SUPREME COURT OF QUEENSLAND

CITATION:	*R v MCQ* [2018] QCA 160
PARTIES:	**R** **v** **MCQ** (appellant)
FILE NO/S:	CA No 268 of 2017 SC No 1068 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 2 November 2017 (Clare SC DCJ)
DELIVERED ON:	10 July 2018
DELIVERED AT:	Brisbane
HEARING DATE:	11 May 2018
JUDGES:	Fraser and Gotterson and Morrison JJA
ORDER:	**The appeal is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where the appellant was found guilty after trial of two counts of rape and one count of sexual assault and acquitted of two counts of rape, one count of attempted rape and one count of sexual assault – where the offences occurred in the context of a marital relationship and the possibility of reasonable mistake about consent was raised – where it was submitted on appeal by counsel for the appellant that the jury could only have acquitted on the basis that they did not accept the complainant's evidence of refusal and resistance on those particular dates and if they did not, the guilty verdicts were then irrational – where there existed several matters which could well have impacted upon the jury's ability to reach a conclusion in relation to the counts the appellant was ultimately acquitted on – whether the different verdicts were logical with reference to the evidence – whether the verdicts were unreasonable and impermissibly inconsistent *R v Fanning* [2017] QCA 244, cited *R v McLucas* [2017] QCA 262, cited
COUNSEL:	A J Glynn QC for the appellant J A Wooldridge for the respondent

SOLICITORS: Tubaro Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Morrison JA and the order proposed by his Honour.

[2] **GOTTERSON JA:** I agree with the order proposed by Morrison JA and with the reasons given by his Honour.

[3] **MORRISON JA:** The appellant and the complainant were married in October 2012. At that time she was 20 and he was slightly younger. They remained together until late 2015. During the course of their marriage, which ended in November 2015, they had three children: X, born in January 2013, Y, born in April 2014, and Z, born in September 2015.

[4] During the course of the marriage the complainant said that the appellant had either initiated or continued with sexual intercourse or intimate touching after she had told him not to, or to stop. Her complaints in relation to those matters led to the appellant being charged with four counts of rape, one count of attempted rape, and three counts of sexual assault. He was convicted on two counts of rape and one of sexual assault, and acquitted on the balance. That has led to this appeal which is based upon the contention that the verdicts are inconsistent and therefore should be set aside.

[5] Set out below are the counts on which the appellant went to trial, the time period within which the offence occurred, and the outcome at trial.

Between 12 January 2013 and 1 July 2013

(a) Count 1: rape; acquitted;

Between 30 June 2013 and 28 April 2014

(b) Count 2: rape; acquitted;

(c) Count 3: attempted rape; acquitted;

(d) Count 4: sexual assault; acquitted;

(e) Count 5: rape; guilty;

Between 21 September 2015 and 18 November 2015

(f) Count 6: sexual assault; acquitted;

(g) Count 7: sexual assault; guilty; and

(h) Count 8: rape; guilty.

[6] Though there were eight counts on the indictment, the actual conduct concerned four episodes. The first was count 1, the second was counts 2-4, the third count 5, and the fourth counts 6-8.

[7] The sole ground of appeal[1] is that the verdicts are unreasonable because the verdicts of guilty on counts 5, 7 and 8 are inconsistent with the verdicts of not guilty on counts 1-4 and 6.

Background

[8] The complainant was about 19 when she first met the appellant. He was younger by about 18 months, and just short of 18 years old when the relationship began. They commenced dating towards the start of 2012 and the complainant fell pregnant with X in April 2012. They were living at Alderley at the time they married and stayed there until about July 2013.

[9] In about July 2013 they moved to Arana Hills, remaining there until about September 2014. During that time the second child, Y, was born. The complainant fell pregnant with Y in about August or September 2013.

[10] In September 2014 they moved again, to Narangba. The complainant found she was pregnant with Z on 31 December 2014. She suffered severe morning sickness for the whole of that pregnancy.

[11] They separated on 17 November 2015, when the complainant left with the children.

[12] Count 1 occurred at the Alderley house, counts 2-5 at the Arana Hills house, and counts 6-8 at Narangba.

[13] Before she had met the appellant, the complainant had been the victim of two sexual assaults by two other people. There were no details of those events, including as to their timing in relation to meeting the appellant. Further, the complainant had a long history of depression and anxiety, and had suffered some post-natal depression.

[14] After Y was born the complainant and appellant agreed that the Monday of each week was a day where "we would be able to sit down and talk and that we would have sex … to try and make sure that it happened on a regular basis".[2] The Monday arrangement continued after they moved to Narangba, but the complainant was suffering severe morning sickness and was very unwell.[3]

[15] The complainant told the police in her interview that "throughout the whole pregnancy,[4] sex was very painful for me and I had no desire to have sex at all".[5] The complainant said that the Monday arrangement was one she had felt pressured into making, and had agreed with reluctance.[6]

[16] At trial the issues concerned only the question of consent. Not surprisingly, given that they were married for three years, the defence accepted that there had been an intimate relationship between the complainant and the appellant involving sexual activity. All that was put in issue was whether that activity happened with consent. The defence case was that there was no occasion where there was a lack of consent.

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1 Grounds 1 and 3 are no longer pursued.
2 AB 35 ll 9-11.
3 AB 35 l 40.
4 This referring to the pregnancy with Z.
5 AB 62 l 6.
6 AB 64 ll 7-10.

