SUPREME COURT OF QUEENSLAND

CITATION:	*R v Smillie* [2002] QCA 341
PARTIES:	**R** **v** **SMILLIE, Shane Jon** (appellant)
FILE NO/S:	CA No 58 of 2002 DC No 72 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction and Sentence
ORIGINATING COURT:	District Court at Kingaroy
DELIVERED ON:	6 September 2002
DELIVERED AT:	Brisbane
HEARING DATE:	13 August 2002
JUDGES:	Williams JA and Mackenzie and Holmes JJ Separate reasons for judgment of each member of the court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed** **2. Convictions and verdicts on counts 3 and 4 on indictment set aside and verdicts of acquittal entered on both counts.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS – UNREASONABLE AND INSUPPORTABLE VERDICT – where appellant convicted of one count of arson and one count of fraud and acquitted of one count of arson and one count of fraud – where appeal against conviction – whether verdict unsafe and unsatisfactory – whether guilty verdicts inconsistent with acquittals on remaining counts – whether rational basis for differing verdicts CRIMINAL LAW – EVIDENCE – EVIDENTIARY MATTERS RELATING TO WITNESSES AND ACCUSED PERSONS – EVIDENCE OF ACCOMPLICE – DIRECTIONS TO JURY – whether jury sufficiently directed as to the care to be taken with accomplice's evidence – whether jury to be warned as to unreliability of witness evidence based purely on his status as accomplice *Criminal Code* (Qld), s 632(3)

Penalties and Sentences Act (Qld) s13A, s188, 188(2)

Director of Public Prosecutions (Nauru) v Michael Fowler (1984) 154 CLR 627, considered
Jones v The Queen (1997) 191 CLR 439, considered
M v The Queen (1994) 181 CLR 487, followed
MacKenzie v The Queen (1996) 190 CLR 348, applied
R v AB [2000] QCA 520; CA No 188 of 2000, 19 December 2000, considered
R v B [1993] QCA 321; CA No 346 of 1992, 2 September 1993, cited
R v Gleadhill [2002] QCA 204; CA No 326 of 2001, 14 June 2002, cited
R v Le Blowitz [1998] 1 Qd R 303, considered
R v M [2001] QCA 458; CA No 126 of 2001, 26 October, 2001, considered
R v Maddox [1998] QCA 413; CA No 299 of 1998, 4 December 1998, cited
R v Markuleski (2001) 52 NSWLR 82, considered
R v P [2000] 2 Qd R 401, cited
R v R [2002] QCA 294; CA No 14 of 2002, 16 August 2002, cited

COUNSEL: P J Callaghan for the appellant
C W Heaton for the respondent

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

[1] **WILLIAMS JA:** I agree with the orders proposed by Holmes J for the reasons she has given.

[2] **MACKENZIE J:** I agree with the reasons of Holmes J and with the orders proposed.

[3] **HOLMES J:** The appellant appealed against his conviction by a jury of one count of arson and one count of fraud with a circumstance of aggravation. He also sought leave to appeal against his sentence of three years imprisonment on each count.

[4] The appeal against conviction was brought on two grounds: firstly, that the conviction was unsafe and unsatisfactory, the essence of the argument being that the guilty verdicts were inconsistent with acquittals on another two counts of fraud and arson; and secondly, that inadequate directions had been given as to the evidence of an accomplice.

[5] The first count on the indictment concerned the alleged arson in March 1999 of a motor vehicle owned by the appellant, and the second count an insurance claim made by him in respect of the vehicle. He was acquitted on each of those counts. The third count involved the arson of the appellant's house at Goomeri and the fourth, his insurance claim in respect of it said to have been made fraudulently. He was convicted on these counts.

The motor vehicle counts

[6] The Crown's evidence on all four counts came primarily from a former friend of the appellant's named C. In relation to the motor vehicle, C gave evidence that while he and the appellant were driving in the vehicle one day, the appellant turned to him and asked, "would you keep your mouth shut if I burn the car?" Further along the road, the appellant stopped the car and opened the bonnet. Although the bonnet was up, and he remained in the passenger seat, C claimed to have seen the appellant remove the fuel line, spray its contents over the tappet cover and manifold, and expose the contact on a spark plug lead. He then, according to C, returned to the car and turned the ignition on a couple of times, before getting out again to close the bonnet. After those activities, they drove on for a couple of hundred metres until smoke began to emerge from under the bonnet and the appellant stopped the car. C said that he initially ran from the vehicle, but at the appellant's direction returned to retrieve items from the glovebox. Then the appellant rang the fire brigade by mobile phone.

