SUPREME COURT OF QUEENSLAND

CITATION:	*R v Litzow* [2011] QCA 366
PARTIES:	**R** **v** **LITZOW, Steven James** (appellant)
FILE NO/S:	CA No 269 of 2011 DC No 101 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Hervey Bay
DELIVERED ON:	13 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	1 December 2011
JUDGES:	Fraser and Chesterman JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction allowed.** **2. Conviction and verdict set aside.** **3. Verdict of acquittal entered on count 2.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL ALLOWED – where the appellant was charged with four counts of indecent treatment of a child under 16 – where two counts alleged a circumstance of aggravation, one that the child was under 12 and another that the child was under his care at the time of the offence – where the appellant was found guilty of one count of indecent treatment of a child under 16 – where the appellant argued that the verdict was unreasonable because it was inconsistent with the verdicts of not guilty on the other three counts – whether the quality of evidence with respect to count 2 was better and therefore provided an explanation for the difference in verdicts – whether the verdicts are inconsistent and the conviction therefore unreasonable – whether it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – PREJUDICIAL EVIDENCE – GENERALLY – where the

appellant argued that inadmissible, prejudicial evidence was admitted against him – where the evidence the subject of the complaint was given by the appellant's daughter and the complainant's mother – where the s 93A interview between the appellant's daughter and police contained nothing that corroborated the complainant's evidence of complaint – where the appellant's daughter had simply observed a change in demeanour – where the prosecutor had the appellant's daughter repeat her observation during the pre-recorded evidence pursuant to s 21AK of the *Evidence Act* 1977 (Qld) – where defence counsel had attempted to object to the evidence of the change in demeanour and personality – where the complainant's mother gave evidence of preliminary complaint – where there were contradictions in her account – where the complainant's mother was later asked to recall any other changes in the complainant – where the complainant's mother indicated there were behavioural changes – whether the evidence of observed changes in the complainant's behaviour had a logical connection with the commission of the offences – whether the evidence was admissible – whether the evidence was used improperly – whether its prejudicial effect outweighed its probative value – whether the admission of evidence resulted in a miscarriage of justice

Evidence Act 1977 (Qld), s 21AK, s 93A

Jones v The Queen (1997) 191 CLR 439; [1997] HCA 12, considered
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, considered
MacKenzie v The Queen (1996) 190 CLR 348; [1996] HCA 35, considered
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, considered
R v SBL [2009] QCA 130, considered
R v Smillie (2002) 134 A Crim R 100; [2002] QCA 341, cited

COUNSEL: J J Allen for the appellant
J A Wooldridge for the respondent

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

[1] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Chesterman JA. I agree with those reasons and with the orders proposed by his Honour.

[2] **CHESTERMAN JA:** The appellant stood trial in the District Court at Hervey Bay on an indictment which charged him with four counts of indecent treatment of a child under 16. Two of the counts alleged a circumstance of aggravation, one (count 1) that the child was under 12 and another (count 4) that she was under his care at the time of the offence. On 16 September 2011, after a three day trial, the

appellant was convicted of the offence alleged as count 2 but acquitted on the other three counts. He was sentenced to 12 months' imprisonment with parole eligibility being set at 16 March 2012.

[3] The appellant has appealed against his conviction on the ground that inadmissible, prejudicial evidence was admitted against him, and that the verdict is unreasonable because it is inconsistent with the verdicts of not guilty on the other three counts.

[4] Count 2 was alleged to have occurred between 31 January 2010 and 1 July 2010 at Gatakers beach near Point Vernon at Hervey Bay. The complainant child A was born on 27 May 1998. She lived with her mother and some siblings in a house about a mile from the appellant's house. A's mother and the appellant enjoyed an intimate friendship from about May 2004 until October 2010. The appellant and A's mother would regularly spend the night at each other's homes. They were, as well, regular, heavy, drinking companions.

[5] A's evidence in support of count 2 was that early in the year, after school had started but before the first holidays, on a Saturday about midday, she went fishing with the appellant at Gatakers beach. They drove there in the appellant's truck. The appellant caught three or four fish but A was unsuccessful. She went for a swim. The appellant also entered the water. He "grabbed" A, pulling her onto his lap and holding her tightly around her waist. He put his hands down her shorts, under her bathing costume and inserted the fingers of one hand in her vagina while he held her with his other hand.

[6] A said, in relation to count 1, that she was playing with her dog outside the laundry of her home. She went into the laundry. The appellant was there, fetching beer from the fridge kept there for A's mother who was in the dining room. The appellant grabbed her, pulled up her jumper, shirt and bra, and squeezed her breasts with both hands. As he did so he made orgastic noises.

