SUPREME COURT OF QUEENSLAND

CITATION:	*R v P* [2003] QCA 324
PARTIES:	**R** **v** **P** (appellant)
FILE NO/S:	CA No 110 of 2003 DC No 95 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	25 July 2003
DELIVERED AT:	Brisbane
HEARING DATE:	25 July 2003
JUDGES:	Davies and Williams JJA, and Mackenzie J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed**
CATCHWORDS:	CRIMINAL LAW- APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE OR UNSUPPORTABLE VERDICT – WHERE APPEAL DISMISSED – where appellant charged on five counts – where convicted on counts three to five – where acquitted on count two – whether verdicts returned so irreconcilably inconsistent that they are unreasonable and unsupportable by evidence – whether verdicts unsafe and unsatisfactory
COUNSEL:	P Callaghan for the appellant M Copley for the respondent
SOLICITORS:	Legal Aid Queensland for the appellant Director of Public Prosecutions (Queensland) for the respondent

MACKENZIE J: The appellant appeals against conviction on the grounds that the verdicts of guilty returned by the jury are irreconcilably inconsistent with the verdict of not guilty returned by the jury on the count 2, and that the verdicts of

the jury are unreasonable, cannot be supported by the evidence and are thus unsafe and unsatisfactory.

Counts 1 and 2 were based on one occasion. Count 1 was that the appellant administered a drug to the complainant with intent to stupefy her to enable a sexual act to be engaged in with her. Count 2 charged that the appellant being the occupier of premises knowingly permitted the complainant, the child under 16 to be in the premises for the purposes of a person unlawfully and indecently dealing with her. At the end of the evidence a nolle prosequi was entered on count 1 due to inadequacy of evidence relating to administration of a drug. The jury returned a verdict of acquittal on count 2.

Counts 3, 4 and 5 related to one occasion. Count 3 charged that the appellant wilfully and unlawfully exposed the complainant, a child under 16, to an indecent act by the appellant with circumstances of aggravation that the child was her lineal descendant and under her care. Count 4 charged the appellant with unlawfully and indecently dealing with the girl with the same circumstances of aggravation. Count 5 charged the appellant with the rape of the complainant.

Count 6 charged wilfully and unlawfully exposing the complainant, a child under 16, to an indecent act by the appellant with the same circumstances of aggravation. Verdicts of guilty were returned on counts 3 to 6. At the time of all offences the appellant was in a relationship with a man who is now deceased. It is accepted that the learned

trial Judge appropriately and forcefully told the jury that the prosecution case rested on the credibility of the complainant.

The crux of the appellant's argument is that if the jury doubted the complainant's word as to the events which were the subject of count 2, there was no apparent reason why they should not have done so as well on the other counts. Equally, if they accepted her evidence on counts 3 to 6 there was no rational explanation as to why they should not have done so in relation to count 2. It was submitted that the case was not one where there was contradictory evidence on some charges, but not others. It was common ground that there was independent evidence supporting the complainant's evidence and therefore no rational basis for distinction between the cases on the basis that in some instances the complainant's account was corroborated.

It was also submitted that there was no reason to think that the verdict on count 2 should be characterised as a merciful verdict. One issue that did emerge in relation to count 2 was that the complainant gave evidence that when the man had said he was going to bed on the night of the alleged incident, her mother said that the complainant should go too. The girl said that she did what her mother told her to do. She said that the next thing she remembered was that she was naked in bed with the man who was attempting to indecently deal with her. Unlike the other incidents charged it was not alleged that the

appellant had played any active part in what had actually occurred in the bedroom.

The girl gave evidence that the mother had entered the room on two occasions, when she looked at them, walked to a cupboard and took something out and walked out again. The evidence suggests that while the appellant was in the room, the man temporarily desisted from what he was doing and sat on the end of the bed while the girl curled herself up on the bed.

On the third occasion the appellant entered the room, she asked the man what they were doing after which she dressed the girl and took her to bed. On the first two occasions there had been no conversation as far as the girl could remember. The girl was cross-examined about her original statement to the police which did not refer to the appellant telling her to go with the man. In that statement she said that she remembered the man saying that he was going to bed and that, "for some reason", she followed him in there. During the course of cross-examination on this issue the girl repeated that her mother had told her to go with the man.
Counts 3, 4 and 5 related to an allegation that the appellant had come into the complainant's bedroom, woken her up and asked her to come and have a talk with her and the man. The appellant took off the complainant's clothes and placed her on the bed. The appellant then rubbed baby oil onto the man's penis, then the appellant committed oral sex upon the complainant. After she had finished, the man had sexual

intercourse with the complainant while the appellant put her hand over the complaint's mouth to prevent her from screaming.

