SUPREME COURT OF QUEENSLAND

CITATION:	*R v TAM* [2019] QCA 206
PARTIES:	**R** **v** **TAM** (appellant)
FILE NO/S:	CA No 330 of 2018 DC No 18 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Emerald – Date of Conviction: 7 November 2018 (Moynihan QC DCJ)
DELIVERED ON:	4 October 2019
DELIVERED AT:	Brisbane
HEARING DATE:	12 June 2019
JUDGES:	Sofronoff P and Morrison JA and Boddice J
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where the appellant was convicted of one count of indecent dealing with a child under 12 years – where the appellant was acquitted of a second count of indecent dealing against the same complainant – where the evidence for the first count included that of the complainant and other witnesses in respect of preliminary complaint evidence – where the only evidence in respect of the second count was that of the complainant – whether there was a material difference in the nature and quality of the evidence in respect of each count – whether the verdicts were inconsistent *M v The Queen* (1994) 181 CLR 487; [1994] HCA 63, cited *MacKenzie v The Queen* (1996) 190 CLR 348; [1996] HCA 35, cited
COUNSEL:	The appellant appeared on his own behalf D Balic for the respondent
SOLICITORS:	The appellant appeared on his own behalf Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** The appellant was charged with two counts of indecent dealing with a child under 16 years, and who was in fact 11 years old at the date of the offences alleged in the indictment. He was convicted of one of those offences. He now appeals against that conviction on a single ground but one which raises two contentions. First, he submits that the guilty verdict was rationally inconsistent with the verdict of not guilty. Second, he submits that the guilty verdict was unsupportable having regard to the evidence.

[2] On 28 November 2017 the appellant was at home and he had been drinking. The complainant was his 11 year old step-daughter. After she came home from school on that day she received permission from the appellant to go to the local swimming pool. Upon her return from the pool she went to her bedroom and lay on her bed. According to her evidence, the appellant was by that time a little more drunk than he had been earlier. He came into her room, sat on the bed next to her and began a conversation about her having a boyfriend. He left the room but soon returned and began another conversation, which the complainant described in some detail in her evidence, but which can be summarised as the ramblings of a man who had drunk too much beer.

[3] Some time later, the complainant moved to a different part of the house where she sat on a sofa and began to watch a movie on a television set. The appellant sat down close beside her. Her evidence then continued:

> "'Cause I was sitting a bit further from him, and he made, and he pushed me forward, like pulled me towards him, and then he started touching my bad bits and, um, it was really weird. And, um, he, ah, kept apologising for something. I don't know why he was apologising, just kept saying I'm sorry. And he walked out again."

[4] Later, she furnished more detail:

> "He was sitting next to me and then he was pulling me closer and started touching here and here [*at this point the complainant pointed to the area of her vagina*]. And, um, then he got up after a while and said no, no, sorry, and then he exited, then he crashed into the door."

[5] The complainant described the manner of touching as "scraping it a bit" and "just like scooping it". She said that he was "rubbing his fingers against it" on the outside of her clothing. This touching, she said, went on "a little while" and made her feel "very disturbed".

[6] This touching constituted count 1, which was the count on which the jury found the appellant guilty.

[7] The complainant also described some further touching of her by the appellant. This constituted count 2 and the sole evidence about it was as follows:

> "Okay. And did he touch you anywhere else?---Ah, and on my butt.
>
> On your butt. Okay. Whereabouts?---[recording indistinct]
>
> Okay. So you said you were feeling a little disturbed. So how did that make you, how were you feeling disturbed?---Um, because he just kept, like I think he was feeling it and it just made me not feel comfortable.

> Okay. And when you feel uncomfortable how do you feel in your tummy?---Um, just really awkward.
>
> Okay. And you said that he was touching your, your butt. Whereabouts [indistinct]?---Um, here.
>
> So that's on your, on your right side?---Ah, yep.
>
> Alright. And how was he touching you?---Um, he was kind of squishing it at first.
>
> Okay. And how was he squishing it?---Um, just like this.
>
> Okay. And what happened next?---Um, and then he, after he while he got up and said 'no, no, sorry'.
>
> Okay. And what happened next?---Um, and then he crashed into the door and went outside."

