SUPREME COURT OF QUEENSLAND

CITATION:	*R v SCC* [2013] QCA 300
PARTIES:	**R** **v** **SCC** (appellant)
FILE NO/S:	CA No 30 of 2013 DC No 295 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	11 October 2013
DELIVERED AT:	Brisbane
HEARING DATE:	19 July 2013
JUDGES:	Chief Justice and Holmes and Fraser JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed.** **2. Convictions quashed.** **3. Enter verdicts of acquittal on counts 1, 2, 3, 5, 6 and 9.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL ALLOWED – where the appellant was found guilty of one count of maintaining an unlawful sexual relationship with a child under 16 years, one count of procuring a child to commit an indecent act with circumstances of aggravation, and four counts of indecent treatment of a child under 16 with circumstances of aggravation – where the complainant was the grand-daughter of the appellant's wife and had been living with the appellant and her grandmother – where the complainant gave evidence by way of two police interviews and by way of pre-recorded evidence at trial – where there were minor discrepancies between the complainant's evidence in her police interviews and her pre-recorded evidence – where the appellant contended that these discrepancies affected the credibility and reliability of the complainant's evidence – where the complainant's accounts were consistent in all essential respects – where the complainant indicated she had kept a handwritten journal

which became an exhibit at trial – where the complainant said she had subsequently typed the journal – where an expert called by the appellant to examine the complainant's computer found three typed diaries created after the first police interview that appeared to relate to the handwritten journal – where the evidence suggested that the handwritten journal was created after the police interviews – where, apart from count 5, the events described in the diaries occurred outside the jurisdiction – where the jury were directed that the diaries were relevant as "background evidence" and evidence demonstrating that the appellant had a sexual interest in the complainant – where the evidence about the diaries bore upon the complainant's credibility and the reliability of her evidence – whether on the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where the appellant contended his acquittals on the charges of rape in counts 4 and 7 and of indecent dealing in count 8 were inconsistent with his convictions on other counts – where the appellant contended that the rejection of the complainant's evidence on some counts undermined her credibility in relation to the other counts – where the complainant seemed to be as confident and articulate in her evidence about count 4 as she did in her evidence about the counts upon which the jury convicted – where there may be an explanation why the jury doubted the complainant's evidence on count 4, it does not satisfactorily explain why that doubt was not extended to other counts – where the conflict between the convictions and the acquittals on counts 4 and 8 remains so stark that it cannot be disregarded – whether there is any proper way the verdicts can be reconciled – whether verdicts are unreasonable and cannot be supported by the evidence – whether verdicts inconsistent – whether there is a risk of possible injustice in the convictions

Douglass v The Queen (2012) 86 ALJR 1086; (2012) 290 ALR 699; [2012] HCA 34, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
MacKenzie v The Queen (1986) 190 CLR 348; [1996] HCA 35, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
R v Kirkman (1987) 44 SASR 591, cited

COUNSEL: C Heaton QC for the appellant
G P Cash for the respondent

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

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

[2] **HOLMES JA:** I agree with the reasons of Fraser JA and the orders he proposes.

[3] **FRASER JA:** After a trial in the District Court the appellant was found guilty of six offences: maintaining an unlawful sexual relationship with a child under 16 years (count 1), procuring a child to commit an indecent act with circumstances of aggravation (count 2), and four counts of indecent treatment of a child under 16 with circumstances of aggravation (counts 3, 6, and 9, and as an available alternative verdict to rape charged in count 5). The appellant contends that the convictions should be set aside because the guilty verdicts are unreasonable having regard to the quality of the complainant's evidence in the context of the whole of the evidence and the acquittals on other counts, and because they are inconsistent with the acquittals.

The case at trial

[4] The complainant, the grand-daughter of the appellant's wife, was aged between 11 and 14 during the period of the alleged offending. The complainant came to live with her grandmother and the appellant (whom she called "Gramps") after the complainant's mother died. The complainant's grandmother gave evidence that the complainant lived with them from about June 2006. On 12 February 2010, after she had collected the complainant from a youth group meeting, the complainant told her that there was something that she had been wanting to tell her for a long time but had been scared that she would be angry with her. The complainant said that the appellant had been molesting her for almost the whole period she had been living with the appellant and her grandmother. The complainant said that the appellant had not actually penetrated her. He had tried to but she had done everything in her power to stop him, she had moved all around the place and he had tried to overpower her. The complainant also said that the appellant had raped her, but she added that she had kept moving around and he couldn't get his penis into her at that time. The complainant's grandmother contacted the police and took the complainant to the police station on 14 February 2010.