[17] The complainant gave evidence that there were numerous occasions when the appellant persisted with sexual activity notwithstanding her telling him not to or to stop. She also described occasions early in their relationship where, if they had an argument, the appellant would get angry and hold her against a wall or try and stop her from walking away.[7]

[18] One matter that occupied some time during the trial was cross-examination of the complainant about her social media posts on Facebook, Instagram and on a blog she maintained. The messages were largely ones that praised the appellant and her relationship with him. I shall deal with relevant aspects of those entries below.

Circumstances of the offending

Count 1 - Rape

[19] The complainant gave evidence that this offence occurred whilst at Alderley and when X was three or four months old. Early one morning she woke up to find the appellant touching her on her breasts and vagina. The touching was both outside and inside the clothes she wore to bed. The complainant asked him to stop but he did not. She had been facing away from the appellant, towards the edge of the bed where X was lying. The appellant rolled her over so she was more in the middle of the bed and kept on touching. She kept on asking him to stop. The appellant took her underwear off, put his penis into her vagina, and started thrusting in and out. The complainant said she kept asking him to stop and she tried to roll away, but the appellant was using his weight to hold her down. She told him no and to stop a number of times, but he did not. After a short time he shifted his body weight and the complainant was able to roll over and take X, and get out of bed.

[20] The complainant said she was really scared so she stood in the corner of the room holding X, trying to keep him asleep. The appellant got up and got ready to go to work.

[21] She could not specifically recall saying anything to the appellant at that point, but they spoke by text[8] saying she did not like what had happened and she did not want that sort of thing to happen again because she thought that if sex was to occur, it was something that both parties had to want. She could not recall any response.

[22] The complainant did not tell anyone else about what had occurred. She said the reason for that was that she was partly scared and worried that if she did tell someone she would not be believed, or that people "would just say that if we were married then I was just expected to have sex with him anyway, whether I wanted to or not".[9]

[23] The complainant was asked whether, prior to that occasion, the appellant had intercourse with her without consent, and answered, "Not that I recall, no".[10]

[24] In cross-examination it was put to the complainant that there was never an occasion after any intimacy between her and the appellant where he said "sorry", or where he

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7 AB 27.
8 The complainant used the phrase "sent him a message" which I infer was a text message.
9 AB 29 l 25.
10 AB 30 l 8.

apologised for anything. She answered that there were occasions where he did apologise afterwards, but she could not specifically recall when that was.[11]

[25] Further, the following questions and answers occurred in cross-examination:

> "Were there times during the relationship where you would wake up and [the appellant] was touching you in an intimate way? --- Yes.
>
> And were there times when that conduct was unwanted at least from your point of view? --- Yes.
>
> And were there times from your point of view where you were happy with that contact – the touching? --- Yes."[12]

[26] There was no specific cross-examination about the events of count 1. Counsel for the appellant put to the complainant that there was no occasion on which she had been sexually assaulted by the appellant, or that sexual interaction between her and the appellant had been other than consensual.

Count 2 (rape), count 3 (attempted rape), and count 4 (sexual assault)

[27] The complainant's evidence as to these three offences was that they occurred after she and the appellant had moved to Arana Hills. She discovered she was pregnant with Y in about August or September 2013 and then the three offences occurred out of the one incident in November 2013. She said that they occurred late at night when she had been asleep. She woke up to the appellant touching her on her vagina and breasts. The touching was underneath her pyjamas. She asked him to stop because she was in the early stages of pregnancy and really tired, and hadn't been well. However, he kept going. She asked him to stop again and he would not. The appellant rolled her on to her back and then commenced to have sexual intercourse.

[28] Her description of the event was as follows:

> "And I asked him to please stop as I was in the early stages of pregnancy and really tired and hadn't been well. And … he kept on going … I asked him to stop again and he wouldn't and again, he rolled me further onto my back, because I normally sleep on my side, and climbed on top to put his penis into my vagina and started having sex. After a little while, I kept trying to ask him to stop and … told him I didn't want to. And after a while, he rolled me onto my stomach and he tried to put his penis into my anus and … I remember that it really hurt. That wasn't something that I had done before and it wasn't something I wanted to do. And I screamed. And I was able to … roll around a bit so that he wasn't able to. But he still held me down while I asked him to please stop. And then he masturbated over me until … he ejaculated on me. And then I got up and at that point, I decided I didn't want to be there anymore. So I went and packed some things into a bag and got [X] so I could leave".[13]

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11 AB 48 ll 34-38.
12 AB 64 ll 12-19.
13 AB 30 l 44 to AB 31 l 10.

[29] The complainant said that the appellant continued to touch her vagina whilst masturbating. She asked him to stop during this time but he continued to touch her.

[30] The complainant gave evidence that she packed the bags, took X out of bed and went downstairs where she found the appellant sitting on a couch next to the garage door with a large kitchen knife. The appellant said that if she tried to leave he would kill himself. She said she didn't know what to do, was scared and went back upstairs and put X back to bed.

[31] The complainant said she called her father, though at the time she did not reveal to him what had occurred. She did not tell her father about the sexual acts. Her father came over and spoke to the appellant. As a result she continued to stay with the appellant and in that relationship.

