SUPREME COURT OF QUEENSLAND

CITATION:	*R v SCD* [2013] QCA 352
PARTIES:	**R** **v** **SCD** (appellant/applicant)
FILE NO/S:	CA No 160 of 2013 DC No 216 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	29 November 2013
DELIVERED AT:	Brisbane
HEARING DATE:	7 November 2013
JUDGES:	Muir and Morrison JJA and Boddice J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The guilty verdicts in respect of counts 1 and 4 be set aside.** **2. Verdicts of acquittal be entered.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where the appellant was convicted of two counts of indecent treatment of a child under 12, under care (counts 1 and 4) and acquitted of two such counts (counts 2 and 3) and one count of rape (count 5) – where the appellant appeals against the guilty verdicts in respect of counts 1 and 4 on the basis that they are inconsistent with the acquittals on counts 2, 3 and 5 – where the appellant contends that the credibility of the complainant, whose evidence was uncorroborated, was irretrievably damaged by the not guilty verdicts on counts 2, 3 and 5 – where the appellant contends that the different verdicts represent an affront to logic and commonsense – where the respondent submits that the verdicts can be reconciled as the jury may not have been satisfied beyond reasonable doubt of the indecency of the conduct the subject of counts 2 and 3 and count 5 was a non-traditional form of rape – where the trial judge commented that it seemed "a little extraordinary", given the complainant's computer record of the allegations, that the clinical psychologist was told so little – where there were inconsistencies between the complainant's account of her

discussions with the clinical psychologist and the clinical psychologist's evidence of their conversations – where there were significant discrepancies in the complainant's evidence, including her change of position on whether the appellant was wearing underwear during the count 5 incident – where there was nothing in the complainant's evidence or the surrounding circumstances which rendered her evidence in relation to counts 1 and 4 more reliable – whether the verdicts can be reconciled

EVIDENCE – ADMISSIBILITY AND RELEVANCY – HEARSAY – STATEMENTS – SELF-SERVING – where the appellant participated in a video recorded interview with police and a pretext telephone conversation initiated by the complainant during which he denied all allegations made against him – where the trial judge refused to admit the record of interview and the pretext telephone conversation into evidence as they contained wholly exculpatory statements – where the appellant contends that the evidence did not offend the hearsay rule as it was not sought to be led to prove the truth of the appellant's denials – where the appellant relies on a line of English authority in which it was held that self-serving statements are admissible as evidence of the reaction of the accused – where the respondent relies on the principle espoused in *Callaghan* and *Kochnieff* that self-serving statements are inadmissible unless contained within statements containing an admission on which the prosecution seeks to rely – whether the evidence is admissible – whether the refusal to admit the evidence gave rise to a miscarriage of justice

Criminal Code 1899 (Qld), s 349(2)(b)

Barry v Police (SA) (2009) 197 A Crim R 445; [2009] SASC 295, considered
Jones v The Queen (1997) 191 CLR 439; [1997] HCA 12, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
MacKenzie v The Queen (1996) 190 CLR 348; [1996] HCA 35, considered
R v Callaghan [1994] 2 Qd R 300; [1993] QCA 419, applied
R v CX [2006] QCA 409, cited
R v Donaldson (1977) 64 Cr App R 59, not followed
R v Kirkman (1987) 44 SASR 591, cited
R v Kochnieff (1987) 33 A Crim R 1, applied
R v McCarthy (1980) 71 Cr App R 142, not followed
R v Pearce (1979) 69 Cr App R 365, not followed
R v Rudd (2009) 23 VR 444; [2009] VSCA 213, distinguished
R v Rymer (2005) 156 A Crim R 84; [2005] NSWCCA 310, distinguished
R v Storey (1968) 52 Cr App R 334, not followed
Spence v Demasi (1988) 48 SASR 536, considered

COUNSEL:	A Vasta QC, with K Payne, for the appellant/applicant B J Power for the respondent
SOLICITORS:	McMillan Criminal Law for the appellant/applicant Director of Public Prosecutions (Queensland) for the respondent

