# SUPREME COURT OF QUEENSLAND

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| CITATION: | *R v BCE* [2012] QCA 58 |
| PARTIES: | **R**<br>**v**<br>**BCE**<br>(appellant) |
| FILE NO/S: | CA No 323 of 2011<br>DC No of 130 2011 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Appeal against Conviction |
| ORIGINATING COURT: | District Court at Mackay |
| DELIVERED ON: | 20 March 2012 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 24 February 2012 |
| JUDGES: | Muir, Fraser and Chesterman JJA<br>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 – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where the appellant was convicted following a trial of one count of unlawfully and indecently dealing with a girl under the age of 14 but was acquitted of two counts of rape and four additional counts of indecent dealing – whether the variegated evidence was able to sustain the differing verdicts – whether the verdict is unreasonable because of inconsistency with the acquittals on the other six counts<br><br>*MacKenzie v The Queen* (1996) 190 CLR 348; [1996] HCA 35, cited<br>*R v CX* [2006] QCA 409, cited<br>*R v SBL* [2009] QCA 130, cited<br>*R v Smillie* (2002) 134 A Crim R 100; [2002] QCA 341, cited<br>*R v Stone* [1955] Crim LR 120, cited |
| COUNSEL: | A J Glynn SC for the appellant<br>G P Cash for the respondent |
| SOLICITORS: | Robertson O'Gorman for the appellant<br>Director of Public Prosecutions (Queensland) for the respondent |

[1] **MUIR JA:** I agree that the appeal should be dismissed for the reasons given by Chesterman JA.

[2] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Chesterman JA. I agree with those reasons and with the order proposed by his Honour.

[3] **CHESTERMAN JA**: On 17 November 2011 the appellant was convicted, after a three day trial in the District Court at Mackay, of one count of unlawfully and indecently dealing with a girl under the age of 14, his stepdaughter. The indictment contained in all nine counts: five of indecent dealing and four of rape. Two of those, counts eight and nine, were withdrawn from the jury when the trial judge ruled there was insufficient evidence to support them. The appellant was acquitted of the remaining four counts of indecent dealing and the two rape counts.

[4] The complainant stepdaughter ("C") was born on 19 December 1971. The offences were alleged to have been committed between 31 October 1979 and 26 December 1985 when C was between the ages of 7 and 14. The oldest of them, count one, of which the appellant was convicted, was alleged to have occurred between 31 October 1979 and 1 December 1979.

[5] The offence the subject of counts one, two and three in the indictment were said to have occurred at Koumala, a hamlet on the outskirts of Mackay, where the appellant and his family lived before moving to B Road Mackay in 1981. When C gave evidence the offences alleged to have occurred at Koumala were almost 30 years old. The most recent, alleged to have occurred at Mackay, was over 20 years old.

[6] The appeal against conviction was prosecuted on the sole ground, added by leave to the Notice of Appeal, that the conviction was unreasonable, because inconsistent with the acquittals on the other six counts. The original grounds, that the conviction was unsatisfactory, or unreasonable, were expressly disclaimed. The appellant submits that the different verdicts cannot be explained logically, so the guilty verdict is unreasonable, because a reasonable jury:

> ""… [W]ho had applied their mind properly to the facts in the case could [not] have arrived at the conclusion …" Per Devlin J in *R v Stone* [1955] Crim LR 120."

The passage was quoted by Gaudron, Gummow and Kirby JJ in *MacKenzie v The Queen* (1996) 190 CLR 348 at 366.

[7] The appellant further submits that the present case falls within the "residue of cases" described by their Honours (at 368):

> "[W]here the different verdicts … represent … an affront to logic and commonsense which is unacceptable …"

[8] Before considering the evidence it is appropriate to recall some of the applicable legal principles. The judgment of Gaudron, Gummow and Kirby JJ in *MacKenzie* includes this:

> "… [I]f 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 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." (at 367)

[9] In *R v CX* [2006] QCA 409 Jerrard JA said (at [33]):

> "A number of matters as principle have been settled …
>
> 1. … [T]he onus is on the party alleging that inconsistency to persuade an appellate court that the different verdicts are an affront to logic and commonsense which is unacceptable, and which strongly suggests a compromise in the performance of the jury's duty, or confusion in the minds of the jury, or a misunderstanding of their function, or uncertainty about the legal difference between specific offences, or a lack of clarity in the instruction on the applicable law. …
> 2. Whether … verdicts are inconsistent … is a test of logic and reasonableness; has the party alleging inconsistency satisfied the court that no reasonable jury … could have arrived at the various verdicts?
> 3. Respect for the function of the jury requires appellate courts to be reluctant to accept submissions that verdicts are inconsistent … and if there is a proper way by which an appellate court can reconcile the verdicts, allowing the court to conclude that the jury performed their functions as required, that conclusion will generally be accepted."