[32] The complainant said that she told her father at a later stage about the sexual abuse that occurred, but that was before she made her complaint to the police. That was in the few weeks after she and the appellant separated in November 2015. She could not recall the specific words she used to describe the "sexual things that happened without my consent", and said she did not describe them in any explicit detail.[14] Her recollection was that she told her father that the appellant would have sex with her and if she asked him to stop or told him no, that he would keep on going. Also that the appellant would touch her on her breasts and genitals, again continuing even if she said no or asked him to stop.[15]

[33] In cross-examination the complainant was questioned about an affidavit she made in order to obtain a domestic violence restraining order. She said she could not recall specifically what was in the affidavit, but that the police had told her she did not need to include more detail than she had.[16] She agreed that she did not refer to the attempted anal intercourse in that affidavit.[17]

[34] The complainant was then asked whether it was her evidence that the attempted anal intercourse only occurred once. Her answer was:

> "I can't recall specifically. I know it happened on that particular incident".[18]

[35] The complainant said she was unable to say, one way or the other, whether it had happened on other occasions.

[36] She was then cross-examined about her account of the incident which resulted in counts 2-4 in her affidavit and she agreed that she had sworn the following:

> "One night, while I was pregnant with [Y] in 2013/2014, I woke up to him rubbing my genitals and breasts and trying to have sex with me by putting his fingers inside my vagina and then putting his penis inside my vagina. Despite me saying no several times he continued until he had ejaculated. After this we argued and [the appellant] was yelling and swearing at me and telling me that it was my fault that it had happened because I was rubbing him in my sleep and he thought

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14 AB 51.
15 AB 51.
16 AB 69 ll 14-20.
17 AB 69 l 32.
18 AB 69 l 35.

> that I was awake. He again stated that if I would have sex with him more often he wouldn't have had to do the things to me without my consent".[19]

[37] The complainant agreed that in her affidavit she had made no mention at all of the appellant attempting to anally rape her.[20]

[38] An entry made on 11 December 2013 on her Facebook was of a photograph, namely a picture of a pie including a hashtag "love heart for my sweetheart". It was suggested this was a reference to the appellant and though the complainant could not remember that specifically, she did say she was not dating anybody else.[21] That entry was three days following the events of counts 2-4.

[39] On 13 December 2013 the complainant posted on a blog that:

> "Not everything in my life is easy and there are times when just getting through the day can be a struggle. But I am blessed with a beautiful son, a healthy daughter on the way and a wonderful man who I can call my husband."[22]

[40] The complainant accepted that the post was made several days after the events of counts 2-4.

[41] Another entry was made on 25 December 2013:

> "Day 11. I am grateful for cuddles and relaxing on the couch with my husband".[23]

[42] Yet another was made on 5 February 2014.[24] The post read:

> "I am grateful for my husband".

Count 5 (rape)

[43] The complainant said that the events of count 5 occurred early in the morning on Sunday, 8 December 2013. At that point she was still pregnant with Y. She said she woke up to find the appellant "trying to initiate sex and touching me, touching my breasts and touching my vagina".[25] She asked him to stop but he did not, and kept on going. She kept asking him to stop. He rolled her over, climbed on top and inserted his penis in her vagina. Just prior to that, while she was lying on her side facing outwards, the appellant was behind her and he "sort of, positioned his penis in between my legs and was thrusting backwards and forwards, but at that point he hadn't penetrated".[26] The appellant took her underwear off after he had rolled her over. She asked him to stop whilst he was engaged in intercourse, and tried to get away but the appellant hit her.[27] The appellant also slapped her on the face and on

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19 AB 70 l 35 to AB 71 l 15.
20 AB 71 l 38.
21 AB 52.
22 AB 53.
23 AB 53.
24 The transcript records that as 5 February 2013 but the sequence of days shows that to be incorrect.
25 AB 32 ll 28-29.
26 AB 32 ll 45-44.
27 AB 33 ll 16-18.

her arms, and kept going until he ejaculated. Then he rolled over and went back to sleep.[28]

[44] The complainant said she went to the bathroom, got dressed and got X out of bed, and then left and went to where her father was at church. She did not tell her father at that time about the sexual acts which had occurred. After being at the church she then went to a shopping centre and met the appellant's mother. Whilst she was there she started getting text messages from him saying that if she did not come home then she should not bother, that he would have the locks changed, and that he was very angry with her. The complainant said she was scared to go back home but did so later in the afternoon, accompanied by the appellant's father.[29]

[45] The complainant said she did not tell anyone on that day about what had occurred because she was really scared, and afraid that if she did, the appellant would hurt himself or hurt her again. She said: "I had a not quite one year old and was pregnant, and I didn't want my kids to have to grow up without two parents around".[30]

[46] In cross-examination the complainant was asked about what she had said to the appellant's father and mother when she spoke to them later that day. She said she could not specifically remember the conversation that she had.[31]

[47] The complainant was cross-examined about her posts on social media during this period. One such entry was one on 30 October 2013. In the blog entries the complainant described the appellant as "my wonderful husband", "still my very best friend and I feel blessed to have him in my life", but also this entry: "But there are some things you just can't do!!"[32]

Count 6 (sexual assault), count 7 (sexual assault), and count 8 (rape)

[48] The complainant's evidence about the incident that led to these three counts was that it was between October and mid-November 2015, when their third child, Z, was only a few weeks old. She said she woke up one night and the appellant was touching her again. She asked him to stop because Z had only just got to sleep and wasn't sleeping very well at night. She said the appellant kept on touching her and she kept asking him to stop. This was the subject matter of count 6. He then got very angry, yelled at the complainant, stormed off and slammed the door.

