SUPREME COURT OF QUEENSLAND

CITATION:	*R v Manning* [2014] QCA 49
PARTIES:	**R** **v** **MANNING, Gregory Thomas** (appellant)
FILE NO/S:	CA No 143 of 2013 CA No 242 of 2013 DC No 181 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Cairns
DELIVERED ON:	Orders delivered ex tempore 17 February 2014 Reasons delivered 21 March 2014
DELIVERED AT:	Brisbane
HEARING DATE:	17 February 2014
JUDGES:	Margaret McMurdo P and Holmes and Morrison JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Orders delivered ex tempore on 17 February 2014:** **1. The appeal is allowed.** **2. The verdicts of guilty are set aside.** **3. A retrial is ordered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – IMPROPER ADMISSION OR REJECTION OF EVIDENCE – where the appellant was convicted of 20 counts of sexual offences – where the appellant had a friendship with the complainant's parents which disintegrated – where the appellant telephoned the complainant's father, crying and sobbing, repeatedly saying he was sorry, and that he wanted to keep the relationship going – where the learned primary judge allowed the prosecution to lead evidence of the telephone call by the appellant to the complainant's father as evidence of the appellant demonstrating a sexual interest in the complainant – where the High Court in *Pfennig* held that propensity evidence was only admissible where it bears no reasonable explanation other than the inculpation of the accused for the offence charged – where the appellant

contended at trial, and submits here, that the telephone call could be equally interpreted as demonstrating his concern for the relationship between the families – whether the telephone call reasonably bears an innocent explanation

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where the appellant was convicted of 20 counts of sexual offences – whether the jury's verdicts of guilty on counts 7 (digital rape), 14 (sodomy), 19 (digital rape), 22 (sodomy) and 24 (sodomy), and verdicts of not guilty on counts 8 (sodomy) and 12 (digital rape), are inconsistent – where count 8 required the element of penetration to be satisfied – where the quality of the complainant's evidence as to penetration varied between count 8 and counts 14, 22 and 24 – where count 12 required the element of absence of consent to be satisfied, while count 7 did not – where the complainant gave evidence, in respect of count 12, consistent with passive acquiescence – whether the verdicts can be reconciled

Criminal Code 1899 (Qld), s 349(3)
Evidence Act 1977 (Qld), s 93A

BBH v The Queen (2012) 245 CLR 499; [2012] HCA 9, considered
HML v The Queen (2008) 235 CLR 334; [2008] HCA 16, considered
MacKenzie v the Queen (1996) 190 CLR 348; [1996] HCA 35, cited
Pfennig v The Queen (1995) 182 CLR 461; [1995] HCA 7, considered
R v Smillie (2002) 134 A Crim R 100; [2002] QCA 341, cited
R v WAC [2008] QCA 151, considered
Roach v The Queen (2011) 242 CLR 610; [2011] HCA 12, cited

COUNSEL: A J Glynn QC, with J R Jones, for the appellant
D C Boyle for the respondent

SOLICITORS: Peter Shields Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** I agree with Morrison JA's reasons for the orders made by this Court on 17 February 2014, subject to the additional observations of Holmes JA.

[2] **HOLMES JA:** I have had the advantage of reading the reasons for judgment of Morrison JA and agree with his Honour's conclusions that the verdicts were not inconsistent, but that there was error in the admission of the evidence of the telephone conversation which necessitates the ordering of a retrial.

[3] As to the latter, while I concur with his Honour about the existence of rational inferences other than guilt, I would regard the conversation as inadmissible on a more fundamental basis: not only was it capable of bearing innocent explanations, it was, in my view, actually incapable of bearing the inference of guilt contended for by the Crown so as to be probative of anything in the Crown case.

[4] **MORRISON JA:** On 17 February 2014 this Court allowed the appellant's appeal against his conviction on 20 counts of sexual offences. The basis of the Court's orders was that inadmissible evidence as to a particular telephone call from the appellant had been allowed to go to the jury with the consequence that there had been a miscarriage of justice, and there should be a retrial. What now follows are the Court's reasons for that conclusion.