[7] While they waited for the fire brigade, according to C, the two men endeavoured to ensure they had consistent accounts to the effect that they had been driving along, smelt fuel, stopped the car, and seen smoke coming from under the bonnet, neither having any idea how the fire had started. That was then the version given by C to an investigating police officer; and the appellant gave a similar account when he made an insurance claim in respect of the vehicle, identifying C as a witness to the event.

[8] An assessor employed by the insurance company against which the claim was made examined the vehicle. He gave evidence that the fire could have been started by deliberate exposure of a spark plug lead connection where fuel had been allowed to spray about; but equally might have resulted from the accidental breaking of a perished fuel line.

The house counts

[9] C had lived with the appellant at the Goomeri house. He gave evidence that in September 1999 the appellant asked him to burn the house down, telling him that he was having "girlfriend problems" in the town of Goomeri and could not live there anymore. He intended to obtain the insurance money so that he could move away and look elsewhere for land. When C agreed, the appellant told him to buy some firelighters, to place them above the electrical fuse box, on top of a wooden beam under the house, and to ignite them. While C performed this service, the appellant intended to go to Kin Kin to stay with friends named Madden. In return for his assistance, C would be given a vehicle worth about $3,000. According to C, he duly lit the fire in the way in which he had been instructed, and the house burned to the ground. He gave a statement to the police on the following day listing the belongings he had lost in the house and some of the appellant's belongings, stating that the electrical fittings in the house were in good order, and asserting that he did not know how the fire had started.

[10] C gave evidence that a motorcycle belonging to the appellant which was usually kept under the house was parked away in a shed on the night of the fire, and that the appellant had taken three of his rifles with him to Kin Kin. He had also taken his dog, but C said there was nothing unusual about that. Mr Madden, the friend with

whom the appellant was staying at the time of the fire, gave evidence that the appellant had brought to his property in his 4WD Landrover trayback a number of tools, camping gear, rifles and motorcycle gear. Following the fire, Mr Madden went with the appellant to the Goomeri property and retrieved another old Landrover and tools from a shed. Mr Madden agreed, however, that the tools originally brought by the appellant to the Kin Kin property were needed for work to be performed there; and it proved that he was uncertain as to which items had been brought by the appellant when he initially arrived at the Madden house, and which had later been retrieved from Goomeri. And although Mr Madden had done no shooting with the appellant at the Kin Kin property (which was six acres) he conceded that there were kangaroos there.

[11] On the other hand, there was evidence from Mr Nash, who was a fire investigator acting on behalf of the relevant insurance company, that items of some value – a stereo system and a large screen television – were found in the burnt house. On the whole, it appears that there was no real evidence that the appellant had removed items of value before the fire. As to the cause of the fire, Mr Nash said that if firelighters had been used, it was virtually impossible to find any residue. It was possible that the fire had been caused in the way C described; again, it remained a possibility that there had been an electrical fault.

[12] The appellant made a claim under his home and contents insurance policy. He received amounts totalling $3,600 for temporary accommodation and an emergency allowance, and a sum of $57,030 for re-building the house. C's evidence was that the dwelling originally was "pretty run down" but some work had been done on it by way of replacing a back porch. The loss adjuster who gave evidence about the claim said that the appellant had in fact been under-insured for the cost of re-building, but was able, after some enquiries of his own, to get a quote from a builder to build a smaller-sized house with different materials within the insured sum.

[13] The evidence as to the causes of the fires and any possible gain to the appellant was "intractably neutral". The only other piece of evidence which the Crown offered in support of C's account was a statement by the appellant's former girlfriend, Ms Dugan, that during the period of her acquaintance with the appellant (which had begun about January 1999) he had once mentioned that if the house burnt down he would be in a better position financially. It was apparent from her evidence that this had occurred early in the period of their acquaintance.

C's position as witness

[14] C's allegations of arson came to light when his own girlfriend, after an argument, contacted the police about the burning of the house. C gave a statement outlining the burning of the motor vehicle and the house, and pleaded guilty to one count of arson (in respect of the house) and one count of fraud (in respect of the car). Sentencing proceeded in accordance with the provisions of s 13A of the *Penalties and Sentences Act* 1992. On the fraud count, he was sentenced to three months imprisonment wholly suspended, with an operational period of twelve months, and on the arson count to two years imprisonment wholly suspended, with an operational period of three years.

