SUPREME COURT OF QUEENSLAND

CITATION:	*R v CBF* [2012] QCA 294
PARTIES:	**R** **v** **CBF** (appellant)
FILE NO/S:	CA No 150 of 2012 DC No 488 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	30 October 2012
DELIVERED AT:	Brisbane
HEARING DATE:	15 October 2012
JUDGES:	Muir JA, Atkinson and Applegarth JJ 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 one count of rape, found not guilty of one count of rape and found not guilty of four counts of indecent treatment of a child – where jury was unable to reach agreement in relation to four counts of rape and one count of indecent treatment of a child – where all counts related to the same complainant – where appellant contends that the guilty verdict cannot be reconciled logically or reasonably with the verdicts on other counts – whether the guilty verdict on count 4 was inconsistent with other verdicts *Criminal Code* 1899 (Qld), s 668E *Evidence Act* 1977 (Qld), s 21AK *MacKenzie v The Queen* (1996) 190 CLR 348; [1996] HCA 35, cited *R v BCE* [2012] QCA 58, cited *R v CX* [2006] QCA 409, cited *R v DAL* [2005] QCA 281, cited *R v Garrett* [2009] QCA 300, cited *R v JK* [2005] QCA 307, cited *R v Kahu* [2006] QCA 33, cited

R v Ritchie (2005) 12 VR 145; [2005] VSCA 166, cited
R v SBL [2009] QCA 130, cited

COUNSEL: S M Ryan for the appellant
M B Lehane for the respondent

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

[1] **MUIR JA:** I would dismiss the appeal for the reasons given by Applegarth J with which I agree.

[2] **ATKINSON J:** I agree with the order proposed by Applegarth J for the reasons given by his Honour.

[3] **APPLEGARTH J:** On 8 June 2012 the appellant was convicted of one count of rape. The complainant was aged eight at the time of the offence. The appellant had been charged with 11 sexual offences involving the complainant. The jury was unable to agree on verdicts on five of the counts. Not guilty verdicts were returned on five counts.

[4] The complainant's mother and her partner came to know the appellant and his partner. In December 2009 the complainant's family moved from their previous home to live with the appellant and his partner at W. They lived there until March 2010. The complainant called the appellant, who by March 2010 was aged 60, "Pop".

[5] The offences were alleged to have happened either at the appellant's home or on a fishing trip to D in late June 2010. Count 7 alleged an offence at D, when it should have alleged that this offence was committed at a different time at W. This error in the indictment was only detected late in the trial, when it was too late for the prosecution to amend Count 7. As a result, a not guilty verdict was directed on that count. Save for Count 3, each offence was alleged in the indictment to have been committed on "a date unknown" between particularised dates.

[6] The verdicts and outcomes may be summarised as follows:

Count	Charge	Date	Place	Verdict/Outcome
1	Rape	Between 31.12.2009 and 1.4.2010	W	Unable to agree
2	Indecent treatment, Child under 12, Under care	Between 15.1.2010 and 24.1.2010	W	Unable to agree
3	Indecent treatment, Child under 12, Under care	On or about 17.2.2010	W	Not guilty (majority verdict)
4	Rape	Between 23.6.2010 and 2.7.2010	D	Guilty
5	Indecent treatment, Child under 12, Under care	Between 23.6.10 and 2.7.2010	D	Not guilty (unanimous)
6	Rape	Between 23.6.2010 and 2.7.2010	D	Unable to agree
7	Indecent treatment, Child under 12, Under care	Between 23.6.2010 and 2.7.2010	D	Not guilty (directed)
8	Rape	Between 31.12.2009 and 11.7.2010	W	Unable to agree

9	Rape	Between 31.12.2009 and 11.7.2010	W	Not guilty (unanimous)
10	Indecent treatment, Child under 12, Under care	Between 31.12.2009 and 11.7.2010	W	Not guilty (majority)
11	Rape	Between 31.12.2009 and 11.7.2010	W	Unable to agree

[7] The appellant argues that his conviction is "unsafe and unsatisfactory" in the sense of being unreasonable within the meaning of s 668E(1) of the *Criminal Code* due to inconsistency. He contends that the guilty verdict "is inconsistent and irreconcilable with the verdicts of not guilty and the jury's inability to reach agreement on certain counts." Before considering the principles that apply to allegedly inconsistent verdicts, some general observations are appropriate by way of background.

