SUPREME COURT OF QUEENSLAND

CITATION:	*R v McLeod* [2011] QCA 373
PARTIES:	**R** **v** **McLEOD, Matthew Daniel** (appellant)
FILE NO/S:	CA No 278 of 2011 DC No 9 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Emerald
DELIVERED ON:	16 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	29 November 2011
JUDGES:	Muir, Chesterman and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against conviction dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where the appellant was convicted of one count of unlawfully permitting himself to be dealt with by the complainant who was under 16 years – where the appellant was acquitted of two counts of unlawful carnal knowledge and one count of indecently dealing with the same complainant – where identification was in issue on the trial – where the complainant's evidence in respect of the permitting offence was corroborated by the evidence of the complainant's friend – whether the verdicts of acquittal were inconsistent with the guilty verdict CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant submitted that the verdict depended solely on identification of the appellant by the complainant and her friend – where the appellant argued that the identification evidence was deficient and could not support a guilty verdict – whether the guilty verdict in respect of the permitting offence was unreasonable or insupportable having regard to the evidence as a whole

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 Kirkman (1987) 44 SASR 591, considered
R v McMullen [2011] QCA 153, cited

COUNSEL: M J Copley SC for the appellant
S P Vasta for the respondent

SOLICITORS: Anne Murray & Co Solicitors for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MUIR JA: Introduction** After a trial in the District Court at Emerald the appellant was convicted of one count of unlawfully permitting himself to be dealt with by a child under 16 years on a date unknown between 1 June 2009 and 1 January 2010 (count 3). He was acquitted of two counts of unlawful carnal knowledge of the same complainant between the same dates (counts 1 and 4) and of another count of unlawfully and indecently dealing with the same complainant between the same dates (count 2). The appellant appeals on grounds that the verdict on count 3 is inconsistent and irreconcilable with the verdicts on the other counts and that the conviction is otherwise unreasonable, unsafe and unsatisfactory.

[2] Counts 1 and 4 were each particularised as sexual intercourse at the appellant's home in Bluff. Counts 2 and 3 were particularised, respectively, as the insertion by the appellant of his finger or fingers into the complainant's vagina and an act of fellatio in the appellant's four wheel drive motor vehicle whilst on a "pigging" expedition.

[3] The essence of the defence case was that the appellant was not the person called "Matty" with whom the complainant had had sexual contact.

The complainant's evidence

[4] The complainant stated as follows in an interview with a police officer at Blackwater Police Station on 19 March 2010. She was 15 years of age. She had met "Matty", who lived in Bluff, the previous year. She thought he was about 19, possibly older. Asked by the police officer if she had sex with "Matty" she said, "Mmhmm". Asked "what did that entail?" she replied, "I dunno". She was then invited to tell "everything about this time [she] had sex with him". She responded as follows. At about the middle to the end of the previous year, she went to Matty's house on his insistence. She was wearing jeans and singlet. He stripped her down, kissed and touched her "Everywhere". Asked how he touched her, she said, "Fingered me and shit". She did not mention or describe any sexual intercourse.

[5] The house in which this incident took place was a two storeyed house next to that of a named person and across the road from the home of two other people identified by the complainant.

[6] A couple of months later, Matty asked her and her friend, S, to go pigging with him. They did so in a "pigging cruiser" with a number plate which had on it "Matt" followed by numbers. He gave them an alcoholic drink. S became sick. Matty

tried to touch the complainant "the way guys do… [w]ith their hands". The police officer asked, "Okay… so when he was touching you and he had his hands down your pants, did his fingers go inside?" The response is recorded as, "Mmhmm."

[7] The police officer asked, "on any occasion did you perform oral sex on him or did he perform oral sex on you?". She responded, "Oh, he performed on me. And then when I was drunk that night in his car, I performed on him".

[8] There was then a detailed description of what comprised the oral sex. Asked if there had been "any incident since", she described an occasion when she went to Matty's house with a friend, C, and performed oral sex on Matty. Matty stripped her under a blanket as she was seated on the lounge. She did not explain what else took place. The police officer asked, "And did he orgasm?" The complainant responded, "Don't think so". She later said that Matty touched her "[j]ust like all the other times", but that she did not touch him back. Asked if anything had happened since then, she responded that nothing had happened.[1]

[9] The police officer summarised what he understood was the substance of what he had been told referring to the third incident:

> "…he touched you, you didn't touch him and then under the blanket and then um, you mentioned you ended up having sex, how did youse ended up having sex in the, in the lounge room?"