The directions as to C's evidence

[15] The learned trial judge directed the jury that the prosecution case on all counts was dependent on C's evidence. He pointed out that C was a person "who may have had an interest in shifting blame for what he was involved in to somebody else" and that "that sort of thing" had to be borne in mind in considering his evidence. Initially, he reminded them, C had said that he knew nothing about the house fire and had given an innocent account of the car fire until after his girlfriend had spoken to police and he was interviewed by detectives, when he gave the accounts now in evidence before them.

[16] His Honour went on to say this:

> "Now once C had – had told these accounts of things to the police officer, unless he was going to resile from them himself at an early stage, as, for instance plead not guilty in court, and – and go to trial, and try and convince a jury there was some doubt about his guilt, unless he was going to do that, once he had told the stories to the police he was stuck with the stories. In other words, he really had to stay with them once he had told them. And defence counsel has made submissions to you about that, based upon the disposition of C's matter in the District Court where he was given a suspended gaol sentence, and in the light of him agreeing to cooperate with the authorities in the prosecution of Smillie. And once he had done that, of course, even more, you would understand that C really had to stay with that story, or that account of things. Now, again, that's not to say that he is not telling the truth, but that's just the fact of the matter."

[17] The learned trial judge continued by telling the jury that they might ask themselves why C would have volunteered any information about the car fire if it were not true, apart perhaps from wishing to make the account of the arson of the house more believable; and why C would set fire to his friend's house. He concluded by reminding them that unless satisfied of C's accounts beyond reasonable doubt, they could not convict on the respective counts.

The appellant's submissions

[18] Mr Callaghan, for the appellant, argued that the acquittals on the first and second counts necessarily meant that the jury could not have found C a credible witness on those counts; and there was no basis on which the convictions on the remaining counts could be reconciled with those acquittals. His further submission was as to the adequacy of the directions. He argued that the jury had not been given sufficient direction as to the care to be taken with C's evidence, given the following features: what must, on C's account, have been his initial false statements to police; his complicity on his own admission in an offence of fraud; the circumstances of his confession, his girlfriend having spoken to police about the arson of the house; his position as an uncorroborated accomplice; and the benefit that he had derived from the operation of s 13A, with the consequent need for him to adhere to his statement.

[19] Moreover, Mr Callaghan contended, a direction which was explicit as to the effect of s 188 of the *Penalties and Sentences Act* and the consequences for C if he departed from his statement should have been given. The reference to defence

counsel's submissions in that regard was inadequate; judicial authority was required. Finally, the jury should have been given a direction along the lines suggested by McPherson JA in *R v M*[1], to the effect that a reasonable doubt entertained by them as to C's evidence in respect of any of the counts ought to be taken into account by them in considering his credibility generally. A redirection to that effect had been sought by counsel for the appellant at trial but was refused.

The Crown's submissions

[20] Mr Heaton, for the Crown, contended that there were features of C's evidence which might have given the jury greater confidence in relying on it in relation to the arson of the house than with respect to the count involving the car. His actual involvement in the burning of the house meant that he was implicating himself in a much more serious offence than in respect of the car; and there was no rational explanation for his setting fire to the house other than the account that he gave, that he was doing it at the appellant's behest. The other matter which might have inclined the jury towards accepting C on those counts was the evidence of Dugan as to the statement made to her by the appellant, which suggested a consciousness on his part of the benefit to be gained from burning the house.

[21] Mr Heaton submitted that the directions given by the learned trial judge were sufficient to apprise the jury of the reasons to treat C's evidence with care. Section 632 of the *Criminal Code* (Qld) precluded any general direction concerning C's role as an accomplice. The trial judge was not required to give a direction in accordance with that suggested in *R v M*, given that there was nothing in the evidence which objectively showed C's evidence to be unreliable. The directions of the learned trial judge sufficiently dealt with C's motivation to maintain his version of events, and were given judicial authority notwithstanding the reference to defence counsel's address.

Were the learned trial judge's directions adequate?