[1] **MUIR JA: Introduction** The appellant was convicted after a trial of two counts of indecent treatment of a child under 12, under care (counts 1 and 4). He was acquitted of two such counts (counts 2 and 3) and of one count of rape (count 5). He appeals against his convictions on grounds that:

1. the trial judge erred in not allowing him to adduce evidence that he had participated in a three hour police interview during which he protested his innocence;

2. the trial judge erred in not allowing him to adduce evidence that during a "pretext" telephone conversation he denied all of the complainant's allegations;

3. the guilty verdicts on counts 1 and 4 are inconsistent with the verdicts of not guilty on counts 2, 3 and 5; and

4. the guilty verdicts are unsafe and unsatisfactory having regard to the evidence impugning the complainant's credibility.

[2] The appellant also seeks leave to appeal against his sentences of two years and three months imprisonment suspended after 13 months, with operational periods of four years, on the ground that they were manifestly excessive.

Familial circumstances

[3] The complainant, who was born in 1994 in the Philippines, was adopted by the appellant and his wife, who was also a citizen of the Philippines when they met and married in 1989. The appellant was then about 39 years of age and his wife was 16. The couple had two male children, one was born in 1991 and the other in 1992. The complainant, who was a neglected and malnourished child, was taken by the appellant's wife into her care, and that of the appellant, in 1995 for a six month period. She was then returned to her mother's care, but after her health quickly deteriorated, the appellant and his wife adopted her informally.

[4] After his marriage, the appellant travelled a great deal out of Australia in the course of his employment. From 2002 to 2011, he was a humanitarian aid worker. He worked in Albania from the beginning of 2002 until about February 2003. It seems that the whole of the family then resided in Albania with the appellant. During vacations, the family rented an apartment in Burleigh Heads where they socialised with friends and relatives.

Allegations of discreditable conduct

[5] The complainant gave evidence of an occasion, whilst the family was living in Albania, when the appellant came to tuck her into bed. As he did so, he "pulled [her] pants and [her] undies down and he stroked [her] vagina and then he put them back up again, and then he kissed [her] on the forehead and he said, 'Goodnight'".

[6] The complainant also referred to an incident in Ethiopia between 2004 and 2006 when the appellant came into the bathroom where she was showering. He said that he needed to shave and get ready for a meeting. The complainant opened the door for him, got back into the shower and pulled the curtain. The appellant asked her if he could use the shower water so she would not get cold water in the shower. He opened the shower curtain and asked her to turn around. She did so and the appellant "booped [her] body and … touched the side of [her] breast, and … said, 'Wow, you're turning into a woman', and … his fingers just kind of went across [the] front of [her] vagina and then he said he was done and … went out to go to his meeting".

[7] The complainant also referred to incidents in Ethiopia when the appellant opened his robe and exposed his penis to her. These allegations were not within the counts on the indictment.

[8] The complainant's evidence in respect of the five counts on the indictment was to the following effect.

The count 1 incident (guilty)

[9] At the house of a relative in Forest Lake in which the family were residing in December 2002, the complainant and other children were playing in the pool when the appellant called to the complainant from the verandah that it was time for her to leave the pool. After she had showered, she complained to the appellant that her vagina "felt a bit weird because the shampoo … was still in there". The appellant asked her to lie on the bed. She complied with her legs "spread open" and "dangling off the edge". She felt something, which she thought was the appellant's nose, prodding the lips of her vagina and she felt "something like a tongue because it was wet and then he pulled out and he said, 'Does it feel better?'". The complainant responded, "I think it does".

The count 2 incident (not guilty)

[10] In late December 2002 or early January 2003, the family stayed at an apartment on the Gold Coast. On an occasion when the appellant was the only adult present with the complainant and other children, the appellant, who had a towel wrapped himself as if he had just showered, asked her to come into the bedroom. She did so. The appellant closed and locked the door and asked her to rub lotion on his chest. She complied. The appellant lay down and asked her to massage his feet, which she did. The appellant then "asked [her] to go on top of him, like lying down on top of him so that [her] pelvis was on top of his pelvis and against his genitals, but [she] was facing his feet and [her] legs were facing his face". The towel "was a little bit open … [and] his private parts were showing". As the complainant massaged the appellant's calf muscles, "he kind of rotated his hips against [hers]". He then said, "Okay that's – I'm good now" and the complainant left the bedroom.