[10] She responded:

> "Oh I just sitting on the lounge, he's just stripped me and, yeah.
>
> …
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> [He] ended up throwing me back and making me lie down next to him and stuff, so."

[11] In cross-examination, the complainant was referred to her identification of a person on a police photoboard. It was suggested to her that the person she picked out was someone whom she had seen outside the Bluff Hotel one evening and asked for a cigarette. She agreed. It was then put to her that this person was not the same person with whom she had had sexual contact. She responded, "It was the same person". It was then put that the accused had not had any sexual contact with her. She denied that.

The evidence of the complainant's friend S

[12] In the course of an interview with police officers on 23 April 2010, the complainant's friend, S, made statements to the following effect. She, the complainant and Matty went "pigging" in Matty's car. She and the complainant were "pretty drunk". She swapped seats with the complainant, who "gave Matty a head job". By this time, she was "pretty sick from drinking so much". Matty was "short… he had blonde type hair and… he was just like a normal guy". She said that Matty lived "on the bottom" of "a big two storey house". She described what was in his living area in the house in some detail.

[13] In cross-examination, S agreed that it was clear to her that the complainant knew the male who went on the pigging expedition and that she had the impression that the complainant "seemed to be quite keen to be with" him. It was put to her that "the

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1 Record 305.

Matty that [she] told police about" was not defence counsel's client. She disagreed with that proposition and also with the proposition that she was not in the appellant's company at any stage.

[14] S identified the appellant on a photoboard on 23 April 2010 as the person "Matty" with whom she and the complainant had gone "pigging".

The evidence of the complainant's friend C

[15] In her interview with a police officer at Blackwater Police Station on 19 March 2010, C made statements to the following effect. She was born in April 1995 and was a friend of the complainant. She recalled being at a house in Bluff during school holidays the previous year with the complainant and a male. The complainant and the male were on a couch behind her. She was sitting on the floor. Asked if the complainant had ever told her about having sex with Matty, she responded, "She just said like, like she's had sex with that person and stuff I think". She was told that some time in the previous year. She said that on the occasion on which she was in the house with the complainant and Matty, "[t]hey had like, a blanket over them or something… [t]hey were like, laying (sic) next to each other". She did not notice the complainant and Matty in any sexual activity.

The appellant's counsel's submissions

[16] Given the acquittals for the other counts, the conviction on count 3 was "an affront to logic and common sense".[2] The verdicts cannot be explained on the basis that the act of fellatio (count 3) was supported by S's observation of it and her subsequent identification of the appellant as the offender. There was nothing inherently implausible about the complainant's account of her other sexual encounters with "Matty". It follows that, if the jury were satisfied that S had correctly identified the offender, they should have been similarly satisfied that he was the offender on the other three occasions. The count 3 conviction strongly suggests a compromise verdict.

[17] The verdict was also unreasonable. It depended solely on the correctness or otherwise of the identification of the appellant as that was the only real issue on the trial. There were a number of areas where the prosecution could have, but perplexingly did not, adduce evidence that might have supported the complainant's account, including:

(i) where the appellant lived, and whether it was in the described proximity to the other people known by the complainant;
(ii) whether his house met the descriptions given by the complainant and S and whether it contained any of the video material referred to by them;
(iii) whether he owned or had access to a "pigging cruiser" with a number plate that included his name or part of it;
(iv) where he was employed and whether he ever wore "mining" clothing as S asserted;
(v) The identification evidence suffered from the following deficiencies:
(vi) the complainant and S were not the shown the photoboard until months after the offences were committed;
(vii) the appellant was the only person from Bluff who was on the photoboard shown to the complainant;

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2 *R v McMullen* [2011] QCA 153 at [68] and [70].

(viii) neither of the young women had been able to give a detailed description of the offender and the complainant's description was especially sparse. Although S described the offender as having blond hair, she selected a photograph that showed the appellant with dark hair;

(ix) S's observations of the offender occurred under less than ideal conditions when she was so heavily intoxicated as to be nauseated.

The identification evidence – Consideration

[18] The deficiencies in the identification evidence were the subject of submissions at first instance. They were referred to by the primary judge in his summing up and there was no complaint in this regard. The cross-examination of the complainant proceeded on the premise that the complainant had asked the appellant for a cigarette one evening outside the Bluff Hotel. The complainant accepted that it was this person whom she had identified on the photoboard, but denied that that person was not the person with whom she had sexual contact.

