SUPREME COURT OF QUEENSLAND

CITATION:	*R v DAO* [2007] QCA 372
PARTIES:	**R** **v** **DAO** (appellant)
FILE NO/S:	CA No 47 of 2007 DC No 144 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Rockhampton
DELIVERED ON:	2 November 2007
DELIVERED AT:	Brisbane
HEARING DATE:	3 October 2007
JUDGES:	Jerrard and Keane JJA and Jones J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – OBJECTIONS AND POINTS NOT RAISED IN COURT BELOW – PARTICULAR CASES – where the appellant was acquitted by a jury of two counts of unlawfully and indecently dealing a child under 16 years, and on another count of unlawfully permitting himself to be indecently dealt with by the same child – where the appellant was convicted by the jury of a count of having unlawfully had carnal knowledge of a child – where the appellant argued that the verdicts were inconsistent – whether the conviction should be overturned *Mackenzie v The Queen* (1997) 190 CLR 348, applied *R v CX* [2006] QCA 409; CA No 262 of 2005, 20 October 2006, applied *R v Kirkman* (1987) 44 SASR 591, applied
COUNSEL:	The appellant appeared on his own behalf S Bain for the respondent
SOLICITORS:	The appellant appeared on his own behalf Director of Public Prosecutions (Queensland) for the

respondent

[1] **JERRARD JA**: On 21 February 2007 the appellant was acquitted by a jury of two counts of unlawfully and indecently dealing with CR, a child under 16 years, and on another count of unlawfully permitting himself to be indecently dealt with by the same child. He was however convicted by the jury of a count of having unlawfully had carnal knowledge of the child CR, and on 21 February 2007 the learned trial judge sentenced the appellant to three years imprisonment. He has appealed against that conviction, on the ground that the verdict of the jury is unsafe and unsatisfactory, and on the ground of inconsistency between the three acquittals and the conviction.

[2] All four offences were alleged to have happened on 27 December 2003, at Rockhampton. The evidence against the appellant came very largely from the complainant CR, who was first interviewed by police about the matter in a video recorded interview held on 29 June 2004, at Biloela. The complainant's account was that on Christmas Day and Boxing Day 2003 she had visited her aunt's house in Rockhampton, with her family, and on the Boxing Day night, had "had sex" with the appellant.[1] She was 12 at the time, and had heard her mother tell the appellant of that fact on Boxing Day morning.

[3] The evidence suggested that the first night CR stayed at her aunt's home, she slept in the appellant's bedroom, and on the second night in a lounge room on a couch, with her two brothers. the appellant, who had returned that day to the family home, had slept on the second night in his own room. On that second night CR had gone to a downstairs part of the residence to a toilet, and when she came out the appellant had begun:

> "Kissing me and touching me".[2]

During that he had put his hand on her breasts, and had rubbed her bottom and groin area. She said he put his tongue in her mouth when he kissed her. That conduct in toto constituted count 1,[3] on which the jury acquitted of the charge of indecently dealing.

[4] CR's interview with the police described all of that touching as being on the outside of the clothing she was then wearing, and that it ended when the appellant heard her brother get off the couch upstairs. The appellant went upstairs first; she washed her hands and then followed him. A little later she got up to have a drink, and the appellant was at the door, and kissed her again. He invited her to join him in his room in about half an hour, but she went back to her bed. She attempted to wake one of her brothers but could not. She watched TV for a while, and felt cold, and realised that her jumper was in the appellant's room, left there from the night before. She went in there to get it, and he woke up and kissed and hugged her. He then removed her clothing and his, and at his invitation she performed fellatio on him. That conduct constituted count 2, on which the jury acquitted.

[5] On her evidence he then performed cunnilingus on her (count 3), another acquittal, and then:

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1 At AR 292.
2 At AR 293.
3 According to the directions the judge gave the jury at AR 233.

"We started having sex".[4]

She described painful penile intercourse, in which the parties changed position on more than one occasion, and in which the intercourse included a "doggy style" act, and gave a description of his having ejaculated. After that she went to the toilet, and then to sleep on the couch. The vaginal intercourse was count 4, on which the jury convicted.

[6] CR gave evidence-in-chief and was cross-examined in a video taped proceeding conducted before, as it happened, the same judge as the learned trial judge, and conducted on 29 August 2005. The appellant's counsel put to the complainant that there had been no sexual intercourse or sexual activity with the appellant whatsoever, and the complainant disagreed.[5] The complainant was quite extensively cross-examined by SD's counsel in that hearing.

[7] CR's mother gave evidence confirming that she had told the appellant on Boxing Day morning the ages of her children, including that CR was 12, "going on 13". She also gave evidence that on 27 December 2003, after she and the family had returned to Moura, CR had told her (in answer to the mother's questions) that CR and the appellant had had intercourse. The account CR's mother gave of what CR said had happened, generally accorded with the account CR had given to the police, and with CR's oral evidence. CR's mother said CR had asked her mother not to tell her father, but CR's father later found out. That was because CR wrote to her best friend, and told her best friend about it, and the best friend's father found the letter and told CR's father. At his suggestion CR's mother saw the Moura Police in June 2004.

[8] A medical examination conducted on Tuesday 6 April 2004 revealed that CR's hymen was fragmented, which the medical examiner considered was consistent with earlier penile penetration.

[9] The appellant did not give or call any evidence. On the evidence which was led, it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the unlawful carnal knowledge of CR. That was the test approved in the joint judgment in *M v R* (1994) 181 CLR 487, and repeated in *MFA v R* [2002] 193 ALR 184; 77 ALJR 139. Applying that test, the verdict is not unreasonable, and can be supported having regard to the evidence. CR's evidence, recorded on video tape, was consistent with the account she gave the police in June 2004, and described sexual dealings between herself and the appellant, to which she appeared to consent.

