SUPREME COURT OF QUEENSLAND

CITATION:	*R v RAE* [2008] QCA 364
PARTIES:	**R** **v** **RAE** (appellant)
FILE NO/S:	CA No 333 of 2007 DC No 718 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Beenleigh
DELIVERED ON:	21 November 2008
DELIVERED AT:	Brisbane
HEARING DATE:	1 August 2008
JUDGES:	McMurdo P, Muir JA and Wilson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. The appeal against conviction on counts 1 and 2 is dismissed.** **2. The appeal against conviction on count 3 is allowed, the verdict of guilty on count 3 is set aside and instead a verdict of acquittal is entered.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – VERDICT – INCONSISTENT, AMBIGUOUS AND MEANINGLESS VERDICTS – OTHER OFFENCES – 17 year old appellant charged with five counts of indecent dealing (counts 1 to 4 and 6) and one count of rape (count 5) – complainant was the seven to eight year old sister of a friend of the appellant – jury found the appellant guilty on counts 1 to 3 and not guilty on counts 4 to 6 – counts 1 and 2 involved only kissing on the lips and were supported to some extent by complainant's mother's evidence – otherwise, complainant's evidence unsupported –counts 3 and 4 formed part of the same episode but were the subject of a guilty verdict on count 3 and a not guilty verdict on count 4 – whether, if not satisfied beyond reasonable doubt on counts 4 to 6, the jury must have had a reasonable doubt on all counts – whether the jury verdicts are inconsistent and not able to be rationally reconciled *Criminal Code* 1899 (Qld), s 668E(1)

Mackenzie v The Queen (1996) 190 CLR 348; [1996] HCA 35, applied

COUNSEL: B W Farr SC for the appellant
M J Copley for the respondent

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

[1] **McMURDO P:** The appellant was charged with five counts of indecent dealing with a child under 12 years (counts 1 to 4 and 6) and one count of rape (count 5). On 5 December 2007 he was found guilty after a seven day trial on counts 1 to 3, and not guilty on counts 4 to 6. He was placed on nine months probation. He appeals against his convictions, contending that the verdicts were "unsafe and unsatisfactory", effectively a claim that the verdicts were "unreasonable or cannot be supported having regard to the evidence": *Criminal Code* 1899 (Qld), s 668E(1).

The evidence

[2] A consideration of this ground of appeal requires a review of the relevant evidence. Each count was charged as occurring on a date unknown between 1 January 2001 and 31 December 2003. The appellant was then aged either 16 or 17 and the complainant about seven or eight.

[3] The complainant gave the following evidence by way of a video-recorded interview with police on 26 September 2005. At the time when the offences occurred the appellant was a friend of her brother, K, and visited their house. He sometimes slept at their house on Friday and Saturday nights. On one such occasion, when she was about seven or eight years old, the appellant was in her bedroom whilst the rest of the family were watching TV or helping prepare dinner. She was lying on her bed and the appellant kissed her on the lips. This was the first time that he kissed her. She felt scared (count 1 – guilty verdict).

[4] A similar episode took place on a second occasion, this time in her brother's bedroom. She went to her brother K's bedroom to find him. The appellant followed her in and shut the door behind them. They were then alone in the bedroom. She said that she knew he was not going to hurt her. The appellant again kissed her on the lips. She was sitting on the bed. He put his arms around her, hugging her. She was not scared (count 2 – guilty verdict).

[5] On the evening of her brother B's 21st birthday party, they were again alone together in her brother K's bedroom. About 70 people attended a party for B at the house. The appellant kissed her again (count 3 – guilty verdict). She was lying on the bed. He removed his clothing apart from a singlet and lay down beside her. The door was shut. He again kissed her on the lips. He lay on top of her. This went on for about five minutes (count 4 – not guilty verdict). When they heard someone coming, he put on his clothes and they left the bedroom.

[6] The complainant agreed that these incidents happened at her parent's "old house"; it did not happen anywhere else; and it always happened inside the house. She told police that nothing happened in the cubby house outside in the yard.

[7] Police officers conducted a further video-recorded interview with the complainant on 4 November 2005 which was also part of her evidence at trial. She said that on the night of B's 21st birthday party she and the appellant were playing behind the water tanks in the back yard of her home. She "sucked on his thingy … [h]is nuts." This was the second time she had seen his private parts. They were kissing and then he stopped and said, "suck on it". The appellant pulled his pants down. Everyone else was partying. K came out to find the appellant and was calling him (count 5 – not guilty verdict).

[8] When police officers asked her whether she had anything else she wanted to talk about, she added, "In the cubby he put his finger in my private part". She said that this happened the year she was in Grade 2. He ran into the cubby house and she followed him. The incident probably lasted about 10 minutes. He put his hand in her pants and then his finger in her private part. Afterwards, they returned inside the house (count 6 – not guilty verdict).

[9] The complainant's mother gave evidence that when the appellant visited, she explained to him that the rules at her home were that only girls were allowed in the cubby house and that boys were not to go into the girls' rooms and the girls were not to go into the boys' rooms. On two occasions she found the appellant in the complainant's room. On the first occasion, he said he was fixing the door. On another three or four occasions she found the complainant in K's room alone with the appellant. Once when she was in the kitchen, the complainant screamed out from the other end of the house in the direction of the boys' rooms: "[The appellant's] trying to kiss me, oh, gross." The mother immediately went in that direction. She found the complainant and the appellant alone together in K's room. The complainant said she was only joking. The complainant was then about six or seven years old. The complainant's mother reminded them both of the house rules. On another occasion she found the complainant alone in the cubby house with the appellant; the door was shut. They appeared startled when she opened the door. She asked them what they were doing. The appellant said that the complainant wanted to show him her cubby house. The mother emphasised the house rules and told him not to come near the complainant again. On another occasion when she was doing the laundry she called out to her girls and the complainant came out between two water tanks. The mother asked her what she was doing. The complainant said that the appellant was very upset and he needed somebody to talk to. The appellant then came out from between the water tanks and looked red in the face.

