SUPREME COURT OF QUEENSLAND

CITATION:	*R v MBP* [2012] QCA 90
PARTIES:	**R** **v** **MBP** (appellant)
FILE NO/S:	CA No 131 of 2011 DC No 205 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	13 April 2012
DELIVERED AT:	Brisbane
HEARING DATE:	9 March 2012
JUDGES:	Fraser JA and Margaret Wilson AJA and Applegarth 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 – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where appellant was convicted of maintaining a sexual relationship with a child (count 1), indecent treatment of a child (count 2) and one count of rape (count 3) – where appellant was found not guilty of one additional count of rape (count 4) – where counts 3 and 4 were alleged to have occurred on the same date – whether guilty verdicts on counts 1, 2 and 3 were inconsistent with the not guilty verdict on count 4 CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – UNREASONABLE OR INSUPPORTABLE VERDICT – where appellant argued that the jury did not give due consideration to the evidence and its verdicts were not consistent with the evidence – where appellant contended that the jury's verdicts were an emotional reaction to the allegations – whether the jury's verdicts on counts 1, 2 and 3 were unreasonable *Criminal Code* 1899 (Qld), s 668E *Evidence Act* 1977 (Qld), s 21AK

MacKenzie v The Queen (1996) 190 CLR 348; [1996] HCA 35, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
R v BCE [2012] QCA 58, cited
R v CX [2006] QCA 409, cited
R v SBL [2009] QCA 130, cited
R v Smillie (2002) 134 A Crim R 100; [2002] QCA 341, cited

COUNSEL: The appellant appeared on his own behalf
S P Vasta for the respondent

SOLICITORS: The appellant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Applegarth J and the order proposed by his Honour.

[2] **MARGARET WILSON AJA:** The appeal should be dismissed. I agree with the reasons of Applegarth J, which I have had the advantage of reading.

[3] **APPLEGARTH J**: The appellant was tried on four counts of sexual offences:

- maintaining a sexual relationship with a child between 1 May 2008 and 13 September 2009 (count 1);
- indecent treatment of the same child by unlawfully procuring her to commit an indecent act on a date unknown between 1 May 2008 and 13 September 2009 (count 2);
- rape of the child on 12 September 2009 (count 3);
- rape of the child on 12 September 2009 (count 4).

[4] On 5 May 2011 the appellant was found guilty on the first three counts and found not guilty on the fourth count. He appeals against conviction on the grounds that:

(a) the verdicts of the jury were unreasonable or insupportable having regard to all of the evidence; and

(b) the guilty verdicts on counts 1, 2 and 3 are inconsistent with the not guilty verdict on count 4.

[5] The appellant was self-represented in the conduct of his appeal. In short written submissions he argued in support of the first ground of appeal that "the jury did not give due consideration to all the evidence presented during the trial and the verdicts reached were not consistent with the evidence". In oral submissions he developed this point by arguing that the jury gave undue weight to the accusations and did not give proper weight to matters that raised a reasonable doubt. These included the improbability that he would digitally rape the young girl on 12 September 2009 in the "computer room" where he might be easily observed and detected by women, including the complainant's mother, who were present at his house that day. He also relied in oral submissions upon what was said to be prejudicial evidence given by a paediatrician who examined the complainant 11 days after the alleged digital rape, who under cross-examination explained that visible signs of trauma might

have healed during those 11 days. In general, the appellant contends that the jury's guilty verdicts were an emotional reaction on its part to the allegation that he sexually abused the young girl.

[6] As to the second ground, the appellant's written submissions were that the jury's verdicts "were contradictory in that the first rape charge returned a guilty verdict while the second rape charge returned a not guilty verdict despite the fact that (the) offenses (sic) were alleged to have been committed on the same day in a short period of time." In his oral submissions the appellant posed the question of how the jury, having a reasonable doubt in relation to the fourth count, could not have had a reasonable doubt in relation to the other counts.

The factual background

[7] The appellant was born in early 1979, and was 29 or 30 at the relevant dates. He lived with his mother and his brother, and had his own bedroom. His mother socialised with the complainant's mother and other women who visited the home. The complainant and her mother would visit the home regularly, typically on a weekend, two or three times each month.