The count 3 incident (not guilty)

[11] When the family was still holidaying on the Gold Coast, the appellant, the complainant and her brothers swam in the ocean. As the complainant was waiting for her turn to shower, the appellant suggested that she use his shower. The appellant entered the bathroom when she was showering. She asked what he was doing and he responded, "Oh, I want to have a shower and [the boys] aren't

finished". As he entered the shower, she "noticed that he had got an erection, and then he was washing [her] hair and [she] felt like his erection was pressing into [her] back". As soon as he finished washing her hair, she said, "Okay, I'm done" and "quickly ran out of the shower with [her] clothes and [her] towel on".

The count 4 incident (guilty)

[12] On an evening when the family was living in a house in Rothwell, Brisbane, and the appellant was visiting from Afghanistan, the appellant's wife and the two boys were in their respective bedrooms. The appellant and the complainant were sitting on a couch watching television when the appellant, who had his arm around the complainant, put his hand under her shirt and then under her underpants "to [her] vagina". She "quickly moved away and … asked, 'What are you doing?'". He responded, "I was just trying to rub your stomach". She replied, "Okay" and "sat closer to him". She recalled that he then "had his arms around [her] stomach again, and then his hands went down [her] pants of [her] undies and he started touching [her] front … and then he pulled out [his hands]".

The count 5 incident (not guilty)

[13] Again during one of the appellant's stays in Rothwell, the appellant drove his wife to her sister's home in Zillmere. After returning, he asked the complainant to come into his bedroom and give him a foot massage. The complainant "by this time … knew what that meant, so [she] went to the toilet to try and stall [for] time and he kept coming in knocking on the door saying, 'Are you done yet?'". After she "eventually finished", the appellant asked, "What did you do, did you do a number 1, or a number 2?". She replied that she had done a "number 2". The appellant told her to have a shower. He would not let her shut the shower doors and "would on occasion walk in to see what [she] was doing". As she went to dress, he told her not to put her clothes back on. Lying naked on his bed, he asked her to massage his feet. She did so and the appellant asked her to:

> "… go on top of him again just like [she] did in the Gold Coast, and then [she] did and then, then he asked [her] to move up a bit closer to his head so [her] legs were spread out so his head was in between [her] legs, and then [she] felt something go inside on [her] vagina, and, um, when [she] looked to [her] side, because there [was] a sliding wardrobe mirror in [her] parents' bedroom, and [she] looked to see what he was doing and he was oral, and [she did not] know how long he went for."

[14] She saw in the mirror the appellant "putting his tongue in [her] vagina". When it was over, he said that he needed to go and pick up his wife and "for some reason" she asked to go with him. When they were in the car, he asked her not to tell his wife about what had happened because it was their "little secret". The complainant said that the words "he was oral" meant that the appellant "was putting his tongue and he was licking [her] vagina". Asked if she felt the appellant's tongue go inside her vagina or part of her vagina, she responded, "My lips, that's what they are called, yeah".

The confronting of the appellant

[15] According to the complainant, before Christmas 2009, in Australia, the appellant asked the complainant why she was treating him so coldly when he did so much for

her. She said that she would tell him the next morning. That morning she told him "about all the incidents that had happened". The appellant denied the allegations. She then told him about his "having an erection in the shower, and he said, oh well, I get that sometimes because it has a reaction with the warm water. And then, sorry, he denied doing all those things". The appellant said, she thought in reference to the appellant making her lie on top of him in order to massage his feet, that "he might have mentioned along the lines of, oh, that was just a bit of fun". The appellant also said, "even though I can't remember what I did can you still forgive me". The complainant told him that, when she had children, she did not think she could ever trust him with them. The appellant commented to the effect that the fact that the complainant would not trust him or let him spend time with her children hurt him the most. Asked, "if we weren't daughter and father before, can we at least be friends now", the complainant responded, "yeah, okay".

