SUPREME COURT OF QUEENSLAND

CITATION:	*R v Webb* [2018] QCA 102
PARTIES:	**R** **v** **WEBB, Callum James** (appellant)
FILE NO/S:	CA No 127 of 2017 DC No 1206 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 14 June 2017 (Shanahan DCJ)
DELIVERED ON:	1 June 2018
DELIVERED AT:	Brisbane
HEARING DATE:	9 February 2018
JUDGES:	Sofronoff P and Morrison and McMurdo JJA
ORDERS:	**1. Allow the appeal.** **2. Set aside the conviction.** **3. Substitute a verdict of acquittal on count three of the indictment.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellant was charged with two counts of using electronic communication with intent to procure a person the appellant believed was under the age of 16 years to engage in a sexual act (counts one and three) and one count of grooming a child under 16 by exposing, without legitimate reason, a person the appellant believed was under the age of 16 years to indecent matter (count two) – where the appellant was an adult registered to use the social networking application Grindr – where a female police officer was also registered to use Grindr under the fictitious identity of a 14 year old boy called "Mack" – where the appellant used Grindr and text messages to communicate with Mack – where Mack sent the appellant messages informing the appellant that he was 14 years old – where the appellant and Mack exchanged messages discussing a potential sexual encounter (count one) – where the appellant sent Mack an image showing an erect penis in underpants (count two) – where the appellant and Mack exchanged further messages arranging a place to meet (count 3) – where

the appellant gave evidence that he believed Mack to be aged 18 years old – where the jury acquitted the appellant on counts one and two but convicted him on count three – whether it was open to the jury to reject the appellant's evidence that he believed that Mack was aged 18

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where the appellant submitted that the evidence suggested no fact or circumstance, between the occasion the subject of count two and that the subject of count three, by which the jury, if in doubt as to count two, could have been in no doubt as to count three – where counts two and three concerned messages sent on the same day – whether anything significant occurred between the times of counts two and three from which the jury might have become satisfied, beyond a reasonable doubt, that the appellant believed Mack was aged under 16 years when the jury was not so satisfied as to the appellant's belief at the time of count two – whether there is a way by which the different verdicts on counts two and three can be reconciled

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – PARTICULAR CASES – WHERE APPEAL ALLOWED – where an accused can be criminally responsible under s 218A(1) of the *Criminal Code* (Qld) where in fact the other person is under the age of 16 years, or where the accused believes that the person is under the age of 16 years – where s 218A(9) and s 218B(8) provide that it is a defence to a charge under s 218A and s 218B respectively to prove that the accused believed on reasonable grounds that the person was at least 16 years – where Mack was not in fact under 16 years old – where the basis of the appellant's charge was the appellant's belief about Mack's age, not Mack's true age – where the trial judge directed the jury that the appellant had a defence if he could prove that he believed on reasonable grounds that Mack was at least 16 – whether the trial judge misdirected the jury about the defence provided by s 218A(9) and s 218B(8)

Criminal Code (Qld), s 218A(1), s 218A(8), s 218A(9), s 218B(1)(b), s 218B(7), s 218B(8)

MacKenzie v The Queen (1996) 190 CLR 348; [1996] HCA 35, applied
R v Shetty [2005] 2 Qd R 540; [2005] QCA 225, applied

COUNSEL: J J Allen QC for the appellant
J A Wooldridge for the respondent

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

respondent

[1] **SOFRONOFF P:** I agree with the reasons of McMurdo JA and the orders his Honour proposes.

[2] **MORRISON JA:** I have the considerable advantage of reading the draft reasons of McMurdo JA, with which the President concurs. That enables me to state my own reasons, respectfully disagreeing with the conclusion in respect of count 3, and the orders proposed, in short form.

[3] As McMurdo JA says, counts 1 and 2 were based on communications on Grindr on 8 December 2015 and 10 December 2015.