[8] The complainant was born in early 2003, and was aged five or six at the relevant dates. She would play with the appellant's young half-sister when that girl would visit the appellant's home every second school holidays. On those occasions the appellant would play with the two girls in the backyard. On other occasions when the appellant's half-sister was not at the home, and the complainant and her mother would visit, the appellant would have contact with her. His evidence was that the complainant's mother would initiate the contact, but that he spent as little time with the complainant "as was politely possible". The complainant's mother would send her to see the appellant in the "computer room" or the complainant would come into that room by herself and ask the appellant to swing her around. He would then go out into the yard and swing her around for a while and then try to go about his own business. The appellant's evidence was that on the many occasions that the complainant had visited the house with her mother prior to September 2009 he had as little interaction with the complainant as possible. She was aged about six and he was aged about 30 and they did not have common interests. His evidence was that he did not encourage the child to use the computer, but allowed her to use it on 12 September 2009 because he wanted some peace, and allowed her to play a children's game that was downloaded from the internet.

[9] The appellant had a strong interest in computing and was a "video gamer". He would play games on the computer that was located in a small "computer room" that also served as a storeroom or utility room. Access to the computer room was from the back deck of the house. The appellant explained at the trial that the door was kept open when the computer was on because otherwise the computer would overheat. Photographs tendered at the trial depicted the physical layout of the house including the scope for persons sitting at a table on the back deck to look through the doorway of the computer room and see part of it. Depending upon the angle of observation, an observer might see the back of the head of someone seated in one of the two chairs in the room if that person was using the computer. Toys were stored in the room and the complainant might play with them on the floor of the room and be able to be observed doing so by persons on the back deck.

[10] On Saturday 12 September 2009 the complainant and her mother visited the appellant's home, as they had done on many occasions since the appellant's mother

and her family had moved there in May 2008. The complainant's mother brought a six pack of beers that were consumed by her over a period of four or five hours. The complainant's mother and the appellant's mother were joined by another woman named Cathy that day for the social occasion. Some of the women drank wine. Most of the time they sat at a table on the back verandah. The women and the appellant also smoked cannabis that day.

[11] The complainant and her mother were given a lift home at around 7 pm. After dinner, and as the complainant's mother was putting her to bed, the complainant told her that the appellant had hurt her by putting his fingers inside her and wiggling them. The complainant reported that she was sore. The complainant's mother put some cream on the outside of her vagina which the complainant's mother noticed was very red. The complainant flinched when she did so. The complainant's mother comforted her that night. On 19 September 2009 she took the complainant to see a general practitioner. The police became involved and the complainant was examined by a paediatrician employed by Queensland Health on 23 September 2009. The complainant was interviewed by police the same day.

The first police interview

[12] At the interview on 23 September 2009 the complainant gave an account of being sexually abused by the appellant in the computer room "heaps of times". She said that the appellant would swirl his fingers around inside her knickers and had done this nearly 20 times. She said the first time that she could remember this happening was when she was three. The last time was on a recent Saturday when he did it more times than usual. The complainant said that he did it four times that day and described a digital rape.

[13] She also described an occasion when she went with the appellant into the built in wardrobe (sometimes described as a cupboard) in his bedroom and the appellant procured her to touch his penis. She said that this happened when she was four and it was on a Sunday.

[14] She said that the computer room was the only location at which the appellant had touched her.

[15] The complainant's recollection that she was aged three when the appellant first touched her on the vagina is inconsistent with another statement in the interview that the appellant did not touch her at "his old place". The appellant and his mother moved to what the complainant described as "his new place" in May 2008, and the complainant's evidence in the first police interview that he started doing it when he moved to his new place was the basis upon which the count of maintaining was particularised as occurring between 1 May 2008 and 13 September 2009.

The second police interview

[16] The complainant was interviewed by other police on 11 October 2009. Again, she gave a recollection of the appellant having touched her when she was three. She was asked by a police officer, "Tell me everything from the beginning about the time that you best remember". She gave an account of watching television with the appellant when "he did it". She described an episode of digital rape on an occasion when she was sitting on his knee watching television. She said that after the appellant went to get a drink she went outside on the verandah where her mother was talking to her mother's friends named Chris, Deb and Cathy.