[5] The complainant was interviewed by police on 14 February 2010 and again on 18 February 2010 (when she was 14 years old) and she gave pre-recorded evidence on 8 August 2012, 5 November 2012, and 1 February 2013 (when she was 17 years old). It is useful here to reproduce from the appellant's outline of submissions a table which includes the Crown particulars derived from that evidence:

Count Verdict	**Date of offences**	**Nature of offences**	**Particulars**
1 Guilty	Between 31 January, 2007 and 13 February, 2010	Maintaining an unlawful sexual relationship with a child under 16 years	He started doing sexual things with her after her mother died, which was on 18 December, 2006. She estimates the indecent treatment commenced in about March or April 2007.
2 Guilty	On a date unknown between 6 December, 2008 and 31 December,	Procure a child to commit an indecent act (aggravated)	**Expose Vagina (Granny flat)** Complainant went to the granny flat in the back yard where her mother's ashes were. He came in

	2009 **93A#1** **14 February, 2010: p20-26**		as she was sitting talking with her mother's ashes. She went to leave and he told her to sit down as he wanted to talk to her. He asked her how her bits were and asked her to show him her vagina. He 'bribed her' by telling her he would take her shopping for clothes. So she pulled her pants down and lifted her shirt and exposed her vagina to him. She then pulled them straight back up and went to leave again, but he stopped her. (p.21)
3 Guilty		Indecent dealing with a child under 16 (Aggravated)	**Rub vagina with penis (Granny Flat)** He then pushed her onto the bed. She said "*no*" and tried to get up but he pushed her down and got undressed. He then rubbed his penis up against her vagina for 3 minutes. (p.25). He did it really slowly on all fours and moved back and forth. It was wet and disgusting. "*I wasn't screaming that time because he was doing it lightly. I put my hands on my face and squeezed really hard and left marks on my face.*"
4 Not Guilty	On a date unknown between 1 December, 2009 and 13 February, 2010 **93A#2** **18 February, 2010: p2-10**	Rape	**Digital Rape** Boat incident In the second interview with police (on 18 February, 2010) she explained that her 'Gramps' used to always take her out in the boat and then take the opportunity to molest her. On one occasion, he took her to a spot where the boat got bogged and he had to push it over to a narrow passage. In this spot he 'fingered her'. She kept refusing to have anything to do with him and so he forced himself upon her. She said no and [he] was trying to pull her pants down but she resisted him. He pulled her down onto him so that she was on top of him with a leg on each side of him and up close to him so that he could get access to 'everything'. "*I couldn't get away because he had so much force on my legs.*" "*He put his hand down my pants and put his finger into my vagina.*" Some other people came along in a boat and so he stopped and when he was talking to the other people

			she started up the boat and headed off. This was also the last occasion of sexual abuse on the boat and it happened before the trip to Tasmania.
5 [Not guilty of rape] [Guilty of indecent treatment of a child under 16 (aggravated)]	On a date unknown between 17 January, 2010 and 28 January, 2010 **93A#1** **14 February, 2010: p13-20**	Rape (Not Guilty) *Alternatively* Indecent treatment of a child under 16 (Aggravated)	**Penile Rape** (Post shower incident in main bedroom) This incident happened on a Wednesday about 2 weeks prior to the interview with police. (p19) "*I had a shower and got out and put a towel around me. He came in and put me on the bed and took the towel off me and raped me. He kept trying to get his penis in me, and I wouldn't let him. I was just screaming and yelling and wanted to get out of there. He put one leg on either side of me and tried pushing it in. I was screaming and crying and I was just so scared."* She was moving away from him and he couldn't put it in. She said "*I think it went in a little bit...*" (pl5). He continued until he ejaculated on and 'in' her vagina, "*but not inside me, just the top and the inside."* (p.16)."
6 Guilty	On a date unknown between 25 January, 2010 and 13 February, 2010 **93A#1** **14 February, 2010:** **p.27-29**	Indecent dealing with a child under 16 years (aggravated)	**Touching of breasts (Patio Incident – Outside)** About 3 weeks prior to the interview with police on 14 February, 2010, she said they were outside watching TV and he asked her to come and sit on his lap. She said, "*No*", but he told her nothing would happen. So she sat on his lap. He then put his hand in her pants and put his finger into her vagina. (Count 7). She didn't say anything because he would just get angry. He then stopped and started playing with her chest (Count 6) and then she got up and said she had to help with the dishes and she went inside and sat next to Nana. (p.27) She went on to explain that she asked him a question for an assignment. It was then that he told her to sit on his lap. When she sat on his lap he *then* put his hands inside the dress and started playing with her breasts (therefore, now Count 6 was first in time).

7 Not Guilty		Rape	**Digital Rape (Patio Incident - Outside)** He then said, "*stand up I want to see your dress.*" He then lifted up her dress and then he put his hands in her pants and fingered her. She then said that she had to go inside to do the dishes and she left and went and sat next to her Nanna. So, when first giving this account, she said that she sat on his lap and then he put his finger into her vagina and after that he touched her on her breasts. She then went on to explain this event again but this time she sat on his lap and he touched her breasts and then he asked her to stand up and it was then that he put his finger into her vagina.
8 Not Guilty	On a date unknown between 1 January, 2010 and 13 February, 2010 **93A#1 14 February, 2010: p.29-32**	Indecent dealing with a child under the age of 16 years (aggravated)	**Pool Incident** In the pool, a couple of weeks ago, he pulled her close to him and pulled her boardies down and he pulled his swimmers open and put his penis down inside the top of her boardies, and then she pulled away. (p31) "*He does it in the pool lots of times but that was the most recent time.*"
9 Guilty	12 February, 2010 **93A#1 14 February, 2010: p8-13**	Indecent dealing with a child under the age of 16 years (aggravated)	**Couch incident** On the Friday just passed (12 February, 2010) he grabbed her on her vagina with his hand and he started moving his hand really quickly for about 5 seconds. She moved his arm and he stood up. Then she grabbed a cushion and put it between her legs. He got really angry and then went into the office.

