SUPREME COURT OF QUEENSLAND

CITATION:	*R v McCallum* [2013] QCA 254
PARTIES:	**R** **v** **McCALLUM, Nicholas Glen** (appellant/applicant)
FILE NO/S:	CA No 83 of 2013 DC No 211 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	10 September 2013
DELIVERED AT:	Brisbane
HEARING DATE:	13 June 2013
JUDGES:	Chief Justice and Gotterson JA 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 dismissed.** **2. Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – NON-DIRECTION – where the appellant was a qualified masseur and fitness coach in a tennis centre where the complainant trained and was treated by the appellant – where the appellant was convicted of six counts of unlawfully and indecently dealing with a child under 16 years of age who was under his care at the time – where for each count, except one, the appellant was alleged to have touched the complainant's vagina at least four times – where for the last occasion, the alleged touching was once, but more intrusively and for a longer period of about five minutes – where the complainant gave evidence that she had thought it was an accident prior to the last occasion – where the appellant contends that a s 23(1)(b) direction should have been given for all counts on which he was convicted as well as the other counts – where upon providing the jury with a document stating what the Crown must prove beyond reasonable doubt the trial judge expressed the view that having regard to the nature of the Crown case, a s 23(1)(b) direction was not necessary – where the appellant's trial counsel was content

with the document going to the jury without a s 23(1)(b) direction – whether the evidence in question called for such a direction – whether the learned trial judge failed to direct the jury adequately as to s 23 of the *Criminal Code*

CRIMINAL LAW – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES AMOUNTING TO MISCARRIAGE – MISDIRECTION OR NON-DIRECTION – NON-DIRECTION – where the trial judge repeated what was said in the document given to the jury with respect to the meaning of the word indecent – where the appellant contended that the direction was "unexceptional but basic" – where it was said that it failed to link specifically to the facts in question – where the appellant relied on the decision of this Court in *R v Jones* to justify the giving of a direction in regards to motive – where the touching of the vagina, if accepted as being deliberate, did not have any possible legitimate justification – whether the learned trial judge erred in not directing the jury that the appellant's motive or intention was relevant to the deliberation and decision on the element of indecency

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where the appellant was acquitted on six counts and one alternative count – where the appellant contended that there was nothing to distinguish the massage sessions involved in all of the counts – where the appellant argued that the verdicts of acquittal necessarily demonstrated that the jury did not accept the evidence from the complainant which they would have had to have accepted before they could have brought in the two guilty verdicts – where the jury were directed both as to the requirement to consider each charge separately and in terms of the Markuleski direction – whether the verdicts that the jury reached on the respective counts were open to them acting in conformity with those directions

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted of six counts of indecent dealing with a child under 16 under his care – where the appellant relied on the unlikelihood of the appellant having committed any of the conduct which, it was said, was manifested by his good character, unblemished career as a masseur, the location of the massage room and its accessibility by others, his cooperation with the police and the consistency of his explanation – whether it was open to a jury which had had the benefit of seeing and hearing all the witnesses to be satisfied of the appellant's guilt on the counts on which he was convicted

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where at the sentence hearing the Crown prosecutor submitted that the appropriate range for a head sentence was between two to three years – where the appellant's counsel submitted a head sentence of not more than two years with release prior to the half way mark – where the sentence imposed of two years to be suspended after nine months was within the range for which defence counsel had submitted – where no special circumstances were identified to warrant the conclusion that the appellant ought not be bound by the conduct of his case in the court below – whether a review of the cases to which this Court was taken indicated that the sentence manifestly excessive

Criminal Code 1899 (Qld), s 23, s 210

Drago v The Queen (1992) 8 WAR 488, cited
Kaporonovski v The Queen (1973) 133 CLR 209; [1973] HCA 35, distinguished
MacKenzie v The Queen (1996) 190 CLR 348; [1996] HCA 35 cited
Murray v The Queen (2002) 211 CLR 193; [2002] HCA 26, distinguished
R v Falconer (1990) 171 CLR 30; [1990] HCA 49, cited
R v Fereiro [2006] QCA 10, distinguished
R v Jones (2011) 209 A Crim R 379; [2011] QCA 19, distinguished
R v Lacey & Lacey [2011] QCA 386, cited
R v PAH [2008] QCA 265, cited
R v Stone [1955] Crim LR 120, cited
R v Sutton (2008) 187 A Crim R 231; [2008] QCA 249, distinguished
R v Taiters; ex parte Attorney-General [1997] 1 Qd R 333; [1996] QCA 232, cited
R v Van Den Bemd (1994) 179 CLR 137; [1994] HCA 56, cited
Stevens v The Queen (2007) 227 CLR 319; [2005] HCA 65, distinguished

COUNSEL: A Boe with A Anderson for the appellant/applicant
M R Byrne QC for the respondent

SOLICITORS: Nyst Lawyers for the appellant/applicant
Director of Public Prosecutions (Queensland) for the respondent

[1] **CHIEF JUSTICE:** I have had the advantage of reading the reasons for judgment of Gotterson JA. I agree with the orders proposed by his Honour, and with his reasons.