[4] The offence under count 2 was complete at 11.21 am on 10 December 2015, when the appellant sent an image of himself to the undercover agent using the name "Mack".[1]

[5] Up to that point there was evidence in the responses of the appellant which indicated his acceptance that Mack was aged 14 and sexually inexperienced. Whilst those responses were said by the appellant to be part of role-playing on both sides, the jury were entitled to reject that explanation. Those communications can be summarised in the following way:

8 December

(a) 4.21 pm Mack said he was "new" to sexual activity with men, and the appellant responded "everyone needs to start somewhere";[2]

(b) 4.32 pm the appellant explained to Mack where he (the appellant) "started out" in sexual activity;[3]

10 December

(c) 9.24 am the appellant enquires whether Mack has "managed to try anything yet?";[4]

(d) 10.47 am the appellant accepts Mack's explanation that he is hanging out with his mates;[5]

(e) 10.54 am the appellant answers Mack's enquiry about whether he cares that Mack is 14 and new to "all this", by saying "it's all good";[6]

(f) 11.05 am the appellant reassures Mack, who has said he is a bit nervous, by saying that they would "start simple" and "when your comfortable move on to other things", and "see how far you are willing to go";[7]

(g) 11.10 am the appellant asks Mack whether there is anything he wants to try, and when Mack responds by saying "most things", the appellant tells Mack that there isn't much that the appellant has not done, "and some stuff I'm sure your not so keen for right now";[8]

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1 AB 72.
2 AB 68.
3 AB 69.
4 AB 70.
5 AB 70.
6 AB 71.
7 AB 72.
8 AB 72.

(h) 11.17 am when Mack responds to the suggestions of some activity by saying "well maybe one day", the appellant responds "first time no quite for you";[9] and

(i) 11.21 am the image, the subject of count 2, was sent.

[6] Whilst those exchanges did contain evidence of Mack's explanation that he was only 14 and sexually inexperienced, and the appellant's apparent acceptance of that, the jury were evidently not satisfied beyond reasonable doubt to that point that the appellant believed Mack to be under the age of 16.

[7] I respectfully disagree that the events after the image was sent, either individually or cumulating with what had gone before, could not have been accepted by the jury as proving that the appellant believed Mack to be under 16 subsequent to sending the image.

[8] Relevant to that are the following exchanges via Grindr and text on 10 December 2015, between the appellant and Mack:

Grindr

1. 11.44 am the appellant asked if Mack would meet him on a corner "so you can get straight into my car" and Mack resisted that by saying that he wanted to meet the appellant first before jumping into a car;[10]

2. 11.52 am the appellant accepted Mack's explanation that he was reluctant to send a photograph of himself because it would be "in front of my mates" and "they don't know bout me yet";[11]

Texts by telephone

3. 11.58 am the appellant promised that he would "go easy" on Mack;

4. 12.14 pm the appellant proposed that Mack start walking towards the Botanical Gardens to meet him, but Mack resisted;[12]

5. 12.26 pm the appellant responded to Mack saying that he was heading to Hungry Jacks and asked "wanna head down to Timezone?".[13]

[9] In my view, the significance in the texts after the image was sent is not only those identified in paragraph 40 of the reasons of McMurdo JA, but particularly the appellant's proposal that he and Mack "head down to Timezone". The exchanges culminating in that proposal, when seen in the light of the growing or continued acceptance that Mack was young and sexually inexperienced, provided a basis upon which the jury could well have concluded in respect of count 3 that the appellant believed Mack to be under 16, even if they had doubts about his state of belief at an earlier time. The appellant's suggestion that they "head down to Timezone" may well have been seen by the jury as a significant indicator of the appellant's state of mind about Mack's age.

[10] I have therefore come to the contrary conclusion of that expressed by McMurdo JA and Sofronoff P in respect of count 3. I would not order that the conviction be set aside and a verdict of acquittal entered.

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9 AB 72.
10 AB 73.
11 AB 73.
12 AB 74.
13 AB 74.

[11] However, I agree with the conclusion of McMurdo JA on the misdirection issue and the order proposed in respect of that conclusion: paragraph 47 of his Honour's reasons.

