SUPREME COURT OF QUEENSLAND

CITATION:	*R v D* [2003] QCA 522
PARTIES:	**R** v **D** (appellant)
FILE NO/S:	CA No 181 of 2003 DC No 3505 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	20 November 2003
DELIVERED AT:	Brisbane
HEARING DATE:	20 November 2003
JUDGES:	McMurdo P, Davies JA and Wilson J 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 - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AND NEW TRIAL - PARTICULAR GROUNDS - UNREASONABLE OR INSUPPORTABLE VERDICT - WHERE APPEAL DISMISSED - where appellant charged with eight counts of indecent dealing - where appellant convicted on six counts and acquitted on two counts - where complainant's evidence supported by independent evidence suggesting appellant had unhealthy sexual interest in complainant - where a number of explanations existed for different verdicts - whether verdicts inconsistent
COUNSEL:	C J Callaghan (sol) for appellant C W Heaton for respondent
SOLICITORS:	Callaghan Lawyers for appellant Director of Public Prosecutions (Queensland) for respondent

MR C CALLAGHAN (instructed by Callaghan Lawyers) for the appellant

MR C W HEATON (instructed by the Director of Public Prosecutions (Queensland)) for the respondent

THE PRESIDENT: Justice Davies will deliver his reasons first.

DAVIES JA: The appellant was indicted in the District Court on 19 December 2002 on six counts of indecent dealing with a girl under 12 years of age and two of indecent dealing with the same girl under 16 years of age. Count 1 alleged that the offences occurred between 30 June 1975 and 1 August 1975. Count 2 alleged that the offence occurred between 24 December 1976 and 1 February 1977. Count 3 alleged that the offence occurred between 1 February 1977 and 31 March 1977. Count 4 alleged that the offence occurred between 1 November 1978 and 31 December 1979. Count 5 alleged that the offence occurred between 24 December 1979 and 1 February 1980. Count 6 alleged that the offence occurred between 31 August 1979 and 31 October 1979. Count 7 alleged that the offence occurred between 31 December 1978 and 1 January 1982. And count 8 alleged that the offence occurred between 1 January 1982 and 1 December 1983. After a trial lasting four days the appellant was convicted on counts 2, 3, 4, 6, 7 and 8 and acquitted on counts 1 and 5. He appeals against all of his convictions.

The only substantial ground of appeal is that the verdicts of guilty are logically inconsistent with the verdicts of not guilty on counts 1 and 5.

It is submitted by Mr Callaghan, who appeared for the appellant, that the evidence said to support count 1 was strikingly similar to the evidence said to support counts 2, 3, 6 and 8. All incidents were alleged to have taken place in the family home when the complainant's mother was not present and on each occasion the appellant was alleged to have performed oral sex on the complainant. A similar complaint is made about the inconsistency of the not guilty verdict on count 5 with those guilty verdicts but more particularly with the verdict on count 4.

Count 1 was the first in time and must have occurred, if it did, when the complainant was only six and a half. The appellant, who was the complainant's stepfather, had recently undergone an operation for hernia. The complainant said that the event occurred a few days after he returned from hospital. He asked her if she wanted to see his scar. She said she did so he pulled down his underwear exposing his erect penis. He asked her to touch his penis which she did. He lay her down on the floor, removed her underwear and shorts and performed oral sex on her. She says that she can recall the incident specifically because she was concerned that he might hurt himself.

Count 2, the evidence with respect to which Mr Callaghan asks us to compare with that in respect of count 1, was that a few days after Christmas 1976, more than a year and a half after the first alleged count, the appellant approached the complainant saying he wanted to talk to her and show her

something. She followed him into a bedroom when he told her, "Mum's not here so we can have some lickies." He then removed the bottom half of her clothing and performed oral sex on her while she lay on the bed with her legs dangling over the edge. While he did this she could see his hand moving up and down. After a few minutes he got up and walked into the bathroom. She followed him and saw him wiping the end of his penis with a towel.