[22] The learned trial judge was, in my view, precluded by s 632(3)[2] of the *Criminal Code* from giving any warning to the jury as to the unreliability of C based purely on his status as an accomplice. There were, of course, other reasons for scrutinising his evidence with care, as outlined by Mr Callaghan. But the learned trial judge made it very clear to the jury that C's evidence was crucial, that it had to be approached with caution because of things such as his motive to shift blame, and that they should accept it only if satisfied beyond reasonable doubt that he had been truthful and accurate on essential aspects of his evidence.

[23] In hindsight, the jury's task might have been assisted had the direction discussed in *R v M* been given. But the usefulness of such a direction was perhaps not as obvious in this case as it might be in cases of multiple sexual offences. One might also assume that a jury would, as a matter of common sense, and unless otherwise directed, be influenced by its view of a witness' credit on some counts in considering others; and it is worthy of note that the learned trial judge did not in this case give the traditional directions which might be considered to cut across that

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1 [2001] QCA 458; CA No 126 of 2001, 26 October 2001

2 Section 632(3) provides, *inter alia*, that: "the judge must not warn or suggest in any way to the jury that the law regards any class of persons as unreliable witnesses."

approach, as to considering each count separately or accepting some parts but not others of a witness' evidence.

[24] In relation to the significance of the s 13A statement to C's position, his Honour did explain to the jury the need for C to adhere to his first account, in the process giving his imprimatur to defence counsel's comments. It might have been preferable had his Honour been more explicit as to the way the potential to re-open his sentence under s 188(2) affected C for practical purposes, but I do not think there was any failure to direct. In short, although it might have been better had the learned trial judge enlarged on the reasons for treating C's evidence with caution, I do not consider that any substantial error in the directions is shown.

Was the verdict unsafe and unsatisfactory?

[25] The starting point for consideration of whether a verdict is unsafe or unsatisfactory is the question to which the majority judgment of the High Court in *M v The Queen*[3] directs attention: whether the appellate court thinks on the whole of the evidence that it was open to the jury to be satisfied beyond reasonable doubt of guilt, having proper regard to the consideration that the primary responsibility for determining guilt or innocence lies with the jury, which has had the benefit of having seen and heard the witnesses. But, generally,

> "A doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons, which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt, which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act to set aside a verdict based upon that evidence."[4]

Inconsistency in verdicts

[26] Where inconsistency between jury verdicts on different counts is the source of doubt, "the test is one of logic and reasonableness"[5]. An appellate court will be slow to accept a submission that the inconsistency is such that no reasonable jury could have arrived at them:

> "Thus, 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"[6];

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3 (1994) 181 CLR 487 at 493.
4 (1994) 181 CLR 487 at 494.
5 *MacKenzie v The Queen* (1996) 190 CLR 348 at 366.
6 *MacKenzie v The Queen* (1996) 190 CLR 348 at 367.

But if

> "Inconsistency rises to the point that the appellate court considers that intervention is necessarily required to prevent a possible injustice … the relevant conviction will be set aside"[7].

[27] Inevitably whether that point has been reached must be a question of fact and degree in each case[8]; but it is reached if there is no rational basis for distinguishing between verdicts.[9]

[28] *R v Markuleski*[10], a decision of a five-member Court of Criminal Appeal in New South Wales contains a helpful review of the authority in this area, with particular reference to explanations for divergent verdicts. It is apparent from the discussion in that case that there can be no limit set to the bases on which verdicts may rationally differ, but the following is a broad summary of some of the factors which may be considered:

1. The quality of the evidence

The jury may have found the quality of the crucial witness' evidence variable while accepting it as generally truthful. For example, the witness may have exhibited faulty recollection on some points[11] or been able to provide more particularity about the details of some events than others[12]. 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[13], 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[14]. 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.[15]

2. The existence of contradictory evidence on some matters

There may in respect of some counts be evidence contradicting the crucial witness' account such as to explain a variation in the 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*[16]) is a question of fact in each case.

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7 *MacKenzie v The Queen* (1996) 190 CLR 348 at 368.
8 *MacKenzie v The Queen* (1996) 190 CLR 348 at 368; *R v Markuleski* (2001) 52 NSWLR 82 at 93.
9 *R v B* ([1993] QCA 321; CA No 346 of 1992, 2 September 1993); *R v Maddox* ([1998] QCA 413; CA No 299 of 1998, 4 December 1998); *R v P* [2000] 2Qd R 401 at 404.
10 (2001) 52 NSWLR 82.
11 See eg *R v Gleadhill* [2002] QCA 204; CA No 326 of 2001, 14 June 2002.
12 See eg *R v AB* [2000]QCA 520; CA No 188 of 2000, 18 December 2000.
13 See eg *R v Maddox* CA 299/98 4 December 1998.
14 See eg *R v Markuleski* (2001) 52 NSWLR 82 at 116.
15 See eg *R v R* [2002] QCA 294; CA No 14 of 2002, 16 August 2002.
16 (1997) 191 CLR 439.

