SUPREME COURT OF QUEENSLAND

CITATION:	*R v DAL* [2005] QCA 281
PARTIES:	**R** **v** **DAL** (appellant)
FILE NO/S:	CA No 74 of 2005 DC No 80 of 2005 DC No 86 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	12 August 2005
DELIVERED AT:	Brisbane
HEARING DATE:	28 July 2005
JUDGES:	McMurdo P, McPherson and Keane JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders 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 was charged with 23 counts arising out of his abduction and sexual abuse of two young female tourists - where the offences charged included multiple counts of deprivation of liberty, torture and rape - where appellant was convicted on eleven counts and acquitted on one count with the jury failing to return a verdict on the other eleven counts - where it was accepted that there was evidence on which the jury could have convicted in relation to each of the counts that was charged - where it was submitted that the "inconsistent verdicts" which eventuated suggested that the jury had acted unreasonably and had failed to properly understand their function - whether a failure to reach a verdict can be equated with an acquittal for the purposes of establishing "inconsistent verdicts" - whether there was a rational explanation for the jury returning a verdict in relation to some counts and not others - whether it was possible to explain the failure to convict on some counts

as a "merciful disagreement"

Criminal Code 1899 (Qld), s 668E(1)

MacKenzie v The Queen (1996) 190 CLR 348, applied
Osland v The Queen [1998] HCA 75; (1998) 197 CLR 316, applied
R v Charlesworth (1861) 1 B & S 460; 121 ER 786, cited
R v Markuleski [2001] NSWCCA 290; (2001) 52 NSWLR 82, cited
R v Ritchie [2005] VSCA 166; No 238 of 2004, 29 June 2005, cited
Re Mercy Catharine Newton (1849) 13 QB 716; 116 ER 1437, cited
Winsor v The Queen (1866) LR 1 QB 289, considered

COUNSEL: P J Callaghan SC for the appellant
M J Copley for the respondent

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

[1] **McMURDO P:** I agree with Keane JA's reasons for dismissing the appeal.

[2] **McPHERSON JA**: The appeal against conviction in this case is said to raise a question of "inconsistency" between verdicts of guilty returned by the jury to one or more counts in the indictment and their failure to reach verdicts on one or more of the other counts in the indictment. I have been unable to persuade myself that any such inconsistency exists or is capable of arising. It could not have done so at common law. At one time the rule was, or was thought to be, that once an accused person was given in charge on an indictment for a felony, a jury could not in law be discharged until they rendered a verdict. The rule was said to have been so stated by Coke, who was followed in this by Blackstone, although he at least admitted the possibility of such a discharge in cases of "necessity".

[3] The supposed rule was extremely inconvenient, and the need to reconsider or relax it was accepted in the course of the 19th century, first in *Re Mercy Catharine Newton* (1849) 13 QB 716; 116 ER 1437, and more decisively in *Winsor v The Queen* (1866) LR 1 QB 289, where the question was thoroughly reviewed by a strong Court of Queen's Bench. The case was one in which Charlotte Winsor and Mary Harris were brought to trial at the Devon assizes on a charge of murder. Having retired to consider their verdict, the jury deliberated for some 37 hours without being able to reach a verdict, whereupon the judge discharged them. By the time Catherine Winsor was brought before the next assize court, Mary Harris had turned Queen's evidence and testified against her at her second trial at which she was found guilty and sentenced to death.

[4] At that time there was no appeal against verdicts or convictions in criminal cases, and the attempt by the accused's legal advisers to force the matter into the form of a writ of error was unsuccessful. It was sought to present the case as one falling within the rule that a person may not be put in jeopardy for a second time after a verdict has been returned by a jury; but all the judges were agreed that the

rule had no application in the case before them. Cockburn CJ said (LR 1 QB at 311) that it did not follow that, if a trial proved abortive, it could not be submitted to another jury; Blackburn J (LR 1 QB at 319) that the discharge of the jury at the first trial was not equivalent to an acquittal, and that the prisoner was rightly tried again. Mellor J (at 323) said that, to an indictment for felony, there were only four pleas pleadable in bar, including autrefois acquit of which this was not an example. Lush J held (at 325) that, when the first trial had become abortive "by any means whatever", it was not a bar to a second trial for the same offence. See also *R v Charlesworth* (1861) 1 B & S 460; 121 ER 786.