[2] **GOTTERSON JA:** After a trial over eight days at the District Court at Southport, the appellant, Nicholas Glen McCallum, was convicted on 13 March 2013 of six counts of unlawfully and indecently dealing with a child under 16 years of age who was under his care at the time. Each count alleged an indictable offence under ss 210(1)(a) and (4) of the *Criminal Code*.

[3] Two of the offences were alleged to have been committed on 5 February 2011 (counts 3 and 4) and four of them on 3 June 2011 (counts 9, 10, 11 and 12). The convictions on counts 3 and 4 were upon majority verdicts delivered after a Black direction had been given.

[4] The appellant was sentenced to concurrent terms of imprisonment of two years on each count, to be suspended after serving a period of nine months for an operational period of two years. He appeals against the convictions and applies for leave to appeal against the sentence.

[5] At the same trial, the appellant was acquitted of two comparable counts alleged to have been committed on 3 August 2010 (counts 1 and 2) and four comparable counts alleged to have been committed on a date unknown between 10 and 30 March 2011 (counts 5, 6 7, and 8). He was also acquitted of one count of rape alleged to have been committed on 3 June 2011 (count 12) but was found guilty on an alternative count of unlawful and indecent dealing.

Circumstances and evidence with respect to charged offences

[6] All counts concern the same complainant. The appellant who was 49 to 50 years of age at the time of the alleged offending, was a fitness coach at a tennis centre at Runaway Bay. Part of his duties involved work as a qualified masseur. The complainant who was 14 to 15 years old at the time, is Russian. She had travelled to Australia to live in billeted accommodation at the Gold Coast, attend high school there, and train at the tennis centre.

[7] The complainant attended an initial massage session with the appellant when her mother, who had brought her to Australia, was present. The mother then returned to Russia. Relevantly, the appellant massaged the complainant on five separate occasions thereafter, the first being on 3 August 2010 and the last on 3 June 2011. It is uncontroversial that the complainant personally booked each of the five sessions with the appellant. The counts related to four only of those sessions.

[8] Following the session on 3 June 2011, the complainant contacted her mother who was then in Russia, and others. That led to a complaint to police followed by statements made pursuant to s 93A of the *Evidence Act* 1977 by the complainant and a young acquaintance of hers. The complainant made a statement to Senior Constable Darren Foo on 6 June 2011, a recording of which was played to the jury.[1] She made a much longer statement to Detective Sergeant Alisa La Pila on 7 June 2011, a recording of which was also played to the jury.[2] The complainant alleged in the statements that the appellant had inappropriately touched her in every massage session other than the one at which her mother was present.

[9] Particulars of each count were given.[3] They were based on allegations made by the complainant in the statements. It is unnecessary to detail them all at this point.

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1 Exhibit 6, Transcript MFI "B" AB 510-524, tendered AB 85 Tr1-36 L55.

2 Exhibit 7, Transcript MFI "C" AB 525-663, tendered AB 89 Tr1-41 L7.

3 AB 506-509.

They are referred to as required for the purpose of analysing the grounds of appeal. The complainant gave pre-recorded evidence at a hearing on 22 August 2012.[4] The complainant's statements and her oral evidence concerned all five sessions, including one in early May 2011 to which none of the counts related. She said that the appellant inappropriately touched her on that occasion. This evidence was led as discreditable conduct on his part.

[10] The appellant was interviewed by Detective Sergeant La Pila on 8 June 2011. A recording of the interview was played to the jury.[5] He also gave and called evidence, including evidence concerning his character, in support of his denial of any criminal liability. His defence attacked the complainant's character, credibility and reliability.

Grounds of appeal against conviction

[11] The appellant's notice of appeal[6] listed seven grounds of appeal against sentence. At the hearing of the appeal, five of them were abandoned.[7] The two that were retained, Grounds 6 and 7, were the subject of brief oral submissions on behalf of the appellant. The appellant's counsel focused on two additional grounds, 5A and 5B, set out in an amended notice of appeal for which leave was granted at the hearing.[8]

[12] It is convenient to consider each of these grounds separately and in numerical order.