The complaint evidence of the complainant

[16] The complainant's account was to the following effect. In January 2012 at the house in Rothwell, after the complainant and her mother had argued and the complainant had packed, preparatory to leaving home, her mother said, "I'm your mum and I'll always be here for you and you know you can always tell me things". The complainant then said that she had been molested by the appellant. Her mother enquired whether the appellant had penetrated her or had sex with her. She said no. Her mother asked what the worst thing that the appellant had done to her was and the complainant told her "about the oral, what happened". She told her mother about the appellant making her sit on top of him after a shower, licking her vagina and that she could "see it in the mirror". The complainant placed this incident at a time after the separation of the appellant and his wife. Asked if the complainant gave her mother any other details about things that had happened to her, she responded that she "mentioned about how he would make [her] massage his feet and lie on top of him". She said that she did not "go into a lot of detail" because she knew that it was hard for her mother to "listen to it because [they] were both really crying about it".

[17] After telling her mother what had happened, the complainant recorded the incidents in chronological order on her laptop.

[18] Asked if she had any conversations with other family members, she responded, "Yes, the next day we told my two brothers". Her eldest brother asked her:

> "… if it was true and [she] told him that it was. And then he asked [her] what was the worst thing that happened and [she] told him what [she] told [her] mum what happened which was bad. And then [her youngest brother] asked [her] if [she] was being serious or if [she] was joking and [she] said [she] wasn't joking and he did read [her] journal that [she] kept on [her] laptop."

[19] The complainant saw Dr Firth, a clinical psychologist, about a week after speaking to her GP, which was about a week after she had told her mother and brothers about her allegations. In evidence-in-chief, the complainant said that she was not able to recall what she told Dr Firth about her allegations against the appellant. In response to the question, "Do you recall that you did tell [Dr Firth] aspects of the allegations or you did talk about those with her?", she responded, "Not into full detail".

[20] In the course of cross-examination, the complainant confirmed that she had shown her youngest brother everything on the computer, with the exception of the Ethiopian incidents, and that the content of the computer was then the same as that of the documents downloaded from the computer shown to her by defence counsel. The complainant accepted that she had told Dr Firth of the Albanian incident, which she had said occurred in 2002. She denied having told the psychologist that she was five or six at the time, claiming that she said she was seven or eight. She also denied telling the psychologist that there were two incidents in Albania, one of which occurred when she had a broken arm and involved the appellant "put[ting] his hand on [her] genital parts" while he was giving her a shower. She affirmed that there was only one incident in Albania, that referred to in paragraph [5] above.

Cross-examination of the complainant

[21] Cross-examined about the count 1 incident, the complainant said that the appellant did not close the door to the downstairs room to which she and the appellant went after she showered.

[22] In respect of count 3, the complainant accepted that she had told the investigating police officer, "[The appellant] got an erection, I think. Yes, he got an erection, and I was actually scared ... I had shampoo in my hair, and I didn't know if he did it on purpose, but his penis kind of rubbed against my back". The complainant was asked by defence counsel if she was sure that she saw the appellant "in the process of getting an erection" and she responded, "Yes, I'm very sure". She said that she saw the erection when the appellant got into the shower.

[23] The complainant accepted, in respect of count 5, that she had told the interviewing police officer that she was not "too sure whether he had any undies on". She then accepted that in her computer notes she had asserted that the appellant "was lying on the bed without undies". When questioned about the discrepancy, she told defence counsel, "I think he was wearing undies". The complainant subsequently accepted that when she spoke to the police officer about the incident, she said that she thought that the appellant was wearing underwear at the time.

[24] Asked by defence counsel how she could reconcile her statement in cross-examination to the effect that the appellant was wearing "undies" with her evidence-in-chief that the appellant was not wearing "undies", she said, "Well, he was wearing undies when I first went on (sic), but before I went on top of him, he took them off … Which I know I didn't mention before". The complainant accepted that she had not mentioned this course of events to anyone previously.