[10] The appellant did not give or call evidence.

The appellant's contentions

[11] The appellant's counsel made the following submissions. The jury verdicts mean that the jury had a reasonable doubt as to the truthfulness of the complainant in respect of counts 4, 5 and 6. Counts 5 and 6 were the most serious of the six charges. If the jury doubted the complainant's evidence on those counts, they should also have doubted her evidence on counts 1, 2 and 3, especially as it was not supported by other evidence. The jury's not guilty verdict on count 4 was particularly significant. If the jury doubted whether count 4 occurred, they must also have had a reasonable doubt in respect of count 3 which was alleged to have occurred on the same evening as both counts 4 and 5. The not guilty verdicts on

counts 4 and 5 are inconsistent with a guilty verdict on count 3. The jury verdicts suggest a compromise on the part of the jury, especially as their deliberations took in excess of 25 hours.

Discussion and conclusion

[12] Guilty and not guilty verdicts on different counts do not make the guilty verdicts unreasonable if the varying verdicts can be logically and rationally explained on the evidence.[1]

[13] The jury's not guilty verdict on count 5, which the complainant said occurred when she and the appellant were playing behind the water tanks in the backyard on the night of B's 21st birthday party, was logically explicable because the complainant initially told police officers that nothing happened with the appellant outside in the yard; it always happened inside the house. Similarly, the appellant's not guilty verdict on count 6, which allegedly occurred in the cubby house outside in the yard, was logically explicable because the complainant originally told police officers that nothing happened with the appellant in the cubby house. She made no complaint of counts 5 and 6 until the second interview with police. These inconsistencies in her testimony were sufficient to raise a reasonable doubt as to the appellant's guilt on counts 5 and 6.

[14] The not guilty verdict on count 4 and the guilty verdict on count 3, which both related to the same episode on the night of B's 21st birthday are not so readily reconcilable. What is obvious from the earlier review of the evidence is that the complainant's evidence on counts 1 to 3 received significant support from her mother's evidence that the complainant once yelled out that the appellant kissed her and the mother then found them alone together in K's room.

[15] After retiring to consider their verdicts at 3.30 pm on day six of the trial, the jury asked the judge a number of questions. The first was at 6.07 pm: "Do we know if there is a time roughly on count 3?" Later that night, the jury asked further questions of the judge which resulted in them re-hearing the complainant's evidence in full the next day. The jury completed this task at 4.30 pm on day seven of the trial. At 5.03 pm they asked the judge: "Is count 4 limited to 21st birthday party only?" The judge explained that the prosecution's particulars of counts 3 and 4 were that they occurred on the night of B's 21st birthday party in K's bedroom; count 3 was the allegation of kissing and count 4 was the allegation that the appellant removed all his clothes except his singlet and lay on top of the complainant. The judge also reminded the jury that count 5 was the alleged sucking of the appellant's penis by the complainant behind the water tanks on the night of B's 21st birthday party. The judge directed the jury that if they had a reasonable doubt as to any of those counts (counts 3 – 5) occurring as the prosecution had particularised, namely on the night of B's 21st birthday party, then they should acquit on that particular count. The judge completed those redirections at 5.07 pm. The jury delivered their verdicts at 5.21 pm.

[16] For the reasons I have identified, the not guilty verdicts on counts 4, 5 and 6 are readily logically reconcilable on the evidence with the guilty verdicts on counts 1

---

1 *Mackenzie v The Queen* (1996) 190 CLR 348; [1996] HCA 35 at 366 (Gaudron, Gummow and Kirby JJ).

and 2. The appeal against conviction in respect of counts 1 and 2 should be dismissed.

[17] The guilty verdict on count 3 is not, however, rationally reconcilable with the not guilty verdict on count 4 which was part of the same episode of alleged criminal offending as count 3. The jury's questions of the judge suggest that they were having some difficulty in deciding counts 3 and 4. Both counts 3 and 4 turned on whether the jury accepted the complainant's evidence beyond reasonable doubt and were essentially both part of the same episode. If the jury were not satisfied on one of those counts beyond reasonable doubt, then it is difficult to understand how they would be satisfied of the other. It is not possible to rationally explain the differing verdicts on those counts. To find the appellant guilty on count 3 but not guilty on count 4 amounts to an affront to logic and commonsense, such that appellate intervention is required to prevent a possible injustice.[2] The appeal against conviction on count 3 only should be allowed, the conviction quashed and a verdict of acquittal entered.

Orders

1. The appeal against conviction on counts 1 and 2 is dismissed.

2. The appeal against conviction on count 3 is allowed, the verdict of guilty on count 3 is set aside and instead a verdict of acquittal is entered.

[18] **MUIR JA:** I agree with the reasons of McMurdo P and with her Honour's proposed orders.

[19] **WILSON J:** I respectfully agree with the President's reasons for judgment, and with the orders her Honour proposes.

---

[2] *Mackenzie v The Queen* (1996) 190 CLR 348; [1996] HCA 35 at 365 – 368, esp at 368 (Gaudron, Gummow and Kirby JJ).