[10] In *R v Smillie* (2002) 134 A Crim R 100 Holmes J (as her Honour then was) identified a number of factors which might provide a basis in reason and logic for different verdicts. One of the matters referred to by her Honour was the existence of corroboration about which her Honour said (at 107):

> "Different verdicts may be explicable on the basis that the witness's evidence was supported in respect of some counts but not others …"

[11] Lastly, mention should be made of the judgment of Applegarth J (with whom Margaret Wilson J and I agreed) in *R v SBL* [2009] QCA 130. His Honour said (at [32]):

> "A jury's verdicts of acquittal on some counts do not amount to a positive finding by the jury that the events as recounted by the complainant did not occur. They show no more than that the jury was not satisfied to the requisite standard that the acts alleged in those counts occurred or occurred at the times or in the circumstances particularised in them."

[12] The parties agreed upon a description of the offences as given by C in her testimony:

> "Count 1 (indecent dealing)
>
> C said that this incident occurred when her mother went into hospital to give birth to her little sister, [N]. She said that her little sister was born on 9 November 1979 when the complainant was in Grade 3 at the time. She said that she was doing her homework and needed help with something so she went and asked the Appellant for help. She thinks it occurred in the afternoon. She says that she approached the Appellant who was laying on her Mum's bed. She said that the Appellant asked her to lay on the bed beside him so he could see it better. She says that she did this.
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> She says that the Appellant then started to feel her chest around her breast area and that his hands went down towards her pants and then

inside her pants and he started to rub her vagina. She couldn't recall what clothes she was wearing at the time. She says that the Appellant then put his fingers into her vagina and that he used spit on his fingers to put them in. She says that his fingers were going in and out. She said that she started crying. She said that the Appellant said that what had occurred was something that fathers and daughters do but Mum's don't understand so that it was their secret.

Count 2 (indecent dealing) Count 3 (rape)

C [said] that this incident occurred when her aunty BR and her uncle BB came to stay. She did not recall how long after the first incident it was. She says that it occurred in the house in Koumala after the first incident. She said that her aunt and uncle were staying in her bedroom so she had a bed in her brothers' room. She said that she was woken by the Appellant who got into bed with her.

She says that he started to feel her breast area again and then moved down her pants and put his fingers in her vagina. She says that he used spit again on his fingers before rubbing her vagina. She said that the Appellant got on top of her and put his penis in her vagina and went backwards and forwards and that when the Appellant finished he left and then she had all this sticky stuff on the sheets. She said that she was crying but also trying to keep quiet because her brothers were there and she was scared. She says that the Appellant reminded her that it was their secret.

Counts 4, 5 and 6 (indecent dealing) Count 7 (rape)

C [said] that the Appellant worked in a caravan sales yard in M Street. She says that at the time she was in Grade 8 at the MN High School. She said that she went into the office where her Mum worked as the receptionist. She says that her Mum wasn't there and that the Appellant called her into the office and shut the door and told her that he'd bought her a present. She says that the Appellant pulled out a little box out of his draw (sic) and showed her a vibrator and said that he had bought it for her and that he wanted to use it. She said that she was 12 at this time.

She says that she next saw the vibrator at the house in B Road. She was home alone with the Appellant. She didn't recall how long this was after the caravan yard incident where she was shown the vibrator but she was pretty sure she was still in Grade 8. She said that the Appellant called out to her to come into his bedroom and she did.

She said that he was sitting on the side of the bed naked and he asked her to come in and she froze. She said that she didn't want to go in there and that the Appellant got up and made her come into the room. She said that she could hear the TV and that there was a pornographic movie being played. She said that she could see naked people having sex on the TV. She said that the Appellant undressed her and directed her onto the bed. She said that she was crying at this time. She said that the Appellant kept telling her to be quiet and just do it.