[7] Count 3 was said to have occurred at a family gathering at A's house a day or two after the funeral of A's nephew, an infant who had succumbed to SIDS. He was the son of A's older sister. The offence occurred in the evening. A was in the kitchen washing dishes. Her mother was in the dining room, or her bedroom. Her brother and sister were in the lounge room. The appellant came into the kitchen. He lifted her shirt up, fondled her breasts and squeezed her bottom.

[8] Count 4 was said to have occurred at a playground in a park near the beach, at night. A, the appellant's daughter, JL, and the appellant went together to the park where the girls played on swings. Both girls sat on swings while the appellant pushed them. A said that the appellant grasped her by the breasts while pulling her back on the swing before pushing her forward. He held her breasts "really hard" so that it hurt. She got off the swing and waited until JL finished playing. They then went home.

[9] JL was the same age as A. They were classmates and friends. JL did not live with the appellant but with her mother. She was, however, a regular visitor to the appellant's house. A gave evidence that she told JL that the appellant had been "molesting her". JL "just went all quiet and didn't say anything."

[10] The evidence, the subject of complaint, was given by JL and by A's mother. JL was interviewed by police. An edited video recording of the interview was tendered pursuant to s 93A of the *Evidence Act* 1977. Nothing was said in the interview

which corroborated A's evidence of complaint. JL did say, however, on several occasions, that A told her that she did not like the appellant and she "hated" going to the beach with him. JL said that A "started getting … upset … she used to be … really … happy all the time. … And she stopped being to (sic) happy all the time" about halfway through 2010. When asked to elaborate JL said that A "wasn't so energetic … her personality sort of changed."

[11] When giving pre-recorded evidence pursuant to s 21AK of the *Evidence Act* 1977, the prosecutor had JL repeat her observation that A's "personality changed a bit."

[12] JL gave other evidence relevant to count 4 which tended to cast doubt on A's account. JL denied that A had ever told her that the appellant had touched her inappropriately, or sexually. She said that it was A who had asked the appellant if he would go with her and JL to the playground where the swings were. The area was well lit. She did not observe her father touching A in any inappropriate way. A did not behave in a manner which might indicate that she was upset. She seemed "perfectly happy" after she finished playing on the swings. That night A, JL, the appellant and A's mother spent the night at the appellant's house. About five in the morning A, who was cold, went to the bed where her mother and the appellant were sleeping and got in with them, next to her mother.

[13] An attempt by defence counsel to object to JL's evidence of change in demeanour and personality in A was rebuffed by the trial judge before counsel had a chance properly to articulate the grounds for objection.

[14] A's mother gave evidence of preliminary complaint. The credibility of a witness is hard to gauge from the pages of a transcript, but she appears to have been an unsatisfactory and unimpressive witness. There were contradictions in her account of the number and occasion of A's complaints to her and her credibility on that topic appears doubtful. She said that in October 2010 A had told her "certain things had been happening" which she wrote down. They were that the appellant "had been touching her, putting his hands down her shorts and into her underwear on several occasions and tried to put his finger inside on another occasion. That he had touched her breasts when … she was being pushed on a swing. Incidents at the beach … while they were fishing". She spoke as well of an attempt to "grope her" when she was in the kitchen of the house. The prosecutor asked, "how was [A] as she was telling you these things?" and the witness answered, "Extremely upset, shaking, crying. … Angry." Later the prosecutor asked whether A's mother recalled any other changes in A. The answer was affirmative and she was asked to detail the changes. The answer was:

> "Not listening, distancing, quiet, not sleeping in her own bed, sleeping with her sister. Just behavioural. I put it down to teenage years. … A lot of behavioural problems and isolating herself and just very quiet and secretive."

[15] The prosecutor in her address gave great emphasis to JL's evidence of the observed changes in A. She commenced and concluded her address with the topic, and adverted to it elsewhere. She said:

> "… [Defence counsel] made some submissions … about [JL's] evidence, and what she didn't see … . I'd like to speak to you, firstly, about what she did see and it's one of those telling pieces of

> evidence. … [JL] … told you specifically of a behavioural change that she noticed in her friend, from about some time in 2009. In her words she said, 'The complainant just wasn't happy anymore.' It was suggested … that that might have been because of the loss of the nephew. … she rejected that. On her … observations … [A], was sadder before that … . It's a matter for you how you weigh that kind of evidence … but I would suggest to you that you have been told by [A] of a very good reason for that kind of behaviour and that kind of observed sadness … ."

[16] The peroration was:

> "It is not just what [A] is saying … but more particularly the way that she … gave her evidence that underlines the truth of it … . What 13 year olds do you know who could think through an allegation of sexual misconduct, recount it in this way … consistent with childhood development and memory, and continue her complaint to her mother and … in Court through cross-examination by an experienced barrister? … what 13 year old do you know who can do that? Overlay that with maintaining a façade of over 12 months around her friends and around her family where she has had … a palpable change in demeanour."