[49] The following morning the complainant said she was up before Z had woken. She was in the shower washing her hair when the door opened and the appellant got in with her. He came over and started to hug her and kiss her neck. The complainant asked him to stop because "I just wanted to be able to have a shower and just have some quiet time before the kids got up in the morning".[33] The complainant persisted, and started to touch her breasts and vagina. Again she asked him to stop and he did not. The appellant turned her around and held her against the shower wall. He inserted his penis in her vagina and started to thrust in and out. She again asked him to stop.

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28 AB 33 ll 29-35.
29 AB 34.
30 AB 34 l 22.
31 AB 72 l 2.
32 AB 52 ll 8-22.
33 AB 36 ll 33-34.

[50] The complainant said she was eventually able to move enough that his penis was removed from her vagina. The appellant then held her against the shower wall while he masturbated until he ejaculated on her. He then left the shower, she washed herself off, got out of the shower and went back to the bedroom.[34]

[51] The complainant said at the point when he was masturbating, she was crying because she was scared and upset. She tried to move away but he held her against the wall in the corner of the shower.[35] The appellant held her with one arm against her chest so she could not move, and the other hand was on his penis.

[52] The complainant said that after it was over she told him she did not want him to do that to her and he responded that if the complainant "wasn't so restrictive in what he did during the sex and if I would have the sex with him more often then he wouldn't just have to take it whether I was willing or not".[36]

[53] The complainant said it was after that incident that she made the decision to leave, which she did on 17 November 2015. In that process she spoke to a friend and "told her some of the issues we'd been having in our relationship and that [the appellant] would touch me when I was asleep … and when I asked him not to, but I can't recall if I told her about any specific occasions that had taken place".[37]

[54] On the day that she left another friend came round to assist packing up. The complainant contacted DV Connect, a women's helpline for women in domestic violence situations. She could not recall if she told them about the specific incidents that had occurred, but did tell them that the appellant would continue with sex or touching even when she asked him to stop.

[55] In cross-examination the complainant was taken to various parts of her formal police statement. She confirmed that she had told the police that throughout the pregnancy with Z "sex was very painful for me and I had no desire to have sex at all".[38]

[56] Through that period, however, she agreed that she had sent some intimate photographs of herself to the appellant.[39] She was taken to a number of photographs which, it was suggested, she had sent to the appellant on her own initiative, and she responded that although she had no recollection of doing so, it was possible. She also said that the appellant would ask for photos at times as well.[40]

The complainant's social media posts

[57] The complainant accepted that the posts were made, as well as her posting photographs of the family in which she expressed love and affection towards the appellant.[41] The complainant also accepted that she had made quite a number of posts to blogs or websites in which she expressed her gratitude to be married to the appellant, how

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34 AB 36.
35 AB 37 ll 1-4.
36 AB 38 ll 8-10.
37 AB 38 l 22.
38 AB 62 l 6.
39 AB 62 l 15.
40 AB 64 l 1.
41 AB 54 l 35.

important the appellant was to her child, or how grateful she was to be married.[42] One such post was made on 31 May 2014:

> "I want my husband to know, without a doubt, that if I was stranded on a desert island and could choose between my phone and him, that I would choose him".[43]

[58] Some posts read in a more qualified way. The complainant accepted that she made one on 8 September 2014 which read, in part:

> "Searching for sunshine when you hit rock bottom … I am also very grateful to have a husband who hasn't given up on me yet, although I am sure I give him more than enough reasons to".[44]

[59] A further post occurred on 13 February 2015, when, according to the complainant, she put up a message which read:

> "Damn, my husband is lucky to have a wife as romantic as me".[45]

[60] In the same month was another post which included a photograph of the appellant working in the garden and the text:

> "What a stud my husband is; came home early from work with sandbags and a shovel".[46]

[61] Also in February 2015 was a posted image of the appellant accompanied by text saying: "Breakfast with this stud".[47]

[62] On 20 July 2015 the complainant agreed she posted a document which read:

> "But would I exchange that for the feeling of waking up every morning next to my best friend? Would I exchange that new-found excitement for the warmth that is in my heart every time my husband and I look at each other from across the room and know that we are okay and that we love each other? Absolutely not!".[48]

[63] There were also posts in August 2015 of a photograph of the appellant and Z and Y reading "Such a wonderful Daddy", and a photograph of the complainant and the appellant together with the caption: "I love you, and thank you for being incredible".[49]

[64] Amongst other laudatory social media posts and texts was one (the last put to the complainant) dated 13 October 2015, comprising a photograph of the appellant and complainant accompanied by the text:

> "Happy anniversary to my wonderful husband. Three years, three kids, three houses and three cars later and we haven't killed each other yet. In fact, I even still love you. Here's to not having four kids on our fourth anniversary and to the next 60 years of loving you.

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42 AB 55.
43 AB 56 l 5.
44 AB 56.
45 AB 57 l 25.
46 AB 57 l 40.
47 AB 58 l 9.
48 AB 59 ll 1-5.
49 AB 59.