[6] It was not until the second police interview that the complainant spoke of the appellant having digitally raped her on a fishing trip (count 4). The complainant gave the accounts of the other alleged offences in the first interview. At that interview, the complainant told police that her grandfather had sexually abused her for the past three and a half years and it had got really bad lately. She had told her friend at youth group about it a couple of months earlier and also in about October of the previous year. Her friend told her that if she did not tell her grandmother then her friend would tell somebody. As a result the complainant told her grandmother. The complainant said that she had been afraid that her grandmother would be angry with her. The complainant thought that the first time her grandfather did anything was when she was 11 when he grabbed her chest when she got out of the shower.

He just kept doing it again and again. At first she was really scared but she got used to it in the end. The complainant said that "he does it so regularly now that I can't remember the first time, when he did it" and that "it's usually more than once a day". In response to a question from the police officer whether the appellant did it more than twice a day most of time, the complainant responded that he did it whenever her grandmother was not around and he did it a lot. She said that her grandfather played with her chest; she hated it a lot, but he thought it was normal and that "he's making them grow…by stimulating or something…". The complainant spoke of the "fingering thing" happening more than three times a day probably when her grandmother was not around, starting maybe a couple of months after her mother died. She said that the appellant grabbed her around the arms and "pulls me places or throws me onto the bed or…tries to get me in the shower with him, tries to make me go skinny dipping with him, but I never go skinny dipping with him. He tries to make me have baths with him and anywhere where I am naked that's where he tries to get me."

[7] The complainant also spoke of a trip to Tasmania during the Christmas/New Year period preceding the interview. The complainant said that on that trip the appellant started playing with her in an outside bath but was interrupted when the complainant's grandmother arrived. The complainant spoke of two other occasions in Tasmania when the appellant did or attempted to do something to her. In that part of the first interview the complainant referred to writing in a diary. She gave evidence and was extensively cross-examined on that topic.

[8] The complainant was also cross-examined in detail about what she had told police in her two interviews and about her pre-recorded evidence-in-chief. In response to suggestions that the appellant did not threaten to hurt anyone, the complainant said that he had told her that he would kill or hurt her friends, with specific reference to a friend who gave preliminary complaint evidence, and that he had threatened to kill the complainant. The complainant was also cross-examined about undated letters which she had written to the appellant in which she was apologetic about her inability to meet his standards and expressed her fondness for him and a wish for his company and attention. In the course of cross-examination on the letters, the complainant said that she would never complain to the appellant's face about him molesting her "in fears that he would hurt me",[1] and that (in relation to a request in one of the letters that the appellant muck around with her in the shed) that "he was ignoring me, and when he ignored me it meant that he was angry at me, and when he was angry he hurts me. And so I was asking him and giving him what he wanted…[b]ecause I was afraid he would hurt me…[p]hysically and sexually".[2] The complainant gave the following evidence in cross-examination:

> "And I suggest to you that in both of those letters you're indicating that you were quite desperate to spend time with him?-- In the letters it's portraying that, but as a person I was not.
>
> So, were you writing lies in the letter?-- I was writing lies into a letter. Yes.
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> So, you, on your version of events, you were lying in some letters to your grandfather, for what reason?-- To protect myself from getting hurt.

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1 Transcript 1 February 2013, p 1-7

2 Transcript 1 February 2013, p 1-9, 1-10.

> How did lying in a letter expressing a desire to be with him, protect you from being hurt?-- Because he was of the opinion that I didn't want to spend time with him, which was true. And so he got very angry at me, and kept threatening to hurt me. And so I was writing these letters to try and fix the situation with him so I didn't get hurt.
>
> And inviting him into your bedroom at 6.30 or 7 in the morning to wake you up?-- In the letter, yes.
>
> I mean, you would have been horrified-----?-- He worked – he worked with trucks, so he was always up early. And so I thought that he would be able to just knock on the door and wake me up.
>
> And if he was sexually abusing you, the thing you would want to chat to him about, surely, is to get him to stop sexually abusing you?-- I told him to stop all the time. He never listened."

[9] The complainant denied suggestions made by defence counsel that the appellant did not molest her and that her allegations were untrue.

[10] In cross-examination the complainant's grandmother gave evidence that the complainant told her that the appellant had photographs of the complainant's friends in their houses on his telephone and had threatened to harm them. She agreed that the complainant had been keen to go with the appellant on a lengthy driving trip in May 2009 and that the complainant had been upset when she hadn't gone on other trips with him.

[11] The complainant's friend gave preliminary complaint evidence that in late 2009 the complainant told her that the complainant's grandfather used to have showers with her and "feel me". In cross-examination she agreed that the complainant spoke to her about this on two occasions, the first of which could have been in late 2009 and the second of which could have been in late 2009 or February 2010 at a youth group. She agreed that on the second occasion she convinced the complainant to tell her grandmother. She could not remember whether the complainant used the word "rape" but agreed that it did not get any higher than that "[h]e got worse and he tried to go, like, all the way with her." Her evidence substantially reflected her statements in a police interview on 14 April 2010. The complainant's great aunt and uncle gave evidence that on the night of 12 February 2010 the complainant said that the appellant had been interfering with her for about three years, that every opportunity when they were alone the appellant would either grope her breasts or touch her indecently in some way, and that he had photos on his phone of her friends and would hurt them if she did not do what he wanted.