[17] In the body of the address the prosecutor argued that A's emotional reaction to the suggestion in cross-examination that the offences did not happen was an indication of her truthfulness. The prosecutor said:

> "… I'd remind you again that she hasn't just had an emotional reaction in Court but an emotional reaction noted by others; noted by her mother when she was … complaining … and noticed by [JL] throughout 2009 coinciding with the times that the child says that she was touched. What an extraordinary coincidence for [JL] to have noticed that and not known about these allegations."

[18] A little later the prosecutor said:

> "What is more reliable, in relation to these preliminary complaints … is … what each of the witnesses has said about [A] and how she was reacting. … She was crying when she told her mother. You've heard … that [JL] said that [A] hated going to the beach and … had, on one occasion, specifically said she didn't want to go because the defendant was going."

[19] The address misstated the evidence from JL which was that A's statements that she did not like the appellant were made in the second half of 2010 and that the observed change in behaviour occurred a few months before the death of A's nephew which was in July 2010. The prosecutor pre-dated the changes by about 12 months and thereby prolonged them.

[20] The only direction on the point from the trial judge was quite short and merely rehearsed in summary form the prosecutor's argument. His Honour said:

> "The Crown … said [JL's] evidence of a behavioural change before the death of [A's] nephew … was consistent with abuse … and should not be put down to her adolescence or to the fact that she and

> [JL] were now in separate classes and they might have formed new friendships."

[21] Counsel for the appellant rightly submitted that the evidence of observed changes in A's behaviour had no logical connection with the commission of any of the offences, and did not tend to prove that any was committed. A's mother herself put it down to other factors. There was no evidence from A that her attitudes or behaviour changed because of the appellant's conduct towards her. The evidence of behavioural change does not give rise to an inference that its cause was the appellant indecently treating her. The evidence was therefore irrelevant and should not have been led. The prosecutor, however, used it to generate prejudice against the appellant and put the evidence to a use for which it was not fit. It was said by her to corroborate A's evidence in support of the counts in the indictment. It was not capable of corroborating it without a connection, which the evidence did not supply, between the change in behaviour and the alleged offences.

[22] The same is true of the mother's evidence of distress and anger in A when she made the complaint. This evidence was admissible, being an integral part of the complaint, but it should not have been used, as the prosecutor used it, as evidence independently corroborating A's account.

[23] The improper use of the evidence may have been nullified had the trial judge firmly directed the jury that the evidence could not be used in the manner advanced by the prosecutor. But that antidote was not given and the jury was left to make what they wished of the irrelevant, prejudicial evidence.

[24] Counsel for the respondent in a frank and helpful address conceded that the impugned evidence could not support A's evidence and was insufficiently linked to the circumstances of the offences to be probative of their having occurred. Nevertheless Miss Wooldridge submitted that the evidence was so limited in extent that it was not likely to have influenced the jury who would not have regarded such evidence concerning an 11 or 12 year old girl to be of much significance. It was, as well, submitted that the evidence "did not form the central basis of [the prosecutor's] submissions to the jury."

[25] The latter part of the submission cannot be accepted. Had the evidence, after it was adduced, been ignored in addresses and in summing up there would be considerable force in the respondent's argument. It was not, unhappily, ignored but over-worked and over-emphasised and wrongly made a supportive pillar for A's credibility.

[26] It cannot be said that the evidence, used as it was, did not influence the jury against the appellant. For that reason the conviction must be set aside. Whether there is to be a new trial or a verdict of acquittal will depend upon the second ground of appeal, that the conviction is inconsistent with the verdicts of acquittal, and is unreasonable.

[27] The appellant submitted that the different verdicts of not guilty on counts 1, 3 and 4, and the verdict of guilty on count 2 falls within what was described by Gaudron, Gummow and Kirby JJ in *MacKenzie v The Queen* (1996) 190 CLR 348 (at 368) as the:

> "… residue of cases … where the different verdicts … represent, on the public record, an affront to logic and commonsense which is unacceptable and strongly suggests a compromise of the performance

> of the jury's duty. More commonly, it may suggest confusion in the minds of the jury or a misunderstanding of their function, uncertainty about the legal differentiation between the offences or lack of clarity in the judicial instruction on the applicable law. It is only where the inconsistency rises to the point that the appellate court considers that intervention is necessarily required to prevent a possible injustice that the relevant conviction will be set aside." (footnotes omitted)

[28] The test is one of "logic and reasonableness". An appellant relying on this ground must establish that no reasonable jury who had applied their mind properly to the facts could have arrived at the different verdicts. The review of the authorities and of the facts in the case, in *R v SBL* [2009] QCA 130 shows a reluctance to assume unreasonableness or inconsistency from different verdicts. A number of factors have been identified as providing explanations for a rational difference in verdicts. See *R v Smillie* (2002) 134 A Crim R 100 at 106-7.