> I'm so blessed to be doing life with you and I wouldn't choose anyone else to build my family with. Love you, XX".[50]

[65] In re-examination the complainant was asked to explain why it was she had put those posts up on Facebook, Instagram and in blog entries. Her answer was as follows:

> "I suppose there's a couple of separate reasons. One of those is again why it took me so long to leave the relationship in coming from a religious background and not ever having seen a marriage or something that would end in divorce, I was genuinely hoping that over time we would be able to work through our issues and that that wouldn't have to occur, and in that circumstance it's easier to try and focus on any good things that are happening because rather than focusing on the bad things because if you're only focused on those, it'd be a lot more difficult. Also Facebook and Instagram is – and blogging so to speak is often so much – and certainly for me was great to describe many positive points in my relationship, but certainly wasn't a forum that I ever used to discuss significantly negative things about our relationship. And I had also grown up thinking that if you're having problems in a relationship or with your husband that that's something that you try and sort out between the two of you and if you need to bring in a third party, then you do, but it's not something that you gossip about and you talk about to everybody all the time. So it wasn't the sort of place I would've said anything about that either".[51]

[66] It was also put to the complainant, and she accepted, that she had sent a number of intimate images to the appellant.[52] Her explanation for that in re-examination was as follows:

> "… I suppose part of me had hoped that, if we were still able to be intimate when it was consensual that perhaps the other times would stop and they wouldn't happen, and … I was still trying to make an effort to somehow make our relationship work, despite everything that was going on and even though, for me …".[53]

Evidence of the complainant's father

[67] The complainant's father said that in mid-2013 he went to the complainant's house and spoke with the appellant. He and the appellant went for a long walk and spoke about some things to do with the relationship between the appellant and the complainant. The complainant subsequently described a situation where "she had been violated", but it was not clear whether it was the situation that resulted in him going to the house.[54]

[68] The father said that he had been told by the complainant that she had been violated, but she did not go into detail. His recollection was that she used the word "violated". He did not ask what she meant.

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50 AB 60 ll 26-30.
51 AB 72 l 46 to AB 73 l 15.
52 See paragraph [56] above.
53 AB 73 ll 28-32.
54 AB 74.

[69] He recalled an occasion when the complainant spoke to him on the morning before church, but she did not discuss any aspect of sexual abuse at that time. However, late in 2015 she described two events to him. One was that "she was in bed, had one of the children in bed with her, and that [the appellant] had attempted to, or wanted to, have sex with her" but she refused. The second one was a situation "where he had forced himself upon her when she had simply said that she didn't want to have sex but he nevertheless proceeded".[55] In neither case did she apply the explanation to a particular occasion.

[70] After the complainant and appellant separated the complainant told him of an occasion where, in the morning, the appellant was attempting to have sex with her, which she did not want, so she fled to their bathroom where he followed her and proceeded to force himself upon her. Nothing else was said.[56]

[71] In relation to counts 2-4, in cross-examination the father said that when the complainant called him because the complainant was threatening harm with a knife, he asked why and the answer was "it was because she had refused to have sex with him".[57]

[72] The father said that the complainant had not mentioned any attempted anal rape, as "she has not mentioned that level of detail to me".[58]

Evidence of MJS

[73] MJS knew the complainant through church. She attended the complainant's house at Narangba on 16 November 2015, at which time the complainant told her that the appellant had sex with her even when she didn't want to. The complainant mentioned one instance when she woke up with the appellant "about to stick it in".[59] The complainant did not reveal any more about that occasion or about sexual abuse, and no specific dates. However, one of the times referred to by the complainant was just after she had given birth to Z. In cross-examination she said that the complainant had not used explicit words, but the impression she gained was that the appellant tried to force himself upon her.

Evidence of AWC

[74] AWC was an interventional counsellor for DV Connect. She gave evidence that she had a phone call with the complainant on 17 November 2015. In that call the complainant brought up the topic of sexual violence within her relationship and disclosed that she was forced "at least twice a month to have intercourse with her husband when she did not want to and was also forced to do things sexually that she didn't want to do".[60] She also said that the appellant would manipulate her beforehand and attempt to coerce her to have sex, even though she was saying no. She said that the appellant would hold her down and force her to have sex with him.[61]

[75] AWC was not cross-examined.

Evidence of PEJ

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55 AB 75 l 43 to AB 76 l 2.
56 AB 76 ll 18-23.
57 AB 77 l 10.
58 AB 78 l 5.
59 AB 79 l 12.
60 AB 81 l 43.
61 AB 82.