[12] The appellant's sister gave evidence in the Crown case that a few months before he was arrested she saw the complainant deliberately rub her foot up and down the appellant's legs; the appellant moved away and the complainant smirked at the appellant's sister.

Unreasonable verdicts

[13] Under the ground of appeal that the verdicts of guilty are unreasonable, the court is required to review the record of the trial and decide whether, on the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the

appellant was guilty of the offence.[3] If that review results in this Court having a reasonable doubt about the appellant's guilt the conviction must be set aside unless that doubt is capable of being resolved by reference to the jury's advantage over this Court in seeing and hearing the evidence as it was given.[4]

[14] The complainant's evidence of the appellant's conduct in relation to those counts upon which he was convicted was detailed and plausible. There were some minor differences between the complainant's description of the appellant's conduct in the police interviews and in her evidence, but her accounts were consistent in all essential respects and they were essentially consistent with the preliminary complaint evidence. The appellant argued, however, that the credibility or reliability of the complainant's evidence was thrown into doubt by various inconsistencies and discrepancies.

[15] The inconsistency between the complainant's letters to the appellant and the evidence of the complainant volunteering to be in the appellant's company on the one hand, and her evidence that she sought to avoid the alleged sexual abuse on the other hand, did not necessarily require the jury to doubt the general reliability of the complainant's evidence. The jury could accept the complainant's evidence of the appellant's sexual misconduct and find a satisfactory explanation in the vulnerable and conflicted position in which the complainant found herself. That is suggested, for example, by the complainant's evidence quoted in [8] and [34] of these reasons. Some discrepancies could also be attributable to the lapse of time after the alleged offences. For similar reasons the suggested confusion in the complainant's evidence about the order of the events charged in counts 6 and 7 (see the table in [5] of these reasons) did not require the jury to doubt her evidence that count 6 did occur.

[16] In the second police interview the complainant referred to an occasion when her bed collapsed when the appellant forced herself onto him and she kicked him off the bed while he was holding her down. The complainant said that the appellant told his wife "that he dived into the bed to go for a nap and it collapsed inwards".[5] The complainant dated these events as having occurred in January 2010 after the trip to Tasmania. There does not seem anything surprising about the complainant making these disclosures only in the second interview. Her account of the appellant's explanation to his wife is inconsistent with the latter's evidence that when she became aware that the bed was broken the complainant told her that she and her brother had broken it, but the jury were not bound to reject the complainant's version for that reason or, if they doubted it, to think that it fatally undermined her evidence of the appellant's sexual misconduct.

[17] The evidence about diaries created by the complainant is more concerning.[6] In her pre-recorded evidence the complainant said that she wrote in a diary throughout the duration of the Tasmanian trip. She identified that diary as the handwritten journal which became exhibit 1. The journal of the trip commences on 19 December 2009 and concludes on 7 January 2010 (the twentieth day of the trip) with a reference to

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3 *M v The Queen* (1994) 181 CLR 487 at 493; *MFA v The Queen* (2002) 213 CLR 606 at 615.

4 *M v The Queen* (1994) 181 CLR 487 at 494.

5 Record of interview 18/02/2010 at p 14.

6 The admissibility of the evidence about the diaries is at least doubtful. There was no objection to its admission, presumably because defence counsel wished to use the diaries in support of a challenge to the complainant's credibility.

arriving at home. The following page refers to 27 January 2010 and includes statements (apparently relating to count 5) that "Gramps raped me … it was extremely painful … [h]e ejaculated all over me and 'inside' me … he threatened to kill [her boyfriend] if I told anybody …". The complainant gave evidence that she subsequently typed the journal because she felt that her writing was not very neat. The typed, eight page diary became exhibit 2. It is not identical with the journal, but the text is very similar and there is no significant difference in the chronology of described events. The eight page diary does not include any entry for 27 January 2010. The police officer who interviewed the complainant gave evidence that it was provided to police just after the second police interview of 18 February 2010 and the journal was provided to police after June 2010.[7]

[18] The cross-examination on this issue is best understood in the context of the evidence subsequently given in the defence case. The appellant did not give evidence. He called evidence from Dr Schatz, who was accepted by the Crown as an expert in computer and digital science. Dr Schatz examined a computer which the complainant had used. He was asked by the appellant's solicitor to examine the computer to ascertain whether there were any electronic documents relating to the handwritten journal. The computer clock was accurate. Dr Schatz found in the "guest user account" of the computer three typed diaries that appeared to relate to the journal: a two page diary covering days 1 to 5 (19-23 December 2009) which, in Dr Schatz's opinion, was first created at 8.29 pm on 16 February 2010 (exhibit 14); a three page diary covering day 1 to 20 (19 December 2009 to 7 January 2010) which, in Dr Schatz's opinion, was created at 4.18 am on 18 February 2010 (exhibit 15); and the eight page diary (exhibit 2) which, in Dr Schatz's opinion, was created at 7.07 am on 20 February 2010. The prosecutor did not dispute this evidence. Dr Schatz agreed in cross-examination that his evidence assumed that the computer's clock was accurate when the documents were created. There is no reason to doubt that it was. The appeal should be assessed on the footing that the documents were created at the times stated by Dr Schatz. That being so, I will refer to the documents by the dates assigned by Dr Schatz.