Ground 5A – s 23(1)(b) direction

[13] This ground, as expressed in the amended notice of appeal, is that the learned trial judge failed to direct the jury adequately as to s 23 of the *Criminal Code*. Subject to certain exceptions of no relevance here, s 23(1) excludes criminal responsibility for certain acts, omissions and events. By paragraph (a) thereof, the exclusion is for an act or omission that occurs independently of the exercise of the person's will. I pause here to note that the appellant does not submit that the occasion for giving a s 23(1)(a) direction arose.[9]

[14] The exclusory limb of s 23(1) which is now contained in paragraph (b) thereof, as originally enacted, was for "an event which occurs by accident". Since 4 April 2011 that limb has been re-enacted such that a person is not criminally responsible for:

> "an event that –
>
> (i) the person does not intend or foresee as a possible consequence; and
>
> (ii) an ordinary person would not reasonably foresee as a possible consequence."[10]

(The provision in this form was operative for counts 9, 10, 11 and 12. For the other counts, it was in the form referable to accident.)

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4 AB 20-45.
5 Exhibit 13, Transcript MFI "I" AB 658-716, tendered AB 176 Tr3-13 L15.
6 AB 724-5.
7 Tr1-3 LL21-24.
8 Tr1-3 LL17-18.
9 Tr1-3 LL31-33.
10 *Criminal Code Act and Other Legislation Amendment Act* 2011 s 4.

The re-enactment adopted the phraseology that Gibbs J (with whom Stephen J agreed) had used to describe the operation of the limb in *Kaporonovski v The Queen*.[11] It did not change the law.

[15] The appellant contends that a s 23(1)(b) direction should have been given for all counts on which he was convicted, as well as the other counts.

[16] The six counts of unlawful and indecent dealing on which the appellant was convicted were each particularised as a touching of the complainant's vagina under her underwear while massaging her legs. In some instances she was lying face down on the massage table (counts 3 and 9) and in others, face up (counts 4, 10, 11 and 12). For each count, except count 12, the appellant was alleged to have touched the complainant's vagina at least four times. For count 12, the alleged touching was once, but more intrusively and for a longer period of about five minutes.

[17] In laying an evidential basis for the contention, the appellant referred to evidence of both the complainant and the appellant. In a written note[12] that the complainant had prepared for her interview with Senior Constable Foo, she said with reference to being touched in the vaginal area:

> "By the way, this happened before (every time except the first time when my Mum was there watching me). Each time it got worse and worse. I was afraid to tell my Mum, and I was trying to convince myself that what he did was normal, that he is professional. Also I thought that it was an accident."

[18] In her s 93A statement, the complainant provided the following answers to Detective Sergeant La Pila's questions:

> "COMPLAINANT: Um he started to massage my legs and he was massaging my legs and his hands got closer to my back and um his the his hands seemed to just slip a little bit so that they went ah into the private area.
>
> LA PILA: Uh huh.
>
> COMPLAINANT: So they just a little bit like really briefly touched the vagina.
>
> LA PILA: Uh huh.
>
> COMPLAINANT: Like really like this is why I thought it was an accident.
>
> LA PILA: Uh huh.
>
> COMPLAINANT: And it and it was like two, three times on each leg."[13]
>
> …
>
> LA PILA: Ok … ok um you said you thought it was an accident. Tell me more about why?

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11 (1973) 133 CLR 209 at 231.

12 Exhibit 5 AB 493-4.

13 Transcript AB 611.

COMPLAINANT: Oh well because it was only two times out of six, seven that he was rubbing the leg.

LA PILA: Uh huh.

COMPLAINANT: So it wasn't like ah it didn't seem to be on purpose like he did it on purpose.

LA PILA: Uh huh.

COMPLAINANT: So it looked like it was an accident and I didn't really want to talk to anyone about that. That's why I tried to convince myself that it was an accident."[14]

[19] The complainant's homestay mother testified that she had had a conversation with the complainant at home in the late afternoon of 3 June 2011. The complainant was apparently upset. She indicated that she had been touched in the breast and groin areas during the massage that day. Asked if it had happened before, the complainant said that the appellant had touched her in the groin area at the preceding massage and added:

"I thought he slipped and it was an accident."[15]

[20] The appellant denied any touching of the complainant's vaginal area other than at the massage on 3 June 2011 when he said that inadvertent contact with the back of his hand occurred. In his interview with Detective Sergeant La Pila he explained how that occurred as follows:

"APPELLANT: … I'd have my leg on the massage table like so her knee would be on there and I'd be working through the muscle but then I'd be working into the trigger point itself so when I was pushing down onto those that's where her reaction when it was too painful is to roll to the side decided to roll away from it and that's when the back of my hand or so has made contact with her groin."[16]

…

LA PILA: Okay. At what point you said there's [in]advertent contact?