[76] PEJ was a counsellor, psychotherapist and educator. He was involved in counselling sessions with the appellant and the complainant. During those sessions one issue raised was that the appellant had been starting sex while the complainant was asleep.[62] He could not recall who raised that issue. In cross-examination he said that his discussions with the appellant and the complainant went beyond that mere description. However, the complainant never raised the assertion that the appellant had attempted to anally rape her.[63]

[77] In cross-examination the following passage emerged:

> "Did [the complainant], in that meeting, ever raise the assertion that [the appellant] would continue to have sex with her even when she had said no? --- No.
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> Did you, during that meeting after the disclosure that you have given evidence about, ask [the complainant] whether she had ever previously said to [the appellant] that she did not like that behaviour? --- I was very specific in asking her if she shared with him her thoughts about that. And I … said have you spoken to [the appellant] and told him that's not what you want and she said no.
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> And when you say that, you're referring, of course, to … ? --- Initiating
>
> … what you said earlier? --- Initiating sex when she's asleep.
>
> And, I'm sorry, you say you did ask [the complainant] that question? --- I asked [the complainant] specifically that question.
>
> And what was her answer? --- No, she had not told [the appellant] that she was not happy with that".[64]

Evidence of CML

[78] CML was a friend of the complainant who assisted. In early-2015 the complainant said that the appellant had sex with her without her consent.[65] When asked for the words used, the answer was "She … said she felt pressured to have sex with [the appellant] and that, at times, she would be asleep and … she would wake up to him having sex with her".[66]

[79] CML said that was all the complainant said to her. She was not cross-examined.

Evidence of TEL

[80] TEL was another friend of the complainant and involved in the same church. He had known the complainant since early-2015. He said that the complainant had not ever disclosed to him anything about the appellant having sexual activity with her without her consent. He had referred the appellant and the complainant to the counsellor PJ. He said that the appellant told him, after he had had some counselling, that there was an occasion when he and the complainant were engaged

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62 AB 86 l 25.
63 AB 87 l 38.
64 AB 87 l 41 to AB 88 l 12.
65 AB 89 l 3.
66 AB 89 ll 11-13.

in sex, and the complainant asked him to stop and he could not.[67] That was the only occasion on which the appellant mentioned it. He also said there was an occasion, towards the middle or end of 2016, when the appellant told him that the complainant "uses sex to manipulate men then calls rape when it goes too far".[68] The example given by the appellant was that the complainant "would send him nude photos of herself while he was at work, how they would have a shower together, and then say no when it came to having sex".[69] He described it as a conversation about how frustrating it was for the appellant.

[81] TEL was not cross-examined.

Legal Principles

[82] Recently the principles applicable to the issue of inconsistent verdicts was summarised in *R v McLucas*,[70] where Flanagan J said:[71]

> "[65] In *R v GAW* Philippides JA (with whom Margaret McMurdo P and Holmes JA (as the Chief Justice then was) agreed) by reference to *M v The Queen*, *Jones v The Queen* and *MacKenzie v The Queen* summarised the principles concerning inconsistent verdicts as follows:
>
> > "[19] The principles concerning inconsistent verdicts are well-established. Where alleged inconsistency arises in the jury verdicts upon different counts affecting an accused, the test is one of 'logic and reasonableness'; that is, whether the party alleging inconsistency has satisfied the court that the verdicts cannot stand together because 'no reasonable jury, who had applied their mind properly to the facts in the case could have arrived' at them.
> >
> > [20] However, respect for the jury's function results in a reluctance in appellate courts accepting a submission that verdicts are inconsistent in the relevant sense, so that:
> >
> > '... 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.'
> >
> > [21] In that regard, '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

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67 AB 91 l 44.
68 AB 93 l 12.
69 AB 93 ll 17-19.
70 [2017] QCA 262.
71 *R v McLucas* [2017] QCA 262 at [65]-[67], Sofronoff P and Boddice J concurring; internal citations omitted.

> 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 on one count; a function which has always been open to a jury.
>
> [22] It is only where the inconsistency rises to the point that the appellate court considers intervention is necessary to prevent possible injustice that the relevant conviction will be set aside. While it is impossible to state hard and fast rules, the following provide examples of relevant inconsistency; where the different verdicts returned by the jury are an affront to logic and common sense which is unacceptable, and strongly suggests a compromise in the performance of the jury's duty, or which suggests confusion in the minds of the jury, or a misunderstanding of their function, or uncertainty about the legal difference between specific offences, or a lack of clarity in the instruction on the applicable law."

[66] In *R v Conn; R v Conn; Ex parte Attorney-General (Qld)* Sofronoff P (with whom Fraser JA and North J agreed) observed that it is not irrational for a jury to accept a witness's evidence in relation to some events while holding a reasonable doubt in respect of other events sought to be proved by the same witness, particularly when that witness is the only witness to prove all issues. Juries are invariably directed to consider each count separately by reference to the evidence applicable to that count. Sofronoff P further stated:

> 'Frequently, the argument that a miscarriage of justice has occurred and can be demonstrated by what is said to be an irreconcilable inconsistency of verdicts is raised in cases in which the sole evidence implicating an accused is the uncorroborated evidence of a complainant. There will often have been a delay in the making of any complaint. Commonly it can then be said that there is no apparent difference in the character or quality of the evidence given by a complainant to prove each of the counts. However, it cannot be maintained that these factors alone would justify a conclusion that there has been a miscarriage of justice in any case in which a jury has convicted on some counts and acquitted on others. That is so because the significance of features like these will also depend upon the facts of a particular case, the way the trial has been conducted by the prosecution and the defence and the content of the Judge's directions to the jury.'

[67] Importantly for present purposes Sofronoff P observed:

> "It must constantly be borne in mind, when considering such a ground of appeal, that it is not for the Crown to justify or to rationalise verdicts of conviction and acquittal.