[17] Later in the interview a question was asked about whether the appellant was living at the same place when the complainant was three and the complainant said no. Reference was made to the living room of the home in which the appellant was currently living. She was asked whether at the time when she was three about which she had spoken to the police on 23 September 2009 was the same time or a different time. The complainant answered "the same time", but this passage of the interview is rather confusing. It may be a reference to the alleged digital rape in the living room or to something else.

[18] Shortly later the complainant was asked about the occasion in the lounge room that she had mentioned earlier in the interview. The complainant explained that there were two different times, one in the lounge room, and then they went into the computer room, but that this happened on the same day. The interviewer then goes on to mention the fact that the complainant had told the police that she was three. The complainant reiterated that the appellant had touched her "heaps of other times" but that she could not remember any of those other times. She gave further details of the occasion when she went into the appellant's cupboard and the appellant procured her to touch his penis.

[19] Towards the end of the interview, and by way of summary, the police noted that the complainant was able to tell them about the time when she was three, about watching the television in the living room and about the episode with the cupboard. She was asked how old she was when she was with the appellant in the cupboard and she answered six (being the age she was at the time of the interview). She volunteered that she was six when she was with the appellant at the computer, and that the episode in the cupboard was at a different time to the computer. Finally, she reiterated that there was a time when she was three "with the TV" at the appellant's place. She was playing with toys at the time. She confirmed that the episode with the cupboard was when she was six and that there was another occasion when she was six when the appellant and she "were bouncing up and down" on a Saturday.

The pre-recorded evidence of the complainant

[20] A pre-recording of the complainant's evidence occurred before a District Court judge on 4 October 2010 pursuant to s 21AK of the *Evidence Act* 1977 (Qld). The cross-examination turned to the last time that she went to the appellant's mother's place. She recalled the appellant hurting her. When asked where this happened she responded, "In the computer room and when we were sitting down to watch television." The complainant's recollection was that the door to the computer room was closed at the time. The episode that occurred when they were watching television occurred after they had been in the computer room. The complainant explained that she did not tell the police officer on the first day she was interviewed by police about the lounge room "because [she] didn't remember that it was on the lounge as well."

[21] The complainant also gave evidence about the appellant having procured her to touch his penis when they were inside his cupboard. She said this occurred on a Saturday when she was six. She also said under cross-examination that the incident in the cupboard happened the same day that she was touched in the lounge room and in the computer room, and that this all happened on the last time that she went to the appellant's house.

The other evidence at the trial

[22] It is unnecessary to recount evidence that was uncontentious. The following summary concentrates upon evidence that is relevant to the appellant's grounds of appeal.

[23] The complainant's mother gave evidence about events on 12 September 2009 and that, after their arrival the complainant greeted the appellant and put her arms up, following which he picked her up and gave her a hug. The complainant's mother settled in for the social occasion with her friends. She recalled that the complainant was playing games with the appellant, running around the yard, watching television and being in the computer room. She recalled the door to the computer room being slightly closed and having seen her daughter and the appellant in there twice or perhaps three times. She could see the back of the appellant's head and could not see the complainant at that time. Later, she saw her daughter in the lounge area, sitting on the floor. She and the appellant were watching television.

[24] She gave evidence of the complaint that was made to her at her home later that night.

[25] The complainant's mother explained that she and her daughter would visit the home of the appellant's mother at least twice, and probably three times a month. Under cross-examination the complainant's mother denied that contact between the appellant and the complainant on any of these occasions prior to 12 September 2009 was always very fleeting. She said that the appellant quite often would play with the complainant.

[26] The complainant's mother said that the appellant spent a lot of time with the complainant on 12 September 2009.

[27] On that day the complainant's mother was seated at a table on the back deck. She could not recall an occasion when the complainant asked if she could play a computer game, but recalled seeing her daughter in the computer room. Her recollection was that the complainant was in the computer room for about 10 minutes. Later the appellant came and sat down beside the complainant's mother and socialised with the group. He joked about how the complainant had "kicked him off the computer".

[28] According to the complainant's mother, she and her daughter spent many hours at the appellant's home that day. Her best estimate was that it was between around 1 pm to 6 or 6.30 pm.

[29] As previously noted, it was on the evening of 12 September 2009 that the complainant complained to her mother that the appellant had put his fingers inside her and hurt her, that the complainant's mother saw that her vagina was very red, and that she observed her daughter's pain when she applied cream to it.