[8] The complainant was first interviewed by police on 24 July 2010, and a further police interview occurred the next day. Her evidence was not pre-recorded pursuant to s 21AK of the *Evidence Act* 1977 until 24 February 2012.

[9] In the police interviews the complainant gave a detailed account of sexual abuse by the appellant over an extended period. She was aged only eight at the time of the interviews, but was able to describe and demonstrate in some detail how the alleged sexual offences were committed. They included an offence of penile rape, offences of digital rape and various forms of indecent treatment. There was no suggestion that the complainant had obtained this kind of information about sexual activities from other sources. The accounts given by her on the first day that she was interviewed by police of 10 of the 11 offences,[1] and the accounts given by her of Counts 2 and 4 when she was interviewed the next day, did not sound or appear incredible. On the contrary, her account of events was detailed and plausible. Her evidence did not appear contrived and the manner in which she gave it bolstered, rather than detracted from, her credibility.

[10] As will appear in my consideration of each of the counts, issues arose about the date of certain offences. For example, after describing the activities that gave rise to Counts 9 and 10, the complainant was asked when this happened, to which she replied:

> "This happened um probably, I think when I was five or four or something, but I was still like small".

This placed the offences in 2006 or 2007, well before the period particularised in the indictment. This alone might explain the not guilty verdicts on Counts 9 and 10.

[11] For sound forensic reasons, the appellant's counsel at trial may have invited the jury, in effect, to take an "all or nothing" approach to the offences, and to deliver not guilty verdicts on all counts because of reservations about the prosecution case which depended on the credibility and reliability of the complainant's evidence. However, the trial judge required the jury to give separate consideration to each offence, and it should not be supposed that the jury, which deliberated for a very lengthy period, did not do so.

[12] After telling the jury that the evidence in relation to the separate offences was different, so its verdicts need not be the same, the trial judge stated that the Crown case depended "pretty much wholly and solely" on the evidence of the complainant. Her Honour continued:

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[1] There was no reference to the facts founding Count 2 in the interview on 24 July 2010.

> "So if you have a reasonable doubt concerning her truthfulness or reliability in relation to one or more of the counts, whether by reference to her demeanour or for any other reason, that must be taken into account in assessing the truthfulness or reliability of her evidence generally.
>
> Obviously your assessment of her generally will be relevant to all of the counts but you have to consider her evidence in respect of each count when considering that particular count. It may occur in respect of one of the counts that for some reason you're not sufficiently confident of her evidence to convict in respect of that count.
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> A situation may arise where in relation to a particular count you get to the point where although you're inclined to think she's probably right, you have some reasonable doubt about an element or elements of that particular offence. If that occurs, of course, you find the accused not guilty in relation to that account (sic). It doesn't necessarily mean you can't convict of any other count. But you have to consider why you have reasonable doubt about that part of her evidence and consider whether it affects the way you assess the rest of her evidence. That is, whether your doubt about that aspect of her evidence causes you also to have a reasonable doubt about the part of her evidence relevant to any other count. And that's for the reason that she really is the – the Crown case rises and falls on her evidence."

Principles about inconsistent verdicts

[13] In *MacKenzie v The Queen*[2] 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."[3] (citations omitted)

[14] Various matters of principle have been settled about the assessment by appellate courts of claims of inconsistent verdicts by a jury. In *R v CX*, Jerrard JA 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

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2 (1996) 190 CLR 348.

3 At 367.

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?

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. …"[4] (citations omitted)

[15] 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.[5]

[16] A jury's failure to reach a verdict cannot be equated with a verdict of acquittal.[6] The absence of a verdict indicates that the jury was not prepared to find

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4 [2006] QCA 409 at [33].

5 *R v SBL* [2009] QCA 130 at [32] followed in *R v BCE* [2012] QCA 58 at [11].

6 *R v DAL* [2005] QCA 281 at [5], [26] – [27]; *R v JK* [2005] QCA 307 at [22] – [25]; *R v Kahu* [2006] QCA 33 at [27]; *R v Garrett* [2009] QCA 300 at [35] – [37].

unanimously (or by majority if the circumstances permitted a majority verdict) that the evidence did not establish that the defendant was guilty beyond a reasonable doubt.[7] The absence of a verdict also indicates that the jury was not prepared to find unanimously (or by majority) that the evidence did establish that the defendant was guilty beyond a reasonable doubt.

