SUPREME COURT OF QUEENSLAND

CITATION:	*R v Ducrot* [2016] QCA 66
PARTIES:	**R** **v** **DUCROT, Stephen James** (appellant)
FILE NO/S:	CA No 235 of 2015 DC No 480 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Cairns – Date of Conviction: 9 September 2015
DELIVERED ON:	22 March 2016
DELIVERED AT:	Brisbane
HEARING DATE:	11 March 2016
JUDGES:	Margaret McMurdo P and Philippides JA and Bond J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal be dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where the appellant was acquitted of one count of burglary with circumstances of aggravation but convicted of one count of assault occasioning bodily harm – where the appellant was alleged to have entered the complainant's home and assaulted her – where the appellant submitted there were discrepancies and inconsistencies in the evidence presented at trial – whether it was open to the jury to rationally distinguish between the two counts – whether there was sufficient evidence to support the verdict on the assault count *Jones v The Queen* (1997) 191 CLR 439; [1997] HCA 56, cited *M v The Queen* (1994) 181 CLR 487; [1994] HCA 63, cited *MacKenzie v The Queen* (1996) 190 CLR 348; [1996] HCA 35, applied *Osland v The Queen* (1998) 197 CLR 316; [1998] HCA 75, cited *R v CX* [2006] QCA 409, applied *R v GAW* [2015] QCA 166, applied
COUNSEL:	A J Glynn QC for the appellant S J Farnden for the respondent

SOLICITORS: Philip Bovey & Company Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** I agree with Philippides JA's reasons for dismissing this appeal against conviction.

[2] **PHILIPPIDES JA: The appeal** The appellant was tried on an indictment charging him with one count of burglary with circumstances of aggravation (count 1) and one count of assault occasioning bodily harm (count 2). He was acquitted of count 1 but convicted of count 2.

[3] The grounds of appeal as amended were that the verdict was unreasonable and could not be supported having regard to the evidence in that:

(a) the differing verdicts were irreconcilable in that there was no rational basis for convicting the appellant on count 2, given that the jury did not accept the complainant's evidence on count 1;

(b) the evidence contained discrepancies and inconsistencies, was tainted and otherwise lacked probative force.

Relevant principles

[4] The appeal raises the issue of whether, given the acquittal on count 1, it was open to the jury, on the whole of the evidence, to be satisfied beyond reasonable doubt of the guilt of the appellant on count 2: see *M v The Queen*.[1] The principles concerning inconsistent verdicts are well-established.[2] They were summarised in *R v GAW*:[3]

> "Where alleged inconsistency arises in the jury verdicts upon different counts affecting an accused, the test is one of 'logic and reasonableness'; that is, whether the party alleging inconsistency has satisfied the court that the verdicts cannot stand together because 'no reasonable jury, who had applied their minds properly to the facts in the case could have arrived' at them.[4]
>
> However, respect for the jury's function results in a reluctance in appellate courts accepting a submission that verdicts are inconsistent in the relevant sense, so that:[5]
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> > '... 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.'

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1 (1994) 181 CLR 487 at 493-494; see also *Jones v The Queen* (1997) 191 CLR 439 at 450-452 and at 455.
2 See *MacKenzie v The Queen* (1996) 190 CLR 348 at 366-368.
3 [2015] QCA 166 at [19]-[22] and [1].
4 *MacKenzie v The Queen* (1996) 190 CLR 348 at 366, quoting *R v Stone*, unreported, 13 December 1954 per Devlin J.
5 *MacKenzie v The Queen* (1996) 190 CLR 348 at 367 per Gaudron, Gummow and Kirby JJ (citations omitted).

> In that regard, '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'.[6] Alternatively, the appellate court may conclude that the jury took a merciful view of the facts on one count; a function which has always been open to a jury.[7]
>
> It is only where the inconsistency rises to the point that the appellate court considers intervention is necessary to prevent possible injustice that the relevant conviction will be set aside.[8]"

[5] In *R v CX*, Jerrard JA, referring to *Osland v The Queen*,[9] stated:[10]

> "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."

The evidence

[6] The appellant and the complainant had previously been in a relationship, and had a child together before separating in the latter part of 2013.