[12] **McMURDO JA:** The appellant was tried by a jury in the District Court upon an indictment alleging three offences. The first count was that on 8 December 2015, he used electronic communication with intent to procure a person, whom he believed was under the age of 16 years, to engage in a sexual act, that being an offence under s 218A(1) of the *Criminal Code* (Qld) ("the Code"). The second count was that on 10 December 2015, he engaged in conduct in relation to a person, whom he believed was under the age of 16 years, with an intent to expose, without legitimate reason, that person to indecent matter, that being an offence against s 218B(1)(b) of the Code. The third count was that on the same day, he committed another offence under s 218A(1), in relation to the same person, with the circumstance of aggravation that the offence involved the appellant going to a place with the intention of meeting that person.[14]

[13] The other person, on each occasion, was not someone under the age of 16 years. She was instead Detective Sergeant Ford, using the fictitious identity of a 14 year old boy called "Mack Jones".

[14] The jury acquitted the appellant on counts one and two, but convicted him on count three. He appeals against that conviction upon grounds that the verdict is unreasonable, the verdict is irreconcilable with the verdicts on counts one and two, and that there was a misdirection on the law by the trial judge.

The evidence

[15] The appellant made a number of formal admissions. He admitted that he was aged 25 years in December 2015, thereby proving that he was an adult as was required for these offences. He admitted that he was registered to use a social networking application called Grindr. He admitted that on 8 and 10 December 2015, he used Grindr to communicate with a person using the identity "Mack", and he admitted the precise terms of those exchanges. He further admitted that he and "Mack" exchanged certain text messages, at certain times, on 10 December 2015.

[16] Detective Sergeant Ford was the only witness in the prosecution case. She gave evidence that Grindr is a social networking application used by men to contact other males, to chat in real time and to share images and their locations. To become a registered user of Grindr, a person must enter a date of birth, but that can be done without any authentication of that date. She registered as Mack Jones, with a profile screen shot showing a photograph of the rear of a man's head and upper torso, and the information that Mack was aged 18, 172 cm tall, white, of toned build and a single male.

[17] Count one was based upon the exchanges between the appellant and Mack on 8 December 2015. Early in those exchanges, Mack told the appellant that he was "not exactly 18" and that he was "reely (sic) … about 14 almost 15", adding that "no one knows … experimenting … u know." The appellant asked "how old are you?" Mack replied "14". The exchanges which followed over the next few hours involved discussions of a potential sexual encounter between the two, with Mack saying that he was sexually inexperienced.

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[14] s 218A(2)(b)(ii) of the Code.

[18] Count two was based upon communication, again using Grindr, in which Mack said he was aged "14" and "new to all this". These exchanges began at 8.53 am on 10 December 2015 and ended three hours later. At one point (11.21 am) the appellant transmitted an image showing an erect penis in underpants. The jury was shown that image. The appellant said, in effect, that he would stay at home and wait for Mack, to which Mack replied "don't know how to get there wanna meet me here" (which was in the CBD).

[19] The appellant asked Mack to send "a face pic", saying "I would love to see your face". Mack said that he wanted to meet him before "jumpin in car [because he was a] bit nervous." Again the appellant asked him to send "a face pic" so that he could recognise him. He continued to press Mack for a photograph but Mack said simply that he would meet him at a certain place in the Queen Street Mall at 12.30 pm.

[20] Count three was based upon those exchanges on the morning of 10 December and the subsequent exchange of text messages, the apparent purpose of which was to arrange their meeting. The last message was from the appellant, who texted "practically here" at 12.37 pm, before being arrested by the police waiting for him in the Queen Street Mall.

[21] The appellant gave evidence. He said that he had used the Grindr application, primarily to meet sexual partners, for some years. He said that he believed Mack to be aged 18 years, as Mack had stated in his profile. He said that he remained of that belief, despite the statements by Mack that he was aged 14 years, because he believed that Mack had "some sort of sexual desire to pretend to be a 14 year-old boy, that he wanted to have somebody that was older and to recreate that experience with him".[15] The appellant gave this further explanation for his belief that Mack was, in truth, aged 18:

> "when I was younger on different sources like this, when I was too young to be on them, the last thing I did was tell somebody because you'll get yourself kicked off there, and you will not be able to use it anymore, so the fact that this person said it openly made me believe they were lying or being distruthful."[16]

The appellant testified that "Mack's" statements about going to school were a form of role-playing. He said that he had had experience of persons on Grindr lying about their age or appearance. He said that the fact that Mack was communicating during school hours contributed to his disbelief that he was aged 14.