The evidence of the appellant's wife

[25] The appellant's wife gave evidence that the complainant made her first complaint of sexual mistreatment to her in January 2012. She said, in substance, that the complainant then told her of the facts relating to the count 1 incident. She said that half an hour after the initial conversation, the complainant came back to her and told her about matters relating to the count 5 incident.

[26] She said that, on that and the following day, the complainant wanted to tell her "more and more". But on the morning of the second day, she told the complainant to write down anything else that she recalled in a journal as she "struggle[d]" and could not "listen to the details".

[27] In cross-examination, the appellant's wife accepted that at the time of the initial complaint she had had a disagreement with the complainant who had packed up her belongings and was moving out of the house. She accepted that it was "in those circumstances that [the complainant] said, well, look, I'm going to tell you something that's going to upset you".

[28] Asked in evidence-in-chief if she could remember any other details of misconduct revealed by the complainant around the time of the first complaint, she said that she was told by the complainant that when she went to bed, the appellant would ask her to come closer and he would "sit at the end of the sofa chair and … touch her private part". She accepted that she did not mention that to the police officer who interviewed her. She accepted also that she did not tell the police officer anything of the facts relating to the count 5 incident or the count 4 incident.

[29] The appellant's wife said, in effect, that for cultural reasons the invariable practice followed by herself and the appellant was that the appellant would not wash or undress the complainant. She said also that the appellant would not change even the boys' nappies.

The other complaint evidence

[30] The appellant's eldest son gave evidence to the following effect. He was told by the complainant in January 2012 of the allegations against his father. She told him that "something had taken place" and he asked if there had been "any penetration or anything with (sic) that nature". She replied "no". Asked if he recalled any other details of the conversation, he said he remembered that there was "some reference to massaging and in the shower somewhere". He thought that this was in Burleigh and that she had said "something about being naked massaging". In cross-examination, he agreed with the proposition that the appellant "washed and changed and dressed [the complainant] hundreds of times". He accepted, also, that it was not unusual for all the children to shower together and be washed by the appellant when they were young. He said that massages were common occurrences and the means by which the children "made most of [their] money growing up". He accepted that he "never" saw "anything untoward in relation to [his] father massaging [the complainant], or [the complainant] massaging [his] father".

[31] His mother suffered from "post-traumatic stress syndrome" and was "often … the instigator of the fights" between his parents. In that regard, he said that he saw scratches and bruises on the appellant and "broken computers and broken goods in the house". He said that they were "constantly fighting".

[32] The appellant's youngest son recalled the complainant making allegations of sexual impropriety against the appellant. He said that she really did not tell him much about each accusation, but "sort of, like, read them out". He also read them on the laptop at the complainant's invitation and telephoned the appellant and "asked him about them". He accepted in cross-examination that there were "[p]lenty of times" when the appellant had to clean the complainant up after she had defecated because of "some sort of bowel problem". He said that he had "walked in" on the complainant reading an erotic book which contained material which was "real explicit on different positions, and stuff". He accepted that it described a scenario where "a person lay on top of another person with her head towards the feet of that person, and their feet towards the person's head". He stated, "it was saying how,

and then he … was licking, like the lips – he was licking my vagina … how it felt good, and when his moist tongue touched my clitoris, and stuff like that". The complainant had denied reading any such book other than one titled "Politics" which had "nothing graphic in it".

[33] The substance of the evidence of Dr Firth was that the complainant told her that she had been sexually abused by her father. During the first session, the complainant said that the sexual abuse commenced when she was eight and went on for four to five years. During a subsequent session, the complainant said that the first time was in Albania in 2002 when she was around five or six. She said that she had broken her arm; the appellant had given her a shower and put his hands on her genital parts. That happened twice while she was in Albania. The complainant also told Dr Firth of matters consistent with her evidence in relation to count 1; however, Dr Firth's notes indicated that the count 1 incident occurred in Albania. Additionally, the complainant spoke of an occasion on which the appellant told her to get into bed, pulled up her dress under the sheets, pulled down her panties and rubbed her "genital parts". That was the extent of the complainant's account to the psychologist concerning her experience of indecent treatment at the hands of the appellant. Dr Firth kept contemporaneous notes of her conversations with the complainant.