[17] Inconsistency does not automatically follow an acquittal on other counts:

> "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."[8]

[18] These principles require consideration of the individual counts in order to determine whether there was an unacceptable inconsistency. One aspect is to determine whether the verdicts mean that the jury must have found the complainant to be an unreliable witness generally, so that it could not have been satisfied beyond reasonable doubt of the appellant's guilt on Count 4.

Count 1: Rape – penile penetration (jury unable to agree)

[19] In her first police interview the complainant described incidents of sexual abuse by the appellant when her mother and father were not at the appellant's home and her "Nan" was at the shop. A police officer then asked the complainant:

> "And tell me about, tell me about the first time you're talking about then when Mum and Dad weren't there and Nan went to the shop."

The question may not have been intended to ask, or been understood to ask, about the first time that the appellant had committed a sexual offence upon her.[9] It asked about the first time he did so when her parents and her "Nan" were not at the appellant's home. In any event, in response to the question the complainant recounted an occasion when she and two of her cousins had been playing on a trampoline. The appellant invited them inside for a biscuit and a drink. He then dragged the complainant into his room, pulled her pants down, threw her on the bed and hopped on top of her. The complainant described how the appellant was rocking forwards and backwards and going up and down. The complainant described how the appellant had his pants down and was touching her "on the fanny" with his "doodle". She thought that his doodle was on the inside of her fanny. She described how the appellant's penis felt and how he "took his doodle out and let me went and play".

[20] In a later part of the same interview when questions returned to this episode, the complainant was asked how old she was when it happened, to which she responded, "I was five".

[21] By the time of the pre-recording of the appellant's evidence pursuant to s 21AK of the *Evidence Act* on 24 February 2012 the complainant could not remember if the

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7 *R v DAL* (supra) at [27].

8 *R v Ritchie* [2005] VSCA 166 at [17] followed in *R v DAL* (supra) at [26].

9 The appellant's submissions interpret the question and the answers that follow as the complainant nominating this offence as the "first time" the appellant had committed a sexual offence upon her.

appellant's penis went "right in" her "rude part", but could remember that it went in and that it made her sore. Later during her cross-examination the complainant was asked the leading question, "So when he put his doodle in your rude part you were about eight, I suppose, were you?", to which she responded, "Yeah".

[22] The jury may have been satisfied beyond reasonable doubt that this offence occurred, but been unable to agree on a verdict because at least some members of the jury placed reliance upon the fact that, in the first interview, the complainant said that she was five when it occurred. This evidence placed the incident before the dates particularised in Count 1.

Count 2: Indecent treatment – digital touching (jury unable to agree)

[23] On the second day that the complainant was interviewed by police, she was asked to tell the police about the first time that the appellant "did something" to her. She described being "over at his house", and going inside and giving him a kiss. The appellant invited her upstairs, saying that he had a surprise for her. The appellant kissed her "very badly" all around the neck. The complainant described how the appellant put a finger down her pants and rubbed her vaginal area. She thought that she was eight when this happened, and that it occurred during school holidays and on her birthday. She and her family went there on her birthday and this was the first time that he did anything to her. She recalled that it was on a Saturday, "cause we were only just back from [C][10]."

[24] If this incident occurred, and occurred on the complainant's eighth birthday, then it fell within the period charged in Count 2. However, the complainant's evidence that this was the first time that the appellant had done something to her, and other evidence given by her, may have raised a doubt about whether the episode occurred before her eighth birthday. When she was cross-examined she accepted that she was about five and "visiting the house" when something happened between her and the appellant. She went on to describe an incident in which she went inside the house and was touched in the area of her vagina by the appellant's finger inside her clothes. When giving this evidence at the pre-recording of her evidence on 24 February 2012, the complainant thought that this incident happened on a weekend when she was at school, rather than on the school holidays.

[25] If the incident about which the complainant was giving evidence at that stage was the "first time" incident about which she spoke in her second interview with police, then there was a problem in relation to timing. If it was in fact the first time that the complainant had sexually abused her and occurred when she was five or six or seven and before her family moved from C and commenced living with the appellant, then the offence occurred before the dates particularised in Count 2.