The relevant provisions of the Code

[22] Section 218A of the Code relevantly provides as follows:

> "218A Using internet etc. to procure children under 16
>
> (1) Any adult who uses electronic communication with intent to procure a person under the age of 16 years, or a person the adult believes is under the age of 16 years, to engage in a sexual act, either in Queensland or elsewhere, commits a crime.

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15 AR 31.30-35.
16 AR 31.45-50.

Maximum penalty—10 years imprisonment.

(2) The adult is liable to 14 years imprisonment if—

(a) the person is—

(i) a person under 12 years; or

(ii) a person the adult believes is under 12 years; or

(b) the offence involves the adult—

(i) intentionally meeting the person; or

(ii) going to a place with the intention of meeting the person.

…

(7) For subsection (1), it does not matter that the person is a fictitious person represented to the adult as a real person.

(8) Evidence that the person was represented to the adult as being under the age of 16 years, or 12 years, as the case may be, is, in the absence of evidence to the contrary, proof that the adult believed the person was under that age.

(9) It is a defence to a charge under this section to prove the adult believed on reasonable grounds that the person was at least 16 years."

[23] Section 218B(1) relevantly provides:

"218B Grooming children under 16

(1) Any adult who engages in any conduct in relation to a person under the age of 16 years, or a person the adult believes is under the age of 16 years, with intent to—

(a) facilitate the procurement of the person to engage in a sexual act, either in Queensland or elsewhere; or

(b) expose, without legitimate reason, the person to any indecent matter, either in Queensland or elsewhere;

commits a crime.

…

(6) For subsection (1), it does not matter that the person is a fictitious person represented to the adult as a real person.

(7) Evidence that the person was represented to the adult as being under the age of 16 years, or 12 years, as the case may be, is, in the absence of evidence to the contrary, proof that the adult believed the person was under that age.

(8) It is a defence to a charge under this section to prove the adult believed on reasonable grounds that the person was at least 16 years."

[24] Under s 218A(1) and s 218B(1) there are alternative bases of criminal responsibility. The first is where, *in fact*, the other person is aged under the age of 16 years. The second is where the accused *believes* that the person is under the age

of 16 years. In the present case, of course, it is the second basis which was relevant. The prosecution had to prove, as an element of each charge, that the appellant believed that Mack was under the age of 16 years.

[25] The effect of s 218A(8) and (9) was considered by this Court in *R v Shetty*.[17] Section 218A(8) facilitates the proof of this element of the offence, namely an accused's belief. But where there is evidence which is to the contrary of that belief, it remains for the prosecution to prove that belief, beyond reasonable doubt.[18]

[26] It was further held in *Shetty* that s 218A(9) has no application in cases such as the present, where it is the accused's belief about the age of the person, rather than the true age of the person, which is the basis of the charge. If the prosecution proves that the accused had the requisite belief, the facts could not fall within s 218A(9). And if the prosecution fails to prove the requisite belief, then the accused must be acquitted. Section 218A(9) affords a defence only where the prosecution alleges and proves that the person was, in fact, under the age of 16 years or 12 years, as the case may be.[19]

[27] The reasoning in *Shetty* is equally applicable to s 218B(7) and (8).

The summing up

[28] The trial judge correctly directed the jury that the prosecution had to prove, beyond reasonable doubt, that the appellant believed that the person with whom he was communicating was aged under 16.

[29] However, his Honour also directed the jury about the defence provided by s 218A(9) and s 218B(8). The trial judge said:

> "Now, this provision also provides a specific defence for an accused person. It is a defence for the defendant to prove on the balance of probabilities that the defendant believed on reasonable grounds that the person was at least 16.
>
> So this allows the defendant to prove a defence if he can prove that he believed on reasonable grounds that the person was at least 16. That means that there is an onus on the defendant to establish that defence, and in terms of the extent to which he has to prove that, it's a different standard of proof than the criminal standard that lies on the Crown. It's basically the civil standard of proof, and it's known as proof on the balance of probabilities. That means if it's established that it's more probable than not, then the defence is established. So the defendant has an opportunity, an ability to raise the defence here, but he's got to prove that on the balance of probabilities, and what he's got to prove is that he believed on reasonable grounds that the person was at least of 16 years.
>
> You have his evidence to that effect. Whether you accept his evidence or not is a matter for you. If you accept his evidence on the balance of probabilities that he believed on reasonable grounds that the person was at least 16, you would acquit. If his evidence, as I say, raises a reasonable doubt in your minds about whether the Crown has proved beyond reasonable doubt that he believed the child was under

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17 [2005] 2 Qd R 540; [2005] QCA 225 ("*Shetty*").
18 Ibid at 543 [14] - [15] and 545 [21] (Keane JA), 547 [31] (McMurdo J).
19 Ibid at 543 [15] (Keane JA), 547 [33] (McMurdo J).