[19] The complainant picked "Matty" out of the photographs on a photoboard with no apparent hesitation or doubt. So too did S. Both the complainant and S gave evidence of having spent a substantial period of time in "Matty's" company. They were able to give detailed evidence of the internal appearance of his dwelling. The complainant described his vehicle and number plate containing the name "Matt". She also named people whom she said lived near his dwelling. None of this evidence was challenged in cross-examination. Having regard to the foregoing, it was open for the jury to conclude that the appellant was "Matty".

The inconsistent verdicts ground – Consideration

[20] After reviewing cases discussing principles applicable to inconsistent verdicts, Gaudron, Gummow and Kirby JJ in *MacKenzie v The Queen*[3] extracted a number of general propositions including the following:

> "3. Where, as is ordinarily the case, the inconsistency arises in the jury verdicts upon different counts of the originating process in a criminal trial, the test is one of logic and reasonableness. A judgment of Devlin J in R v Stone is often cited as expressing the test:
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> 'He must satisfy the court that the two verdicts cannot stand together, meaning thereby that no reasonable jury who had applied their mind properly to the facts in the case could have arrived at the conclusion, and once one assumes that they are an unreasonable jury, or they could not have reasonably come to the conclusion, then the convictions cannot stand.'
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> 4. Nevertheless, the respect for the function which the law assigns to juries (and the general satisfaction with their performance) have led courts to express repeatedly, in the context both of criminal and civil trials, reluctance to accept a submission that verdicts are inconsistent in the relevant sense. Thus, if there is a proper way by which the appellate court may reconcile the verdicts, allowing it to conclude that

[3] (1996) 190 CLR 348.

> 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. In a criminal appeal, 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. Alternatively, the appellate court may conclude that the jury took a 'merciful' view of the facts upon one count: a function which has always been open to, and often exercised by, juries." (citations omitted)

[21] Their Honours then quoted, with approval, the following passage from the reasons of King CJ (Olsson and O'Loughlin JJ agreeing) in *R v Kirkman*:[4]

> "[J]uries cannot always be expected to act in accordance with strictly logical considerations and in accordance with the strict principles of the law which are explained to them, and courts, I think, must be very cautious about setting aside verdicts which are adequately supported by the evidence simply because a judge might find it difficult to reconcile them with the verdicts which had been reached by the jury with respect to other charges. 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. This 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."

[22] After quoting these remarks their Honours said:

> "5. Nevertheless, a residue of cases will remain where the different verdicts returned by the jury 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

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4 (1987) 44 SASR 591 at 593.

> a possible injustice that the relevant conviction will be set aside. It is impossible to state hard and fast rules. 'It all depends upon the facts of the case.'
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> 6. The obligation to establish inconsistency of verdicts rests upon the person making the submission." (citations omitted)

[23] The relevant principles were considered by the Court in *MFA v The Queen* in which, after referring to *MacKenzie v The Queen*, Gleeson CJ, Hayne and Callinan JJ said:[5]

> "Since the ultimate question concerns the reasonableness of the jury's decision, the significance of verdicts of not guilty on some counts in an indictment must necessarily be considered in the light of the facts and circumstances of the particular case. Furthermore, it must be considered in the context of the system within which juries function, and of their role in that system. A number of features of that context were emphasised in MacKenzie. They include the following. First, as in the present case, where an indictment contains multiple counts, the jury will ordinarily be directed to give separate consideration to each count. This will often be accompanied by a specific instruction that the evidence of a witness may be accepted in whole or in part. Secondly, emphasis will invariably be placed upon the onus of proof borne by the prosecution. In jurisdictions where unanimity is required, such as New South Wales, every juror must be satisfied beyond reasonable doubt of every element in the offence. In the case of sexual offences, of which there may be no objective evidence, some, or all, of the members of a jury may require some supporting evidence before they are satisfied beyond reasonable doubt on the word of a complainant. This may not be unreasonable. It does not necessarily involve a rejection of the complainant's evidence. A juror might consider it more probable than not that a complainant is telling the truth but require something additional before reaching a conclusion beyond reasonable doubt. The criminal trial procedure is designed to reinforce, in jurors, a sense of the seriousness of their task, and of the heavy burden of proof undertaken by the prosecution. A verdict of not guilty does not necessarily imply that a complainant has been disbelieved, or a want of confidence in the complainant. It may simply reflect a cautious approach to the discharge of a heavy responsibility. In addition to want of supporting evidence, other factors that might cause a jury to draw back from reaching a conclusion beyond reasonable doubt in relation to some aspects of a complainant's evidence might be that the complainant has shown some uncertainty as to matters of detail, or has been shown to have a faulty recollection of some matters, or has been shown otherwise to be more reliable about some parts of his or her evidence than about others. Thirdly, there is the consideration stated by King CJ in R v Kirkman, and referred to in later cases: it may appear to a jury, that, although a number of offences have been alleged, justice is met by convicting an accused of some only. And there may be an interaction between this consideration and the two matters earlier discussed." (citations omitted)

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5 (2002) 213 CLR 606 at 617.