> She said that the Appellant tried to get between her legs but she kept trying to stop him and then he took the vibrator out of the drawer. She said that before he got the vibrator out the Appellant used his fingers again and put spit on them and was trying to get them in. She said that he was trying to push his fingers into her vagina. She said that he was penetrating her vagina.
>
> She said that after he got the vibrator out he spat on it and put it into her vagina. She said that the pornographic video was still playing at the time. She said that the Appellant was trying to get her to watch the video while he was penetrating her with the vibrator. She said that there was a lady with a man's penis in her mouth and that the Appellant told her that that's what he wanted her to do. She said that he took the vibrator out and then told her that she had to do what the lady was doing. She says that he, the Appellant, laid on his back and then grabbed her head and tried to force her down onto his penis. She said that she said "No, I don't want to." She said that he was pushing on the back of her head towards his penis and trying to put his penis into her mouth and she kept turning her face so that he was rubbing his penis all over her face. She says that he was circumcised. She said that he was not successful in getting his penis into her mouth.
>
> She said that he then got on top of her and put his penis into her vagina and had sex with her and then left. She said that he ejaculated. She said that she was crying throughout the incident."

[13] In addition to C's evidence the prosecution called her aunt (the appellant's sister-in-law) and one of her brothers ("A"). The aunt, Ms BR, could not say much of particular relevance. She and her husband were guests on several occasions in the appellant's house in which C and her brother, A, had bedrooms downstairs. The other bedrooms and the living rooms were upstairs. An internal staircase gave access from the downstairs area to the upper floor. Ms BR recalled that frequently when the appellant came home from work he would "never come straight upstairs. [He would] take a long time before [he would] come upstairs."

[14] A gave more relevant evidence. His bedroom in the house at B Road adjoined C's. The dividing wall was not soundproof. A recalled occasions when he saw the appellant enter C's bedroom. He could not discern words but he heard voices and "just a lot of noise." He heard C "on a couple of occasions … telling someone to leave her alone." On one occasion he "did yell out" and told the person to "leave her alone." A identified "the person" as the appellant. He said he called out because C "obviously wasn't happy with what was going on. She was crying, she was upset and [he] … could hear the whole thing. It was just not the right thing."

[15] In cross-examination he said that in subsequent years, thinking about what he had heard, he had concluded "that something untoward was going on in the next room".

[16] More relevantly to the appeal, A was asked whether he could recall whether any occasion stood out in his mind. He said:

> "There was one occasion that I thought was quite odd while my mother was at work one night [the appellant] asked me to look after [my] younger brother and sister while he was helping [C] with some homework in their [the appellant's] bedroom."

He saw C and the appellant go into the bedroom and the door close behind them. They remained there for "around a half an hour to an hour." He remembered the incident because it "was very odd to me at the time."

[17] C wrote an account of her relationship with the appellant in a "1985 Australian Pictorial Diary". Events were not recorded contemporaneously in the calendar pages. The account was written on one occasion, apparently Boxing Day 1985, in the "notes" pages at the end of the diary. At trial C had no recollection of the diary, or of the account in it, though she acknowledged she had written it. The diary was given to Ms BR, C's aunt, in 1986, not as a complaint against the appellant but because she thought Ms BR could use the photographs as an inspiration for her painting.

[18] Relevantly, the account reads:

> "Since [N] was born dad has been molestering (sic) me. The first time … was when Mum was in hospital pregnant with [N]. It happened the first night she was away. He asked me to sleep in the bed with him. I was only 8 at this time and I did not know what was going on. [A & J] were at home as well but they did not know what was going on. The first time he did this he felt me and when I wanted to go he said don't go Mummy doesn't mind if I do this. After that night he did it to me again and again. Most of the time he did it when he got drunk or Mum went out … Now were (sic) at B Road and weve (sic) been here for 5 years and he still does it to me. When we first moved here I was in Grade 5 and I was 9. But now he does even more than just feeling me, he does things that only Mums and Dads do. I can't stop him doing it because it would break up Mum and him. But every time when Mum's out he always grabs me and takes me to his room and then he rips of (sic) my clothes and then does it. … I'm scared and I can't tell Mum or anyone. I'm scared that they won't believe me and I am scared that Mum might hate me or something and say I'm a slut or something. But I need to tell someone. … They just got married 2 years ago and he was doing this when they weren't even married …"