> – or the person was under 16, again, you would acquit. However, even if you were to reject his evidence as to that, you must then still look at all the evidence in the trial because the prosecution must still prove to you beyond a reasonable doubt that he believed the person was under 16.
>
> It's obviously this element which is in issue, and the questions you need to consider are has the defendant satisfied you on the balance of probabilities that he believed the person was 16 or older, and secondly, has the prosecution satisfied you beyond reasonable doubt that he believed the person was under 16. That's the issue in this particular matter."

[30] That passage was part of the judge's directions about the charges under s 218A. But his Honour gave effectively the same direction when discussing s 218B, saying as follows:

> "So again, the issue is about the defendant's knowledge as to the age of the person he was communicating with. If the defendant has proved on the balance of probabilities that he believed on reasonable grounds that the person was at least 16, you would acquit, because he would have made the defence out."

[31] The jury then retired and neither counsel suggested any re-direction. About two hours later, there was a note from the jury as follows:

> "Clarification on "believed what's under 16 years". If the defendant thought maybe Mack was 14, does he believe he is 14?"

The jury returned and his Honour directed them as follows:

> "I have got your note and the question you ask is if the defendant thought maybe if Mack was 14, does he believe he is 14? The simple answer to that is no, it's not sufficient. What the Crown have got to prove is that he believed the child – or believed the person he was corresponding to was under 16. So it's not sufficient if all that's been proved is that he may have thought that. The Crown have got to prove that he believed the child or the person was under 16. So it's not sufficient."

[32] The following morning, the judge received a note from the jury that they had agreed on two counts, but not all three. When the jury returned to Court, they were asked to identify the counts on which they had agreed, and the speaker answered that they were counts one and two. The verdicts were then taken on those counts and the jury again retired. The judge expressed to counsel his surprise that the jury had not reached the same conclusion on count three. After the judge discussed with counsel the giving of a Black direction, the jury returned and they were given that direction. His Honour then added:

> "What I need to reiterate to you is, as you probably – or clearly understand – the issue in relation to each of the three counts is really the same and the only live issue is, firstly, whether the defendant had established the defence on the balance of probabilities on reasonable grounds that he believed the person was 16 years or above, and the other and most important issue is the Crown has to prove beyond reasonable doubt that he believed the person he was communicating

> with was under the age of 16. And I mean, that's the same issue in relation to each of the three counts, I would have thought."

[33] The jury again retired and again, neither counsel sought any further direction. A little over an hour later, the jury returned with their verdict on count three.

Grounds of appeal

An unreasonable verdict

[34] The question on this ground is whether it was open to the jury to be satisfied beyond a reasonable doubt that the appellant was guilty on count three.[20]

[35] The prosecution had to prove that the appellant was an adult, that he used an electronic communication, that he did so intending to procure a person to engage in a sexual act and that he believed that the person was under the age of 16 years. But only the last of those elements was in issue.

[36] Therefore the question is whether it was open to the jury to reject the appellant's evidence that he believed that Mack was aged 18. I have summarised the appellant's evidence as to why he believed that Mack was aged 18. His evidence was not so compelling, that the jury was bound to accept it. Nor was it so strong as to require the jury to be left in doubt on the question. In my opinion, it was open to the jury to reject his evidence and to be satisfied, on the criminal standard, that this element, and thereby the charge, was proved.

An inconsistent verdict

[37] Upon the appellant's case, there is a factual inconsistency between the verdicts on counts one and two and that on count three. On each charge, the only issue was whether it was proved that the appellant believed that Mack was under 16. It is said that the evidence suggested no fact or circumstance, between the occasion the subject of count two and that the subject of count three, by which the jury, if in doubt as to count two, could have been in no doubt as to count three.