[10] The appellant represented himself on the appeal, and referred to his written submission which made the point there was no independent evidence supporting the complainant's account. That is true, but the learned trial judge drew that to the jury's attention, reminding them there was no independent evidence supporting the complainant, and instructing the jury that they should:

"Scrutinise her evidence very carefully",

and not convict, unless, after scrutinising her evidence with great care:

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4 At AR 299.

5 At AR 17 and AR 57.

> "and considering the circumstances relevant to the evaluation of that evidence, and paying heed to this warning, you are satisfied beyond reasonable doubt of the truth and accuracy of her evidence."[6]

The judge repeated that warning at least one more time, when summarising the submissions made by the appellant's counsel.

[11] The appellant's written argument also contended that the complainant's medical examination did not establish that vaginal intercourse had occurred in the past. The doctor's evidence was that the vaginal thrush, a white discharge, which that doctor found on examination, and the fragmented hymen, was consistent with an allegation of penile penetration[7]; but also agreed in cross-examination that what the doctor found on examination could be a normal finding as well, in a girl of the complainant's age who had not had sexual intercourse at all. The learned judge gave directions to the jury reminding them of the concession by the prosecutor that the evidence of the examining doctor "did not really prove anything"[8], and that the doctor had said that that doctor could neither confirm nor deny the allegations the complainant had made, from the doctor's examination. The learned judge further commented to the jury:

> "So, really, Dr Love's evidence is not evidence which supports the allegations made by CR. Her findings are equally consistent with there having been no intercourse."

That evidence and those directions mean that the jurors were reminded by the judge of the equivocal nature of the medical evidence, and the absence of any positive support in that for the complainant's account.

[12] Regarding the different verdicts returned, which the appellant contended revealed some error by the jury, the learned trial judge had directed the jurors that they should consider each count separately, and that their verdicts need not be the same on all. Those directions were given more than once, including that the jury would be asked for a separate verdict in respect of each charge.[9]

[13] The appellant also contended that the inconsistencies in the complainant's account, established in cross-examination, and between her evidence and her mother's, rendered the verdicts unsafe. The learned judge had reminded the jury of relevant inconsistencies, including with her mother's evidence, more than once during the course of the directions.[10] The judge reminded the jurors of submissions by the appellant's counsel referring to asserted discrepancies between the complainant's evidence and that of the investigating police officer, and that those inconsistencies might cause the jury to doubt the truthfulness or reliability of witnesses. The learned judge also directed the jury that the complainant's delay in reporting the incident may have had an important consequence in prejudicing the appellant in testing and meeting the allegations made against him.

[14] Part of the appellant's arguments pointed to the presence of the complainant's elder brother, only some metres away on the other side of an open door, when the

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6 At AR 243.
7 At AR 144.
8 At AR 245.
9 Those directions appear at AR 214, 230.
10 At AR 235, 240, 241, and 247.

complainant described being in the appellant's bed. But the learned judge reminded the jury that the complainant had agreed with those suggestions (of her brother's presence close nearby) when summarising the arguments put to the jury by both counsel for the prosecution and counsel for the appellant.

[15] The appellant suggested in oral argument to this Court that had evidence available to him been called he would not have been convicted. But he did not produce any affidavits or statements from any witnesses capable of contradicting the complaint's account that he had intercourse with her, an account which appeared quite comprehensive and convincing in her interview with the police, and in her video recorded evidence. In those circumstances the appellant did not establish that his conviction could not be supported having regard to the evidence, nor that there was any relevant inconsistency between that and the acquittals.

[16] Regarding the complaint of inconsistency, the acquittals on counts 1, 2, and 3 may reflect what the joint judgment in *Mackenzie v R* (1997) 190 CLR 348 at 367 described as a "merciful" view of the facts open to the jury. The joint judgment quoted from *R v Kirkman* (1987) 44 SASR 591 at 593, where King CJ, giving the judgment of the court, wrote:

> "Sometimes juries apply in favour of an accused what might be described as their innate sense of fairness and justice in place of the strict principles of law. Sometimes it appears to a jury that although a number of counts have been alleged against an accused person, and have been technically proved, justice is sufficiently met by convicting him of less than the full number. That may not be logically justifiable in the eyes of a judge, but I think it would be idle to close our eyes to the fact that it is part and parcel of the system of administration of justice by juries. Appellate courts therefore should not be too ready to jump to the conclusion that because a verdict of guilty cannot be reconciled as a matter of strict logic with a verdict of not guilty with respect to another count, the jury acted unreasonably in arriving at the verdict of guilty."

Keane JA referred to that same possibility, of merciful verdicts, in *R v DAL* [2005] QCA 281, at paragraphs [28]-[33]. The possibility of that being the explanation for the acquittals means that there is not the necessary sense of an affront to logic and common sense revealed by the different verdicts, and thereby suggesting a compromise or confusion or misunderstanding by the jury, referred to in *Mackenzie v R* (1997) 190 CLR 348 at 368, and in the judgment of this Court in *R v CX* [2006] QCA 409 at [33].

[17] Counsel for the respondent director, Ms Bain, submitted that the jury may have made a pragmatic decision that the critical offence, in what was one protracted series of incidents, was the intercourse, and that the other offences charged were mere preludes to that, and ought not to be the subject of additional punishment. That is a possible explanation for the verdicts, which would not disclose any misunderstanding of the jury's functions, or of the evidence, or of the instructions given by the learned judge. I would dismiss the appeal against the conviction.

[18] **KEANE JA**: I agree with the reasons of Jerrard JA and the order proposed by his Honour.

[19] **JONES J**: I have read the reasons of Jerrard JA and agree with them and the order he proposes.