[8] The complainant almost immediately informed her older sister about what had happened. This was the appellant's biological daughter. The two girls had the same mother but different fathers. The complainant's sister told her to contact their mother on her mobile phone. The complainant's mother immediately responded by telling the two girls to pack some clothes and leave the house. Soon afterwards a friend of the mother's came and collected the girls and took them to her home.

[9] The complainant's mother gave evidence. She said that the complainant had texted her to the effect that the appellant "was touching my rude parts". That night the two sisters and their mother stayed at a friend's house. On the way home on the following morning to get school clothes, the complainant told her mother only that "Dad was just drinking, that's it" and that "Dad was just Dad, ants in his pants, in and out", which the mother understood to mean that he kept coming and going and could not keep still.

[10] In her evidence the mother volunteered that she did not believe her daughter's allegations. She said that the complainant had previously "accused her biological father and our cousin". She described the complainant's angry tantrums and her telling of obvious lies. In cross-examination the complainant had admitted to throwing tantrums and to telling lies. The only example of a lie put to her, and which she admitted, concerned patently a false denial that she had hit a dog with a stick. It was also put to the complainant that she had once made a complaint to her sister that a cousin had sexually molested her. She denied this. It was not put to her that the complaint had been a false one.

[11] One of the complainant's teachers also gave evidence. She told how, at school on the next morning, the complainant had related what her step-father had done: "He started to touch my rude bits". The teacher made notes of what the complainant told her. The teacher took the complainant to a school guidance officer to whom the complainant repeated her allegations. The complainant said that the appellant had "touched her on the bad bits" and she pointed towards her vaginal area.

[12] The complainant's sister confirmed the complainant's evidence about the preliminary complaint. She also confirmed the mother's evidence about the complainant's tantrums and lies. In cross-examination she related how the complainant had once told her that a cousin had sexually molested her when the she

was three years old. The sister was unable to say whether that was true or untrue. The sister also related how, in a conversation, the complainant had asserted, incorrectly, that the sister had been in the room when the offending took place. This had not been put to the complainant.

[13] The appellant did not give evidence.

[14] The principles concerning inconsistent verdicts are well settled. The onus is on an appellant to demonstrate that no reasonable jury which had applied its mind properly to the facts could have arrived at the verdicts.[1] If there is a proper way by which the appellate court may reconcile the verdicts, allowing it to conclude that the jury performed its functions as required, that conclusion will generally be accepted.[2]

[15] The appellant submitted that the acquittal on count 2 involved a rejection of the truthfulness of the complainant. He submitted that there was no basis upon which the jury could have distinguished between her evidence about the vaginal touching and her evidence about his touching her buttocks. He also pointed to inconsistencies in her evidence. He submitted that when she spoke to police, the complainant had placed the events on a sofa that was in front of the television while she had told her teacher and the guidance officer that the events had happened in the bedroom. That inconsistency is not made out. It is true that the complainant told police that her father had touched her while they were both sitting on the sofa. That evidence was electronically recorded. The complainant's statements to her teacher and to the guidance officer were not electronically recorded and their evidence was based upon their own recollections aided by contemporaneous notes. The teacher's evidence was that she had been told that the indecent dealing had happened in the bedroom. However, as she explained, that was her "best recollection". The guidance officer was asked whether she had been told that the offence had been committed in the bedroom or on the sofa. Her answer was:

> "I think it was in the bedroom. Yeah. According to my notes and the way that I was transcribing it at the time, the bedroom."

[16] It was for the jury to determine what to make of this evidence. It was open to the jury to conclude that the complainant had given inconsistent versions of events to police and to her teacher and the guidance officer. It was also open to them to conclude that the recollection and understanding of the latter two witnesses was faulty. Whatever the jury thought was true in that respect, the whole issue of credit was one for the jury to determine.

[17] The complainant's evidence about count 1 was specific as to the manner of touching, on what part of her body the appellant touched her and how he touched her. If the jury accepted that evidence it necessarily followed that the touching had been indecent. The evidence about count 2 was different. In her first account to police, which was unprompted and which comprised an uninterrupted narrative, the complainant did not mention any indecent touching of her bottom. She did refer to "doing fist bumps" while they were in the bedroom and she also said that the appellant had "slapped" her at this time, but this last was in relation to a statement that he made at the same time that the complainant was "the best family". The context had not been sexual. Later, she described how the appellant touched her on

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1 *MacKenzie v The Queen* (1996) 190 CLR 348, at 366 per Gaudron, Gummow and Kirby JJ.