[19] The diaries (like the journal) refer to the complainant's strong dislike of the appellant and her concern that she was being blamed for disharmony on the trip. The misconduct attributed to the appellant in the 16 February 2010 two page diary was limited to statements that the complainant did not want to go on the Tasmania trip "knowing what gramps would do to me", and he was a "…perve he kept staring at me all the time…" . Additional allegations were implied in the 18 February 2010 three page diary in the references to there being "a huge outside bath and…", "while they were gone gramps…", and the appellant was a "perve" who helped a 15 year old girl to get dressed. It was not until the 20 February 2010 eight page diary that allegations appeared that the appellant was feeling the complainant's breasts, digitally raping her, and attempting to have sexual intercourse with her.

[20] In cross-examination the complainant first said that she could not recall whether her journal was written in full before she returned from Tasmania on 7 January 2010. Ultimately she agreed that it was. She agreed that she had put the journal into a typed form using a computer in the house. She said that she did that before her first interview with police on 14 February and that she created only one typed document (the 20 February diary), which followed the journal fairly closely. She

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7 Police Officer Geck, transcript 6 February 3-27, 28.

denied that she had created any other typed document or that she had created any other document and then changed the order of things. She denied that she started typing an electronic version of her trip to Tasmania on or about 16 February after her first interview with the police. She denied that she created a second version on 18 February, the day of her second police interview. She denied that the 20 February diary was commenced on 20 February. She said that was impossible. She said, as she had in evidence-in-chief, that she created the 16 February diary shortly after getting back from the trip to Tasmania because she felt her journal was not very neat. (The journal tendered in evidence looks very neat to my eye.) She denied that her journal had not been written by then. She said that she recalled copying the 16 February diary word for word from her journal.

[21] The complainant agreed that most of the wording for day 3 of the 16 February diary was in day 2 in the 18 February diary. (The wording for day 2 in the 16 February diary was in day 10 in the 18 February diary.) The complainant could not explain why some text in the 16 February diary for day 3 was in the 20 February diary for 20 December 2009 (day 2). The complainant gave evidence in cross-examination that she created a "written journal on the trip, and then writing one up that didn't have much in it to hide it from [the appellant] just in case he found it, and then I wrote a proper one. I do recall writing one that had explicit and one that didn't"; and she added that she wrote one journal whilst she was away and then "I typed one that didn't have anything bad in it and then I typed the actual journal up, because I was afraid he would find the bad one…".[8] She agreed that the 20 February diary did have "bad stuff" in it. She was not quite sure what had gone wrong there. The complainant denied that it was only after she had been to the police that she started a diary on about 16 February, that she did not copy from a written journal, that she had made up a version of events in drafts, and that the handwritten journal was the last document she created.

[22] The complainant's grandmother gave evidence in cross-examination that on the trip to Tasmania the complainant was writing in a book. The complainant's grandmother said that she handed a book to the police but it was not the book she had seen the complainant writing in. The complainant's grandmother had not seen the complainant sitting with a diary and typing on the grandmother's computer before they went to the police. After they went to the police she had seen the complainant with her diary typing into the computer.

[23] The appellant's arguments upon this topic largely adopted defence counsel's submissions to the jury. It appears from the trial judge's summing up[9] that defence counsel submitted to the jury that the complainant must have lied when she said in evidence that she had prepared the 20 February diary before she spoke to police. Defence counsel submitted that the only logical conclusion from the content and chronology of the documents was that the complainant lied to police when she said that she had written the journal on the days when things occurred in Tasmania and the complainant manufactured the 20 February diary after she had been interviewed by police.[10] Defence counsel submitted that the diary evidence was important as

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8 Transcript of 8 August 2012, 1-36.

9 Transcript 4-42.

10 Transcript 4-34, 4-36.

showing that the complainant could not be trusted as a reliable and credible witness.[11]

[24] The respondent submitted that although there was evidence which might satisfy the jury that the typed diaries were created after the first police interview, that did not compel a conclusion that the handwritten journal was not an accurate and contemporaneous account of the appellant's conduct in Tasmania, the differences amongst the typed diaries were explicable as errors in copying, and the complainant produced electronic versions because she thought her handwriting was not neat enough. The different accounts in the diaries were said to be explained by the complainant's desire to produce a version which did not include the "bad things". The respondent argued that the inconsistency between Dr Schatz's evidence and the complainant's evidence (particularly that all versions of the diary had been completed before the police interviews) could be attributed to the lapse of time between the police interviews in February 2010 and the complainant's pre-recorded evidence in August 2012.

[25] It is difficult to accept that either of the first two typed diaries was created by copying from the much longer and more detailed handwritten journal, particularly having regard to the variations in the date order and content. In addition, the statement in 27 January 2010 entry in the handwritten journal that the appellant threatened to kill the complainant's boyfriend if she told anybody is difficult to reconcile with the complainant's statements relating to count 5 in the first police interview and it is inconsistent with her pre-recorded evidence. Immediately after the complainant made the statements in the first police interview upon which count 5 was based, she said that the appellant afterwards drove her to see her boyfriend, the appellant apologised for what he had done, he dropped her off at her boyfriend's place, and he later collected her from her boyfriend's place and took her home.[12] The making of a threat to kill the boyfriend does not sit comfortably with that account. In the complainant's pre-recorded evidence she readily agreed that the appellant did not make any threats about her boyfriend.[13] Furthermore, when the complainant was shown the reference in her diary to the appellant having threatened to kill her boyfriend if she told anybody, she said "… I'm not positive on that. I don't quite recall any stage of him saying that, but it most likely did happen. I just can't remember it."[14] On the face of it, if the diary entry is accurate and was made on or about 27 January, it might have been expected that in the police interview on 14 February the complainant would have mentioned that recently recorded threat to kill her boyfriend when she mentioned other threats.