APPELLANT: Yeah well sorry that's what I mean by her rolling up she's rolling her groin towards where my hands are."[17]

[21] Prior to commencing the summing up, the learned trial judge discussed with counsel the directions to be given to the jury. By this time, his Honour had prepared a five page document[18] which he proposed to give to the jury.[19] The document set out

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14 Transcript AB 614.
15 AB 231 Tr4-18 LL30-53.
16 Transcript AB 677.
17 Transcript AB 679.
18 Exhibit MFI "M", AB 717-719.
19 The document was given to the jury during the course of the summing up: AB 385, Tr1-14 LL1-6.

certain factual admissions that had been made jointly or by the defence, the elements of the counts that the Crown was required to prove, and a summary of the particulars of each count. With respect to the unlawful and indecent dealing counts, the document stated that the Crown must prove beyond reasonable doubt that:

> "1. The defendant dealt with the complainant.
>
> The term "deals with" includes a touching of the complainant. It must be a deliberate touching of the child on the vagina (counts 1-7 and 9-11) and on the breasts (count 8).
>
> In respect of count 12, if not satisfied beyond reasonable doubt of the elements of rape, an alternative verdict of indecent treatment of a child under 16, under care, is available if the jury are satisfied that the defendant deliberately touched the complainant's vagina.
>
> 2. The dealing was indecent.
>
> The word "indecent" bears its ordinary everyday meaning, that is, what the community regards as indecent. It is what offends against currently accepted standards of decency. Indecency must always be judged in the light of time, place and circumstances.
>
> 3. The dealing was unlawful.
>
> Unlawful means not justified, authorised or excused by law.
>
> 4. The complainant was under 16 years.
>
> The complainant was born on 11 May 1996. Therefore the complainant was aged 14 years at the time of counts 1-8 and aged 15 years at the time of counts 9-11.
>
> 5. The complainant was under the defendant's care for the time being.
>
> This means that the defendant was responsible for the control and supervision of the complainant."[20]

[22] In the course of discussions with counsel, s 23 was mentioned. Reference was made to the evidence of the complainant and the appellant to which I have referred. Attention was directed to the document and the statement in it that the Crown case was one of deliberate touching. His Honour expressed the view that having regard to the nature of the Crown case, a s 23(1)(b) direction was not necessary. The appellant's trial counsel said that he was content with the document going to the jury without a s 23(1)(b) direction.[21]

[23] Whether the evidence in question called for a s 23(1)(b) direction depends upon whether it is capable of being evidence of an event that that limb of the provision describes. In *R v Taiters*,[22] this Court[23] observed:

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20 AB 718-9.
21 AB 365, Tr5-73 LL15-41.
22 [1997] 1 Qd R 333.
23 Macrossan CJ, Pincus JA and Lee J at 335.

> "… It should now be taken that in the construction of s 23 the reference to 'act' is to 'some physical action apart from its consequences' and the reference to 'event' in the context of occurring by accident is a reference to 'the consequences of the act'. Even if, as has been said, there can on occasion be some difficulty, in an exceptional case, in distinguishing the border line between act and event so viewed, this theoretical distinction is clear. Taking an example from *Kaporonovski* itself, the thrusting of the glass by the accused was the act and the injury to the victim's eye which constituted the grievous bodily harm was the event. A number of occurrences can as a result of the operation of one or more chains of causation follow upon the doing of an act. However, s 23 is concerned to excuse from criminal liability so the relevant event for the purpose of the section should be taken to be the one which, apart from the operation of the section, would constitute some factual element of an offence which might be charged. In cases when grievous bodily harm is charged the state of bodily harm will be the relevant event and when unlawful killing is charged, the death will be the relevant event …"

[24] These observations reflect what Gibbs J had said in *Kaporonovski* and has subsequently been endorsed by the High Court in *R v Van Den Bemd*,[24] *R v Falconer*[25] and *Murray v The Queen*.[26]

[25] Faced with this weight of authority, counsel for the appellant sought to characterise the alleged touching of the complainant's vagina as an event within the meaning of s 23(1)(b). It was submitted that the act of which the touching was a consequence was "all of the conduct associated with providing a therapeutic massage to the body of" the complainant.[27]

[26] The dichotomy of act and event and the relationship between them which the appellant seeks to draw are unconvincing. The alleged touching was in no sense a consequence of the overall massage treatment. If it occurred, it occurred as an integral part of the process in which the appellant administered the treatment.

[27] In argument, the appellant sought to draw an analogy with the circumstances of *Stevens v The Queen*[28] in which, on a charge of the murder of a business partner, the accused claimed that a gun discharged when he attempted to grab it as his partner apparently prepared to shoot himself. There, the circumstances allowed for separate identification of the discharge of the gun as the act and the death as the consequence. Whether the death of the deceased had been intended or foreseen was an issue separate from whether the discharging of the gun had been intended. Here, however, the Crown case was that the touching was deliberate. If that was not proved, none of the counts on which the appellant was convicted could have been made out. There was no separate event for which a s 23(1)(b) direction was required.