[24] In his summing up, the primary judge gave the conventional direction that each charge had to be considered separately, "evaluating the evidence relating to that particular charge". He pointed out that the evidence in relation to each charge was different.

[25] As counsel for the respondent submitted, there was nothing inherently improbable in the accounts given by the complainant in respect of the four counts on the indictment. However, her evidence in relation to some of the counts was vague and there was something of a flavour of prompting by the interviewing police officer. That was put to her in cross-examination. There was no witness to the conduct constituting the count 1 offence and it is unclear whether the evidence, if believed, supported a verdict of guilt of unlawful carnal knowledge.

[26] What particularly distinguished count 3 from the other counts is that the complainant's evidence was supported by the clear, corroborative evidence of S. The fellatio incident in the car was also described in rather more detail than was the offending conduct involved in the other counts. Having regard to the complainant's vagueness in her police interview and the leading nature of some of the police officer's questioning, it is not surprising that the jury was not prepared to convict unless the complainant's evidence was corroborated. And, of course, S's evidence did not corroborate the complainant's evidence in relation to the count 2 offence which was alleged to have occurred at about the same time as the count 3 offence.

[27] The only other count in respect of which there was a potential witness was count 4. C was present at the time that offence was alleged to have been committed, but she did not observe any sexual conduct between the appellant and the complainant.

[28] The fact that the central issue in the case was identification did not relieve the jury of the duty to consider each count separately. In fact, after observing that "what the defence strongly puts in issue is the identity of any man who had sexual activity with the complainant", the primary judge said:[6]

> "This is not to say, members of the jury, that you do not have to be satisfied beyond reasonable doubt of the elements of the charges, as I shall explain them to you. You do, indeed, have to be satisfied. However, your focus perhaps - it's a matter ultimately for you - will be on the reliability of this identification evidence, the truthfulness and reliability of it. That is the way the case has been contested. Remember what I told you about the onus and standard of proof. The prosecution carries the onus of proving that any man who interfered with the complainant was the accused man. The prosecution carries the onus of proving all the elements of the charges and the standard of proof is proof beyond reasonable doubt."

[29] The different verdicts were thus readily explicable and the inconsistent verdict ground must be rejected.

The unsafe and unsatisfactory ground – Consideration

[30] As for unreasonableness of the verdict, the appellant's counsel relied, for the most part, on his submissions in relation to identification. As I have said, and as the appellant's counsel accepted, there was nothing improbable about the complainant's

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[6] Record 197.

evidence. In respect of count 3, her evidence was corroborated by the evidence of S. Although the complainant's evidence was short on detail, for example as to the address of the appellant's house and its external description, she did identify persons who lived in adjoining and/or nearby houses. She described the house as having two storeys and said that the appellant lived on the ground floor. She described the vehicle in which she, the appellant and S went "pigging".

[31] S also described the part of the house in which the appellant resided. The descriptions by S and the complainant of the part of the house in which the appellant was said to live were not challenged or contradicted. Nor was the complainant's description of the vehicle used in the "pigging" excursion.

[32] It was not correct to assert, as counsel for the appellant did, that the appellant's conviction depended solely on the correctness or otherwise of the appellant's identification. The jury had to be satisfied that the conduct constituting the charged offences had taken place. It is apparent that they gave careful consideration to the evidence and accepted the complainant's evidence in critical respects only when it was corroborated.

[33] For the above reasons, including those relating to the identification issue, it was open to the jury upon the whole of the evidence to be satisfied beyond reasonable doubt of the appellant's guilt. Accordingly, this ground also fails.

Conclusion

[34] For the above reasons, I would order that the appeal be dismissed.

[35] **CHESTERMAN JA:** I agree with the order proposed by Muir JA, for the reasons given by his Honour.

[36] **WHITE JA:** I have read the reasons of Muir JA and agree with his Honour for those reasons that the appeal should be dismissed.