[30] The doctor who saw the complainant a week later undertook a visual examination of the complainant's genital area and saw no sign of injury or irritation. The paediatrician, Dr Harris, who saw the complainant on 23 September 2009 gave evidence that the reported redness of the complainant's genitalia was a non-specific finding. The redness could be due to many things, including trauma, a bacterial infection or a simple irritation to the skin. She explained that it neither confirmed nor refuted that the child had been sexually abused. Under cross-examination she responded to the following questions:

> "But in any case, your examination occurred 11 days after the alleged incident?-- That's correct, which would give even further opportunity for potential healing of any injuries.
>
> Sure. That places you in a disadvantaged – disadvantageous position examining a child 11 days after the alleged incident, doesn't it?-- It makes it less likely that there will be visible signs of trauma as most of these will be healed."

The paediatrician also noted that in this case there was no history given of the child suffering irritation from soap, bubble bath or such things.

[31] At the hearing of the appeal the appellant complained about the fact that Dr Harris gave evidence that visible signs of trauma could have healed during the 11 days between the alleged incident and her examination of the complainant. The appellant's complaint about this evidence is unjustified. The evidence was given in response to a question under cross-examination, and is unremarkable. The evidence was relevant and served to explain why signs of trauma caused on 12 September 2009 might not be observable 11 days later.

[32] The appellant's mother was called to give evidence during the prosecution case. She explained that on 12 September 2009 she was visited by the complainant and the complainant's mother, and another friend Cathy. Such a gathering between the three women was a usual occurrence. The appellant's mother and the other women sat on the back deck, smoked "a couple of marijuana joints" and had a few drinks. The appellant's mother was sitting with her back to the house looking towards the pool, with the computer room to her right. During the afternoon the appellant's mother drank four or five glasses of champagne. She noticed the complainant play in the area, and later in the afternoon the complainant watched the television.

[33] During the afternoon the appellant was in the computer room and his mother recalled that at one stage her son joined the women and conversed with them. At another stage in the afternoon the appellant had taken the complainant out in the yard and was swinging her around. The appellant's mother estimated that this play went on for about 20 or 30 minutes.

[34] The appellant's mother said that her son was in the computer room for most of the afternoon and he appeared to be playing a computer game. She saw the complainant go into the computer room and observed her in an area behind the appellant where there is shelving. She was playing on the floor with items that had been left in the room to play with. The appellant's mother did not see the complainant sit on the appellant's lap. The door to the computer room was open.

[35] The appellant's mother explained that it was commonplace for the complainant's mother to encourage the complainant to go and speak with the appellant when they came over, and that the appellant's mother did not like having children overhearing the adult conversation that occurred between her and her friends. On these regular visits the complainant's mother would suggest that she go and see what the appellant was doing or, when the complainant became bored she would be encouraged to go into the computer room, which the appellant's mother described as "the utility room". It contained craft items and items for children.

[36] According to the appellant's mother, on 12 September 2009 the appellant spent about 90 per cent of the time that the complainant and her mother were at the house

in the computer/utility room. She estimated that the complainant was in the computer room for about 15 minutes when she was playing a game, and probably 40 minutes altogether. The appellant's mother acknowledged that she would only glance in that direction occasionally, and thought that she would have glanced about half a dozen times during the 15 minutes that the complainant was in the computer room and playing a computer game.

[37] Apparently later in the afternoon, the appellant's mother set the complainant up in the lounge room to enable her to watch a cartoon on cable television. According to the appellant's mother, this provided a good opportunity for the appellant to be on his own, and at no time that afternoon did she see her son and the complainant sitting in the lounge room together.

[38] A mutual friend of the complainant's mother and the appellant's mother named Cathy also gave evidence. She recalled the events of 12 September 2009 and seeing the appellant in the computer room. The door to the computer room was open. Cathy, like the complainant's mother, visited the home for social occasions usually each fortnight. She said that the appellant was someone who tended to keep to himself, did not initiate contact with the complainant and that it was always the complainant who would approach him. The appellant was not unsociable and would come out and say hello to the visitors.

[39] On 12 September 2009 Cathy noticed the appellant playing with the complainant in the yard near the pool, swinging her around in an old pair of denim jeans, using them like a sling. This game took about half an hour. For most of the afternoon the appellant was in the computer room. At one stage the complainant also was in the computer room and Cathy noticed her positioned on the floor playing with items. She did not see the complainant on the appellant's lap.