Grounds of appeal

[5] The evidence of the telephone call, and its use on the part of the respondent to argue that it demonstrated a sexual interest in the complainant, was the subject of ground one of the appeal. The contention was that there was error on the part of the learned trial judge in permitting that evidence to be adduced, because such evidence could only be admissible if, when considered with other prosecution evidence, there was no reasonable view of it consistent with the innocence of the accused.[1]

[6] Ground two urged that there was error in failing to give a proper direction as to the dangers of convicting on the evidence of the complainant alone. Ground three contended that there had been a miscarriage of justice based on the inconsistency between the convictions on certain counts, and the not guilty verdicts on others.

The nature of the offences

[7] The complainant was a boy aged between 11 years and eight months and almost 13 years of age at the times of the offences. The appellant was a friend of the complainant's family. The families would from time to time go to each other's homes for barbeques, as a result of which the complainant developed a close relationship with the appellant and the appellant's son. The complainant also worked for the appellant in his juice delivery business. On occasions the complainant would stay overnight at the appellant's home.

[8] The offences all arose from circumstances when the complainant was spending time with the appellant at his home, or when they were working together. A schedule provided to the jury[2] outlined the incidents which were the subject of each charge. They were as follows:

1	The sexual offending included the defendant sodomising the complainant, inserting his finger in the complainant's anus, touching and sucking his penis and having the complainant suck the defendant's penis. The offending happened at the defendant's house, his business premises and whilst driving with the complainant on business deliveries.

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1 *BBH v The Queen* (2012) 245 CLR 499, at 547 and 550; *Pfennig v The Queen* (1995) 182 CLR 461, at 481; *Roach v The Queen* (2011) 242 CLR 610, at 615 and 621; *HML v The Queen* (2008) 235 CLR 334, at 384.

2 MFI "A", AB 392–393.

2	At the defendant's house in a shed toward the end of 2008. The defendant showed the complainant a pornographic magazine.
3	The defendant grabbed the complainant's penis out over the top of his pants and began sucking it.
4	In late 2008 the complainant was sleeping over at the defendant's house. The complainant was in the lounge room with the defendant. The defendant started giving the complainant a foot massage. The defendant then started massaging up the complainant's leg then touched the complainant's testicles. The defendant then touched the complainant's penis.
5	The defendant then removed the complainant's pants and put the complainant's penis in his mouth and sucked it.
6	The defendant then made the complainant undress so he was naked. The defendant then made the complainant suck his penis.
7	The defendant rubbed spit around the complainant's anus and then inserted his finger into the complainant's anus.
8	The defendant inserted the head of his penis into the complainant's anus.
9	The defendant then removed his penis from the complainant's anus and positioned himself so that the complainant's legs were around his torso. The defendant then masturbated himself to ejaculation and ejaculated onto the complainant's stomach.
10	In the cubby house, the defendant began rubbing the complainant's penis then sucked it.
11	The complainant was in the defendant's bedroom. Whilst in the bedroom the defendant sucked the complainant's penis.
12	The defendant then removed a tube of KY lubricant from his bedside drawer and began to rub some of the lubricant on the complainant's anus. The defendant then inserted one of his fingers in the complainant's anus.
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14	The defendant then removed his finger from the complainant's anus then forced his penis into the complainant's anus. The defendant forced his penis about halfway in.
15	The defendant then removed his penis from the complainant's anus then masturbated himself to ejaculation.
16	During a school holiday period. The defendant was near the vegetable patch. The defendant pulled down the complainant's pants, rubbed his penis then sucked it.

17 18	The defendant then asked the complainant, "Can you suck mine for a bit?" The complainant then put the defendant's penis in his mouth and sucked it.
19 20	The defendant then pulled down the complainant's pants and pushed one of his fingers into the complainant's anus.
21	The defendant then licked the complainant's anus.
22	The defendant then forced his penis into the complainant's anus. The defendant moved his penis in and out of the complainant's anus for a period of time.
23	The complainant recalls the defendant gave him a set of speakers. The defendant delivered them to the complainant's home and helped to set them up in the complainant's bedroom. Whilst the defendant was in the complainant's bedroom he exposed his penis to the complainant. The defendant also played with his penis.
24	The defendant sodomised the complainant at the depot near the area where the pallets were stored. The defendant ejaculated inside the complainant's anus.