[5] Those decisions show that being discharged from rendering a verdict cannot be equated with a verdict of acquittal. The learned judge in the present case does not seem to have formally discharged the jury from giving verdicts in the prosecution case against the appellant in relation to those counts in which they failed to agree or return verdicts. It is, however, clear from what his Honour said after receiving their verdicts and before proceeding to sentence that he was discharging them from doing so. He invited them to apply to the Registrar for exemption from being called again as jurors in the course of the same sittings. Of course, there cannot now be the slightest doubt that the appellant could and can be proceeded against on the same indictment before another jury on those counts on which no verdict is given. *R v Winsor* shows that there is no legal impediment to such a course. We know that in practice it often happens.

[6] What then is the basis for the appeal in the present case? We know it is neither autrefois acquit or autrefois convict. It is said, however, to consist of a form of inconsistency in verdicts. The word verdict is derived from the Latin *veredictum* meaning a true declaration: *Black's Law Dictionary*, title "Verdict". But in the case of those counts in the indictment here as to which no verdict was given, the jury made no such declaration or decision. There cannot be a state of inconsistency between something and nothing. Of course, it is said that if you look at the evidence, it is not easy to see why the jury convicted on one count and did not on the same evidence do so on another. That may be a matter of regret for the Crown, but it cannot be a source of legitimate complaint by the appellant. It is not a reason for setting aside the verdict or verdicts in those instances in which they did find him guilty.

[7] The introduction in the English-speaking world of a procedure for criminal appeals on questions of fact has changed many things. The decision in *R v Winsor* was given in an era when such questions could not be considered in the Court for Crown Cases Reserved. But even under the new dispensation embodied in Queensland in s 668E(1) of the *Criminal Code* there are limits on what the Court of Appeal can do on appeal. There is in my view no basis for saying the guilty verdicts or any of them against the appellant are "unreasonable". On the contrary, they are, viewed in the light of the evidence at trial, verdicts which, it might be thought, the jury were almost certain to reach. Moreover, the case is very far from being one in which the verdicts of guilty "cannot be supported having regard to the evidence". The evidence against the appellant was strong. It is not suggested, nor could it be, that the judgment of the trial court in accepting those verdicts should be set aside "on the ground of the wrong decision of any question of law". Is there "any ground whatsoever" to show there has been a miscarriage of justice? None has been identified except that on the same or much the same evidence one might have

expected the jury to have convicted the appellant on other counts as well. It may be perplexing that they did not; but it is no source of injustice to the appellant.

[8] The whole process of inconsistency of verdicts as a basis for setting aside verdicts appears to be one of relatively recent growth, which has, one suspects, been promoted by the inclusion of multiple counts in the same indictment. At one time in legal history an indictment was required to confine itself to one count only. Such pristine simplicity is no longer feasible or practicable. Hence, the chances of inconsistent verdicts on the same evidence have been immeasurably increased. Because ultimately the verdict will be reflected in the record in the form of a judgment of conviction or acquittal, it is thought to be rationally unacceptable that there should be conflicting judgments in respect of the accused on the same evidence. The same considerations do not apply to cases in which there is no verdict and consequently no judgment. Since, even after some 800 years, juries and their verdicts are still not, at any rate to minds tutored in the logic of legal reasoning, always susceptible of completely rational explanation in all cases, it is wise not to insist that they ought to be. At least that is so where, as here, there is no apparent justification for questioning the verdicts that the jury in fact returned in favour of the prosecution. At most, it may suggest that they were overwhelmed by the multiplicity of offences in a single night that the appellant was charged with committing. But it does not to my mind suggest that they were wrong in relation to those in which they found the offence proved.

[9] I would dismiss the appeal against conviction.

[10] **KEANE JA:** The appellant stood trial on an indictment which contained two counts of deprivation of liberty, one count of sexual assault, two counts of assault with intent to rape, 13 counts of rape, two counts of torture, two counts of procuring a sexual act by coercion and one count of robbery. These offences were alleged to have been committed during an escapade which occurred in the early hours of 2 October 2002. The appellant was convicted on one count of assault with intent to rape, two counts of deprivation of liberty and eight counts of rape. The appellant was acquitted on one count of procuring a sexual act by coercion. There were no verdicts on the other 11 counts.