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24 (1994) 179 CLR 137 at 139.
25 (1990) 171 CLR 30 at 38.
26 [2002] HCA 26; (2002) 211 CLR 193 at [8].
27 Tr1-5 LL4-5.
28 [2005] HCA 65; (2007) 227 CLR 319.

[28] The complainant's evidence that she thought that some of the touching might have been accidental does not give that touching the character of accident for the purposes of s 23(1)(b). As has been often noted, the word "accident" is used in ordinary parlance with a variety of meanings. It was not used here by the complainant consciously with the meaning that it has in the s 23(1)(b) context. Moreover, the context in which she used it suggests that the complainant meant that she had persuaded herself to believe that the touching had been inadvertent and not that it was in fact inadvertent.

[29] As to the appellant's evidence, it did not leave open the application of s 23(1)(b). He said that on one occasion when touching occurred, it had occurred when the complainant rolled towards his hand. There was no act on his part of which the touching could be said to have been a consequence.

[30] For these reasons, this ground of appeal cannot succeed.

Ground 5B – direction with respect to indecency

[31] This ground of appeal is that the learned trial judge erred "in not directing the jury that the appellant's motive or intention was relevant to the deliberation and decision on the element of indecency".

[32] In the course of summing up, his Honour repeated what was said in the document for the jury with respect to the meaning of the word "indecent".[29] The appellant submitted that the direction was "unexceptional but basic".[30] It was said that it failed to link specifically to the facts in question. In particular, the direction did not clarify for the jury that the purpose of the appellant's actions was relevant for determining whether, in fact, the touching of the vagina was indecent in the circumstances.[31]

[33] Reliance was placed on the decision of this Court in *R v Jones*.[32] In that case the accused, a paramedic, who had carried out an electro-cardiogram ("ECG") on a woman called at her house once she had been discharged from hospital. He said that the doctor had required her to have another ECG. He placed two of the ECG pads on her breast tissue brushing her left breast with the inside of his wrist area. The accused was convicted on a count of indecent assault. In the course of directing the jury, and on two redirections sought by them, the trial judge instructed that the accused's motive was irrelevant to indecency.

[34] On appeal, White JA (with whom the Chief Justice and Fraser JA agreed) cited the following observations of Murray J in *Drago v The Queen*:[33]

> "… whether an act may be described as indecent because it offends against community standards of decency, may depend not only upon the nature or quality of the act in itself, but upon the motive or purpose of the actor. That would be so under the Code in my view, just in the same way as at common law. …
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> But where the act in question was capable of being regarded as indecent, but was not necessarily to be so regarded in itself, the

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29 AB 386; Tr6-15 LL28-37.
30 Tr1-6 L41.
31 Tr1-6 L41-Tr1-7 L2.
32 [2011] QCA 19.
33 (1992) 8 WAR 488 at 503.

> motivation of the actor might operate in one of two ways. It might of course confer the quality of indecency upon an act which might, differently explained, be held not to be so. On the other hand, the motive of the actor might render innocent an act which otherwise, without explanation, might be regarded as indecent."

[35] At paragraph [32] of her reasons, White JA drew from those observations the proposition that:

> "The quality of "indecency" is pre-eminently a question for a jury and where there is evidence capable of casting doubt upon the sexual quality of the alleged assault, the motive of the alleged offender must go to the jury for their deliberation and decision. …"

[36] The following paragraphs from her Honour's reasons illustrate eloquently why she concluded that that case was one which called for a direction with respect to the accused's motive in the context of indecency:

> "[28] Because the appellant placed the upper electrodes, on the complainant's evidence, on her breast tissue and the lower electrodes under the fold of her breasts, his Honour considered that the appellant's motive for doing so was irrelevant. This characterisation of the acts as 'unequivocally' sexual failed to have regard to a not insignificant body of uncontested evidence that the appellant was an ambulance officer, very interested in his work, particularly in the administration of the ECG and the readings, and had discussed that interest in the past in relation to patients with his superiors. Furthermore, Dr Verran regarded the reading from 21 October as unremarkable which arguably excluded (artifice) from placing the electrodes inappropriately for a good reading.
>
> [29] The body of evidence, if directed on motive, may have been sufficient for the jury to have a reasonable doubt about any sexual connotation in the assault. That might be so even if the jury accepted that the appellant obtained the complainant's consent to the further procedure by fraudulently representing that he came at the behest of a doctor. …"

[37] *Jones* is not to be taken to propound that a direction requiring the jury to consider motive in the context of indecency must be given on every occasion where indecency is an element of the offence. White JA was careful to identify the circumstances which would require it as those where there is evidence capable of casting doubt upon the sexual quality of the alleged assault.

[38] In *Jones*, there was no issue that the breasts were being touched. It was an intentional touching by both hands and by the application by the ECG pads. The act of touching the breasts was arguably for a therapeutic reason. That evidence cast doubt upon the sexual quality of the touching.