2 *ibid.* at 367.

her bottom while they sat on the sofa. The appellant asked the Court to look at the video recording of the complainant's police interview. It is difficult to see on that recording where the complainant was pointing when she spoke of the appellant touching her "butt" and, unlike count 1, it is not totally obvious that the touching was sexual in nature.

[18] For this reason, it was open to the jury not to be satisfied that count 2 had been proved. The quality of the evidence was simply different from the quality of the evidence on count 1. A failure to be satisfied about the evidence on count 2 did not have to impinge upon the evidence about count 1.

[19] For this reason the appellant's submission concerning inconsistency in the verdicts must be rejected.

[20] Otherwise, the appellant has pointed to matters that, he submits, affect the complainant's credibility. These included her tantrums, her lie about hitting a dog and her complaint about her cousin. He points to the sister's evidence that she herself saw nothing untoward. He submits that the jury ought to have had a reasonable doubt because of these matters.[3]

[21] These were matters for the jury to consider. It is not possible for this Court to say, on the materials in the written record and upon the basis of the recorded evidence that it was not open to the jury to find the appellant guilty of count 1. It was open to the jury to believe the complainant's evidence about count 1 despite her mother's disbelief and despite the other evidence that was relevant to her credit. If the jury believed the evidence about count 1 then the offence was proven.

[22] The appellant also contends that the Crown failed to negative accident. A defence under s 23 of the *Criminal Code* (Qld) was in issue at the trial. It arose from the following evidence:

> "Well, my next question was going to be, was it him taking it off you because you're not supposed to have it for dinner? That was the first one. The second one was to be, was it – you know how when brothers and sisters – well, you've got a sister, sisters one has a sandwich and the other one hasn't, so I might take it off you to tease you and be funny? Do you think it was one---?---Yeah.
>
> ---of those?---The second one.
>
> Yeah. And you did – did you sort of struggle and try to get it back?---Yes.
>
> And is that the time where you say he's got his arm around you and he's done something wrong?---Yeah.
>
> Whilst you were struggling and trying to get it back?---Yes.
>
> Do you think – so, he's drunk, you're sitting there, he's taken your sandwich and you're struggling trying to get it back, if he did come close to touching you on the privates, do you think it could have just been an accident in the circumstances?---I think so.

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

So you can't say that it wasn't?---No."

[23] The immediate problem with that piece of cross-examination was that the cross-examiner was not prepared to confront the central allegations. The actual allegation against the appellant was that he had had been "scraping" and "scooping" her vaginal area and "rubbing his fingers against it". A question to a child of the complainant's age whether touching might have been "an accident in the circumstances" when that question is premised upon the false hypothesis "if he did come close to touching you" cannot be regarded as fairly raising a defence of accident to meet the allegation that was actually made. It was open to the jury to conclude that the complainant's concession, which was one that any honest witness would have felt compelled to make, was one that she made in relation to something that had never happened. In any case, it was certainly open for the jury to conclude that the facts as the complainant related them, concerning the appellant's touching her between her legs, could not possibly accommodate an accidental touching.

[24] For these reasons, the appeal should be dismissed.

[25] **MORRISON JA:** I agree with the reasons of each of Sofronoff P and Boddice J. I agree with the order proposed by Sofronoff P.

[26] **BODDICE J:** The comprehensive summary of the evidence and issues at trial, set out in the reasons of Sofronoff P, which I gratefully adopt, allows me to briefly state my reasons for agreeing that the appeal should be dismissed.

[27] First, there was a material difference between the nature and quality of the evidence in respect of count 1 to that in respect of count 2. That material difference included the specificity of the allegation, the evidence of preliminary complaint in respect touching her vagina, and the obvious sexual nature of that touching, compared to the touching the subject of count 2.

[28] Those material differences explain how a reasonable jury, applying its mind properly to the facts, could have arrived at the verdicts of guilty on count 1 but not guilty on count 2. Those verdicts do not establish inconsistency.

[29] Second, a consideration of the evidence as a whole amply supports a conclusion that it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt of count 1.

[30] I agree with the orders proposed by Sofronoff P.