[34] It is convenient to consider the grounds of appeal.

Grounds 1 and 2

[35] The appellant participated in a video recorded interview of more than three hours with police on 11 July 2012. In the interview, the appellant denied all of the allegations made against him. He also denied the complainant's allegations of indecent conduct in a pretext telephone conversation initiated by the complainant on 15 February 2012. Defence counsel submitted to the trial judge that the record of interview and the tape recording of the pretext telephone conversation should have been admitted into evidence. Defence counsel argued that the fact that the appellant "volunteered an interview" and made no admissions against interest went to "the probability or otherwise of guilt or absence of guilt". The same considerations, it was urged, applied to the recording of the pretext telephone call.

[36] On appeal, it was contended that this evidence did not offend the hearsay rule as it was not sought to be led to prove the truth of the appellant's denials.

[37] Reliance was placed on a line of English authority including *R v Storey*;[1] *R v Pearce*;[2] and *R v McCarthy*,[3] in which it was held that such evidence is admissible as: showing "the reaction of the accused when first taxed with the incriminating facts";[4] evidence of the defendant's "reaction which is part of the general picture which the jury have to consider but … not evidence of the facts stated";[5] and because "[o]ne of the best pieces of evidence that an innocent man can produce is his reaction to an accusation of a crime".[6]

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1 (1968) 52 Cr App R 334.
2 (1979) 69 Cr App R 365.
3 (1980) 71 Cr App R 142.
4 *R v Storey* (1968) 52 Cr App R 334 at 337–338.
5 *R v Donaldson* (1977) 64 Cr App R 59 at 65.
6 *R v McCarthy* (1980) 71 Cr App R 142 at 145.

[38] The authorities on which the appellant relied have not been accepted as authoritative in this State.[7] At least since 1987,[8] the long established principle that self-serving statements by accused persons are inadmissible unless in a statement containing an admission on which the prosecution seeks to rely has been applied. That is also the position in South Australia.[9]

[39] It seems that in some states that there is or has been a practice of the prosecution leading evidence of wholly exculpatory statements by the accused in records of interview.[10] No such practice exists in this State. In *R v Rymer*,[11] a wholly exculpatory statement by an accused was held admissible by application of s 60 of the *Evidence Act* 1995 (NSW). There is no equivalent provision in this State.

[40] Even if, contrary to my conclusions, there had been substance in the appellant's submissions, the refusal to admit the evidence under consideration was not productive of any injustice and could not have occasioned any miscarriage of justice. Defence counsel, in evidence-in-chief, led evidence from the appellant that he had been happy to speak to police and "give [his] side of the story". That evidence was unchallenged. The complainant accepted in cross-examination that, when she confronted him, the appellant had denied her allegations and that was also the effect of his evidence.

Ground 3

[41] The appellant's argument may be summarised as follows. The guilty verdicts on counts 1 and 4 are starkly inconsistent with the acquittals on counts 2, 3 and 5 in circumstances in which the complainant's credibility was critical, her evidence being entirely uncorroborated. The credibility of the complainant was irretrievably damaged by the not guilty verdicts on counts 2, 3 and 5 with the consequence that the guilty verdicts were "an affront to logic and commonsense".[12]

[42] Counsel for the respondent submitted that the differences in the jury's treatment of the five counts on the indictment are capable of being reconciled. The acquittal on count 2 was said to be explicable on the basis that the jury may have not been satisfied beyond reasonable doubt that the appellant's conduct was indecent. I am unable to accept, however, that any reasonable jury could so conclude. The complainant's evidence was clear. The appellant asked her to come into the bedroom. He closed and locked the door. After she had rubbed lotion on his chest and massaged his feet, the appellant, who was lying down and wearing only a towel, which was partly open so that his genitals were showing, had the complainant lie on top of him with her pelvis against his genitals. According to the complainant, the appellant did not stay still, but "rotated his hips against" hers. There could be no innocent explanation for the appellant's conduct if the complainant's evidence was accepted.