[39] By contrast, in the present case, there was no comparable evidence. The touching of the vagina, if accepted as being deliberate, did not have any possible legitimate justification. It was not part of the massage treatment; nor did the appellant contend

that it was. Thus the state of the evidence did not require the jury to consider motive in the context of indecency.

[40] This ground of appeal is not made out.

Ground 6 – inconsistent verdicts

[41] In *MacKenzie v The Queen*,[34] Gaudron, Gummow and Kirby JJ explained factual inconsistency in verdicts in the following terms:

> "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*[35] is often cited as expressing the test:[36]
>
> > '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.'[37]

[42] Their Honours supplemented the explanation with the following propositions concerning the process by which it is ascertained whether verdicts are inconsistent in this legal sense:

> "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.[38] 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.[39] 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.[40] 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.[41] 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.[42] …"[43]

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34 (1996) 190 CLR 348.

35 Unreported, 13 December 1954, per Devlin J.

36 See, eg, *R v Hunt* [1968] 2 QB 433 at 438; *R v Durante* [1972] 1 WLR 1612 at 1617; [1972] 3 All ER 962 at 966; cf Archbold, *Criminal Pleading, Evidence & Practice*, 43rd ed (1995), vol 1, par 4-457.

37 At 366.

38 See *Mercer v Commissioner for Road Transport and Tramways (NSW)* (1936) 56 CLR 580 at 595; *Ward v Roy W Sandford Ltd* (1919) 19 SR (NSW) 172.

39 *R v Wilkinson* [1970] Crim LR 176.

40 *Hayes v The Queen* (1973) 47 ALJR 603 at 604-605.

41 *R v Andrews Weatherfoil Ltd* (1971) 56 Cr App R 31 at 40.

42 *R v Hunt* [1968] 2 QB 433 at 436.

43 At 367.

[43] The appellant submitted that there was inconsistency of verdicts at two levels, namely, the acquittals on counts 1 and 2 and counts 5, 6, 7 and 8 on the one hand with the convictions on counts 3 and 4; and the acquittal on the count 12 digital rape count with the convictions on its alternative count and counts 9, 10 and 11.

[44] With respect to the first level, the appellant presented the following argument in written submissions:

> "35. … the complainant made clear in the La Pila s 93A statement (Exhibit 7), that she could not distinguish the conduct she alleged against the appellant on the separate occasions:
>
> Q: Can you tell me anything different that you can remember on any of those three other occasions?
> A: No nothing.
> Q: Or around a particular time? Or an event that happened?
> A: No they were pretty much the same as the first one.[44]
>
> 36. The particulars reflect this. The only differences in the particularised conduct are the increases in the number of times the complainant's vagina was touched during the massage and the addition of a count involving the breasts on one occasion (count 8) one alleging digital penetration (count 12) on another. These specific allegations both resulted in acquittals.
>
> 37. The complainant's account as to digital penetration was emphatic and clear in the La Pila s 93A statement from which she did not resile under cross-examination in her pre-recorded evidence at trial.[45]
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> 38. Her further evidence as to the conduct on the earlier occasions is also clear in material respects. She suggests that the touching of the vagina occurred on 'every' occasion she was massaged other than the first one at which her mother was present.[46] She makes no attempt to distinguish the nature of the touching on the first occasion to that on the final occasion or any other occasion (other than the alleged penetration).
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> > '… **every** time I went and had a massage, he's when I was lying on my back and on my stomach, ah he was massaging um um his hands were going from my um calf muscles like to my waist and then to my stomach and then back. Touching the private areas I told before, **the same thing**. But his fingers were not sticking into that like he didn't really try to. So it was not as inappropriate as it was on that Friday.'[47]
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> 39. Indeed, throughout the La Pila s 93A statement, she uses terms such as 'like the same thing happened',[48] and 'exactly the same think happened as on Friday'[49] more than once. She

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44 AB 620-621.
45 AB, 39, L49.
46 Eg AB 588, 629.
47 AB 589.
48 AB 552.
49 AB 596.

made clear that there was no massage, after the first, where he did not inappropriately touch her.[50]

40. The appellant denied ever having deliberately touched the child's vagina. Indeed he denied any contact at all with it other than in the last massage, which he explained as being 'inadvertent'. He also denied having ever touched the child's breasts (count 8)."

[45] The appellant submitted that there was nothing to distinguish the massage sessions involved in all of these counts and argued that the verdicts of acquittal necessarily demonstrated that the jury did not accept the evidence from the complainant which they would have had to have accepted before they could have brought in the two guilty verdicts.