[26] The jury's inability to agree on a verdict is consistent with some members of the jury having a reasonable doubt about the date of the episode that the complainant described in her second interview, but not doubting the complainant's evidence that such an episode of digital touching occurred.

Count 3: Indecent treatment (not guilty – majority)

[27] This offence was alleged to have occurred "on or about 17 February 2010", but the evidence is that it occurred on the date of the appellant's birthday party, which took place on 20 February 2010. The complainant's evidence, as contained in the police

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[10] The name of the town in which the complainant and her family lived until December 2009.

interview on 24 July 2010, is that the appellant's birthday party was at his house, and that he said to the complainant that he was going to "fuck" her when she was older. The evidence established that the birthday party was held with a large number of people gathered in a paddock. According to the complainant, the appellant put his tongue inside her pants and licked her in the vaginal area. This was said to have occurred upstairs in the complainant's cousin's room. The complainant was eight years old at the time. The complainant said that she and her cousins told her aunty, CP. An answer that she gave in cross-examination may suggest that she told CP about this on the night of the appellant's birthday party. CP gave evidence that she was not approached by the complainant on the night of the party and told that the appellant had been doing something to the complainant. Although CP had been drinking, she thinks that she would have remembered such a report if she had been told. However, it may be that the complainant's evidence under cross-examination was not that she told CP on the night of the appellant's birthday party. The complainant acknowledged that "it wasn't until the very end" that she told CP. This would be some months after the birthday party. Still, CP's evidence may have caused the jury to have some reservations about the complainant's evidence on this count, at least in respect of the date that it occurred or the date that she told CP about it.

Count 4: Rape – digital penetration (guilty)

[28] This incident is alleged to have occurred on a fishing trip in late June 2010. There was evidence that the appellant asked for permission to take the complainant and her younger brother on an overnight fishing trip to D. The children's mother agreed, and she arranged to collect them the next day.

[29] Significantly, this count was the first incident of sexual abuse which the complainant referred to in her interview with police on 24 July 2010, and related to events a relatively short time before the complainant spoke to police. In the first interview the complainant did not descend into detail about this episode, and proceeded to recount details of matters that form the basis of Count 5. In the interview the next day she referred to the incident that was charged in Count 4 in greater detail. She again referred to it in some detail in her pre-recorded evidence. In this regard, Count 4 is the only incident that was referred to in both police interviews and in the pre-recorded evidence. The account given on each occasion is fairly consistent.

[30] The complainant explained that she, her brother and a cousin went on the trip. They were down at the sand playing sandcastles. She went up to tell "Pop" to have a look at the sandcastles. It was when she was alone with him that he put his hand down her pants and touched her on the inside of her vagina. She described and demonstrated how he made his finger into a "little hook", and how when he put his finger inside her it felt "rough and gross".

[31] She explained that when she went up to see the appellant in the caravan he was unpacking all of their stuff and getting their pyjamas ready. Her evidence was detailed and plausible, and there was other evidence that the complainant stayed overnight during the fishing trip at the campsite which the appellant had arranged.

Count 5: Indecent treatment (not guilty)

[32] The complainant gave evidence of another episode that she said occurred during the fishing trip. Everyone had gone to bed and the appellant "was faking to be asleep".

When she was nearly asleep and had closed her eyes or was about to close her eyes the appellant got up and "got his pointer and put his finger down my pants and touched me on the rude part". The complainant said that she jumped up and took his hand out. The complainant did not give further evidence about this incident during her pre-recorded evidence and was not cross-examined about it. Given that she said that she was almost asleep when the incident happened, and the jury accepted that she had been digitally penetrated by the appellant that day, it was open to the jury, applying suitable caution, to conclude that her recollection of what occurred shortly before she went to sleep was impaired. It may have concluded that, on the edge of sleep and in a traumatised state, she was imagining another sexual assault of the kind that had happened earlier that day. It was open to the jury to at least have doubts about the reliability of her account on Count 5.