[9] He was convicted on all but counts 8, 10, 12, 17 and 20. Although found not guilty on count 8 (sodomy of a child under 12, under care), he was convicted of the uncharged alternative (attempted sodomy of a child under 12, under care). He was found not guilty on count 10 (indecent treatment of a child under 16, under care), count 12 (rape) and count 17 (rape). No verdict was taken on count 20 (indecent treatment of children under 16, under care) as it was pleaded as an alternative to count 19 (rape) on which the appellant was convicted.

The complainant's evidence

[10] The complainant's evidence was given in the form of two statements under s 93A of the *Evidence Act* 1977 (Qld). His evidence included details of how he was a friend of the appellant's son and the occasions when he would sleep over at the appellant's house. At the time of the interview, the complainant had known the appellant's son for about four years, but the complainant did not "really hang out" with the appellant's son as he was two years younger than the complainant. In his evidence he also dealt with his relationship with the appellant, which included helping him in his work at his juice factory. That work lasted for over a year, and ceased at a time when the appellant had a fight with the complainant's parents.

[11] The complainant also gave evidence of having stayed over at the appellant's house, and how the appellant would teach his son, the complainant and another boy various things concerning bush craft, such as how to make a fire. He also described occasions when he, the son and another boy would go camping with the appellant.

[12] In his first interview the complainant was reluctant to participate, and especially reluctant to particularise any allegation of sexual offending by the appellant. On a number of occasions the complainant said he did not wish to speak about it and described the appellant as "just a good friend".[3] He also expressed concern about

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[3] AB 415.

whether the appellant was going to get into trouble as a consequence of what the complainant was saying.

[13] In the second interview, however, the complainant went into considerable detail in relation to the offences. In many cases he described the appellant responding to his objections by telling him that it was all right or okay, and that nobody was judging the complainant. The complainant said a number of times that, effectively as a result of the appellant's assurances, he thought it was okay. On one occasion the complainant's objections were overcome by the appellant offering to buy him a pellet gun if the complainant let him continue.

[14] In his cross-examination the complainant reaffirmed the friendship that existed between the families, and in particular between himself and the appellant. He described them as being friends and that the appellant treated him more like an adult[4] than a child. Together with the appellant's son they went four wheel driving, fishing and swimming. The complainant also described how he liked the appellant's wife and trusted her.[5]

[15] The complainant was questioned as to why he did not object more strongly than he did to what was being done to him. His responses included that the appellant "was a friend",[6] on occasions when he told the appellant to stop he did so,[7] and that the appellant was "a really good friend" and a friend he trusted.[8]

The breakdown between the families

[16] The complainant's mother and father gave evidence. The mother described the friendship with the appellant and his wife as being "very good friends of ours", and with whom they regularly socialised on an almost weekly basis.[9] She described the first occasion when there was a falling out between them. It involved the complainant's father verbally disciplining the complainant, at which point the appellant took the complainant's side, and had an argument with the father. The argument was so heated that it actually brought a neighbour out to ensure that everything was okay.[10] She described how the appellant came to their house the following day to apologise, admitting that he had overstepped the mark. That defused the acrimony and good relations resumed.[11]

[17] The second occasion when there was a falling out occurred after the complainant had been to a water park with friends and, as a result of their conduct there, the complainant's mother banned him from returning to the water park. Once again the appellant took the complainant's side and as a consequence there was a "stand up argument" between the complainant's mother and the appellant.[12]

[18] The third occasion when there was a falling out occurred, according to the complainant's mother, because the appellant voiced his objection that the

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4 AB 31.
5 AB 29.
6 AB 39.
7 AB 40; 49-50.
8 AB 56.
9 AB 162-163.
10 AB 163.
11 AB 164.
12 AB 164-165; 199. The appellant's wife did not describe the incident in the same terms as the complainant's mother, but she did say it was over what had happened at the water park, and that the complainant's mother got upset with the complainant, then "went off at Greg as well", and "it was a big, very big fight": AB 278.

complainant's father was giving too little attention to the complainant and spending too little time with him.[13] The complainant's father took offence and there was an exchange between himself and the appellant. The consequence was that the friendship between the families was brought to an end.[14] That was the last time that there was any physical interaction between the families.[15] As a consequence the complainant's working with the appellant was also terminated.[16]