The circumstances of count 6 were that the complainant was taken by the appellant into the bedroom where the man was lying on the bed, and again the appellant rubbed his penis with baby oil. The appellant gave evidence denying any of the activities alleged by the complainant. If the jury accepted the complainant's evidence on counts 3 to 6 there was a sound basis in the evidence for conviction on each.

If the prosecution case was really that the appellant was the principal offender in an offence of indecently dealing by virtue of section 7(c) of the Code, the utility of charging an offence under section 213(1) may be questioned in circumstances which may literally fall within the words of the section, but involve some straining of the notion of knowingly permitting a child who ordinarily resides in the premises with others involved in the criminal conduct to be in the premises for the purposes of the offence.

Experience and application of Ockham's Razor in its popular form would suggest that using a more complex provision is more likely to create problems than assistance for the jury. Quite apart from that, it is the case that the offence charged in count 2 involved different considerations from the other counts. In particular, it was necessary to prove a particular purpose. Given the elements of count 2 and the issue whether the complainant had been told to go with the man or not and

what to my mind may have seemed to be a lack of certainty about what the mother had the opportunity of actually observing about what was happening in the bedroom on the occasions when she entered the bedroom, the jury may have been left in a state of reasonable doubt about the count while otherwise accepting the complainant as a truthful and accurate witness.

In the circumstances, there is no basis in my view for finding the verdicts were irreconcilably inconsistent. No complaint was made about the directions given to the jury either on the elements of the offences or the pivotal role that credibility played.

The only faint criticism advanced was that the jury was not told that a reasonable doubt entertained by them as to the complainant's evidence in respect of any of the counts ought to be taken into account by them in considering her credibility generally. The Queen against M [2001] QCA 458. It was conceded that there were no requests for such a direction and no application for a re-direction. It was however submitted that the absence of such a direction may add to the concern that there may have been a miscarriage of justice.

In addition to the matters already mentioned, the jury had before it that the complaint was not made for a number of years and that there was a substantial body of evidence of communication and interaction socially between the complainant

and the appellant in cordial terms in the period between the alleged offences and the complaint being made.

These matters were all before the jury, but the jury was prepared to accept the complainant's evidence. It was open to the jury to do so. In my view the ground that the verdicts are unsafe and unsatisfactory has not been made out. I would therefore dismiss the appeal.

DAVIES JA: I agree with the order proposed Justice Mackenzie and also with his reasons. I would add that two matters in particular, persuade me that the verdicts of the jury on count 2 and the other counts are not irreconcilably inconsistent. The first of them is, as was pointed out by Mr Copley for the respondent that the complainant's first version of what happened on the occasion of count 2 was not that the appellant told her to go with Bob, but that for some reason she followed him.

There was a substantial length of time between that occasion and the trial of the action of the giving her of her evidence, and the jury may well have been prepared to think that the contemporary account was a more reliable one, or at least that may have caused the jury to have some doubt about the complainant's ability to recall precisely what was said on the occasion of her giving evidence.

The second matter which it seems to me was relevant to this question, is that it's unclear to me and I think it would have

been unclear to the jury, precisely what the appellant saw when she first entered the room. There was evidence that it was dark, and in addition to that the complainant gave, it seems to me, two inconsistent versions about what her mother would have seen when she came into the room.

It was therefore, it seems to me, open to the jury to think that the appellant either did not appreciate when she first entered the room what was truly happening, or she may have suspected it but didn't want to believe that on the first occasion and that only really she was finally prepared to accept it on the third occasion on which she came into the room, and the events happened as Justice Mackenzie has indicated.

For those reasons, in addition to those given by his Honour, I agree that the appeal should be dismissed.

WILLIAMS JA: I agree with what has been said by each of the other members of the Court. I would only add that a verdict of not guilty on count 2 does not necessarily mean that the jury doubted the complainant's credibility when she gave evidence of sexual activity occurring on the bed between herself and the man, Bob. Given all of the evidence, the jury's concern may well have been with the sufficiency of evidence capable of establishing the other elements of the change, namely that the appellant knowingly permitted the complainant child to be in the premises for the purposes of a person unlawfully and indecently dealing with her. As the

other members of the Court have pointed out there were significant differences between the evidence against the appellant on that count and the evidence against her on the other counts on which convictions were recorded.

I agree with the order proposed.

DAVIES JA: The appeal is dismissed.