Count 6: Rape – oral (jury unable to agree)

[33] The complainant told the police of another episode on a fishing trip when she and the appellant were getting the rods ready to go and fish. She was in the caravan with him when he put his tongue down her pants and on to her vagina. She said that she was trying to pull his head away because it was hurting and then she left the caravan and ran to her friend's caravan, and then ran to a sandpit and played with her brother and her cousins. When asked by police whether this occurred on the fishing trip that year or another year, she replied, "Another year". She could not remember where she went fishing. Later in the interview she said that she was eight years old when the complainant put his tongue on to her vagina during a fishing trip.

[34] Her earlier reference to the relevant event having happened "another year" was apt to raise an issue for the jury's consideration about whether such an incident occurred, and if it did, whether it occurred during a fishing trip in another year. This may explain why the jury was unable to agree on this count. Its inability to agree does not necessarily mean that some members of the jury made an adverse assessment of the complainant's credibility and reliability. The jury may have been persuaded that such an incident occurred but been unable to agree that it occurred during the period alleged in Count 6 of the indictment.

Count 7: Rape – digital (not guilty)

[35] This was the directed verdict which arose because the relevant evidence related to an episode at the appellant's home whereas Count 7 on the indictment charged that the offence took place at D during the period that the appellant had booked a camping site for the fishing trip. As a result, the trial judge directed a verdict of not guilty.

Count 8: Rape – digital (jury unable to agree)

[36] In her first interview with the police the complainant described an episode when she was staying at the appellant's house. Her "Nan" was at work. Her male cousin, B, was also staying at the house. The appellant was the only other person there. It was late at night and the complainant was getting ready to go to bed. She says that the appellant said to her that when she was older he was going to "do what adults do to have babies". She said that the appellant got her cousin B to put his finger down the complainant's pants and that the appellant also put his finger down her pants. Later, when her Nan came home B was in the lounge room with the appellant watching TV and pretending that nothing had happened. She described how earlier they had put their fingers down her pants at the same time, then at different times and were

"trying to find this little hole and I kept on saying, 'Stop, stop', because it's annoying and it hurts". She said that the appellant "put his finger inside the hole".

[37] Although the complainant said that the appellant put his finger inside her vagina, she also said that at around this time she was faking being asleep and started to close her eyes, but when she opened them she saw the appellant doing it, but not B. Then when she shut her eyes and tried to go to sleep she was woken again and opened her eyes and saw the appellant and B putting their fingers down her pants.

[38] B was interviewed by police in July 2010 shortly before his eighth birthday. He denied "touching anybody else's private parts" or having seen anybody do such a thing.

[39] The evidence left open the possibility that some members of the jury had a reasonable doubt about whether the appellant penetrated the complainant. There may have been a reticence on the part of some jurors to convict in the light of B's denials of his involvement. The Crown case was that the appellant had corrupted B into participating in the sexual abuse of the complainant. The jury may have thought that this probably was the case, but some of its members not been prepared to find this episode was proven beyond reasonable doubt in the face of B's denials. Simply put, its inability to agree on a verdict does not indicate a rejection of the complainant's credibility or reliability on this count, let alone generally.

Count 9: Rape (not guilty) and Count 10: Indecent treatment (not guilty – majority)

[40] Counts 9 and 10 were offences allegedly committed in the course of one incident. They were based on evidence given by the complainant of an episode that occurred "a very long, long time ago". The complainant said that it occurred "roughly when I was six, some age". The appellant was the only adult at home on that occasion. The complainant and two cousins were playing outside. The appellant was inside on his chair watching television. He called her in and told her to "suck his doody". The appellant had his penis out of his pants and was pushing the complainant's head onto it. She was screaming out. Her female cousin, B, came in to see what was happening. The complainant thought that her female cousin saw what was happening and pulled the appellant back. She also said that the appellant got her hand and put it on his penis. When asked when these matters happened the complainant said, "I think when I was five or four or something, but I was still like small."

[41] If the episode described by the complainant occurred, then on the complainant's own evidence it had occurred a very long time ago when she was about six, and not during the period particularised in the indictment. This provides a rational explanation for the jury's verdict of not guilty on Count 9 and its inability to agree on Count 10. An additional, rational explanation for the not guilty verdict on the count of rape was a possible doubt about penetration. There was some confusion at the trial as to whether the alleged act of penetration charged in Count 9 was "the penis in the mouth" or digital rape. The trial judge first directed the jury on the basis that Count 9 related to the sucking on the penis, but later redirected the jury that the alleged rape was digital penetration.

