SUPREME COURT OF QUEENSLAND

CITATION:	*R v M* [2003] QCA 231
PARTIES:	**R** v **M** (appellant)
FILE NO/S:	CA No 94 of 2003 DC 80 of 2003
DIVISION:	Court of Appeal - Cairns Circuit
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	27 May 2003
DELIVERED AT:	Cairns
HEARING DATE:	27 May 2003
JUDGES:	Davies JA and Cullinane and Jones JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against conviction dismissed**
CATCHWORDS:	CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - UNREASONABLE OR UNSUPPORTABLE VERDICT - WHERE APPEAL DISMISSED - where appellant convicted of indecent dealing and maintaining an unlawful sexual relationship with a child - where appellant acquitted on other counts - where jury directed as to the need to consider each charge separately - whether rational basis existed for the jury to return the verdicts of guilty on some counts and not guilty on others *MacKenzie v R* (1996) 190 CLR 348, followed *MFA v R* (2002) 193 ALR 184, considered
COUNSEL:	B M Murray (Cairns) for appellant L J Clare for respondent
SOLICITORS:	Legal Aid Queensland for appellant Director of Public Prosecutions (Queensland) for respondent

DAVIES JA: The appellant was charged on an indictment containing 16 counts. He was convicted after a trial in the District Court in Cairns on the following of those counts: one

of maintaining unlawful sexual relationship with a child under the age of 16 which was count 1; five of the indecent dealing, which were counts 2, 9, 12, 15 and 16; and two counts of procuring a child to commit an indecent act which were counts 13 and 14. He was acquitted by the jury in respect of two counts of indecent dealing, which were counts 4 and 6, four of wilfully exposing a child to an indecent picture, counts 3, 8, 10, 11, one of wilful exposure of a child to an indecent videotape, count 7 and one of procuring a child to commit and indecent act, count 5.

There were two complainants. The principal one was the appellant's stepdaughter, then aged 12. The second was a friend of the stepdaughter who was 13 years of age. The appellant appeals against those convictions. In argument the appeal has been confined to an appeal against the convictions in counts 2 and 9, and it is submitted in consequence, count 1, the remaining count.

The appeal against conviction on counts 2 and 9 are on the basis of inconsistency between the conviction on those counts and the acquittals on counts 3 to 8. The appeal on count 1 is based on the assumption of a successful appeal on either count 2 or count 9 and a submission that in consequence there are not three or more occasions within the meaning of 229B of the Criminal Code.

It is unnecessary to explore that last contention further unless the earlier grounds of appeal succeed in part.

The question which arises in the first ground of appeal, that is the ground of appeal relating to counts 2 and 9 are based on inconsistency, requires the appellant to show that there is no rational basis for the verdicts of guilty resulting in conviction on those counts. As the Court said in *MacKenzie v R* (1996) 190 CLR 348 at 367, if there is a proper way by which the appellate court may reconcile the verdicts, allowing it to conclude that the jury performed their functions as required, that conclusion would generally be accepted. See also MFA v R (2002) 193 ALR 184 at 188 to 191 and 201 to 202.

The learned judge directed the jury clearly and thoroughly about the need to consider each charge separately and look at the individual events of each count separately. No criticism is made by Mr Murray, who ably argued this matter for the appellant, about the directions given by the trial judge.

Count 2 was the first in time of the specific counts alleged by the appellant, and for the purpose of considering this question it is necessary to set out in a little detail the facts of counts 2 to 9, and for that I am grateful for the summary given by Mr Murray in his outline which I will adopt in what I am about to say.

In count 2, the first complainant swore that the appellant called her into his bedroom to rub his back. She mentioned in particular, I might add, that he had a bad back from his time in Thursday Island I think it was and she had rubbed his back

before. On this occasion, as she knelt on the bed beside him, the applicant slid his hand inside her underwear and rubbed her vagina and clitoris. She asked him what he was doing and he replied, "I was playing with your cunt." She asked him what he meant. On this count, as I have already mentioned, the appellant was convicted.

Count 3 followed shortly after. As a response to S's question the appellant retrieved a pornographic magazine and showed her various obscene pictures. He offered, according to the complainant, explanations and pointed various things out in the pictures. On this count, as with the other counts that I am about to mention down to count 8 the appellant was acquitted.

Count 4, the complainant said that this involved an incident similar to count 2, although on this occasion the appellant went further, removing her pants and underwear from one leg and rubbing his penis on her vagina. They were both lying on their sides. He then masturbated and S, the complainant, got dressed. He told her not to tell anyone, saying, "You don't want me to go to gaol; do you?"

Counts 5 and 6 occurred in the appellant's bedroom. After rubbing the complainant's vagina he sat her astride him so that her vagina came into contact with his exposed penis. He moved her up and down for a short period and then she got off him. He masturbated and then told her to lick and suck his penis and pushed her head towards his penis. She did this for a short

time and then pulled away. The appellant then masturbated to ejaculation.