[43] Counsel for the respondent submitted in relation to count 3 that the jury may have had a doubt about whether the appellant had deliberately pressed his penis against the complainant's back in the shower or as to whether the complainant was mistaken as to the manner of the touching.

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7 *R v Callaghan* [1994] 2 Qd R 300.
8 *R v Kochnieff* (1987) 33 A Crim R 1.
9 *Barry v Police (SA)* (2009) 197 A Crim R 445; *Spence v Demasi* (1988) 48 SASR 536.
10 See e.g. *R v Rudd* (2009) 23 VR 444 at 458; *R v Rymer* (2005) 156 A Crim R 84 at 90.
11 (2005) 156 A Crim R 84.
12 *R v CX* [2006] QCA 409 at [33].

[44] Again, the complainant's evidence was clear and the alleged conduct was unambiguously indecent. No innocent explanation was proffered for the appellant's conduct. The contest on the trial, as was the case with count 2, was whether the incident occurred. On the complainant's version of events, the appellant, having induced her to use his shower when she could have used another shower a few minutes later after her brothers finished showering, got in the shower with her naked and with an erection and washed her hair. As he did so, she "felt like his erection was pressing into [her] back".

[45] The respondent's submissions in respect of count 5 were to this effect. The allegation of rape would have presented itself to the jury as unusual, being a rape constituted by penetration during cunnilingus. The charge to the jury by the trial judge specified penetration of the vagina as an element of the offence. Although the offence may be committed by penetration of the vulva,[13] that was not made clear to the jury and they may not have been satisfied that such an offence occurred. It was submitted also that the jury may have thought it curious that, although count 1 involved very similar conduct, rape had not been charged. Also the jury were not directed that a verdict of guilty of indecent treatment was open on count 5 if they were not satisfied of the elements of the offence of rape. A further possibility, it was submitted, was that the jury returned a merciful verdict.

[46] The contest on the trial concerned whether the incident took place at all. The complainant's evidence referred to in paragraph [14] above, however, did give rise to the possibility that the jury could have experienced a reasonable doubt about whether rape, as explained by the trial judge, did occur. It may be doubted that the jury would advert to, let alone focus on, a non-issue, that is, whether the incident constituted rape, but it is possible that they did. The verdict on this count thus offers little assistance to the appellant.

[47] The position, however, remains that there were two guilty verdicts and two not guilty verdicts in respect of incidents alleged by the complainant. The guilty verdicts rested on the uncorroborated evidence of the complainant and were contrary to the, also uncorroborated, evidence of the appellant.

[48] The principles relating to the circumstances in which inconsistency in verdicts may lead to a finding that a conviction resting on one or more of the verdicts is unsafe and unsatisfactory were stated in the following terms by Gaudron, Gummow and Kirby JJ in *MacKenzie v The Queen*:[14]

> "3. Where, as is ordinarily the case, the inconsistency arises in the jury verdicts upon different counts of the originating process in a criminal trial, the test is one of logic and reasonableness. A judgment of Devlin J in *R v Stone* is often cited as expressing the test:
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> > 'He must satisfy the court that the two verdicts cannot stand together, meaning thereby that no reasonable jury who had applied their mind properly to the facts in the case could have arrived at the conclusion, and once one assumes that they are an unreasonable jury,

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13 *Criminal Code* (Qld), s 349(2)(b).

14 (1996) 190 CLR 348 at 366–367.

> or they could not have reasonably come to the conclusion, then the convictions cannot stand.'
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> 4. Nevertheless, the respect for the function which the law assigns to juries (and the general satisfaction with their performance) have led courts to express repeatedly, in the context both of criminal and civil trials, reluctance to accept a submission that verdicts are inconsistent in the relevant sense. Thus, if there is a proper way by which the appellate court may reconcile the verdicts, allowing it to conclude that 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."

