*[24] to be "one of logic and reasonableness". Their Honours observed courts are reluctant to accept verdicts are inconsistent if they are reconcilable. Their Honours explained:

> "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. In a criminal appeal, 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."[25]

*Counts 1 and 4*

[62] The above observations are pertinent to the appellant's argument regarding the alleged inconsistency of verdicts as between the convictions on counts 1 and 4 and the acquittals on counts 2 and 3. It is noteworthy that the two acquittals relate to the alleged vaginal and anal rape which occurred during the second episode. Had those two counts produced different results, the appellant's complaint of inconsistency would carry greater force. The challenge confronting the appellant is that the differing verdicts in respect of the rape charges may be readily explained by the jury holding a reasonable doubt as to whether the complainant had been raped as alleged during the second episode but holding no such doubt as to whether she had been raped during the first and third episodes.

[63] The jury may have had a reasonable doubt on the element of consent in respect of counts 2 and 3. The complainant's evidence touching upon that topic when describing counts 2 and 3 was not as compelling as her evidence on that topic when describing episodes 1 and 4. Her account of the events attracting counts 2 and 3 described physically co-operative behaviour by her. She was not specific about her lack of consent until specifically taken to it by the prosecutor after she had given that

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24 (1996) 190 CLR 348, 366, citations omitted.

25 Ibid 367.

account. That process also took her from initially saying she did not know what he was going to do as she entered the bedroom yet later explaining she had removed her clothes because she knew what he wanted to do. These aspects were emphasised by defence counsel,[26] who addressed in a more prolonged way in respect of counts 2 and 3 than in respect of the other counts in addresses. The jury may in the end result have perceived that there was a degree of uncertainty about the issue of consent regarding counts 2 and 3.

[64] There were self-evidently other differences regarding episode 2 compared to episodes 1 and 3, including that episode 2 allegedly involved anal intercourse. In any event, the nature of the distinction in the force of the complainant's description on the element of consent for counts 2 and 3 as compared to counts 1 and 4 demonstrates it was not inevitable that the harbouring of a reasonable doubt about her testimony on the issue of consent in respect of counts 2 and 3 logically compelled the holding of a reasonable doubt regarding the same element in respect of the first and third episodes.

[65] The verdicts of not guilty in respect of counts 2 and 3 are thus reconcilable with the verdicts of guilty on counts 1 and 4.

*Counts 5 and 6*

[66] The verdicts on counts 5 and 6 are somewhat more problematic in that they were allegedly committed on the same day, albeit on different occasions that day.

[67] On three occasions that day the appellant asked the complainant to withdraw her allegations of rape and later that same day when the complainant announced she would not withdraw the allegations he allegedly punched her, causing her bodily harm in the form of a bruise, a photograph of which was exhibited.

[68] The events giving rise to counts 5 and 6 were not the same event. The alleged assault occasioning bodily harm did not coincide with any of the specific conversations during which the appellant prevailed upon the complainant to withdraw the charges. Rather it occurred later that day, after they had gone to the beach in the interim, in apparent retribution, or at least anger, when the complainant announced she would not be withdrawing the charges.

[69] Further to that temporal distinction, curiously little detail of the physical circumstances under which the alleged assault occurred was adduced in evidence. The sole description of the event occurred in this exchange in evidence-in-chief:

> "So you took him to the beach?---Yes. He came with us.
>
> And what happened next; were you – was there any further discussion about the charges?---When we drove back home, I said to him, "I'm not dropping the charges", then he punched me in my left arm.
>
> Did that hurt when he punched you in the left arm?---Yes, it did.
>
> Did it cause you any injury?---A bruise on my left arm.
>
> Okay. What happened next?---I took – drove him to his house. And I stayed there – we stayed there for half an hour, then went home.

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[26] AR Vol 1 p 37 LL20-35.

> Okay. Did you speak to the police again after that?---Yes I did.
>
> And did you tell them about what had happened?---Yes I did.
>
> And you showed them the bruise to your arm?---That's correct."[27]

A photograph of the complainant with an apparent bruise to her left bicep was shown to her and she confirmed it was a photograph taken of her when she went to the police.

[70] There was no clarification of where the alleged assault occurred. In the above description it occurred when they "drove back home". It is not clear whether that means it occurred after or during the drive, in the car or out of it. It is not clear how or where they were positioned relative to each other at the time of the punch. The photograph taken at the police station did seem to confirm the presence of a likely bruise but no evidence was adduced about how long after the event the complainant had attended upon the police and been photographed. The jury may well have been bemused by the lack of evidentiary detail; detail which might be expected to be given in order to lend some air of reality to count 6.

[71] In addition, when the complainant was cross-examined about the chain of events during which the punch had to have occurred, she made no mention of it. To be fair to the complainant, on a careful review of the relevant questions asked in cross-examination, they did not specifically require mention of the punch if the punch had occurred. However, they were the type of questions in response to which the jury may have expected most people in the complainant's position to proffer an explanation referring to the punch and its influence upon events around that time.

[72] This combination of factors reasonably and logically explains why the jury, while not necessarily disbelieving the complainant, may have concluded that the barely explained evidence of the punch was inadequate to satisfy it to the criminal standard on count 6.

[73] The differing verdicts in respect of counts 5 and 6 are thus reconcilable.

[74] It follows ground 2 must also fail.

**Orders**

[75] Both grounds have failed.

[76] I would order:

Appeal dismissed.

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27 AR Vol 2 pp 117-118.