> Differing verdicts are inherent in trials of multiple counts, particularly when a jury is warned against propensity reasoning. It is for an appellant to demonstrate a miscarriage of justice by showing, by reference to the facts, the evidence, the witnesses and the conduct of the trial, that the differing verdicts are actually irrational or repugnant to each other and not merely that they might be.""

[83] Further, some examples of the way in which verdicts might differ but not in a way such as to warrant setting them aside, were given in *R v Fanning*:[72]

> "[21] Various matters of principle have been settled about the assessment by an appellate court of the issue of inconsistent verdicts. They include:
>
> (a) the appellate court needs to be persuaded that the performance of the jury's duty has been compromised by verdicts which are an affront to logic and common sense, or which suggest confusion in the minds of the jury, or a misunderstanding of their function, or an uncertainty about legal differences between the offences, or a lack of clarity in the instruction on the applicable law;
>
> (b) as the test is one of logic and reasonableness, the question is whether a reasonable jury, who had applied their minds properly to the facts in the case, could have arrived at the various verdicts;
>
> (c) if there is a proper way by which an appellate court can reconcile the verdicts, appellate courts should accept the jury as having performed its function and be reluctant to accept a submission that verdicts are inconsistent;
>
> (d) different verdicts may be a consequence of a jury correctly following instructions to consider each count separately, and to apply the requirement that all elements must be proved beyond reasonable doubt;
>
> (e) different verdicts will show the required inconsistency where a verdict of acquittal necessarily demonstrates that the jury did not accept evidence which needed to be accepted to lead the other verdict of guilty;
>
> (f) a jury may decide that it would be oppressive to convict on all charges and give a merciful verdict;
>
> (g) a jury might find the quality of a crucial witness's evidence variable, even though it is accepted as generally truthful; some aspect of the evidence might point to faulty recollection on some points, or

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72 [2017] QCA 244 at [21]; referring to *R v CX* [2006] QCA 409 at [33]; *R v Smillie* (2002) 134 A Crim R 100, [2002] QCA 341 at [28]; *R v SBL* [2009] QCA 130 at [28]-[34] and *Osland v The Queen* (1998) 197 CLR 316 at 356-357.

> exaggeration on others, or an inherent unlikelihood about some aspect of the evidence, all of which casts doubt on the accuracy in those respects, but not of the witness's general honesty;
>
> (h) in some cases it is possible that in respect of some counts there might be contradictory evidence which does not apply to other counts, and thus explains the variation in the verdicts; and
>
> (i) it may be in some cases that the different verdicts are explicable on the basis that there was corroboration in respect of some counts, but not others."

Submissions

[84] Mr Glynn QC for the appellant submitted that the verdicts on counts 1, 2-4 and 6 could only have been reached on the basis that the jury did not accept the complainant's evidence of refusal and resistance. The evidence on those counts was of the same substance and quality as those on the counts on which he was convicted. It was submitted there was no corroboration of any of the offences.

[85] Further, Mr Glynn submitted that the learned trial judge's attempts to reconcile the verdicts, when sentencing, was misplaced. The rationalisation was based upon the possibility of reasonable mistake about consent in the context of a continuing marriage, which, it was submitted, was not open if the evidence of the complainant was accepted. Further, it was submitted that whilst count 5 involved an allegation of slapping, there was nothing which gave particular support to that allegation. Counts 7 and 8 involve allegations of no greater violence than the other counts on which the appellant was acquitted, and there were no particular inconsistencies in relation to count 6, which did not apply to other counts.

[86] Further, there was nothing in the evidence which would justify the jury reaching different verdicts.

[87] Separately Mr Glynn submitted that the jury's deliberations may have been influenced by a direction given in these terms:[73]

> "There are eight separate charges which means that you're being asked for eight separate verdicts. Just because you find [the appellant] guilty or not guilty of one charge does not mean you can then automatically say that he is guilty or not guilty of the other charges."

[88] He focussed on the word "automatically", contending that it qualified the direction otherwise to determine each count separately.

[89] For the Crown Ms Wooldridge submitted that the jury were expressly directed as to the need to consider each count separately, evaluating the evidence relevant to that count. On a consideration of the whole of the evidence for each count there were logical reasons why the jury could have differentiated between the counts, such that the verdicts were not inconsistent.

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[73] AB 135 l 15.

Discussion

[90] In my view, a review of the evidence relevant to each of the counts, as well as some of the common evidence, reveals that there are logical reasons why the jury may have reached the verdicts it did.

[91] In respect of count 1, the evidence of the counsellor, PEJ, could well have had an impact. Count 1 involved an occasion when the appellant initiated sexual contact while the complainant was asleep. The evidence of PEJ was to the effect that when he asked the complainant directly if she had told the appellant that she did not want sex, or refused sex when he initiated it while she was asleep, the complainant answered in the negative. Further, in her own cross-examination the complainant responded to a proposition that she had never raised unhappiness about something sexual that had happened, by saying that she had "[spoken] to him after things happened, saying I didn't like what had happened".[74] The jury may have entertained doubts on the basis of the evidence about the complaints to do with count 1. Further, such doubts may have been given force by the fact that the complainant's evidence was that she had sent a text later that day signifying her dislike about what happened.

[92] Those aspects provide a basis upon which the jury might have acquitted on that ground whilst treating other grounds differently.