[19] "N" was C's younger sister, born on 9 November 1979. "J" was C's younger brother. There were four children in the household, C, A, J and N. The diary figured prominently at trial and on appeal. At trial it was relied upon by counsel for the appellant to argue that it cast substantial doubt upon the whole of C's testimony and, in particular, her evidence that the appellant had raped her at Koumala (count three) and the rape the subject of count seven. The basis for the submission was the statement that the family had been at B Road for five years "but now he does even more … he does things that only Mums and Dads do …" The reference to "things that only Mums and Dads do" is obviously a description of intercourse. This part of the account was said to indicate that sexual intercourse did not begin until about the time the diary was written, December 1985, when C had just turned 14. The phrase "now he does things …" was said to assert that the appellant had not done them before about December 1985, the time of "now" when the diary was written.

[20] Defence counsel submitted that the diary narrative:

> "[H]as to call into question her entire story. She gave evidence … that she was first raped … at Koumala when she was seven, turning eight. The diary entry tells us that she complains of being raped at

> 14 or 15 … [T]here is a very big difference between being seven or eight or 14 or 15 … That would, in my submission, cause you some concern as to whether you accept [C's] version of events."

[21] The jury may have accepted that argument and thereby doubted the occurrence of the two rapes, the subjects of counts three and seven, and consequently also doubted the testimony of indecent dealing which C said accompanied or preceded the rapes. That approach would account for the acquittals on counts two to seven.

[22] The parties differed as to whether the diary narrative, though it might have cast doubt on counts two to seven, provided corroboration for C's evidence in support of count one. If it did the respondent submitted the verdicts could be reconciled. Counsel for the respondent argued that the diary narrative, consistently with C's testimony, identified both the first occasion when the appellant dealt indecently with her (when C's mother was in hospital giving birth to N), and the indecent dealing, "he felt me". Senior counsel for the appellant argued that on a proper analysis there was no such corroboration. He submitted that apart from dating the occasion the notes provided no corroboration. It was pointed out that there was no detail given of the touching and, in particular, no reference to the appellant fondling C's genitals, and that the narrative referred to an event at night when the appellant asked her to sleep in his bed and that she was told that "Mummy doesn't mind." The account given in evidence was that C asked the appellant for help with her homework in the afternoon. The appellant said what had happened was to remain a secret between them, not that C's mother did not object to it.

[23] If there were no more in the appeal I would be inclined to accept the appellant's argument that the diary provided no corroboration for count one and that there was therefore no discernible reason why the jury would convict on that charge but acquit on the others. There are, however, additional factors which do provide a rational explanation for the differing verdicts.

[24] The first of these is A's evidence which gives some corroboration to C's account. There is not a complete coincidence between C's and A's evidence. He said C approached the appellant at night when their mother was at work rather than in an afternoon when she was in a maternity hospital. There is nonetheless support for C's evidence that she asked for help with homework and C and the appellant were alone in his bedroom.

[25] The second is that the jury was asked to disbelieve C on the basis of a false premise. I do not criticise defence counsel because the diary narrative was capable of the construction he put on it. But it is also, I think, compatible with C's evidence that the appellant began having intercourse with her at age seven or eight. The point is that the acquittals may not reflect any substantial dissatisfaction with C's evidence, but are a product of misdirected criticism of its reliability.

[26] The narrative includes what appears to be a description of rape by the appellant on Christmas Day 1983 and Boxing Day 1985. These were the subjects of counts eight and nine which were withdrawn from the jury. In relation to the first occasion the account reads:

> "1983 Christmas was awful because we had just opened the presents and everyone went upstairs to have a shower except for [the appellant] and I was in my room and he came in and he forced me onto the bed and then did it to me …"

After some expressions of fear and revulsion the account continues:

> " … I hate it when he does it to me. They've just got married two years ago and he was doing this when they weren't even married. It's now 1985 and its Christmas again. Yesterday was Christmas but this morning about 1.30 he came to my room and did it to me again. It's the worst Christmas I ever had he was drunk to (sic)."