[38] What must be considered is whether there is a proper way by which the verdicts may be reconciled, such that it may be concluded that the jury performed their functions as required.[21] In some cases, an appellate court may conclude that the jury took a "merciful" view of the facts upon one count, which might explain an acquittal on that count and a conviction on another.[22] The present case is not said to be one of them.

[39] The effect of the appellant's submission, this is one of a "residue of cases … 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 [or] 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".[23]

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20 *M v The Queen* (1994) 181 CLR 487; [1994] HCA 63; *SKA v The Queen* (2011) 243 CLR 400 at 405 – 406 [11] – [14]; [2011] HCA 13.

21 *MacKenzie v The Queen* (1996) 190 CLR 348 at 367 (Gaudron, Gummow and Kirby JJ); [1996] HCA 35.

22 Ibid.

23 Ibid at 368.

[40] Count one concerned events two days prior to those the subject of counts two and three. And the facts the subject of count three occurred at a different time, although on the same day as those the subject of the count two. As the respondent submits, the jury had to be satisfied, at the time relevant for the charge in question, that the appellant believed Mack to be aged under 16. The respondent's submissions referred to evidence that after the image was sent by the appellant (the subject of count two), there were these features of the communications:

(i) there was a "limited response" to that picture;

(ii) Mack continued to be unwilling to send a picture of himself;

(iii) Mack said that he did not know how to get to the appellant's house;

(iv) Mack indicated that he wanted to meet the appellant before getting in a car with him;

(v) Mack discussed what he had been doing with his mates, with them "not knowing about him yet";

(vi) the appellant continued to facilitate the meeting in the CBD, despite Mack's indicated difficulties in that arrangement;

(vii) the appellant selected a certain place in the Queen Street Mall where they could meet;

(viii) Mack indicated that he was nervous about meeting the appellant.

[41] Still, prior to the sending of the image, Mack had consistently referred to his age as 14 and that he was at school and sexually inexperienced, and despite all of those indications, the jury was not persuaded of the appellant's belief at the time of the earlier offence on the same day. In my view, there was nothing that was significant in what occurred by the time of the second of those offences (count three) from which the jury might have become satisfied, beyond a reasonable doubt, about his belief.

[42] It is submitted for the respondent that there is an alternative basis for the verdict on count two, namely that the jury may not have accepted that the sending of the image the subject of the second count was conduct done with an intent to expose Mack to indecent matter and without legitimate reason. But although the jury had to be satisfied of those matters in order to convict on the charge under s 218B, there was no factual contest about them. The only issue was whether the appellant believed that Mack was under 16.

[43] In my conclusion this ground of appeal should be accepted, resulting in the conviction being set aside and a verdict of acquittal being substituted.

Misdirection

[44] The judge directed the jury, correctly, that the prosecution had to prove that the appellant believed that Mack was under the age of 16. But he ought not to have directed the jury about the defence under s 218A(9) because, as this Court held in *Shetty*, that defence could be relevant only where the prosecution case was that, in fact, the person was under the relevant age. The jury was thereby misdirected.

[45] The respondent's submissions accept that a direction, in the terms of s 218A(9), was "unnecessary". But it is submitted that no prejudice arose because the jury was given clear instruction as to what the prosecution had to prove. It is said that the direction provided an additional path to an acquittal and could not have prejudiced the appellant.

[46] I am unable to accept the respondent's submission. It can now be seen clearly that the jury could not have been satisfied both that the appellant had the requisite belief under s 218A(1) and a belief under s 218A(9). But that did not occur to either counsel at the trial and it cannot be assumed that it would have occurred to the jury, who would have disregarded the direction under s 218A(9). It is possible that at least some of the jury may have been confused about what constituted the one question upon which the outcome depended.

[47] Had I not concluded that the conviction should be set aside upon the ground of inconsistency of verdicts, I would have been persuaded upon this ground to set aside the conviction and order a re-trial.

Conclusion and orders

[48] The conviction should be set aside on the ground that it cannot stand with the verdict of an acquittal on count two. I would order as follows:

1. allow the appeal.
2. set aside the conviction.
3. substitute a verdict of acquittal on count three on the indictment.