[7] At trial, the Crown alleged that the complainant was in bed in the early hours of 14 December 2013 when the appellant entered her house. The complainant was pinned to the bed by the appellant, who had his knee in her back and pulled her head back by grasping her hair. The appellant attacked the complainant and attempted to force a cloth soaked with methylated spirits into her mouth. A struggle ensued, during which the complainant removed the cloth from her mouth and the appellant punched her, initially with five to six blows to the right cheek and then to the head. At least part of the time in which he was punching her he was holding her head. He hit her with his fist about twenty to thirty "extremely forceful" times. She described the force of the blows as being about nine on a scale of one to ten. She blacked out. When she returned to consciousness, she noticed he was carrying a large knife. Later, she said that he had two large knives, but was unable to recall how he obtained the second one. As a consequence of the assault, the complainant said she had lumps all over her head, chunks of hair torn out and bruising to the face. During these events, the complainant was screaming and the appellant yelling. They moved to the patio area of the house, with him shepherding her with a knife in each hand.

[8] She then escaped through the garage and went to her mother's house a few doors away. The complainant said she was dressed in a nightie and her mother gave her

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6 *MacKenzie v The Queen* (1996) 190 CLR 348 at 367 per Gaudron, Gummow and Kirby JJ (citations omitted).
7 *MacKenzie v The Queen* (1996) 190 CLR 348 at 367 per Gaudron, Gummow and Kirby JJ.
8 *MacKenzie v The Queen* (1996) 190 CLR 348 at 368 per Gaudron, Gummow and Kirby JJ.
9 (1998) 197 CLR 316 at 356-357 per McHugh J.
10 [2006] QCA 409 at [33].

a brunch coat. Two police officers then attended at the mother's residence, as did ambulance officers.

[9] The complainant's GP examined her later that day. Photographs of the injuries were taken by the GP, the complainant's mother and police over a number of days.

[10] At the trial, the complainant's mother and the two attending police officers gave evidence, along with the two investigating officers, a neighbour and a forensic officer. Reports by the GP and ambulance officers were also tendered.

Appellant's submissions

[11] The appellant's submission was that count 1 required the jury to be satisfied to the requisite standard both that the appellant entered the complainant's house, and that when he entered he intended to assault the complainant. If the jury accepted the complainant's account, they would have convicted the appellant on both counts. The acquittal on count 1 meant that either the jury did not accept that the appellant entered the house, or that they did not accept he entered with intent to assault the complainant.

[12] The only factual scenario on which the jury could act to convict of either count was that advanced in the evidence of the complainant. If the jury accepted that the appellant entered the premises, it was impossible to see how they could not be satisfied that the appellant had the requisite intent.[11] It was thus argued that the jury appeared not to have accepted that the appellant entered the house and, if the jury did not accept that, then it was submitted the jury could not accept the Crown case that the appellant had assaulted the complainant (count 2). The guilty verdict in respect of the assault count was unreasonable and could not be supported having regard to the evidence. There was no basis on which the jury could accept the complainant's evidence on count 2 but reject it on count 1.

[13] It was submitted by the appellant that there were numerous inconsistencies and discrepancies in the Crown case, and that the only support for much of the account was from the complainant's mother, whose evidence was "clearly fabricated in a number of respects". The appellant listed the "discrepancies and inconsistencies" as follows:

(a) The police who attended the complainant's house were unable to locate the cloth allegedly used by the appellant. There was no sign of methylated spirits or components of it on the complainant's nightie.

(b) Although the complainant recounted a brutal and extensive assault by the appellant with his fists, the injuries depicted in the photographs in evidence were said to be "completely inconsistent" with such an assault, particularly one that involved 20 to 30 punches of the force described and the alleged forcing of a cloth into her mouth. The medical evidence revealed the injuries were limited to a large bruise to the right zygomatic arch with an abrasion and a gravel rash on the upper right thigh, with her neck tender to palpation posteriorly without obvious bruising. Further, no injuries to the fists or arms of the appellant were observed when he was seen by police within approximately 48 hours of the alleged assault.

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11 It was thus said that if the jury "accepted that the former, they had to accept the latter".

(c) A door knock of neighbours found only one person who had heard a single scream and nothing more at the time of the assault. Its source was not identified.

(d) There were inconsistencies in the complainant's evidence as to whether the appellant had a second knife at the time.

(e) There were inconsistencies in the evidence as to whether the complainant arrived at her mother's house in only her nightie, as the complainant claimed. The complainant's evidence indicated that she had no opportunity to put on a brunch coat before leaving the house. The complainant's mother intially told police the complainant arrived wearing a black brunch coat, but changed her account at trial to indicate she had provided the complainant with the brunch coat.

(f) The complainant's mother said she went to the complainant's house with her 14 year old granddaughter the next morning with the attending police. She said she could smell methylated spirits and made a comment to that effect to the police. The police indicated that complainant's mother did not go to the house with them and they did not observe the smell of methylated spirits.