[49] Their Honours agreed with observations of King CJ in *R v Kirkman*,[15] which concluded:[16]

> "[J]uries cannot always be expected to act in accordance with strictly logical considerations and in accordance with the strict principles of the law which are explained to them, and courts, I think, must be very cautious about setting aside verdicts which are adequately supported by the evidence simply because a judge might find it difficult to reconcile them with the verdicts which had been reached by the jury with respect to other charges … Appellate courts therefore should not be too ready to jump to the conclusion that because a verdict of guilty cannot be reconciled as a matter of strict logic with a verdict of not guilty with respect to another count, the jury acted unreasonably in arriving at the verdict of guilty."

[50] Their Honours continued:[17]

> "5. Nevertheless, a residue of cases will remain where the different verdicts returned by the jury represent, on the public record, an affront to logic and commonsense which is unacceptable and strongly suggests a compromise of the performance of the jury's duty. More commonly, it may suggest confusion in the minds of the jury or a misunderstanding of their function, uncertainty about the legal differentiation between the offences or lack of clarity in the judicial instruction on the applicable

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15 (1987) 44 SASR 591 at 593.

16 *MacKenzie v The Queen* (1996) 190 CLR 348 at 367–368.

17 *MacKenzie v The Queen* (1996) 190 CLR 348 at 368.

> 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.'"

[51] If the jury's rejection of the complainant's account in respect of count 5 may not have damaged her overall credibility, the rejection of her evidence in respect of counts 2 and 3 certainly did. It is impossible to identify a legitimate reason why they took a different approach in respect of counts 1 and 4. If the appellant was to be given the benefit of the doubt as to whether his conduct in respect of counts 2 and 3 was capable of an innocent explanation or because the complainant may have had an erroneous impression of what had taken place, the facts as narrated by the complainant in respect of count 1 were a more obvious candidate for such an approach. The complainant did not claim to see what was happening around the lips of her vagina. She had complained to the appellant about the feeling in her vagina, by which she may well have meant vulva or genital area. The appellant was alleged to have touched her with something wet before asking "Does it feel better?" The complainant responded, "I think it does". Whether the response was accurate or not was not stated.

[52] As was the case in *Jones v The Queen*,[18] there was "nothing in the complainant's evidence or the surrounding circumstances which gives any ground for supposing that her evidence was more reliable in relation to … counts [1 and 4] than it was in relation to [counts 2 and 3]". In addition, there were reasons why it was incumbent on a reasonable jury to scrutinise the complainant's evidence with considerable care.

[53] In her two interviews with Dr Firth, the complainant mentioned two incidents in Albania (in respect of the first, it was recorded that the complainant had a broken arm at the time), the incident the subject of count 1 and an incident which does not appear to have been the subject of any complaint to anyone else and which was not charged. The complainant denied having told Dr Firth that she had a broken arm when residing in Albania. The trial judge commented in the course of his summing up that it seemed "a little extraordinary that if the computer record had been written up, even if it didn't contain the Ethiopian episode or episodes, that Dr Firth was told so little by [the complainant] during the conversations with her". The broken arm was not mentioned in the complainant's computer record.

[54] Another significant discrepancy in the complainant's evidence was her change of position on whether the appellant was wearing underpants at the time of the count 5 incident and her explanation, thought of for the first time during cross-examination, that the appellant took off his underpants during the incident.

Conclusion

[55] For the above reasons, I have concluded that it was not open to the jury on the whole of the evidence to be satisfied beyond reasonable doubt of the appellant's guilt.[19] I would order that the guilty verdicts in respect of counts 1 and 4 be set aside and that verdicts of acquittal be entered.

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18 (1997) 191 CLR 439 at 453.

19 *M v The Queen* (1994) 181 CLR 487 at 493–495.

[56] **MORRISON JA:** I have had the benefit of reading the reasons prepared by Muir JA. I agree with those reasons and the orders proposed by his Honour.

[57] **BODDICE J:** I have read the reasons for judgment of Muir JA. I agree with those reasons and the proposed orders.