[40] At one stage the appellant came out of the computer room and made a jocular comment that the complainant had "kicked him off the computer". The appellant served some food. At that stage the complainant was seated in a chair in front of the computer. Cathy could see into the computer room from the seat that she occupied on the back deck.

[41] Cathy also recalled at some stage the complainant went to watch a television show. She could not recall how long the complainant watched television but thought it was not very long. Her recollection was that the appellant was in the computer room when the complainant was watching television.

[42] The appellant elected to give evidence. As noted, he explained that during the long period that the complainant had been visiting his house prior to September 2009 he interacted with her as little as possible. He would be polite with her and if she asked him to swing her around then he would do so but then try to go about his own business. He denied that the complainant would sit on his lap and he said that he never watched television with her. He did not encourage the complainant to use his computer, but on 12 September 2009 he did so because he "just wanted some peace." She came into the computer room and asked to use the computer. She could not play the game that he was playing and so he arranged for her to play one that she and the appellant's half-sister had previously used. The appellant went on the internet and downloaded the game which was a dress-up game for putting clothes on a mannequin.

[43] The appellant's evidence was that he could not recall the complainant sitting on the floor in the computer room.

[44] At one stage the appellant sat out on the back deck with the ladies for about 15 minutes, and brought them some food. The appellant and the ladies smoked cannabis together.

[45] The appellant explained that while the complainant and her mother visited a couple of times a month, he was never interested in babysitting or child minding and that while he would play games with the complainant, whilst the women socialised, he would do this "under duress" when the complainant's mother would send her in to see him.

The summing up

[46] The appellant made no complaint at the trial, and makes no complaint in his appeal, about the judge's summing up. However, it is appropriate to refer to part of it, since it is relevant to the second ground of appeal in relation to alleged inconsistency between verdicts. The trial judge directed the jury:

> "You must consider each charge separately evaluating the evidence relating to that particular charge to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the essential elements of the charge. When you return with your verdicts, you will be asked to return separate verdicts for each of the four charges.
>
> The evidence in relation to the separate offences is different in some respects and so your verdicts need not be the same. I will say something more about that in a moment. The elements of the offences, that is, as between count 1, count 2 and count 3 and 4 are different, so your verdicts need not be the same.
>
> However, having said that, if you have a reasonable doubt in this case concerning the truthfulness or reliability of the child and her evidence in relation to one or more of the counts, whether by reference to her demeanour, that is, presentation in the tapes or for any other reason, that must be taken into account in assessing the truthfulness or reliability of her evidence generally.
>
> Your general assessment of the child as a witness will be relevant to each of the counts, but you will have to consider her evidence in respect of each count when considering that particular count. So, therefore, you have got to give separate consideration to the evidence relating to count 2, to count 3, to count 4 and to count 1.
>
> And, indeed, I suggest to you that that is the way in which you approach the evidence, that you look at the evidence in relation to counts 2, 3 and 4 and the evidence of the other times which were spoken of and about which I will give you a little more guidance in a moment before you go to count 1.
>
> It might be in respect of one of the counts that for some reason you are not sufficiently confident of her evidence to convict in respect of that count. A situation might arise where in relation to a particular count you get to the point where although you are inclined to think that she is probably right, you have some reasonable doubt about one of the elements of that particular offence. If that occurs, of course, you would find the accused not guilty in relation to that count, but

> that does not necessarily mean that you cannot convict of any other count.
>
> You have to consider why you have some reasonable doubt about that part of her evidence and consider whether it affects the way that you assess the rest of her evidence. That is whether your doubt about that aspect of her evidence causes you to have a reasonable doubt about the part of the evidence relevant to any other count."

The jury's deliberation

[47] The appellant's contention that the jury did not give due consideration to all of the evidence and that its verdicts were unreasonable on that basis is not supported by the course of its deliberations.

[48] After being assisted by a comprehensive summing up, which canvassed relevant evidence, the jury retired at 4.07 pm on the third day of the trial. It returned at 5.55 pm that day with a request to see the three video recordings of the complainant. The jury's speaker told the trial judge, "We are concerned about the timing of certain events". Arrangements were made for the jury to assemble the next day and to watch the videos in the courtroom, and it retired at 5.57 pm.