[26] The combination of that evidence, the grandmother's evidence that the book which the complainant handed to police was not the book she had seen the complainant writing in on the trip to Tasmania, and particularly the unchallenged expert evidence of Dr Schatz and the way in which the content of the typewritten diaries grew and changed over time, strongly suggests that the journal tendered in evidence was created only after the police interviews. In summary, the complainant's evidence about when the electronic diaries were created was shown to be wrong and her evidence about when the journal was created was probably also wrong. Other

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11 Transcript 4-42.

12 Record of interview 14/2/2010 at pp 16-17, 19-20.

13 Transcript 1-45, 1-46.

14 Transcript 1-46.

discrepancies appeared, such as the doubt thrown upon the accuracy of the 27 January 2010 entry in the journal that the appellant threatened to kill the complainant's boyfriend if she disclosed the offending. In assessing the significance of the complainant's evidence about the diaries and the journal, the jury could take into account both the complainant's rather confusing evidence that there was a second journal which was not tendered in evidence and the significant delay (some two and a half years) between the time when the diaries were created and the time when the complainant was cross-examined about them. Even so, the errors in the complainant's evidence on this topic remain concerning.

[27] Apart from the entry in the journal for 27 January 2010 relating to count 5, the events described in the diaries occurred outside the jurisdiction. However, they were relevant, as the trial judge directed the jury, as "background evidence so that the offences aren't viewed in a vacuum" and, if the jury was satisfied beyond reasonable doubt that the evidence demonstrated that the appellant had a sexual interest in the complainant, as possibly suggesting that "it is more likely the defendant did what is alleged in the charges under consideration …".[15] The evidence about the diaries also bore upon the complainant's credibility and the reliability of her evidence. It cannot be dismissed as being of no importance.

[28] It is necessary to consider those matters in the context also of the appellant's contentions that the convictions were undermined by inconsistent acquittals.

Inconsistent verdicts?

[29] The appellant argued that his acquittals on the charges of rape in counts 4 and 7 and of indecent dealing in count 8 were inconsistent with his convictions on other counts; there was no logical or reasonable basis upon which the jury could accept the complainant's evidence in relation to those other counts whilst not finding it reliable and credible on counts 4, 7 and 8. The appellant acknowledged that the quality of the evidence given by the complainant about penile penetration charged in count 5 (upon which the appellant was found not guilty of rape but guilty of indecent treatment) might be regarded as differing from the quality of her evidence on other counts, but argued that in other respects there was no difference in the quality of the complainant's evidence in relation to the various counts. The complainant was confident and articulate in her evidence concerning all of her allegations, so that the rejection of the complainant's evidence in relation to some counts undermined her credibility in relation to the other counts. In the appellant's submission, a doubt about absence of consent could not explain the acquittals on the charges of rape because the complainant's evidence was that she did not consent and she either resisted or she succumbed only out of fear or intimidation. The appellant's case was that the offences did not occur at all and consent was not a real issue.

[30] In *MacKenzie v The Queen*,[16] Gaudron, Gummow and Kirby JJ said:

> "…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

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15 Summing at 4-21, 4-22.

16 (1986) 190 CLR 348 at 367- 368, I have omitted citations.

> relevant sense. 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. 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.
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> …
>
> 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 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'."

[31] It seems very unlikely that the acquittals reflect a "merciful" view of the facts. The question is whether there is a proper way in which the different verdicts can be reconciled.

[32] In relation to the acquittal of rape charged in count 5, the jury could have accepted that the complainant's evidence was generally credible and reliable whilst nevertheless harbouring a doubt whether the prosecution had proved penetration beyond reasonable doubt. The trial judge's summing up on count 5 included reference to the complainant's expressions of uncertainty about penetration which are quoted in the table in [5] of these reasons as well as other, similar expressions by the complainant: the appellant was "trying to push his penis into me", "I kept moving away and he couldn't put it in", "he kept putting it on and then moving". Although, as the table indicates, the complainant said "I think it went in a little bit", that expression was equivocal and it was preceded by the words "[a]s close to". The uncertainty in that evidence was consistent with the preliminary complaint evidence summarised in [4] and [11] of these reasons. The acquittal on count 5 is not inconsistent with any of the convictions.