3. The existence of corroboration on some counts

Different verdicts may be explicable on the basis that the witness' evidence was supported in respect of some counts but not others, by, for example, admissions by the accused.[17]

4. The "merciful" verdict

As recognised in *MacKenzie v The Queen* [18] and *R v P* [19], a jury may have decided that it would be oppressive to convict on all charges; that, for example, in a case where there are multiple counts, conviction on a number may sufficiently reflect the culpability of the accused.

Was there a rational basis for differing verdicts in the present case?

[29] One can dismiss immediately any notion of a merciful verdict. The indictment contained only four counts, and no notion of fairness could reasonably have moved the jury to give the appellant relief on two out of the four. It is necessary to consider whether the explanation lies in the evidence.

[30] In the present case there was no appreciable difference in the quality of C's evidence as between the counts. He had given a statement which implicated the appellant in all four counts. The alleged offences occurred within six months of each other, and there was no defect demonstrated in the quality of his recollection as to either set of events. There was nothing inherently unlikely in his account in either case, and nothing to contradict him. If C's evidence as to the arson of the car had been confined to a description of what he saw, one might conclude that the jury allowed for the possibility of error; his view of what the appellant was doing under the bonnet of the vehicle must have been limited. But the possibility of misapprehension disappears when one considers his assertion that the appellant preceded those activities by asking him if he would keep his mouth shut if he burned the car; and that after the event the two on the roadside colluded as to the account they would give. One is forced to the conclusion that the jury simply did not accept C's account of the burning of the car, notwithstanding that there was no obvious deficiency in it, and it was uncontradicted by other evidence.

[31] The Crown's argument that the jury may have been more impressed by the appellant's willingness to volunteer his own direct involvement in a serious offence in the case of the house, also diminishes when one has regard to the fact that the investigating police were, it seems, quite unaware that there was anything untoward about the car fire until C gave his statement. If willingness to volunteer criminal responsibility were to have the impression on the jury that the Crown suggests, one would expect a greater credence to be given in the case where C had implicated himself in a crime which remained unsuspected; as opposed to the house arson, in respect of which his involvement had already been made known to the police. Had the verdicts been reversed, and convictions obtained in respect of the car fire but not the house fire, there might well have been something to be said for the argument.

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17 See eg, *R v R* [2002] QCA 294; CA No 14 of 2002, 16 August 2002.
18 (1996) 190 CLR at 367.
19 [2000] 2 Qd R 401 at 410.

[32] The argument that there was no explanation for C's arson of the house, other than the one he gave, ie that he was instructed by the appellant, smacks of pulling itself up by its own bootstraps. It assumes the jury's acceptance that C set fire to the house and asserts that since C's explanation – that it was done at the appellant's behest - was the obvious one, the jury was right in accepting C's evidence on these counts, including, presumably, his evidence that he had set the house fire; in all, a somewhat circular proposition. But the real question is why the jury accepted the truth of C's admission as to burning the house but rejected his admission to complicity in the burning of the car. The explanation he gave in the latter instance for the criminal act was equally convincing. I do not, in short, think that this approach offers a rational basis for distinguishing the counts.

[33] That leaves the suggestion that what turned the balance towards conviction on the last two counts was the evidence of Ms Dugan; but if the jury relied on that evidence to distinguish the counts, it can only have done so, in my view, by misapprehending its significance. At its highest, it was a statement as to fact, not intention – that the appellant would be in a better financial position if the house burnt down – and was made up to eight months prior. At best it was equivocal; on one reasonably open view amounting to no more than an innocuous statement of fact, on another – the more favourable for the Crown - an appreciation of possible benefit from the destruction of the house; but on its own it was not capable of leading to an inference of guilt. That, of course, will not prevent a piece of evidence being corroborative; facts which taken individually may be neutral, can, taken as a whole in a circumstantial case, provide corroboration[20]. But in this case the statement to Ms Dugan stood in isolation; there was nothing with which it could be looked at in combination so as to afford it greater weight, or to provide some implicative quality. It was not capable, in my view, of affording support to C's evidence.