[49] It returned at 9.12 am on 6 May 2011. The jury sought and obtained clarification of the fact that count 3 was the alleged digital rape in the computer room and count 4 was the alleged digital rape in the lounge room, and that both offences were alleged to have happened on 12 September 2009. The jury continued its deliberations and arrangements were made for it to view exhibits.

[50] It returned with its verdicts at 11.44 am on 6 May 2011.

The first ground of appeal

[51] The jury was properly directed on relevant issues, including the credibility and reliability of witnesses, and the consistency, or lack thereof, of their evidence. It was instructed to act on the evidence and appropriately warned to dismiss all feelings of sympathy or prejudice. It also was told of the need to scrutinise the evidence of the child with great care before it could arrive at a conclusion of guilt in respect of any charge. Specific reference was made to inconsistencies between things said in the first interview, the second interview and the pre-recording, and to consider whether there was a reasonable explanation for those inconsistencies.

[52] The addresses of counsel were summarised and reference made to defence counsel's address concerning alleged inconsistencies between the two interviews with police and in respect of the pre-recorded evidence, and also what was said to be the improbability of the occurrence of the offences on 12 September 2009 in the light of the circumstances that were described by a number of witnesses.

[53] There is no proper basis to conclude that the jury did not follow the directions and warnings that were given to them. The fact that it returned a verdict of not guilty in respect of the fourth count suggests that it acted in accordance with the directions of the trial judge, and was not minded simply to convict the appellant on all counts because of an emotional reaction to the allegations of sexual abuse. I will consider the not guilty verdict in relation to the fourth count in considering the second ground of appeal.

[54] The jury assessed the evidence, including the evidence that the appellant was alone in the computer room with the child at the time the offence alleged in count 3 was said to have been committed in that room. It was open to the jury to be satisfied to the required standard that the offence was committed. The complainant reported that she had been digitally raped shortly after the alleged offence occurred. She told her mother that night. Her mother noticed that her genitals were very red and painful to touch. As the trial judge explained to the jury, the fact that the child was not medically examined for some many days later meant that there was no evidence as to what an earlier medical examination might have found. As the judge and defence counsel explained, the appellant lost the opportunity of having some negative finding on the medical evidence placed before the jury. Still, the jury was entitled to accept the evidence of the complainant, and the evidence of the complainant's mother as to what she observed about her daughter's condition on the night of 12 September 2009.

[55] In his oral submissions on the appeal, the appellant placed reliance upon the evidence given at the trial that the door to the computer room was open. This fact, and the presence of three women on the back deck, would have made it risky for the appellant to commit a sexual offence in case one of the women walked into the room and observed the offence being committed. The descriptions given by the women who were present that day, and the photographic evidence that was tendered concerning the location of the computer room, were able to be assessed by the jury. The evidence did not permit the conclusion to be reached that each or any of the women would have been able to view the complainant wherever she was in the room and at all times. The back of the head of someone sitting in the chair in front of the computer may have been observed by someone looking into the computer room. Although each of the women present on the back deck that day was able to look through the doorway into the computer room, it is possible that the sexual offences occurred in a part of the room that was not easily seen from their table. Further, the women had no reason to keep the room under regular observation. They were drinking and socialising and were not concerned about any interaction between the appellant and the complainant.

[56] It was open to the jury to reject the appellant's denials, and to conclude that he digitally raped the complainant in the computer room that afternoon. Such a conclusion might be safely based upon acceptance of the complainant's evidence and the evidence of her mother. A finding of guilt beyond reasonable doubt was not precluded by the evidence, including the evidence of the appellant's mother and Cathy, concerning their ability to look into the room. For example, the appellant's mother thought that she glanced into the room on about five or six occasions during a 15 minute period.

[57] It was also open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt on counts 1 and 2.

[58] The appellant has not shown that the verdicts of guilty were insupportable, having regard to all the evidence. He has not shown that the verdicts of guilty were unreasonable within the meaning of s 668E (1) of the *Criminal Code*.