[33] The respondent argued that the guilty verdicts were reconcilable with the acquittals of the rapes charged in counts 4 and 7 by reference to the failure by the prosecution to prove absence of consent beyond reasonable doubt. The trial judge appropriately directed the jury that proof of absence of consent was an essential element of the offence of rape and that the Crown case was that the complainant did not consent or any consent she gave was obtained by the appellant's threats or intimidation. The

respondent referred to a question, asked by the jury after they had deliberated upon their verdict for some hours, which conveyed that the prosecutor had indicated that a person under 16 could not give consent, noted that the trial judge had emphasised "consent", and asked about the meaning of consent and "is rape regardless of consent for under 16?" The trial judge redirected the jury that consent was immaterial to the indecent treatment counts but was an essential element of the rape offences: "…for those three counts, if you are not satisfied that the complainant did not consent, then it's not rape … with the indecent treatment charges don't worry about consent, but then when you look at the three rape charges, you have to satisfy yourself, one, that there was penetration and two, that the penetration occurred without the consent of the person…" The jury delivered their verdicts 24 hours later, after a further redirection. The respondent acknowledged that alternative verdicts were potentially available to the jury on counts 4 and 7, if the jury was in doubt about consent but pointed out that, with the acquiescence of defence counsel,[17] it was only in relation to count 5 that the trial judge directed the jury that they might convict the appellant of indecent treatment if the jury was not satisfied that the appellant was guilty of rape. In sentencing the appellant, the trial judge observed that the verdicts indicated that the jury were not prepared to accept that the acts occurred as a result of the appellant's threats. The respondent submitted that the verdicts did not represent a rejection of the complainant's evidence about the appellant's acts.

[34] The acquittal of the rape charged in count 7 may be explicable on the basis that, although the jury accepted the complainant's evidence about the appellant's acts, they harboured a doubt whether the complainant's evidence was sufficient to establish lack of consent. In the police interview the complainant said that "I just let him do that because he was having a good day and … the whole family was happy that day because … it's his mood that sets the family's mood … I didn't want to make him angry because then everyone would get angry and upset and it'd be my fault again …". In relation to that count, the trial judge summed up the prosecution case on absence of consent as relying "on the complainant's evidence that she thought nothing was going to happen and also her evidence that she was in fear and intimidated to prove the element that she did not consent." The jury might well have found that this evidence was insufficient to prove absence of consent beyond reasonable doubt also bearing in mind her evidence that she sat on the appellant's lap at his request and didn't complain of his conduct. An acquittal on that basis did not necessarily throw a doubt over count 6, in which absence of consent was irrelevant. Whilst the complainant's evidence was generally to the effect that she hated what the appellant was doing and sought to avoid it, her evidence on this count was not as compelling. The jury may not have found that the complainant did consent, merely that they were not satisfied beyond reasonable doubt that she did not consent in this instance. The acquittal on count 7 can be reconciled with the guilty verdicts on other counts without necessarily casting any shadow over the complainant's general credibility and reliability.

[35] The complainant gave evidence about count 4 in her police interview of 18 February 2010. She told the police that this offence occurred about four weeks before that police interview, and she gave detailed evidence about what the appellant said when inviting her to go fishing with him, what he said on the way to the boat, the drive to

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17 Transcript 7 February 2013 at 4-3.

the boat, and what they did and where they went in the boat.[18] Her statements in the police interview made it clear that she did not consent and that she conveyed that to the appellant: she said about events shortly before the alleged offence that "I keep refusing to have anything to do with him he'll grab me and like on the arms and [he'll] push me onto the chair that's in the boat … then he'd put one leg, one each of my legs on either side of him and keep pulling me closer to him, and I'll keep shuffling and sitting back up and he'll keep pulling me down … and then he tried to pull my pants down and I kept pulling them back up … I told him to stop but he said no, and he kept going … I sat back up and … he pulled me back down again."[19] After referring to the appellant being interrupted when another boat arrived and telling police that the appellant moved the boat to a different location, the complainant gave evidence of count 4. She said that "he fingered me there", "I couldn't get away because he had so much force on my legs and he was fingering me", "he put his hands over my pants and put his finger inside my vagina and was moving it around"; that lasted for "[a]bout 5 minutes".[20] The complainant made further statements to the same effect and also gave details about how the appellant undid her pants, that she "pulled up and got away from him and I said I really don't want to do this [anymore] can we go home", and that the appellant reacted by telling her that she was "just being a little girl and you can never grow up can you …".[21] The trial judge reminded the jury that "the prosecution relies on the act of the defendant putting his finger into her vagina as the act of penetration and in relation to consent, the prosecution says the complainant's evidence that she pulled away from the defendant and kept refusing his advances is evidence that she did not consent".

[36] Notwithstanding the clarity and forcefulness of the complainant's evidence of the offence charged in count 4 and the trial judge's succinct summary of that evidence in summing up, the jury acquitted the appellant of that count. The complainant seemed to be as confident and articulate in her evidence about count 4 as she did in her evidence about the counts upon which the jury convicted. Her account about count 4 was no less detailed or compelling.

[37] A possible explanation for the acquittal on count 4 lies in the fact that, although the complainant said that count 4 occurred only about four weeks before the first police interview, she did not refer to it in that interview. It is not unusual to see partial disclosures of offences of this kind made in an initial police interview, with disclosures of more serious offending and instances of other offending progressively being made in subsequent police interviews. But the complainant's statements in the second police interview concerned a recent offence which seems less serious and no more embarrassing to disclose than many matters disclosed in the first police interview (for example, those which formed the bases of counts 3, 5, and 8). In the first interview the complainant referred to occasions when the appellant "puts his hands in my pants and fingers me" so often that it had become routine.[22] The police officer pursued that topic asking whether the complainant could remember what she was doing in the lead up to occasions when the appellant had put his hands down his pants and fingered her. The complainant responded by referring to occasions when

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18 Record of interview 18/02/2010 at pp 5-6.
19 Ibid p 6.
20 Ibid pp 7-8.
21 Ibid pp 8-9.
22 Record of interview 14/02/2010 at p 26.

she was sitting on a particular chair or doing something on the computer, and various other occasions. She did not mention the recent occasion on the boat,[23] even though in the second police interview she said that similar incidents had happened in the boat on many occasions: "… it's been happening so often that I just lost count how many times [it's] happened".[24] The jury might have reasoned that, in those circumstances, it was to be expected that if count 4 had occurred it would have been disclosed in the first police interview. But whilst that might explain why the jury doubted the complainant's evidence on count 4, it does not satisfactorily explain why that doubt was not extended to other counts.