[11] The only ground of appeal pressed on behalf of the appellant consisted of the contention that the verdicts were unreasonable within the meaning of s 668E(1) of the *Criminal Code* 1899 (Qld) namely, whether a jury, acting reasonably, must have entertained a reasonable doubt as to the guilt of the accused.[1] In particular, the appellant contends that the jury's failure to agree on verdicts with respect to 11 of the counts charged to have arisen out of the incident indicates that they did not understand the task which they were required to perform.

The trial

[12] The complainants were young women, K and M, from central Europe who were living temporarily on the Gold Coast while studying the English language. On the evening of 1 October 2002, they went together to a nightclub in Surfers Paradise. They left the nightclub at between 1.30 and 2.00 am. They decided to hitch hike; and the appellant offered them a lift to Southport which he said was as far as he was going.

---

1 *Jones v The Queen* (1997) 191 CLR 439 at 451.

[13] The Crown case was that the appellant took them to secluded locations where various sexual offences, the subject of the majority of the charges against the appellant, occurred. During the escapade the appellant ordered the complainants into the boot of his car where they remained until he stopped to obtain petrol at a service station near Palm Beach. Seizing on an opportunity to escape when the appellant opened the boot of his car by mistake, the complainants ran from the car and sought assistance from people in the vicinity. According to some witnesses, the appellant attempted to prevent the complainants from getting help.

[14] In the hours that followed the complainants' escape, the appellant disposed of a number of items of property which the complainants had left behind, undertook to wipe down his car and changed his appearance by shaving his head.

[15] A medical examination of each of the complainants revealed both to have minor injuries to the head, body and limbs as well as abrasions to their genitals that were consistent with non-consensual sexual intercourse having occurred. The appellant's DNA was located in vulval swabs taken from each complainant.

[16] The complainants made what amounted to a fresh complaint to a motorist who picked them up soon after their escape and there was also evidence of a tape recorded "000" call made by one of the complainants while they were locked in the boot of the appellant's car.

[17] The appellant did not give or call evidence. His case was put on his behalf to the complainants in cross-examination.

[18] It was put that the appellant had picked them up outside the Pink Poodle Motel, a location said to be associated with prostitution. It was also put to each of them that they agreed with the appellant to participate in sexual intercourse with him for $100 each. The complainants rejected these propositions.

[19] It was also put to the complainants on behalf of the appellant that an episode of consensual intercourse had taken place between the appellant and the complainants somewhere near Dreamworld, following which they drove to another location in northern New South Wales where once again consensual three-way sex took place. It was put that at this point a dispute erupted about payment and the appellant accused the complainants of taking and hiding his wallet. It was put that in the argument which followed he was stabbed with a screwdriver by the complainant M, and that it was only following this incident that the appellant put the complainants into the boot of his car. Both of the complainants consistently rejected this version of events.

The appeal

[20] The appellant accepts that there was evidence on which the jury could have convicted the appellant on each of the counts to which guilty verdicts were returned; but seeks to argue that the unreasonableness of the jury's verdict is manifest by the "inconsistent verdicts" returned by the jury. The appellant points, in particular, to the circumstance that the evidence on some counts on which the appellant was convicted was directly related to counts on which the jury did not return a verdict.

[21] At the outset of a consideration of the appellant's argument it is necessary to emphasize that the only verdict of acquittal related to one count of procuring a sexual act by intimidation in relation to the complainant M. As the appellant

accepted, there is an obvious explanation for this acquittal by reason of the divergence between what was opened by the Crown and the evidence which was given. Apart from this one instance, it is not correct to speak of inconsistent verdicts. In this case the jury only returned verdicts of guilty while failing to reach agreement on the other charges. The failure to reach a verdict is not to be equated with a verdict of acquittal. As Callinan J said in *Osland v The Queen*:[2]

> "There is an important distinction between an acquittal and a disagreement by a jury. As was pointed out during argument in this Court the jury may have simply been immovably divided on a question whether Mr Albion should be convicted of manslaughter or murder having regard to his lesser involvement in conceiving, planning and executing the death of Mr Osland. I do not accept that the jury's failure to agree upon a verdict in relation to Mr Albion at the joint trial can be regarded as repugnant to the verdict of guilt in respect of the appellant. I cannot accept therefore the appellant's submission that such a disagreement may, for the purposes of determining an issue of inconsistency, be equated with a verdict of acquittal."