Alleged inconsistent verdicts

[59] The appellant alleges that the guilty verdicts on counts 1, 2 and 3 are inconsistent with the not guilty verdict on count 4. He particularly contends that the verdicts on

counts 3 and 4 were inconsistent since those offences were alleged to have been committed on the same day within a short period of time. For the reasons that appear below, the jury's verdict on count 4 did not necessarily involve a rejection of the complainant's evidence that she was digitally raped in the lounge room by the appellant. The not guilty verdict on count 4 did not amount to a finding by the jury that the events as recounted by her did not occur. It indicates that the jury was not satisfied beyond reasonable doubt that the act of digital rape, as alleged in the fourth count, occurred, or occurred at the time alleged in the indictment. The critical issue is whether the verdict of not guilty on the fourth count so affects the credibility or reliability of the complainant that, in the light of all of the evidence, the jury could not be satisfied beyond reasonable doubt of the appellant's guilt on the other counts.

[60] It is appropriate to first address the law in relation to inconsistent verdicts before considering the application of these principles to the circumstances of this case. The relevant principles have been considered by the High Court and by this Court on a number of occasions.

[61] In *MacKenzie v The Queen*[1] Gaudron, Gummow and Kirby JJ stated that where alleged inconsistency arises in the case of jury verdicts upon different counts, the test is one of "logic and reasonableness". Their Honours stated:

> "... 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 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."[2]

The matter was again considered by the High Court in *MFA v The Queen*.[3]

[62] In *R v CX*[4] Jerrard JA addressed the issue of inconsistent verdicts and stated:

> "1. Where inconsistency is alleged as to verdicts of acquittal and conviction on different counts, the 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. Where that inconsistency rises to the point that the appellate court considers that intervention is necessary to prevent possible injustice, the relevant conviction will be set aside.
>
> 2. Whether the verdicts are inconsistent as so described is a test of logic and reasonableness; has the party alleging inconsistency satisfied the court that no reasonable jury, who had applied their minds properly to the facts in the case, could have arrived at the various verdicts?

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1 (1996) 190 CLR 348.
2 At 367 (citations omitted).
3 (2002) 213 CLR 606 at 617 [34].
4 [2006] QCA 409 at [33] (citations omitted).

3. Respect for the function of the jury requires appellate courts to be reluctant to accept submissions that verdicts are inconsistent in the sense described, 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. It is not the role of an appellate court to substitute its opinion of the facts for one which was open to the jury, if there is some evidence to support the verdict alleged to be inconsistent.

4. The view may properly be taken in a criminal trial that different verdicts, claimed to be inconsistent, reveal only that the jury followed the judge's instruction to consider separately the case presented by the prosecution in respect of each count, and to apply to each count the requirement that all of the ingredients must be proved beyond reasonable doubt. Alternatively, an appellate court can conclude that a jury took a merciful view of the facts on one or more counts, a function which is open to a jury.

5. Verdicts of guilty and of acquittal will show the required inconsistency where a verdict of acquittal necessarily demonstrates that the jury did not accept evidence which they had to accept before they could bring in the verdict or verdicts of guilty which they did; or when it follows that when acquitting on a particular count, the jury must have accepted evidence that required them to acquit on a count or counts on which they convicted the defendant."

[63] In *R v Smillie*[5] Holmes J (as her Honour then was) summarised some of the factors that are relevant in considering how verdicts may rationally differ:

"...

1. The quality of the evidence

The jury may have found the quality of the crucial witness' evidence variable while accepting it as generally truthful. For example, the witness may have exhibited faulty recollection on some points or been able to provide more particularity about the details of some events than others. A complainant may have failed to mention some offences in his or her original complaint, giving rise to a question about the accuracy of later recollection. The witness may have been given to exaggeration in some instances, or there may have been an inherent unlikelihood to some aspect of the evidence, which casts doubt on its accuracy in those respects, but not of the witness' general honesty. Or the circumstances in which the offence is alleged to have occurred may raise the real possibility of mistake by the complainant as to the nature of what has occurred.

2. The existence of contradictory evidence on some matters

There may in respect of some counts be evidence contradicting the crucial witness' account such as to explain a variation in the

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5 (2002) 134 A Crim R 100 at 106-7 [28]; [2002] QCA 341 at [28] (citations omitted).