[19] The complainant's father also described the friendship between the families, and how they would visit at each other's place, have barbeques and other social activities.[17] He also described the heated argument which took place when he disciplined the complainant, with the appellant resisting being told that he should not be involved in the issue, but in fact insisting that he should be involved.[18] He also described the later occasion when an argument occurred over the way in which the complainant was dealt with by his parents, which resulted in the families ceasing to have contact.[19]

The telephone call by the appellant

[20] It was in the context above that the respondent sought to adduce evidence of a telephone call made by the appellant to the complainant's father, some unspecified time after the families had ceased contact.[20] The evidence was that the appellant had telephoned the complainant's father, crying and sobbing, repeatedly saying that he was sorry, and that he wanted to keep the relationship going.[21]

[21] The respondent did not merely seek to adduce that evidence as part of the background or to set any particular context, but rather as evidence of the appellant's demonstrating a sexual interest in the complainant. Objection was taken (early in the trial) to the admission of that evidence,[22] on the basis that the conversation concerned the relationship between the families and therefore "it's equally open for interpretation that that was what he was concerned about".[23] The learned primary judge ruled that the evidence could be put before the jury, stating that "[i]t can be accepted by the jury as an interest in his part in the ongoing relationship which is alleged with the complainant".[24]

Ground one – discussion

[22] In *Pfennig v The Queen*[25] the High Court held that propensity evidence is admissible, or has sufficient probative value, only where the evidence, if accepted, bears no reasonable explanation other than the inculpation of that accused in the offence charged. Thus, in the reasons of Mason CJ, Deane and Dawson JJ the following appears:[26]

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13 AB 165-166; 204.
14 AB 166.
15 AB 167.
16 AB 167.
17 AB 207.
18 AB 214.
19 AB 215-217.
20 The complainant's father's evidence was given in a way which suggested that the telephone call was not long after the split up.
21 AB 217, 225.
22 AB 148.
23 AB 148; AB 149.
24 AB 154-155.
25 *Pfennig v The Queen* (1995) 182 CLR 461.
26 *Pfennig* at 481-482 (internal citations omitted).

> "The insistence in some of the judgments of this Court on the need to show that propensity evidence was relevant to "some other issue" as one of the prerequisites of its admissibility so as to prove the commission of the offences charged contributed to a misunderstanding of the *Makin* principles and to statements of principles which lacked a clear and coherent theoretical foundation. So much was recognized by Mason C.J., Wilson and Gaudron JJ. in *Hoch v. The Queen* where their Honours stated that the basis for the admission of similar fact evidence lies in its possessing a particular probative value or cogency such that, if accepted, it bears no reasonable explanation other than the inculpation of the accused in the offence charged. In other words, for propensity or similar fact evidence to be admissible, the objective improbability of its having some innocent explanation is such that there is no reasonable view of it other than as supporting an inference that the accused is guilty of the offence charged."

[23] *Pfennig* also established the role of the trial judge in admitting propensity evidence:

> "Once that criterion of admissibility is accepted, it is apparent that the trial judge is required to discharge an important responsibility. That point was made by the Supreme Court of Canada in *Reg. v. B. (C.R.)* where it was accepted that the process of balancing the probative value of the evidence against its prejudicial effect was a delicate one. But the trial judge, in making that judgment, must recognize that propensity evidence is circumstantial evidence and that, as such, it should not be used to draw an inference adverse to the accused unless it is the only reasonable inference in the circumstances. More than that, the evidence ought not to be admitted if the trial judge concludes that, viewed in the context of the prosecution case, there is a reasonable view of it which is consistent with innocence."[27]

[24] In *BBH v The Queen*[28] the following was stated in relation to the test laid down in *Pfennig*:

> "The test in *Pfennig* operates to exclude otherwise relevant evidence. It applies to evidence of the accused's propensity. In *Roach v The Queen*, the test in *Pfennig* was said to proceed upon the basis that the propensity evidence in question was a necessary step in reasoning to guilt, and to require a trial judge:
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> > "when determining whether the evidence of propensity is to be admitted before the jury, to apply the standard which the jury must eventually apply. The judge must ask whether there is a rational view of the propensity evidence, seen in the setting of the prosecution case, which is consistent with the accused's innocence. If the judge so concludes, the evidence ought not to be admitted.""