Count 7, the complainant said that she was sitting in the lounge room watching Hercules on television when the appellant entered the room and said he had something which they could watch. He played a pornographic video for a couple of minutes but turned it off because her brother came home. She denied suggestions in cross-examination that the appellant did not know how to use a video recorder.

Count 8, the complainant said that about half an hour after count 7 occurred the appellant called her into the computer room and showed her pornographic images on the computer screen. She also stated that the appellant showed her pornographic images on the computer when her mother was not home. She denied suggestions that he did not know how to use the computer.

And then followed Count 9 on which the appellant was also convicted. On this occasion, which was the same day that on which count 7 and 8 occurred, he called her into his bedroom and told her to lie on the bed. He removed her shorts and underwear from one leg, he took a vibrator from the cupboard and rubbed it on her vagina. She said that she said to him, "Isn't it supposed to vibrate?" It apparently did not do so. The appellant, apparently, and the complainant's mother subsequently brought the complainant a vibrator.

There were two main submissions in this respect by Mr Murray. With respect to count 2, is that the verdict in count 2 was inconsistent with that on counts 4, 5 and 6 which were similar to the events in count 2. And the other was that it was inconsistent with count 3 because although the events of count 3 were quite a different kind from those in count 2 they followed immediately after count 2 and it was therefore inconsistent to reach different verdicts on those counts.

In my opinion, however contrary to the able submission by Mr Murray in this respect, there was a rational basis upon which count 2 may be distinguished from counts 4, 5 and 6. Count 2 was the first occasion which the complainant can recall in which serious sexual acts, or contact of this kind being skin to skin, occurred. It would have been, no doubt, a very important and appalling incident in the complainant's life and one which one might expect that she would remember with reasonable precision.

There is also the fact that this event was narrated by her with a great deal of precision as to what occurred. I do not think it is surprising therefore, or irrational for the jury to accept her evidence with respect to this count, but to have some doubt as to her evidence with respect to the subsequent accounts which she might not be expected to recall with such clarity as she plainly might have been expected to recall this count.

Mrs Clare, in her outline and in her submissions, also pointed to the possibility that she, the complainant, may have exaggerated in these later counts. They may be additional factors but in my view the main point of the distinction is the fact that this was the first serious offence committed by the appellant against the complainant.

As to the distinction between count 2 and count 3 on the other hand, I would also reject Mr Murray's submission. The complainant was a very precocious young girl. The jury seemed to have adopted a similar attitude in respect of all of the offences involving pornographic material. The complainant, it is plain, had herself obtained access to pornography without the intervention of the appellant and had indeed shown the pornography to her friend. The jury may have thought that on this occasion, as in other occasions, the complainant had helped herself to this pornography rather than, as she said, that the appellant did so. Or perhaps I should put it another way, because she had on other occasions, helped herself to pornography, may have had some doubt about her story on this occasion. In my opinion, that was enough to justify a rational distinction between count 2 on the one hand and count 3 on the other.

On the other hand, it seems to me, that with respect to subsequent acts, the jury were not prepared to go so far as to accept the complainant's evidence beyond reasonable doubt unless it was corroborated in some way, or there was some other factor which would have made the event specifically memorable.

Unlike counts 4, 5 and 6 there was, I think, such a factor with respect to count 9.

Count 9 involved the use of a vibrator. The vibrator concerned was a white vibrator with a broken cable. I mention that because the complainant had apparently, as I have already mentioned, been given a blue vibrator by her parents which was later found in her room. The subject of count 9, the white vibrator, as I have already indicated did not vibrate when the appellant tried to use it on the complainant. It was discovered in the second top shelf of the cupboard in the appellant's bedroom. It was found to have a broken cable, no doubt explaining why it did not vibrate. The appellant himself accepted that the complainant was not allowed to enter that bedroom, and as Mrs Clare has correctly put, her knowledge of the existence of the vibrator therefore tended to support her account of the appellant's use of it upon her.

To that Mr Murray replies, "Well if that's so, with respect to the vibrator, why isn't that also true of the videos and magazines?" The short answer seems to be that because the complainant had herself obtained access to videos, magazines as well as pornography on the internet, the jury were disinclined to be satisfied beyond reasonable doubt that any of the offences involving pornography should be the subject of convictions. It was also submitted by Mrs Clare that the videos and magazines, the subject of the charges, were not specifically identified as the same videos and magazines which were found in the cupboard in the appellant's bedroom. That

may be an additional factor, but I think it more likely that the reason for the distinction made by the jury is the one I have already indicated.

For those reasons, in my opinion, the convictions on each of counts 2 and 9 may be reconciled with the acquittals on counts 3 to 8. It follows that the appeal in respect of those convictions must, in my opinion, be dismissed and it follows that the appeal in respect of the conviction on count 1 must also be dismissed. Those being the only grounds argued, I would dismiss the appeal.

CULLINANE J: I agree.

JONES J: I agree.