[46] As to the other level, the appellant submitted that given the complainant's certainty about penetration – "for about five minutes" and "it was not an accident" – and the express denial of any penetration by the appellant, the only explanation for the acquittal is that the jury rejected the complainant's credibility and reliability on the issue. Having done so, the guilty verdicts based on her evidence were inconsistent with the acquittal on the digital rape count.

[47] As their Honours in *MacKenzie* stated, it is relevant for this Court to inquire into whether the verdicts at either level may be reconciled. In anticipation of such an inquiry, the respondent identified a number of evidential features which, it was submitted, permitted the verdicts to be reconciled at each level. These features are detailed in the following five paragraphs. It was further submitted that the verdicts of acquittal did not require a rejection of the complainant's credibility and reliability generally.

[48] Counts 1 and 2 were particularised as having occurred on 3 October 2010. However, the complainant told Senior Constable Foo that she thought that the first incident happened "in February" (meaning February 2011).[51] Whilst it is true, as the appellant says, the date is not an element of an offence, the summary of the particulars in the document given to the jury did identify those two counts by reference to that date. Further, in her statement to Detective Sergeant La Pila, the complainant spoke about the "first massage" she had after her mother's departure. On the booking evidence, that massage took place on 3 October 2010. The complainant stated that on that occasion the touching occurred as the appellant's hands "seemed to slip",[52] that it "didn't seem to be on purpose like he did it on purpose"[53] and that this was consistent with her understanding that "he was supposed to massage my legs only so his hands wasn't supposed to go in between my legs".[54]

[49] In respect of counts 5, 6, 7 and 8, the complainant did not herself make a statement to police in terms of the touching at that massage being accidental. However, as noted, her homestay mother testified that the complainant told her on 3 June 2011 that she thought that the appellant's hand had "slipped and it was an accident"

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50 AB 629.
51 AB 523.
52 AB 611.
53 AB 614.
54 *Ibid*.

during the massage previous to the last one.[55] On the booking evidence, that was the massage in late March 2011.

[50] By contrast, none of the complainant's accounts of the massage on 5 February 2011 attributed the possibility of slipping or accident to the touching that she said occurred on that occasion. The complainant's descriptions of other touchings being "pretty much the same" as the first and "the same thing" happening every time are revealed by the detailed questioning about each massage separately, to be generalisations. That questioning elicited references to slipping and accident in respect of some only of the occasions. The complainant did not reference those characteristics to all occasions nor is it to be implied that she meant to do so.

[51] The references to the slipping and accident in respect of counts 1 and 2 and counts 5, 6 and 7 may well have raised doubt in the jury's mind that the touching of the vagina on those occasions was deliberate. That doubt may have carried over in the case of count 8 to the touching of the breast. For counts 1 and 2, the mis-identification by the complainant of the date of the first relevant massage in her statement to Senior Constable Foo could well have added to the doubt. Taking these features into account, the acquittals on counts 1 and 2 and counts 5, 6, 7 and 8 can be reconciled with the convictions on counts 3 and 4.

[52] With respect to the counts for 3 June 2011, in her statement to Detective Sergeant La Pila, the complainant stated several times that the appellant was "trying to stick his fingers into", it may be presumed, her vagina.[56] The complainant explained[57] that "he didn't stick it like really deep but he did a little bit so this is why I am saying trying too (sic)". As to precisely where his fingers were, the complainant's account raises some doubt concerning the proof of the charge of rape. The context of the conversation appears to be a massaging and touching of the vagina, but her reference to feeling the appellant's fingers "in between my legs"[58] puts in question to some degree whether penetration was actually achieved. The acquittal on the rape count and the conviction on the alternative charge is consistent with there having been a reasonable doubt about penetration. The jury had been instructed that if they were not satisfied that there was actual penetration, then it was open to them to return a verdict of guilty on the alternative count.[59]

[53] More broadly, the jury were directed both as to the requirement to consider each charge separately[60] and in terms of the Markuleski direction.[61] Having regard to the matters to which I have referred, the verdicts that the jury reached on the respective counts were open to them acting in conformity with those directions. For these reasons, I am not persuaded that this ground of appeal has been established.

Ground 7 – unreasonable verdicts

[54] The appellant presented this ground as one that overlapped with Ground 6. It was submitted that having regard to the matters that that ground entailed and to a number of other matters, this Court ought to conclude that, upon the whole of the

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55 AB 231 Tr4-18 LL40-42; AB 236 Tr4-23 LL9-11.
56 AB 559.
57 AB 560.
58 AB 558.
59 AB 391 Tr6-20 LL8-12.
60 AB 383 Tr6-12 LL20-40.
61 AB 383 Tr6-12 L42-AB 384 Tr6-13 L1.

evidence, it was not open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt.[62]

[55] Those other matters were, on the one hand, the unlikelihood of the appellant having committed any of the conduct which, it was said, was manifested by his good character, unblemished career as a masseur, the location of the massage room and its accessibility by others, his cooperation with the police and the consistency of his explanation; and, on the other, the implausibility of the complainant's account having regard to the absence of any recent complainant for counts 3 and 4, her continuing to book massages after that one, her reported enthusiasm about the massage booked for 3 June 2011[63] and her having booked a full body massage for that occasion.