[25] The exclusionary rule established by *Pfennig* is to be tested at the point of the trial judge's consideration of the admissibility of such evidence. As Hayne J put it in *HML v The Queen*:[29]

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27 *Pfennig* at 485 per Mason CJ, Deane and Dawson JJ (internal citations omitted).
28 *BBH v The Queen* (2012) 245 CLR 499, at 541 per Crennan and Kiefel JJ (internal citations omitted).
29 *HML v The Queen* (2008) 235 CLR 334, at 384 (internal citations omitted).

> "*Pfennig* establishes the rule that governs the admission of evidence that will reveal an accused person's commission of discreditable acts other than those that are the subject of the charges being tried. The rule takes as its premise that evidence of other discreditable acts of the accused is ordinarily inadmissible. The foundation for the rule excluding evidence of other discreditable acts of an accused is that, despite judicial instruction to the contrary, there is a risk that the evidence will be used by the jury in ways that give undue weight to the other acts that are proved. That is why the exception to that general rule of exclusion is drawn as narrowly as it is by *Pfennig*. It is why *Pfennig* requires that evidence of other acts may be admitted only if it supports the inference that the accused is guilty of the offence charged, and the evidence of those other acts is open to no other, innocent, explanation. But also it follows from the considerations that have just been mentioned that the exclusionary rule is not to be circumvented by admitting the evidence but directing the jury to confine its uses."[30]

[26] The evidence as to the particular phone call was quite brief. As a consequence of the primary judge's ruling[31] the evidence was limited to the fact that the appellant had telephoned the complainant's father, crying and sobbing, and said he wanted to restore their relationship going. The context in which the call occurred was that there had been considerable friendship between the families, with frequent interaction on a social basis, following which there had been a heated argument between (principally) the complainant's mother and the appellant. The consequence of that was that the families ceased their contact. According to the complainant's mother told the appellant's wife that the friendship between the families was at an end,[32] and that later that day she had terminated a call from the appellant, telling him that she did not wish to hear from him.[33] According to the complainant's mother, that was the last time they had direct contact with the appellant's family.[34]

[27] At some unspecified time later the appellant telephoned the complainant's father. The evidence as to that call is as follows:

> "And can you tell us, do you recall receiving a telephone call with [the appellant] on the phone? -- Yes, I do.
>
> And do you recall that he was actually crying and sobbing over the phone? -- Yes, he was.
>
> And do you recall him repeatedly saying he was sorry to you? -- Yes.
>
> And saying that he wanted to keep the relationship? -- That's correct.
>
> Did you, fairly quickly, terminate that call? -- Yes.
>
> [Alright]. And from that point on, is it correct, you've not had any contact with him or his family? -- That's right."[35]

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30 To the same effect see *Roach v The Queen* at 622.
31 AB 155 ll 34-38.
32 AB 166.
33 AB 166-167.
34 AB 167.
35 AB 217.

[28] In cross-examination the complainant's father conceded that what the appellant was asking about in that phone call was "why the friendship was over".[36]

[29] In circumstances where there had been a demonstrated friendship between the families, the telephone call can reasonably be understood as exhibiting the appellant's concern that the friendship between the families had ended, rather than signifying his concern that his sexual relationship or friendship with the complainant was at an end. The respondent contended at the point when objection was taken to the evidence that "[y]ou don't expect grown adult males to be crying or sobbing over the telephone about the end of such a relationship", referring to a breakdown in a friendship between adults.[37] However, different people might react differently to such a situation, and in my view it would be dangerous to try to categorise the telephone call as being only reasonably explicable on the basis of the appellant's sexual interest in the complainant, simply because adult males supposedly do not cry and sob over the breakdown of relationships.

[30] When one considers what was said in the telephone call, albeit with crying and sobbing, there is a rational view consistent with the appellant's innocence which cannot be excluded. That is, that the appellant was upset that the friendship between the families had ended and asked about that issue, rather than asking anything directed towards his particular relationship with the complainant. Indeed, the complainant's father accepted that the appellant was questioning why the friendship was over which, in the context of the complainant's mother having told the appellant's wife that "the friendship between [the] families was at an end",[38] is just as likely directed at that issue as anything else.