[27] C appears to have used "it" as a euphemism for sexual intercourse. The narrative contains several references to the appellant doing "it", apparently a complaint of intercourse. These, or some of them, are in a timeframe earlier than Christmas 1985. Christmas 1983 is an obvious example, but there are others. After the first identified occasion, which was admittedly not intercourse, the account describes the appellant doing:

> " … it to me again and again. Most of the time he did it when he got drunk or Mum went out …"

Some lines later there is the reference relied on by defence counsel:

> " … [W]eve (sic) been here for five years and he still does it to me … but now he does even more than just feeling me, he does things that only Mums and Dads do I can't stop him doing it …"

It is particularly significant that C recorded the appellant "still [doing] it" which suggests intercourse had occurred in the past and was continuing. It is inconsistent with such activity commencing at the time the diary entry was written.

[28] The critical phrase, "now he does more …" is not in context an unequivocal assertion that prior to Christmas 1985 the appellant did not engage in sexual intercourse with C, but only touched or fondled her. The account is self evidently not a chronological account of events or a record of particular acts of molestation. A construction of what was written, at least as plausible as that as put by the defence, is that C was expressing her feelings of loathing and helplessness by reference to generalised descriptions of the appellant's conduct which included acts of intercourse on frequent occasions commencing shortly after the first episode of indecent dealing in November 1979.

[29] When cross-examined C herself refused to accept that what she had written indicated that intercourse had not occurred before December 1985. She gave evidence that it did. Senior counsel who appeared for the appellant very properly accepted that the diary account did not support the construction put on it by defence counsel at trial.

[30] The jury would have been entitled to conclude that the diary did not contradict her testimony, but the trial judge in his charge to the jury endorsed the defence submission. His Honour said:

> "There is another … matter which I should touch upon and that is what … lawyers refer to as prior inconsistent statements. … The most obvious example I would have thought is that it was put to [C] that what she has written in this diary is in a significant way different to what she's told you that she appears as it seems to me, to have written at that time, that the sexual intercourse did not commence until very late in the piece; that prior to that, she complains … of having been interfered with, but as I read it, and it will be a matter for you, of course, it's not until – in the diary, it's not until much later that she suggests that there has been intercourse. On the other hand, her evidence before you is that she was raped by her step-

> father when she was seven … That's one example of what you might say is an inconsistent statement … assuming … that you do think there is an inconsistency, then obviously that calls into question the credibility of the witness."

[31] The trial judge repeated the point when summarising defence submissions. His Honour said:

> "… [S]he was asked about the diary. She said she could not remember writing it. [Defence counsel] asked her a number of questions, essentially suggesting to her that … sexual intercourse … did not commence until much, much later than she had told you ..."

[32] The jury was therefore invited by defence counsel, and encouraged by the trial judge, to find that C's evidence of having been raped on the occasions the subject of counts three and seven was unreliable.

[33] The jury may well have acted on the basis of the warning which, in my opinion, was unduly favourable to the appellant. Reviewing the matter on appeal it does not seem that an acquittal on counts three and seven (and the counts of indecent dealing associated with them) is logically inconsistent with the conviction on count one, which was not affected by admissions of unreliable testimony. Indeed, the trial judge directed the jury that count one was to be considered separately and distinctly from the other counts. His Honour said:

> "Count 1 stands by itself. Counts 2 and 3 are said to have happened in the same exchange … or … virtually at the same time, one after the other and then counts 4, 5, 6 and 7 were all said to have occurred again at the same time or one after the other as it were. So we're looking at incidents which have occurred on three nights or three separate occasions …"

[34] The doubts which the jury were encouraged to have about the occurrence of the most serious misconduct alleged on the second and third occasions may well have led to doubts about the accompanying or preceding conduct. There was no such impediment to the acceptance of C's testimony with respect to count one.

[35] The differing verdicts are explicable on the basis that the jury was encouraged to doubt C's testimony about the most serious misconduct alleged as the subject of counts two and three, and four, five, six and seven; there was no such invitation with respect to count one; there was some independent corroboration for count one; and the basis for inviting doubt as to C's testimony did not do a complete justice to her case and did not necessarily prove unreliability so that acceptance of her testimony as to count one is not an affront to reason.

[36] The appeal should be dismissed.