[56] Those of the matters which concern the complainant do not identify any inconsistency in her evidence of an order that would put it in doubt overall. Nor does her evidence lack plausibility. The complainant's pre-recorded evidence was that she understood a full body massage to be a massage of just the shoulders and the legs.[64] Although the complainant was not cross-examined as to why she continued to make bookings for massages, she did say, as I have noted, that she had persuaded herself to believe that the touching that had occurred had been inadvertent. That is, until she experienced the last massage on 3 June 2011. Further, she told Senior Constable Foo that she wanted to continue going to the tennis centre because she liked playing tennis, but that the appellant was the only masseur there, that he was there all the time, and that she could not avoid him.[65] These factors provide understandable explanations for the continued bookings including the last of them.

[57] The location and circumstances surrounding the massage room in that it was unlocked and easily accessible by others would have been a more persuasive consideration had the impugned conduct on the part of the appellant been overt. There would have been a significant risk of conduct of that kind being observed by others.

[58] In my view, the appropriate conclusion is that it was open to a jury which had had the benefit of seeing and hearing all the witnesses to be satisfied of the appellant's guilt on the counts on which he was convicted. I consider that this ground of appeal cannot succeed.

Disposition – appeal against conviction

[59] Since none of the grounds of appeal has succeeded, the appeal against conviction must be dismissed.

Sentence application

[60] The sole proposed ground of appeal against sentence is that it is manifestly excessive. At the sentence hearing, the Crown prosecutor submitted that the appropriate range for a head sentence was between two to three years.[66] The

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62 *R v PAH* [2008] QCA 265 at [29] and [30]; *R v Lacey and Lacey* [2011] QCA 386 at [115].

63 AB 229 Tr4-16 L48; AB 234 Tr4-21 L38 (evidence of her homestay mother).

64 AB 37 Tr1-28 LL15-25.

65 AB 511.

66 AB 471 Tr9-6 LL34-35.

submission of the appellant's counsel was for a head sentence of not more than two years with release at some point prior to the half way mark.[67]

[61] Given that the sentence imposed – two years to be suspended after nine months – was within the range for which defence counsel had submitted, on appeal against sentence the appellant would need to show in order to advance this ground of appeal, special circumstances sufficient to warrant the conclusion that the appellant ought not be bound by the conduct of his case in the court below.[68] Here, no such circumstances were identified in submissions on behalf of the appellant.

[62] Besides, a review of the cases to which this Court was taken in argument indicates that the sentence imposed was in no way manifestly excessive with regard to the term of imprisonment, suspension or operational period. Two of them may be mentioned briefly to illustrate this.

[63] In *R v Fereiro*,[69] the offender was a podiatrist. He was 33 years old with no criminal history. He recorded a 15 year old female patient getting changed for a consultation and massage. There were also two counts of indecent treatment – massaging of the groin to the line of the underwear and buttocks on one count, and massaging the breasts and buttocks on the other. He lost his professional employment. His sentence was 18 months suspended after eight months for an operational period of three years. That this sentence is less than that given to the appellant is accountable by the less invasive nature of the offending as not involving the vaginal area, and by the plea of guilty on the offender's part.

[64] In *R v Sutton*,[70] the offender was convicted of one indecent assault count and acquitted of other counts. He was 54 years old without a criminal history. He masturbated a 16 year old boy in the course of giving him a massage at home. The offender went to trial. He was sentenced to two years imprisonment with a recommendation for parole after four months. This Court affirmed the sentence of two years as reflecting the offender's serious breach of trust and the warranted elements of general and personal deterrence. The parole recommendation at one-sixth only of the sentence was described as "lenient".[71] That case has similarities with the appellant's case; however, the multiplicity of counts on which he was convicted undermines any claim for leniency with respect to time to be served.

Disposition – sentence application

[65] The proposed ground of appeal against sentence has no measurable prospect of success. The application for leave to appeal against sentence ought be refused.

Orders

[66] I would propose the following orders:
(a) Appeal against conviction dismissed.
(b) Application for leave to appeal against sentence refused.

[67] **MULLINS J:** I agree with Gotterson JA.

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67 AB 475 Tr9-13 L25; AB 476 Tr9-14 LL1-2.
68 *R v Walsh* [2008] QCA 391 at [23], *R v Frame* [2009] QCA 9 at [6].
69 [2006] QCA 10.
70 [2008] QCA 249.
71 At [58].