Count 11: Rape – digital (jury unable to agree)

[42] This offence was alleged to have happened in the shed at the appellant's house. The offending conduct, as described in the complainant's cross-examination, consisted

of the appellant putting his finger in the complainant's vagina and wiggling it. Her police interview suggested a course of conduct that involved both the appellant and her male cousin B which occurred every time they went over to the appellant's house and into his shed. The particular episode that was the basis for Count 11 related to an occasion after the complainant had won a game that involved feeding cows. She then went into the shed and the appellant put his finger down her pants and started to move it. She demonstrated in the interview the form of movement and described him going backwards and forwards and then frontwards and backwards "like a little hook".

[43] Early in the police interview the complainant reported that the last time that she had gone to the appellant's house and his shed and the appellant and B had done things to her was June 2010. However it was not clear whether the specific episode of digital penetration that she described later in the interview and under cross-examination occurred in June 2010 or on some earlier occasion. The lack of clarity about the date of the episode provides a rational explanation as to why the jury was unable to agree on a verdict on this count.

The principal submissions on inconsistency

[44] The appellant submits that the verdict of guilty on Count 4 cannot be reconciled logically or reasonably with the verdicts of not guilty nor with the counts upon which there was disagreement, and that the inconsistency in the verdicts suggest that the jury failed to appreciate that findings of credit in relation to one count could not be isolated from their consideration of other counts. It involves the proposition that the jury failed to follow the direction given by the trial judge which I have earlier quoted.

[45] The respondent submits that the jury's verdicts do not demonstrate that they found the complainant's evidence to be generally untruthful or unreliable. Rather, they are said to reveal that the jury conscientiously and cautiously adhered to the trial judge's instruction to consider separately the case presented by the prosecution in respect of each count.

Was this an "all or nothing" case?

[46] Counsel for the appellant submitted on the hearing of the appeal that this was "essentially an all or nothing credibility case" and the genuine issues at trial were not whether there had been penetration of the complainant's vagina, nor whether the complainant was accurate about dates. The issue was whether there had been sexual abuse at all.

[47] It is true that the prosecution case rested almost entirely on the complainant's credibility and reliability. The trial judge told the jury as much. Still, the jury had to be satisfied that the complainant's evidence proved that there had been penetration by the appellant on each count of rape, and the jury had to be satisfied about dates. The appellant's counsel at trial made reference to dates. The significance of the dates stated in the indictment was brought home to the jury during the trial judge's summing up when a verdict of not guilty was directed in relation to Count 7. As the trial judge instructed the jury, "you'll have to find [the accused] not guilty on that charge, regardless of your view of her evidence generally the dates and the place are wrong."

[48] The trial judge's summing up concluded with a summary of the parties' respective contentions. It ended with the following summary of part of the defence case:

> "She also has the dates way out. Sometimes she says things happened when she was five or six or even four and the dates don't match. She's vague about when things happened. She changes when things happened. She gives different versions of what happened on fishing trips. Different versions in cross-examination. Different versions of what happened on the first occasion. Everything's different every time and you couldn't rely on her and you would acquit."

I do not accept that the jury were given to understand that this was an all or nothing case. They were told at the start of summing up that their verdicts need not be the same, and that the evidence in relation to the separate offences was different. The date upon which the alleged offences occurred assumed importance in respect of a number of counts.

[49] As emerges from the preceding discussion of the individual counts, it was open to the jury to return a verdict of not guilty or to have been unable to agree on a verdict on certain counts if they were not satisfied, or some members of the jury were not satisfied, beyond reasonable doubt that the offence described in the complainant's evidence occurred on a date within a particularised period. In returning a verdict of not guilty, or in being unable to reach a verdict, the jury was not necessarily taking an adverse view of the complainant's credibility or reliability. Such a verdict or outcome was open because of uncertainty about the date when certain offences occurred, including the confusion that arose about whether Count 1 or Count 2 was the "first time" an offence was committed.