[22] In this State "inconsistent verdicts" may afford one way of demonstrating that a jury has acted unreasonably; which does authorise appellate intervention under s 668E(1) of the *Criminal Code*. The distinction between a failure to agree and an acquittal may be important because of what each of those two different outcomes says about the jury's deliberations.

[23] The failure by the jury to agree on verdicts on a number of charges in the present case, for example, may well be explicable by reason of the eccentric view of one juror not being satisfied beyond reasonable doubt of all the elements of the offence in question. Such an explanation does not necessarily throw the integrity of the guilty verdicts into question because it does not imply that the jury as a whole entertained a reasonable doubt about the reliability of evidence germane to the counts on which it convicted in the same way that a verdict of acquittal might have done. It is only if an appellate court is satisfied that a jury must have convicted in spite of such doubts that it must intervene. As McHugh J said in *Osland v The Queen*:[3]

> "When an appellate court sets aside a jury's verdict of guilty on the ground that it is inconsistent with a verdict of acquittal, it usually does so for one of two reasons. First, the verdict of acquittal may necessarily demonstrate that the jury did not accept evidence which they had to accept before they could bring in the verdict of guilty. Second, in acquitting the accused on one count, it may follow that the jury must have accepted evidence that required them to acquit on the count on which they convicted the accused. Sometimes, however, the verdicts may indicate that, if the jury did accept the evidence, it has misapplied or misunderstood the directions of law that it was given."

[24] The most important evidence in relation to each individual charge in this case was that of the two complainants. Other evidence helped provide support for a case that

---

2 [1998] HCA 75 at [232]; (1998) 197 CLR 316 at 406.

3 [1998] HCA 75 at [116]; (1998) 197 CLR 316 at 356 - 357 (citations omitted).

the two complainants had been involved in a series of violent non-consensual sexual encounters with the appellant but the specifics of each of those separate encounters, which provided the foundation for each individual charge, could be drawn only from the evidence the complainants gave about what had happened to them. That this evidence was not always clear or consistent was acknowledged in the summing-up of the learned trial judge when his Honour commented to the jury that:

> "…you might think it's a matter entirely for you, that if two young women are subjected to what, if you accept their evidence, was a terrifying ordeal over a period of several hours, you would expect some differences in their accounts of what occurred when they come to give evidence of it some almost two and a half years later."

[25] The jury had already been properly instructed that they should only return a verdict of guilty if satisfied beyond reasonable doubt that the accused had committed each offence as charged and that:

> "There is no rule that you must or should put any witness and that witness's [sic] evidence in a compartment as being wholly reliable or wholly unreliable. You have a right, as the sole judges of the facts, to say of any witness that you accept all of the witness's [sic] evidence or you reject all of the witness's [sic] evidence and reject the rest.
> You can arrive at a conclusion that a witness is accurate on [s]ome matters but inaccurate or mistaken in respect of others. It is a matter entirely for you."

[26] In those circumstances, in my opinion, it was open to the jury, acting consistently with the directions given to them by the learned trial judge and considering the evidence before them, to find that while the evidence of the complainants provided an adequate basis on which to convict the appellant of some of the offences with which he had been charged, that evidence was not reliable enough to allow for guilty verdicts to be returned with respect to all the charges placed before them. The majority of the charges related to individual incidents. It is entirely possible that different jurors may have decided that the evidence of the complainants could be relied on to different extents with respect to each of those incidents. As Ormiston JA, with whom Charles and Callaway JJA agreed, said in *R v Ritchie*:[4]

> "Now inconsistency does not follow as the night the day merely because juries bring in verdicts which seem to accept a witness or witnesses on one count but not on another, for the evidence in support of particular charges is infinitely various and in many trials there is other factual material which a jury may bring into account or discard so as to reach verdicts acceptable on appeal in which they find the accused guilty on one count but not guilty on another."

[27] Such a statement has added force in circumstances like the present where, as I have noted, the jury did not acquit but simply failed to reach a verdict on several charges. The absence of verdicts of acquittal shows that there was no charge in relation to which the jury was prepared to find unanimously that the evidence did not establish that the appellant was guilty beyond a reasonable doubt. Any doubts held by individual members of the jury about the recollection by the complainants of each of the specific incidents that constituted the basis for each charge would not necessarily be inconsistent with guilty verdicts based on an acceptance that the

---

4 [2005] VSCA 166; No 238 of 2004, 8 June 2005 at [17].

complainants were abducted by the appellant, held against their will and repeatedly violated for a prolonged period of time. It is not suggested that the reliability of the evidence given by the complainants as a whole was such as to render the verdicts that were reached unsafe.[5] The result, in my opinion, is that no obvious contradiction of the kind referred to by McHugh J in *Osland* can be said to arise in the present case.