[38] The respondent argued that the acquittal on count 8 was explicable by the generality of the complainant's evidence and her uncertainty about when the alleged incident occurred. The respondent relied upon the following exchange in the complainant's first police interview:

> "[Officer]: Is there any, um, like I know there's heaps of times, like you said that it happened quite regularly, but is there any that you can remember details of?
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> [Complainant]: Um. A lot used to happen in the pool, I never used to go skinny dipping with him, like, he used to make me stay with him in the pool and I used to use the excuse that I was cold and I'd move around and then try and get out and I say now I'm too cold can I get out now. And then he gets really mad. But, there were times when he held me against him and he grabs my boardies with his, with his with my, sorry with his fingers, and pulls it out, and so then you can my vagina and then he used his thumbs to pull his open and then he grabs his penis and puts it in mine and I just move away straight away because I hate it. And he goes stop being a woose, and I make sure my pants are tucked like, tied shut and he tries taking them off and everything, I'm like, no I want to keep them on and every time we go for a swim, every time that happened.
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> [Officer]: Mm mm Do you remember the last time you went for a swim and that happened?
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> [Complainant]: Um, I don't remember the day or the date, but it was in the day time and it was a couple of weeks ago. I don't know how many weeks exactly
>
> [Officer]: And can you tell me about that time?
>
> [Complainant]: Um, I just gotten in the pool and I was just about to get out when he climbed in, and he goes oh, [it's] stinking hot today and whinging about the heat. And when I was just about to get out and then he just pushed me in the pool, and I was like OK. So I got in the pool and when I went to get out again he jumped in and grabbed me and he goes, so how was your day, and started having a conversation with me about how crap his day was. And then um, he just

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23 Record of interview 14/02/2010 at pp 26-27.

24 Record of interview 18/02/2010 at p 3.

> did that to me, the thing he does. And then does it and I just swim away from him and I say, please don't do that and he goes, oh stop being a woose, he goes, why do you always whinge about this sort of stuff."

[39] The respondent's submission about the acquittal on count 8 focussed upon the generality of the complainant's evidence about the date and the statement that "he just did that to me, the thing he does" as justifying the conclusion that the quality of the complainant's evidence in relation to that count differed from the quality of her evidence relating to the other counts. The content of the allegation was made very clear by her earlier words in the same passage that "he grabs my boardies with his … fingers, and pulls it out, and so then you can my vagina and then he uses his thumbs to pull his open and then he grabs his penis and puts it in mine …". The complainant said that the appellant had done this "heaps of times", count 8 being the most recent occasion. Defence counsel's submission was that this alleged offence did not happen.[25] The complainant's evidence was that this example of a frequent offence happened only a couple of weeks before the first police interview. The acquittal is not explicable by any uncertainty about the precise date of the offence or about the precise nature of the obviously indecent act described by the complainant.

[40] In *MacKenzie v The Queen*,[26] Gaudron, Gummow and Kirby JJ approved King CJ's "practical and sensible remarks" in *R v Kirkman*.[27] Amongst other matters, King CJ said that "juries 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…", that "…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", and that "[a]ppellate 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". Giving full weight to those cautions, the conflict between the convictions and the acquittals on counts 4 and 8 remains so stark that it cannot be disregarded.

Conclusion

[41] The Crown case was based upon the complainant's evidence. The jury were properly directed that a reasonable doubt with respect to the complainant's evidence on any specific count should be considered by them in their assessment of the complainant's credibility generally, but that it remained a matter for the jury as to what evidence they accepted and what evidence they rejected.[28] It ordinarily would be assumed that the jury followed those standard directions. But whilst the complainant's evidence of the counts upon which the jury convicted seems convincing, her evidence on counts 4 and 8 upon which the jury acquitted seems

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25 Summing up at 4-19.
26 (1986) 190 CLR 348 at 368-369.
27 (1987) 44 SASR 591 at 593.
28 Summing up at 4-25.

equally convincing. It is not easy to see how the manner in which the evidence was given could resolve the apparent conflict between the acquittals and the convictions.

[42] The jury might have concluded that despite the acquittals the appellant was probably guilty of the counts upon which he was convicted, but that is not sufficient. The "designedly exacting" criminal standard of proof requires proof beyond reasonable doubt.[29] The combination of the effect of the acquittals on counts 4 and 8 and the reservations about aspects of the complainant's evidence creates a doubt about the reliability of her evidence which compels the conclusion that there is a risk of possible injustice in the convictions. The convictions must therefore be set aside.

Disposition and orders

[43] I would allow the appeal, quash the convictions, and enter verdicts of acquittal on counts 1, 2, 3, 5, 6 and 9.

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29 *Douglass v The Queen* [2012] HCA 34 at [48].