Alleged inconsistency as between Counts 4, 5 and 6

[50] Counsel for the appellant described her strongest argument of irreconcilable inconsistency as arising in respect of the different verdicts on Counts 4, 5 and 6. Each of these offences was alleged to have occurred at D. The evidence in respect of each offence was submitted by the appellant to be "equivalent in quality – in terms of the complainant's language; her turns of phrase and the level of detail she provided." The jury's verdict of not guilty on Count 5 was said to have involved a rejection of the complainant's evidence that "must have damaged her credibility in respect of Count 4", such that the jury could not have been satisfied beyond a reasonable doubt of the complainant's reliability on Count 4.

[51] I do not accept that the evidence in respect of Count 4 and Count 5 was equivalent in quality, or that the verdict of not guilty on Count 5 entailed an adverse view of the complainant's credibility that required the jury to not accept her evidence on Count 4. For the reasons discussed in relation to Count 5, the jury may have concluded that on the night in question the complainant was on the edge of sleep and in a traumatised state. She recalled jumping out of bed and pulling his hand out of her pants. It was open to the jury, applying suitable caution, to conclude that her recollection of what occurred shortly before she went to sleep was impaired. A doubt about whether she was actually abused by the appellant that night because she might have had a traumatised fear of being attacked when she was on the edge of sleep permitted the jury to return a verdict of not guilty. It did not necessarily involve a generally adverse view of the complainant's credibility or reliability.

[52] The circumstances of Count 4 were quite different. There was no issue about whether the complainant was in a fully conscious state that day. She gave a detailed account of the episode.

[53] If the jury had entertained a reasonable doubt about whether the complainant and her brother stayed overnight on the fishing trip to D in late June 2010, then this would have required them to return a verdict of not guilty on Count 5. It would also have cast doubt on the complainant's credibility or reliability more generally. However, there was evidence that the jury was entitled to accept that the complainant and her younger brother stayed overnight on that fishing trip.

[54] In short, the jury's verdict of not guilty on Count 5 is not inconsistent with its verdict of guilty on Count 4.

[55] The appellant seeks to rely in this context upon the fact that the jury was unable to agree on Count 6. The jury's failure to agree cannot be equated with a verdict of acquittal. Further, as discussed above, the jury may have been persuaded that the incident alleged occurred, but been unable to agree that it occurred during the period alleged in Count 6 of the indictment.

[56] The jury's not guilty verdict on Count 5 is consistent with it taking a cautious approach and adhering to the trial judge's directions in respect of an offence which was allegedly committed when the complainant was near sleep. The jury may have concluded that the offence probably happened, but not been satisfied beyond reasonable doubt because of concerns about the state of consciousness of the complainant and the traumatised state that she would have been in as a result of the offence that was charged as Count 4. Any doubt that the jury had about the reliability of the complainant's recollection in respect of Count 5 did not necessarily mean that the evidence of the complainant about what happened when she was fully awake earlier that day was also unreliable. Her evidence about Count 4 was clear, detailed and the subject of two police interviews and cross-examination during the pre-recording of her evidence.

Alleged inconsistency between Count 4 and Counts 9 & 10

[57] The appellant next argues that the guilty verdict on Count 4 is unreasonable because of the jury's rejection of the complainant's evidence on Counts 9 and (by majority) 10. These verdicts are submitted to have made it impossible for the jury to reasonably convict the appellant on Count 4.

[58] Counts 9 and 10 were alleged to have been committed in the course of one incident, and the jury's verdicts of not guilty in respect of these counts may reasonably have been based upon the evidence given by the complainant that the episode occurred "a very long, long time ago" when she was about six. Not guilty verdicts that can be explained on that basis do not carry any implication that the jury rejected the complainant's evidence on that count as incredible or unreliable, let alone a generally adverse view about her credibility or reliability.

[59] The appellant makes the incidental point that the unanimous not guilty verdict on Count 9 is irreconcilable with the majority verdict on Count 10. He submits that the one juror who must have been satisfied of the appellant's guilt beyond reasonable doubt on Count 10 could not have reasonably reached that conclusion in the light of

the unanimous not guilty verdict on Count 9. This submission does not really bear upon Count 4. In any event, the verdicts on Count 9 and 10 can be reconciled.