> jury's verdict. Whether the force of the contradictory evidence goes beyond demonstrating a discrepancy explicable as mistake and warranting a doubt on the party of the jury, so that it must be regarded as undermining the credibility of the witness (as was the case in *Jones v The Queen* [(1997) 191 CLR 439] is a question of fact in each case.
>
> **3. The existence of corroboration on some counts**
> Different verdicts may be explicable on the basis that the witness' evidence was supported in respect of some counts but not others, by, for example, admissions by the accused.
>
> **4. The "merciful" verdict**
> As recognised in *MacKenzie v The Queen* [(1996) 190 CLR 348 at 367] and *R v P* [[2002] 2 Qd R 401 at 410], a jury may have decided that it would be oppressive to convict on all charges; that, for example, in a case where there are multiple counts, conviction on a number may sufficiently reflect the culpability of the accused."

[64] In *R v SBL*[6] the following statement was made:

> "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."[7]

[65] More recently, these principles have been confirmed in *R v BCE*.[8]

[66] The jury's verdict of not guilty on count 4 arose after the jury was given appropriate directions, including a direction to consider whether doubt about one aspect of the complainant's evidence caused the jury to have a reasonable doubt about her evidence in relation to other counts. Having been told that it had to consider the evidence in relation to each offence, and that a finding that the appellant was not guilty in relation to one count did not necessarily mean that he could not be convicted of any other count, the jury was told they had to consider why they had some reasonable doubt about that part of the evidence, and to consider whether it affected the way in which they assessed the rest of the complainant's evidence.

[67] There were reasons why the jury might have a reasonable doubt in relation to the offence charged as the fourth count, but still be satisfied beyond reasonable doubt of the other counts on the indictment. The indictment alleged that counts 3 and 4 occurred on the same day. The jury considered the two interviews that the complainant gave to the police. In the first interview she did not allege that the digital rape in the lounge room occurred on 12 September 2009. In fact, she did not refer to this matter. In the second interview she referred to an occasion when she was in the living room with the appellant when he moved his finger around inside

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6 [2009] QCA 130 at [32].

7 *R v Girgines*, unreported, Victorian Court of Appeal, No 233 of 1995, 26 March 1996 per Hayne JA and Southwell AJA; adopted in *R v Markuleski* (2001) 52 NSWLR 82 at 108-109 [118] per Spigelman CJ and at 127 [221] per Wood CJ in CL; *MFA v The Queen* (supra) at 617-618 [34]-[35].

8 [2012] QCA 58.

her. She said that her mother was on the verandah that day with women named Chris, Deb and Cathy. Yet there was no evidence of any person named Deb being at the home on 12 September 2009. This opened the possibility that the occasion of digital rape whilst watching television occurred on another date or that, at least, there was inconsistency in the complainant's evidence as to the date upon which this offence occurred.

[68] A reasonable doubt about whether the act alleged in count 4 occurred, or occurred at the time particularised in the indictment, was justified by the evidence of the appellant's mother and the witness named Cathy that they did not see the appellant in the lounge room with the complainant on 12 September 2009. The evidence of the complainant and her mother was that the appellant and the complainant did watch television together that afternoon. The jury may have accepted this evidence as a probable account of the facts, but not have been satisfied beyond reasonable doubt because other witnesses did not support it.

[69] The jury was concerned about the question of timing and reviewed the recordings. Having done so, it was left with a reasonable doubt that the offence charged in count 4 occurred, as alleged on 12 September 2009. Its entertaining a reasonable doubt in the circumstances did not amount to a positive finding that the events as alleged by the complainant did not occur. The not guilty verdict may indicate that the jury was not satisfied beyond reasonable doubt that one of the alleged events occurred at the time particularised in the indictment.

[70] A verdict of not guilty on count 4 did not necessarily demonstrate that the jury did not accept evidence which they had to accept before they could bring in verdicts of guilty on counts 1, 2 and 3. The different verdicts were explicable on the basis that the jury was not satisfied beyond reasonable doubt that the appellant was present with the complainant and sexually abused her in the lounge room on the afternoon of 12 September 2009, whereas it was satisfied that they were present together in the computer room earlier that afternoon, that the appellant had the opportunity to digitally rape the complainant in that room, and did so.

[71] The appellant has not shown that the verdicts are inconsistent, such that they are suggestive of injustice. Applying the principles outlined above, the guilty verdicts on counts 1, 2 and 3 are not inconsistent with the not guilty verdict on count 4. The appellant's second ground of appeal is not established.

[72] In my view, the appeal should be dismissed.