# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v B* [2002] QCA 473 |
| PARTIES: | **R**<br>**v**<br>**B**<br>(appellant) |
| FILE NO/S: | CA No 242 of 2002<br>DC No 170 of 2001 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Appeal against conviction |
| ORIGINATING COURT: | District Court at Townsville |
| DELIVERED EXTEMPORE ON: | 5 November 2002 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 5 November 2002 |
| JUDGES: | de Jersey CJ, McMurdo P and Davies JA<br>Separate reasons for judgment of each member of the court, each concurring as to the order made |
| ORDER: | **Dismiss the appeal** |
| CATCHWORDS: | CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – PARTICULAR GROUNDS – UNREASONABLE OR INSUPPORTABLE VERDICT – WHERE APPEAL DISMISSED – where the appellant stood trial for five counts of indecent dealing – where acquitted on four counts and appeals against count four as unsafe because it is inconsistent with the other acquittals – where the learned trial Judge directed the jury as to the prospects of differential verdicts – where it fell to the jury to determine the quality of the complainant's evidence on all counts but where jury must have been satisfied as to the sufficient quality of the evidence only in relation to count four |
| COUNSEL: | K McGinness for the appellant<br>M J Copley for the respondent |
| SOLICITORS: | Legal Aid Queensland for the appellant<br>Director of Public Prosecutions (Queensland) for the respondent |

THE CHIEF JUSTICE: The appellant stood trial on five counts of indecent dealing over the period 1987 to 1995, three in respect of his stepniece A for a period over which she was aged six to 14 years, and two in respect of his stepniece L for a period in which she was aged six to 12 years.

The appellant was acquitted on four counts and convicted on one count in respect of A. At the time of that offence resulting in conviction A was aged 14 to 15 years, or perhaps a bit less than that.

The appeal on the ground that the conviction on Count 4 is unsafe is based on the contention that it is inconsistent with the acquittals.

The conviction concerned events in a caravan at Crystal Waters Plantation Caravan Park. A said that the offence occurred in a caravan not occupied by her family. She gave evidence of a game in which at the appellant's urging she and her cousin L put their hands down his pants to pull out money. She recalled rubbing her hand against his penis as she did so. According to A this was the only occasion on which she participated in this activity and only the three of them were present.

On the other hand her cousin L said that this happened on a number of occasions at various locations and with other cousins present. Those other cousins gave evidence as part of the defence case denying participating in such activity. In

generally rejecting L's credibility the jury could in theory, nevertheless, have accepted A's differing account of this event.

The acquittals concerned first an occasion when A said the appellant rubbed his penis against her for three to seven minutes in an annexe to her grandparents' caravan at a time when she was approximately seven years of age; the second and third, when at Eagleby the appellant encouraged A to place a condom on his penis and masturbate him, and similarly with L, although L did not give evidence of this; and fifth, another occasion of retrieving money from the appellant's pants.

The appeal, as I have said, is based on the contention that the jury could not reasonably have convicted on Count 4 while acquitting on the others.

The learned trial judge directed the jury as to the prospect of differing verdicts and as to the possibility of their reaching different views about the credibility of A and L. In his report to this Court the judge said that he inclined to the view that the verdicts may be inconsistent.
The position taken by the Crown is this. On the first count which A said related to events in an annexe to her grandparents' caravan the appellant's mother gave contradictory evidence about location which could rationally explain why the jury may have entertained a doubt especially bearing in mind that A was then only six or seven years of age.

On Counts 2 and 3 A's position was that L was present and participated but L gave no evidence of doing that. That, likewise, may explain why the jury may therefore have doubted A's reliability on that although not necessarily doubting her honesty. On the other hand it may be noted the jury has rejected all counts dependent on the evidence of L.

As to Count 4 which resulted in the conviction, L said that the so-called game occurred at various places whereas A put it only at Crystal Waters Plantation.

The jury acquitted the appellant in respect of L's complaint about this embodied in Count 5 but convicted on A's evidence in relation to Count 4. The jury obviously must have preferred A's recollection over L's. L's was, as mentioned earlier, that this activity occurred at various places and occasions and on various occasions and with other cousins present, with those cousins giving evidence denying being present. That may have explained why the jury rejected L on this particular count.

There were potentially significant differences between the accounts given by the two complainants in respect of what may have been regarded as the same occasion. The jury has rejected the count based on the evidence of L but convicted on the count which A puts as an isolated event at a particular location whereas L would have it as one of a number of occasions and with others present, those others, however, denying her claim.

It may have been relevant, also, to the jury that at the time of Count 4, A was 14 or 15 years old or thereabouts, whereas she was only six to eight years old at the time of the other counts concerning her.

In light of the discrimination which the learned Judge reasonably invited of the jury it was, in theory, not unreasonable, having heard the complainants, that the jury might have been satisfied on sufficient quality evidence in relation to Count 4, while not on the others.

There was no binding requirement that the jury be instructed that before delivering differential verdicts, they must be satisfied that the differentiation was logical and reasonable. No such direction was sought. Where the result, as in this case, depends completely on the assessment of the credibility of oral evidence on the respective counts, there being no objective support, it fell to the jury to determine the quality of the evidence on those counts.

For the reasons previously expressed, there was, on paper, reason why the jury may possibly and rationally have been satisfied of guilt on Count 4, but not in respect of the other counts. What then matters, of course, in the appeal Court's consideration, is the jury's advantage in having heard the evidence as delivered.

Where a jury discriminates, as here, the presumption is not caprice, but rationality. An appeal Court does not approach

such a situation of differentiation as prima facie wrong, and consistently it falls to the appellant to demonstrate error.

I am satisfied, notwithstanding the trial Judge's inclination, that there was here a rational basis for the jury's approach. Ms McGinness, who appeared for the appellant, raised the absence from the summing-up of a direction as to uncharged acts. No redirection was sought in relation to that matter, presumably because the Judge sufficiently focussed the jury's attention upon the evidence relating to the specific counts.

I would dismiss the appeal.

THE PRESIDENT: I agree. This is not a case where the jury's verdict of acquittal on Counts 1 to 3 and Count 5 was necessarily a finding that the complainant on Count 4 was dishonest or so inherently unreliable as to inevitably taint her credibility or reliability on the other counts. See R v. Gleadhill [2002] QCA 204, CA No 326 of 2001, 14 June 2002, paragraph 31 and R v. D [2002] QCA 445, CA No 189 of 2002, 25 October 2002, paragraph 7.

The Chief Justice has explained in his reasons that the verdicts were not an affront to logic and common sense and there was a rational explanation on the evidence for them. The inconsistent verdicts do not render the guilty verdicts unreasonable or unsafe and unsatisfactory.

I agree that the appeal against conviction should be dismissed.

DAVIES JA: I agree with the orders and the reasons of the Chief Justice.

THE CHIEF JUSTICE: The appeal is dismissed.

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