After the jury had deliberated for some hours they asked the learned trial judge the date of the appellant's hernia operation. That was, as I have already said, in June or July and the complainant said that count 1 occurred a few days after the appellant came out of hospital. The respondent's counsel in this Court, Mr Heaton, points out that the dates in the indictment between which it is alleged this offence must have been committed are 30 June 1975 and 1 August 1975 thus limiting it to the month of July. Although that seems the most likely month it was possible, no doubt that if the appellant had his operation in early June the incident, if it occurred, may also have occurred in June. It was submitted by Mr Heaton that this may have caused the jury to have a doubt about whether the offence occurred during the period alleged. Mr Callaghan for the appellant, concedes that that is a rational explanation for the inquiry which the jury made. In my opinion it is also a rational explanation for the difference in verdict between count 1 and count 2.

There are two other possible explanations for this difference in verdicts, either of which alone could have provided rational explanations for the difference but which may be at least referred to in addition to the explanation to which I have just referred.

The first of these is that it emerged during the course of cross-examination of the complainant that this offence, as described by the complainant, occurred late one morning in front of sliding glass doors which were exposed to the street in front. And, in my opinion, the jury may have had some doubt that although an offence of that kind occurred, it occurred where and in exactly the position that the complainant alleged that it did, that is, in a position in the lounge room exposed to the street.

The third possible explanation for this verdict is that it occurred upon the complainant's evidence, when she was only six and a half. Count 2, the first of the subsequent complaints, occurred a year and a half later when the complainant was about eight. The trial was more than 27 years later. So it is a possible explanation for the jury having a doubt about the guilty verdict on this count that the complainant was so young at the time it must have occurred and the period which has elapsed since then.

It seems to me therefore that these explanations, either separately or together, provide a rational explanation for the jury not convicting on count 1.

Count 4, which occurred when the complainant was nearly 10 was the first of a number of incidents of indecent treatment to which the complainant referred in which the facts were very similar. The appellant and the complainant were alone swimming in the aboveground swimming pool in the backyard of the house where they lived. The incidents all occurred at night. They were playing a "breath holding game" invented by the appellant, it would seem, as a subterfuge to enable him to engage in oral sex with the complainant. She would stand in the middle of the pool with her legs apart. He would swim between her legs, flip over on his back, pull her swimming costume aside and run his tongue up and down her vaginal area.

Count 4 was the first of such incidents. It occurred a few days after the purchase of the aboveground swimming pool. There then followed a series of subsequent incidents of a very similar kind, that is, the incidents occurred during later breath-holding games. In some of these, he ran his fingers up and down her vagina and at least on one of them inserted his finger in her vagina.

But it is clear that, on her evidence if accepted, a number of these incidents of a similar kind occurred continually over the following year, up to and including count 5.

Count 5 occurred according to the complainant, at Christmas in the following year, that is, 1979. It was, she said, exactly the same behaviour. She remembered it, she said, only because she had received a red bikini for Christmas, having asked for

one for more than a year and on Christmas night or the next night they played the same game and she recalls thinking how attractive she looked in her bikini.

It was true therefore, as Mr Callaghan has argued, that the complainant gave specific evidence of a specific recollection of this event. However it seems to me that a rational explanation of the jury's failure to convict on count 5 may be that count 4 was the start of series of similar incidents difficult to distinguish from one another and that therefore it made it difficult to be confident that the incident the subject of count 5 occurred when the complainant said it did. Acting cautiously, the jury may not have been satisfied beyond reasonable doubt that count 5 occurred when she said it did.

There is, in my opinion, another rational explanation for the jury's failure to convict on count 5. This is simply that they were satisfied that following the incident referred to in count 4 there were a number of similar incidents over a period of about a year, of which count 5 was only one. However they may have thought that it was sufficient punishment to convict the appellant of only one of them. Or it may have been a combination of these two factors.

The complainant's evidence was supported by independent evidence tending to prove that the appellant had an unhealthy sexual interest in the complainant. He had taken nude photographs of her and in his own evidence he admitted to having indecently dealt with her, although the said that this

was in the context of sexual education. The jury plainly disbelieved him, from which they would have been entitled to infer that the incident which he described which was not one of those charged, was further evidence of his unhealthy sexual interest in the complainant.

There is no reason to believe that the jury did not generally accept the complainant's evidence. There is, in my opinion, a rational explanation for their nevertheless not convicting on counts 1 and 5 and I would therefore dismiss the appeal.

THE PRESIDENT: I agree.

WILSON J: I agree.

THE PRESIDENT: The order is the appeal is dismissed.