[28] In any event, these evidentiary considerations are not the only possible explanation for the verdicts given by the jury in this case. Even where there is a true case of inconsistent verdicts in relation to offences said to arise out of the same factual matrix, it is well established that a verdict of acquittal on some counts may be reconciled with convictions on other accounts on the basis that the jury may have decided that it would be oppressive to convict the accused on all the charges brought in relation to one criminal episode and that conviction on a number of charges suffices in the view of the jury to reflect the overall criminality of the accused's misconduct.[6]

[29] In the present case the appellant's written submissions make reference to "the oppressively large number of counts produced by the Crown". That observation itself recognizes that there was real scope in the present case for a form of "merciful disagreement" by way of a refusal to convict on some of the plethora of charges brought against the appellant arising out of the one criminal "escapade", even though the jury were not prepared unanimously to acquit him.

[30] The appellant submits it is "non-sensical", given the number of convictions, to talk in terms of a "merciful disagreement". But as Woods CJ at CL said in *R v Markuleski:* [7]

> "The expression ["merciful verdict"] involves something of a misnomer, since a conviction, upon any count in a criminal trial, cannot properly be regarded as merciful."

[31] Further, it is clear that, where a jury has not reached a verdict on some counts while convicting on others, the likelihood that "merciful disagreement" is the explanation of the jury's overall discharge of its constitutional function is strong, especially having regard to the absence of any indication from the jury that they were experiencing difficulties in reaching the verdicts.

[32] Finally, it is necessary to bear steadily in mind that in *MacKenzie v The Queen,*[8] Gaudron, Gummow and Kirby JJ said that:

> "… the respect for the function which the law assigns to juries (and the general satisfaction with their performance) have led courts to express repeatedly, in the context both of criminal and civil trials, reluctance to accept a submission that verdicts are inconsistent in the relevant sense. Thus, if there is a proper way by which appellate courts may reconcile the verdicts, allowing it to conclude that the

---

5 Cf *R v MAL* [2005] QCA 238; CA No 36 of 2005, 28 June 2005 at [39].

6 *MacKenzie v The Queen* (1996) 190 CLR 348 at 365 - 368; *R v P* [1999] QCA 411 at [30]; [2000] 2 Qd R 401 at 410; *R v Markuleski* [2001] NSWCCA 290 at [75] - [77], [226] - [229], [271], [324], [344]; (2001) 52 NSWLR 82 at 100 - 101, 129, 136, 145, 149; *R v Smillie* [2002] QCA 341 at [28] - [29]; (2002) 134 A Crim R 100 at 106 - 107.

7 [2001] NSWCCA 290 at [227]; (2001) 52 NSWLR 82 at 129.

8 (1996) 190 CLR 348 at 367 (citations omitted).

> jury performed their functions as required, that conclusion will generally be accepted. 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 … "

[33] As I have observed, the issue before this Court does not involve the question whether inconsistent verdicts "in the relevant sense" are reconcilable, but the guidance afforded by this passage as to the proper approach of an appellate court applies *a fortiori* to a case where the jury has not returned a verdict on some counts while convicting on others. The point at which a jury decided that "enough is enough" and declined to convict or acquit on some counts is something which the courts cannot seek to second guess on appeal unless the result were to "represent, on the public record, an affront to logic and commonsense which is unacceptable and strongly suggests a compromise of the performance of the jury's duty."[9] For the reasons I have given, this is not such a case.

Conclusion and orders

[34] In my opinion, the jury's failure to reach verdicts in the present case is readily explicable by the possibility of a "merciful disagreement" on the part of the jury. There is no other discernible basis for contending that the jury's verdict was unreasonable. The appeal should be dismissed. It may also be noted that there was originally an application for leave to appeal against sentence, but this application was not pressed, and the application was dismissed at the commencement of the hearing of the appeal.

---

9 *MacKenzie v The Queen* (1996) 190 CLR 348 at 368.