[60] As noted, the trial judge originally summed up on the rape count that was Count 9 on the basis that it related to the evidence that the appellant had forced the complainant to suck on his penis. This summary was repeated and it was only when the jury had retired at 1.24 pm on 8 June 2012 that the prosecutor pointed out that Count 9 related to penetration of the complainant's vagina by the appellant's finger. The trial judge immediately redirected the jury and directed it to a passage of the complainant's evidence in which she described how the appellant had requested her and her male cousin B to come inside, after which, according to the complainant, the appellant and B "put his finger down my pants and then [B] – and then Pop did in and out". That was the evidence of digital penetration upon which Count 9 was based. Count 10 related to other acts that the complainant described in which the appellant pushed her head down onto his penis where it touched her face, and then put her hand on his penis.

[61] A majority of the jury may have returned not guilty verdicts on Counts 9 and 10 because they had a reasonable doubt about whether the offences were committed during the period alleged in the indictment. Some or all members of the jury may additionally have returned a verdict of not guilty on Count 9 because of a doubt about whether it was B's finger or the appellant's finger which penetrated the complainant's vagina during that episode.

[62] In conclusion, the not guilty verdicts on Counts 9 and 10 are not inconsistent with the guilty verdict on Count 4. Count 4 related to a relatively recent episode, about which the appellant's recollection would not be impaired through the passage of time and, unlike Counts 9 and 10, there was no issue about whether the offence described by the complainant fell within the period particularised in the indictment.

Alleged inconsistency as between Counts 4 and 11

[63] The appellant submits that there is no basis upon which the jury "could reasonably have found themselves unable to agree about Count 11 (meaning that some of the jury rejected the complainant's evidence on that count), yet convict the appellant unanimously of Count 4." This submission should be rejected. As I explained in respect of Count 11, the lack of clarity about the date of the event provides a rational explanation as to why the jury was unable to agree on a verdict on that count.

Other aspects

[64] The appellant's submissions acknowledge that there are reasons that explain why the jury was unable to agree on certain counts. These include a reluctance to convict by reason of the male cousin B's denial of offending conduct, and confusion about the first occasion on which the complainant was sexually abused. The appellant submits that account should be taken of contradictions of the complainant's evidence and that it is impossible to reconcile the fact that some of the jurors rejected the complainant's evidence on certain counts, yet accepted her evidence beyond reasonable doubt on Count 4. I do not accept that the points made by the appellant individually or cumulatively about these matters lead to the conclusion that the jury found the complainant to be an unreliable witness generally. Its inability to agree on some verdicts and the not guilty verdicts that it returned on

others can be explained as the jury giving careful consideration to each offence and the separate evidence which related to that offence. The case is quite different to one in which the complainant's evidence and the surrounding circumstances are the same in respect of each count, and there is nothing which gives any ground for supposing that her evidence is more reliable in relation to some counts.[11] The quality of the evidence on each count was not the same. Some counts are related to events which had occurred at least many months before the complainant was first interviewed by police and, as the complainant's evidence showed, possibly related to events that had occurred some years earlier, and not during the period charged in the indictment. Count 4 related to a relatively recent episode and the complainant gave detailed, clear and convincing evidence about it. The jury would not have been affected by any reticence to disbelieve the male cousin B's denials. He was not alleged to have been involved in the offence charged as Count 4.

Conclusion

[65] The not guilty verdicts returned on some counts, and the jury's inability to reach agreement on others, are not inconsistent and irreconcilable with the guilty verdict on Count 4.

[66] The verdicts and outcomes on other counts do not mean that the jury must have found the complainant to be an unreliable witness generally, so that it could not have been satisfied beyond reasonable doubt of the appellant's guilt on Count 4. The prosecution case on Count 4 was stronger than on some other counts. The verdicts and outcomes persuade me that the jury cautiously followed the direction given by the trial judge, and conscientiously observed the duty not to convict the appellant unless satisfied beyond reasonable doubt that the offence was committed during the period specified in the indictment.

[67] The complainant presented as a credible and reliable witness who gave plausible evidence about sexual abuse by the appellant over a substantial period, including episodes that may have pre-dated the periods specified in the indictment. The verdict and outcomes may be reconciled. The verdicts on different counts satisfy the test of logic and reasonableness.

[68] I would dismiss the appeal.

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11 cf *Jones v The Queen* (1979) 191 CLR 439 at 453.