(g) The complainant's mother alleged she saw car headlights in the street when her daughter arrived. At a pre-trial conference, she told the prosecutor she recognised a utility. At trial, she sought to allege she had recognised the utility as one driven by the appellant, and tried to say the prosecutor had told her it was too late to add to her statement.

(h) The complainant's mother said she had found, later on 14 December, black cable ties in her daughter's bed, along with a clump of her daughter's hair and had also recovered hair from the shower recess when she returned to the complainant's house. She mentioned the cable ties in her statement but did not mention the hair in the shower until a pre-trial conference with the prosecutor. She made no mention of the clump of hair found in the bed.

(i) The attending police who responded to the call from the complainant's mother and attended her house gave evidence of visiting the complainant's house without her mother. They found some chairs out of place/some tipped over (there was some conflicting evidence between the two officers but both gave evidence of chairs being in disarray). But they did not locate a cloth soaked with methylated spirits, although they did observe a kitchen knife on the bedside table, lights on in the house and that the back sliding door was open.

Consideration

[14] In considering whether it was open to the jury in this case to distinguish rationally between the counts, it must be borne in mind that the jury were given the usual directions that each count was to be considered separately, the elements of the offences were different so the verdicts need not be the same, they did not have to accept the entirety of either the prosecution or defence case and if the jury had a reasonable doubt concerning the truthfulness or reliability of the complainant's evidence in relation to one count, they were required to take that into account in assessing her truthfulness or reliability generally.

[15] The respondent's submission that upon a review of the evidence for each count and accepting that the jury carefully applied the judge's directions, it was open to the jury to rationally distinguish between the two counts is correct.

[16] As the jury were directed, in relation to the burglary offence they were required to be satisfied beyond reasonable doubt that the appellant had an intent to assault the

complainant at the time of entering the house (if they were satisfied he had entered the house) and immediately acted in the manner described. While the complainant's allegation in relation to a cloth with methylated spirits being used as she described was central to the burglary offence, as indicating the requisite intent, it was not central to the Crown case in respect of the assault count.

[17] The complainant was challenged about her evidence concerning the cloth, and the fact no cloth was found could have given the jury a reasonable doubt as to that aspect of her evidence and thus as to the element of intent necessary to establish the burglary offence when the appellant entered the house. There was no supporting evidence for the burglary charge independent of the complainant's account. Alternatively, the jury may have concluded that the appellant's intent at the time was not to assault the complainant, but to do something else and for that reason were not satisfied that the element of intent to assault had been made out for the burglary offence.

[18] But even if the jury entertained a reasonable doubt, arising from the complainant's evidence about the use of the cloth, for which there was no independent evidence, and thus as to the element of intent to assault, that did not require an outright rejection of the complainant's evidence that the appellant entered the house and assaulted her, where it was supported by other evidence. There was thus a different quality to the evidence in respect of the different counts.

[19] It was therefore open to the jury to have a reasonable doubt about the complainant's evidence, about the use of a cloth, and other aspects of her evidence including the severity of the assault, without that detracting from their being able to be satisfied beyond reasonable doubt that she had been assaulted by the appellant. The jury may have accepted that the complainant had been able to shield herself from more severe injury, which accounted for the injuries actually sustained being less than might be expected given her account.

[20] But, even if the jury reasoned that the complainant had exaggerated the extent of the assault, ensuing struggle and screaming, they may have been prepared to accept her evidence to the extent that there was other support for it. In that regard, the photographic evidence was consistent with an assault to the complainant's face (even if not of the severity alleged by the complainant), as was the ambulance report (which referred to bruising to the facial area being observed at 5.15 am) and the medical statement tendered was also supportive of the allegation of an assault. There was evidence from the neighbour of hearing a scream at a time not inconsistent with it relating to the incident. Although the neighbour heard only one scream, that could be accounted for by the fact that the neighbour heard the scream when she went outside, having opened the sliding door of her house, to settle her dog who had been barking loudly. Further, there was the evidence of the complaint to the police in the early hours of the morning. The subsequently observed disarray in the complainant's house noted by the police officers was also consistent with a struggle having occurred. Moreover, there was evidence from which the jury could infer that the appellant knew the complainant was home alone on the night in question. Although the jury may have had some doubt about the complainant or the mother's evidence because of the inconsistencies referred to by the appellant, it was still open to be satisfied beyond reasonable doubt that the complainant had been assaulted and that the assailant was the appellant.

[21] There was thus ample evidence to support the jury's verdict on count 2 and a rational basis for the differing verdicts on each count.

Order

[22] In my view, there being no substance to the grounds of appeal, the appeal must be dismissed.

[23] **BOND J:** I agree with the reasons and order of Philippides JA.