[34] If the jury did rely on the statement of Ms Dugan as a basis for distinguishing between the two sets of counts there is, in my view, a real risk that they did so with a misunderstanding of its import and weight. That concern is heightened by the fact that although they were referred to Ms Dugan's evidence in the learned trial judge's summing up, the reference was simply that a mention that she had been a witness, without any repetition of the content of her evidence, or any reminder of its limitations, in that it was neither contemporaneous nor amounted to an assertion of intention.

[35] I agree with the submission by counsel for the appellant that Ms Dugan's evidence could not provide a rational basis for distinguishing between the counts; but no other basis is capable of being identified. As a result, I find myself in the position articulated by the majority in *Jones v The Queen*[21]; there is nothing in C's evidence or the surrounding circumstances which gives any ground for supposing that his evidence was more reliable in relation to the counts involving the house than it was in relation to the counts involving the car, so that it becomes difficult to see how it was open to the jury to be convinced beyond reasonable doubt of his guilt on the counts involving the house. And although, as I have indicated, I do not think that the giving of directions in the terms proposed by defence counsel was imperative, there is this to be said: the absence of fuller, and perhaps more forceful, directions

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20 *R v Le Blowitz* [1998] 1 Qd R 303.

21 (1997) 191 CLR 439.

as to the caution needed in relation to C's evidence adds to the concern that the jury misunderstood its task and that there has been a miscarriage of justice.

[36] As a result of all of the foregoing, I conclude that there is a significant possibility that an innocent person has been convicted, and that the two verdicts of guilty cannot stand.

Acquittal or re-trial?

[37] The final question which arises on this appeal is whether verdicts of acquittal ought to be entered or a new trial should be ordered. In their joint judgment in *MacKenzie*, Gaudron, Gummow and Kirby JJ said this:

> "But if, because of inconsistency between verdicts, the appellate court is persuaded that a verdict cannot stand, it must make consequential orders. In the case of a criminal trial, where the verdict has been followed by conviction and sentence, these must be set aside. Where the inconsistency is found between verdicts of acquittal and a verdict of guilty, the appellate court (statute apart) may not disturb the acquittal. It may be appropriate to enter a verdict of acquittal on the subject count(s) on the footing that this merely carries forward the logic of the other acquittal verdict(s). But once again, the relief which is appropriate depends upon the facts of the particular case."[22]

[38] In *R v P*[23] the majority took the view that it was only where verdicts of not guilty could be seen to have resulted from some form of compromise by jurors that a new trial should be ordered on inconsistent verdicts of guilty. The presumption was that the jury had unanimously entertained a reasonable doubt on those charges in which it acquitted, leading to a result inconsistent with other verdicts of guilty, so that the accused was entitled to an acquittal on all counts. Pincus JA dissented in that case, his view being that a new trial should be ordered where the Crown evidence on the verdict set aside appeared "reasonably credible".

[39] In *R v R*[24] McPherson JA described the approach of the majority in *R v P* as setting "a difficult test for the Crown to satisfy on appeal in most cases". He preferred the authority of *Director of Public Prosecutions (Nauru) v Michael Fowler*[25]: what the court had to consider was

> "whether the admissible evidence given at the original trial was sufficiently cogent to justify a conviction, for if it was not it would be wrong by making an order for a new trial to give the prosecution an opportunity to supplement a defective case."

[40] On its face, C's evidence was cogent; it was undiminished by failures of recollection, inconsistencies or any form of retraction. But clearly the jury, having seen him give his evidence in relation to the counts involving the car did not find it so. My conclusion is that verdicts of acquittal ought to be entered in relation to those counts on which he was found guilty; to do so is "merely [to carry] forward the logic of the other acquittal verdicts."

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22 (1996) 190 CLR 348 at 368.
23 [2000] 2 Qd R 401.
24 [2002] QCA 294; CA No 14 of 2002, 16 August 2002, cited.
25 (1984) 154 CLR 627.

[41] In light of these conclusions, it is unnecessary to consider the appeal against the sentence.

Orders

[42] I would allow the appeal, set aside the convictions and verdicts on counts 3 and 4 on the indictment, and enter verdicts of acquittal on both counts.