[93] In respect of counts 2-4, there are several matters which could well have impacted upon the jury's ability to reach a conclusion, of guilt beyond reasonable doubt. First, there is the evidence of PEJ to which I have already referred in respect of count 1. It has equal impact on these counts.

[94] Secondly, the complainant gave conflicting versions of what occurred. The first was that given in court as reflected in paragraphs [27]-[30] above. The second was in her affidavit prepared for the purposes of obtaining a domestic violence order. The text of that affidavit appears in paragraph [36] above. On any view, the versions are different and that could have led the jury to entertain a doubt about guilt.

[95] Thirdly, the complainant's father gave evidence to the effect that the threat by the appellant to kill himself was because the complainant did not want to have sex. But they did have sex. Either way it was not couched on the basis that he was threatening to self-harm because he had just raped the complainant.

[96] Fourthly, there was a body of evidence to the effect that the attempted anal rape was not mentioned to anyone, or in her police statement or affidavit. That was a core feature of the account in respect of this incident, and may well have led the jury to doubt the question of guilt on all counts arising out of that incident.

[97] Fifthly, in cross-examination the complainant was unable to say, one way or the other, whether the appellant had attempted anal rape on any other occasion. That may have caused the jury to doubt her recollection about this particular incident.

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74 AB 47 ll 31-32.

[98] Sixthly, in cross-examination the complainant said that there were times when she was happy with the intimate touching occurring when she woke up. That, too, may have led to a relevant doubt.

[99] Count 5 contained an element which was not present for counts 1-4 or 6-8. That was that it involved violence, the appellant slapping the complainant on the face and on the arms when she resisted.

[100] Further, this was an occasion containing greater detail than the other counts. For example, she was able to give a specific date, it was signified by seeing her father at church, and also by speaking to each of the appellant's parents, by returning to the house with the appellant's father, and the incident being the cause for the agreement concerning sex on Mondays. The fact that there was such an arrangement was not challenged.

[101] Further, this was the only occasion, according to the complainant's evidence, where she received threatening text messages from the appellant.[75] The fact that those texts were sent was not challenged.

[102] For these reasons the jury may have taken the view that the complainant's evidence was more compelling in respect of count 5 than it was for other counts where they acquitted.

[103] Whilst counts 6, 7 and 8 occurred in a relatively short space of time,[76] there is a discernible difference between them. In the period after count 5 occurred the complainant and the appellant put in place the Monday arrangement. There was no challenge to the fact that such an arrangement had been made, and that it involved the proposition the two of them reserving Mondays for consensual sexual intercourse. There was no suggestion that it was the only day, but that was set aside as the nominated day of each week. Therefore, during the period of time that elapsed between when count 5 occurred and the incident constituting count 6, there was a period of consensual sex, at least on Mondays.

[104] Count 6 related to an event a few weeks after Z was born. Z was born on 22 September 2015. No greater specificity was given as to the day of the week, and therefore the jury may have entertained doubt about guilt on count 6 because it may have occurred on a Monday. Combined with that fact was the evidence which the complainant gave that there were times when she was happy with the intimate touching when she woke up. It is possible the jury had some doubt about count 6 on that basis as well.

[105] Further, her request for him to stop was, according to her evidence, because Z, who did not sleep well, had only just gone to sleep. On that basis the jury might have considered that her evidence did not indicate true resistance to sexual intercourse, but rather a concern that the baby might wake. In any event, even though she asked him a couple of times, her evidence was that the appellant did stop. He certainly became angry, yelled at her and stormed off, slamming a door, but he stopped. On that basis the jury may have entertained doubt in relation to the elements of count 6.

[106] Counts 7 and 8 arose out of events the following day. The complainant was having a shower and washing her hair when the appellant got into the shower and started to

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75 See paragraph [44] above.

76 Count 6 on one day and counts 7 and 8 on the next.

hug her and kiss her neck. Notwithstanding her asking him to stop, he did not do so and persisted touching her breasts and vagina. Those facts alone are enough to distinguish between count 6 and count 7.

[107] In addition, the jury may have considered the evidence on counts 7 and 8 to have a level of greater detail and distinguishing features that, they may have concluded, caused it to be better remembered by the complainant. Those features include: unlike all other counts these involved conduct in the shower; they followed the confrontation on the previous night, the subject of count 6; count 8 was the only count where sexual intercourse or sexual touching occurred whilst standing up, let alone in a shower cubicle; the evidence of the complainant included that she was "crying" which the jury may have concluded was additional evidence of non-consent; the events of counts 7 and 8 were the catalyst for her leaving, a decision which was not made without some planning because she called DV Connect, and enlisted the aid of friends to assist her packing; count 8 at least involved a level of violence against her in that he held her against the shower while masturbating; there was the unchallenged evidence that after the incident she told him she did not want him to do that, and he responded that if she wasn't so restrictive in what he did during sex, and if she would have sex more often, then he wouldn't have to take it whether she was willing or not.

[108] For the reasons set out above I am not of the view that the differing verdicts are an affront to logic. The difference in the verdicts, as a matter of logic and reasonableness, can be explained on the basis that the acquittals were because the jury may have had a doubt reflected in the differing features attaching to those counts, as opposed to those counts upon which they found him guilty. I am unpersuaded that the differing verdicts indicates that the jury in some way compromised their duty.

[109] For the reasons outlined above the ground advanced lacks merit. As a consequence the appeal should be dismissed.