[29] One of those factors is that the quality of the evidence may be better, more detailed or more coherent, with respect to some counts than with respect to others.

[30] It is on this basis that counsel for the respondent submits the verdicts do not suggest inconsistency. The complainant's evidence of what happened at the beach was said to be of better quality than her evidence in support of the other counts. In particular, the respondent's arguments stressed the detail of A's description of her and the appellant's relative positions when they were in the water, and the means by which he held her at the waist. As well, it was said that her statement that the appellant did not put his fingers "very far" into her vagina because he was "trying to put them in there" may have been seen by the jury as a fair depiction by a witness who was not exaggerating her evidence against her assailant. Additionally, it was submitted that the conduct which constituted count 2 was what she told police was the incident she "best remembered", and was the first incident she described in the interview.

[31] I am unable to see any sufficient difference in calibre or quality of A's descriptions in evidence of the four offences that may make one think that additional detail, or comprehensiveness of account, in respect of count 2 may explain the different verdicts. It is true that there is some evidence which contradicted A's accounts of the offences on the swing and at the house after the funeral. JL's evidence seemed to cast doubt upon anything untoward happening on the swing. There was evidence from the appellant and from A's mother that the appellant was not at the house after the funeral. But count 1, like count 2, depended entirely upon the jury accepting A's evidence. There were no witnesses to either count, and no objective evidence casting doubt on her recital of fact in respect of them. There is no obvious difference in consistency of account, recall of detail or clarity of recollection between the two accounts which might explain the acceptance of one and rejection of the other.

[32] It is moreover significant that the jury convicted on only one count and were not prepared to accept A's testimony as establishing guilt beyond reasonable doubt on three counts. This case is, I think, in the (perhaps rare) category of case described in *Jones v The Queen* (1997) 191 CLR 439 per Gaudron, McHugh and Gummow JJ at 453. Their Honours said:

> "The jury's finding of not guilty on the second count damaged the credibility of the complainant with respect to all counts in the

> indictment. Implicit in the appellant's acquittal on the second count was a rejection of the complainant's account of the events which were said to give rise to that count. … Whatever the explanation may be, however, the jury's rejection of the complainant's account on the second count diminished her overall credibility. The only reasonable conclusion is that the jury were not satisfied beyond reasonable doubt of the truth of her evidence concerning the incident the subject of the second count. … It is difficult then to see how it was open to the jury to be convinced beyond a reasonable doubt of the guilt of the appellant with respect to the first and third counts. There is nothing in the complainant's evidence or the surrounding circumstances which gives any ground for supposing that her evidence was more reliable in relation to those counts than it was in relation to the second count."

[33] I do not overlook the observations of Gleeson CJ, Hayne and Callinan JJ in *MFA v The Queen* (2002) 213 CLR 606 at 617 that an acquittal for sexual offence may not necessarily involve a rejection of the complainant's evidence but "may simply reflect a cautious approach to the discharge of a heavy responsibility", or a reluctance to convict without some corroboration or a hesitation to accept evidence where there is uncertainty as to matters of detail.

[34] There were some aspects of A's evidence which support the conclusion, from the different verdicts, that the conviction was unreasonable. The first is the evidence that A disliked the appellant for reasons, according to JL, unconnected with her allegations of molestation. There was, for example, evidence that she disliked the appellant's excessive drinking with her mother and the arguments to which it led.

[35] The second is that A's own evidence raised some doubt about the occurrence of count 2. A fixed it as being early in 2010. She said also that she continued to go to Gatakers beach with the appellant to fish or swim for much of that year, up to about September. When it was pointed out to her that if count 2 had occurred as and when she said she would be reluctant to go with the appellant to the beach, she changed her testimony and said that she did not go after the episode, count 2. This testimony diminishes the force in the submission that A's evidence in support of count 2 was superior to the evidence in support of the other counts.

[36] In this case there was no corroboration for any of the offences, so its lack cannot explain the different verdicts. The appellant gave evidence and denied all offences. There was no apparent basis why his denial should be accepted with respect to some offences but not others. There was no apparent basis why the jury should differentiate between A's evidence on the various counts. The jury may not necessarily have rejected her evidence but it was not prepared to accept it on three of the four counts. This is, therefore, a case in which the verdicts can be seen as inconsistent and the conviction therefore unreasonable. Applying the test in *M v The Queen* (1994) 181 CLR 487 at 494, "there is a significant possibility that an innocent person has been convicted". The Court is bound to set the verdict aside.

[37] The appeal should be allowed and the conviction of indecent treatment of a child under 16 should be set aside. A verdict of acquittal should be entered instead.

[38] **MULLINS J:** I agree with Chesterman JA.