[31] Given that an innocent explanation cannot be excluded, the evidence was inadmissible and should not have been put before the jury. The risk that follows its reception is the one referred to by Hayne J in *HML v The Queen*[39] namely, that the evidence will have been used by the jury in ways that give undue weight to the other acts that are proved.

[32] For the reasons above ground one of the appeal succeeds.

Ground three – discussion

[33] The appellant contends that there has been a miscarriage of justice in that the convictions on counts 7, 14, 19, 22 and 24, are inconsistent with the not guilty verdicts on counts 8 and 12.

[34] Whether a conviction on one count will be found inconsistent with an acquittal on another count, is a question of "logic and reasonableness".[40] Such a conclusion will be drawn sparingly:

> "… 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

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36 AB 225.
37 AB 150.
38 AB 166.
39 At 384.
40 *MacKenzie v the Queen* (1996) 190 CLR 348 ("*MacKenzie*"), at 366.

jury. In a criminal appeal, the view may be taken that the jury simply 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."[41]

[35] In *R v WAC*[42] this Court referred to some of the factors relevant in considering how verdicts might rationally differ.[43] Those factors bear repeating here:

> "**1. The quality of the evidence**
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> 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[44] or been able to provide more particularity about the details of some events than others.[45] 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,[46] 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.[47] 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.[48]
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> **2. The existence of contradictory evidence on some matters**
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> There may in respect of some counts be evidence contradicting the crucial witness' account such as to explain a variation in the jury's verdict. Whether the force of the contradictory evidence goes beyond demonstrating a discrepancy explicable as mistake and warranting a doubt on the part 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*[49]) is a question of fact in each case.
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> **3. The existence of corroboration on some counts**
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> 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.[50]
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> **4. The "merciful" verdict**
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> As recognised in *MacKenzie v The Queen*[51] and *R v P*,[52] a jury may have decided that it would be oppressive to convict on all charges;

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41 *MacKenzie* at 367 (internal references omitted); *R v WAC* [2008] QCA 151, at [17].
42 *R v WAC* [2008] QCA 151 ("*WAC*").
43 *WAC* at [18], referring to *R v Smillie* [2002] QCA 341.
44 See eg *R v Gleadhill* [2002] QCA 204.
45 See eg *R v AB* [2000] QCA 520.
46 See eg *R v Maddox* [1998] QCA 413, CA No 299 of 1998, 4 December 1998.
47 See eg *R v Markuleski* at 116.
48 See eg *R v R* [2002] QCA 294.
49 (1997) 191 CLR 439.
50 See eg *R v R* [2002] QCA 294.
51 (1996) 190 CLR 348 at 367.
52 [2000] 2 Qd R 401 at 410; [1000] QCA 411.

> that, for example, in a case where there are multiple counts, conviction on a number may sufficiently reflect the culpability of the accused."

[36] Count 8 was a charge of sodomy. The events took place in the lounge room of the appellant's house and the essence of the charge was that the appellant had inserted the head of his penis in the complainant's anus. This particular event was part of a sequence of events which occurred in the lounge room. They were the subject of charges 4 to 9: see paragraph [8] above. The complainant's recollection of the various events the subject of those counts varied. So, for example, the complainant gave evidence relevant to charge 7, saying that the appellant had put his finger in his anus.[53] By contrast when the complainant spoke about the matters the subject of count 8, he described it in terms of the appellant trying to put his penis in his anus, rather than achieving it.[54] This can be contrasted also with the quality of the evidence the complainant gave in relation to other counts which require, as an element, penetration. Thus, in respect of count 14, the complainant gave specific evidence, in detail, that penetration was achieved.[55] The same can be said in respect to count 22,[56] and count 24.[57]

[37] In respect of count 8 the jury may well have considered that the evidence fell short of assuredness that penetration was achieved. Since that was an element of count 8 they may not have been satisfied that the appellant was guilty of sodomy, but because he attempted but failed to achieve penetration, still guilty of attempted sodomy. Indeed, that the jury's verdict was affected by doubt about whether penetration actually occurred, was a matter which occurred to the learned trial judge, who said in his sentencing remarks: "The jury, obviously, had some doubt about penetration and you were found not guilty of count 8, but guilty of … attempted sodomy."

[38] Count 12 was a charge of rape, involving the appellant inserting one of his fingers in the complainant's anus. It was part of a sequence of events that were the subject of charges 11 through to 15: see paragraph [8] above. The jury found the appellant not guilty of rape but guilty of the alternative charge, namely indecent treatment of a child under 16, a charge which did not include an element of consent.

[39] The complainant was born in January 1997. The offences the subject of counts 12 and 17 were charged as occurring between 31 December 2008 and 1 December 2009. For most of that time, the complainant was not under 12 years of age. That meant that s 349(3) of the *Criminal Code* was relevant. It specifies that for that charge, a child under the age of 12 years is incapable of giving consent. The jury were given directions in relation to that aspect and the relevance of the complainant turning 12 during the period of the offence.[58]

[40] In his directions the learned trial judge referred to the impact of the complainant's turning 12 years of age on counts 12 and 19, contrasting it with counts 6 and 7 which occurred at an earlier point of time. As to count 12 the jury were told that if they were not satisfied that it was done without the complainant's consent, they would have to consider the alternative charge.[59]

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53 AB 433-434.
54 AB 65 and 435.
55 AB 486-487.
56 AB 446-447.
57 AB 462.
58 AB 359-360.
59 AB 360.

[41] The complainant's evidence about the sequence of events for counts 11 through to 15 again varied in terms of the specificity of recollection. There was a specific recollection of the appellant sucking on his penis,[60] using the KY jelly lubricant and rubbing it on the complainant's anus;[61] the penis being inserted in the complainant's anus;[62] and the appellant masturbating after he had removed his penis.[63] There was, however, a variation between the evidence given in court and that when he gave his statement. In the statement he referred to the insertion of the appellant's finger in his anus,[64] but that was not clear in his evidence in court.[65] Further, in terms of the sequence of events the complainant said that he did not tell the appellant to stop at the point where the appellant grabbed his penis, saying the appellant "did it all the time", and "I was pretty much used [to] it after that long time".[66] It is true that the complainant asked the appellant to stop at the point in time where the appellant had achieved penetration with his penis, but that was later in time to the insertion by the appellant of one of his fingers in the complainant's anus.

~~[42]~~ One matter which may have had an influence on the jury's acceptance of the complainant's evidence generally, in respect of this sequence of charges, is his specific recollection in relation to the lubricant. The complainant was able to described what it was, the specific drawer in which it was kept in the bedroom, its appearance and the colour of the tube.[67] Although a more innocent explanation may have been open as the complainant was a frequent visitor to the appellant's home, the jury may have thought these matters gave general support to the complainant's evidence on counts 11 to 15.

[43] It is not difficult to understand why the jury may have had a doubt about proof of the element of lack of consent in respect of count 12. Certainly there was evidence given by the complainant which was consistent with his passive acquiescence until the insertion of the appellant's penis began to hurt him. In my opinion the jury's finding of not guilty of rape on count 12, but guilty of the alternative charge, is rational and explicable. It involves the same apparent process as the jury must have followed when they convicted the appellant of rape in respect of count 19[68] but not guilty of the charge of rape on count 17.[69] As to count 17 the complainant's evidence was that that he permitted the appellant to put his penis in his mouth, at the appellant's urging.[70]

[44] In my view the jury's verdicts are entirely explicable by the varying quality of evidence on the different charges. Thus, on count 8 they likely held a doubt about whether penetration had actually occurred, whereas that was not the case with counts 14, 22 and 24. In relation to counts 12 and 17, the jury may well have had regard to the complainant's age and held a doubt as to whether there was lack of consent. That was not an acceptable consideration on count 6 (rape) and count 7 (rape) which were charged as occurring during a period when the complainant was under 12 years of age.

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60 AB 38 and 485.
61 AB 38 and 485.
62 AB 38, 485 and 487.
63 AB 487.
64 AB 485-486.
65 AB 38.
66 AB 39.
67 AB 485-486.
68 An occasion of digital rape as to which there was specific evidence of penetration: AB 445.
69 But guilty of an alternative charge which did not include an element of consent.
70 AB 444.

[45] For the reasons above ground three fails.

Conclusion

[46] For the reasons given above this Court made the orders setting aside the appellant's convictions and ordering a retrial. In the circumstances it is not necessary to consider ground two.