

SUPREME COURT OF QUEENSLAND

CITATION: *R v CCD* [2018] QCA 187

PARTIES: **R**
v
CCD
(appellant)

FILE NO/S: CA No 77 of 2017
DC No 186 of 2017

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: District Court at Southport – Date of Conviction: 12 April 2017 (Muir DCJ)

DELIVERED ON: 10 August 2018

DELIVERED AT: Brisbane

HEARING DATE: 20 September 2017

JUDGES: Fraser and Morrison JJA and Mullins J

ORDER: **Dismiss the appeal.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where the jury found the appellant not guilty of count 1 rape but guilty of its natural alternative of indecent treatment of a child under 16 years – where the jury found the appellant not guilty of count 2 indecent treatment of a child under 16 years, with the circumstance of aggravation that the child was under 12 years – where the jury was discharged without reaching a verdict on count 3 indecent treatment with the same circumstance of aggravation – whether the differing verdicts of the jury could be reconciled – whether the guilty verdict was impermissibly inconsistent and unreasonable

CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE AND INSUPPORTABLE HAVING REGARD TO EVIDENCE – where the appellant argued that there were significant inconsistencies in the complainant’s evidence, and between the complainant’s evidence and the preliminary complaint evidence – where the complainant changed her evidence at the pre-recording about how many times this conduct had occurred – where the complainant’s mother and the mother’s friend claimed that the complainant had denied there was any penetration – where the complainant did not tell her teacher or an employee at her school about counts 2 and 3 – whether the inconsistencies in

the evidence made the guilty verdict on count 1 unreasonable
MacKenzie v The Queen (1996) 190 CLR 348; [1996] HCA 35,
 applied
R v Clapham [2017] QCA 99, applied

COUNSEL: S Bain 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] **FRASER JA:** The appellant was charged with three sexual offences against the complainant. On count 1 (rape), the jury found the appellant not guilty of rape but guilty of indecent treatment of a child under 16 years. On count 2 (indecent treatment of a child under 16 years, with the circumstance of aggravation that the child was under 12 years), the jury found the appellant not guilty. On count 3 (indecent treatment with the same circumstance of aggravation), the jury were discharged without reaching a verdict.
- [2] The appellant has appealed against his conviction upon the grounds that the verdicts of the jury are inconsistent and that the guilty verdict is unreasonable and not supported by the evidence.

The Crown case

- [3] The complainant was aged between 10 and 11 during the period charged as the time within which the offences occurred. The complainant gave two video recorded statements to police two days apart, about three and a half months after the end of the charged period. About one year after the complainant gave those statements, she gave pre-recorded evidence on two occasions about one month apart. The Crown case was based upon the evidence of the complainant. In addition, the Crown adduced evidence from the complainant's mother, a friend of the complainant's mother, and an employee and a teacher at the school the complainant attended. Those witnesses referred to preliminary complaints the complainant made shortly before she participated in her first police interview.
- [4] Towards the beginning of the first police interview, the complainant said that she was massaging her step-father's back, because it was really sore, and he started to touch her on her private parts and her chest. He refused to stop when she asked (count 1). When the appellant asked her whether it felt nice she said that it did not and it felt really uncomfortable. The complainant said that he had done that to her about five times or four or five times and she felt really uncomfortable. The complainant did not at this point in the interview refer to the appellant penetrating her vagina during the massage. The complainant said that the appellant got a thing from his bedroom that was purple and it was a like a "vibrator thing" but the complainant did not know what it was. She said that the appellant put that on her (count 3). The appellant did not stop when the complainant asked him to and she said that she felt really uncomfortable.
- [5] A police officer asked the complainant to talk about the most recent incident she remembered. She said that she was wearing her school uniform and the appellant

told her to take her clothes off. She was watching a children's show on television, that she named. The appellant told her to lie on the couch cushions, he rubbed her back, and then he started going down her legs and then "into my private" before telling her to turn around so that he could rub her chest (count 1). He rubbed her back, legs, chest, boobs, vagina and bum. When asked whether, when the appellant was rubbing her body, anything else happened, the complainant said that it had not. The appellant said that if she told her mother they would break up, it would cause a big disaster, and therefore she should not tell anyone.

- [6] In that context, the complainant said that the appellant once jumped into the shower with her. When she asked the appellant to get out, he would not and said that he did not want to waste water. The complainant had to get out and let the appellant have his shower. He told her to scrub all of his body and his "doodle". She did not want to do so, but he told her and she had to (count 2). That occurred in the previous year but she did not know when in the previous year. The police officer said that the complainant had said that she did touch him on his doodle. The complainant replied that it was with the scrubber, which she described as a green sponge. When the appellant asked her to rub him she replied that she had just rubbed his back so it shouldn't be sore. In answer to further questions, the complainant said that this referred to the same time when the appellant had rubbed her when she was naked (count 1).
- [7] The police officer asked further questions about the shower incident (count 2), and the complainant said that the appellant had no hair around the appellant's doodle.
- [8] The police officer asked the complainant whether there was anything different that occurred in the four or five times when the appellant had rubbed her. The complainant said that once after the appellant had rubbed her and she had her shower by herself the appellant came to her bedroom and put the purple thing on her, telling her it was a vibrator (count 3). The appellant told her to hold it there and she was really uncomfortable. She described the vibrator. The appellant got it out of his top drawer on the right hand side in his bedroom then turned it on. The appellant put it on her pyjamas over her vagina. The appellant asked her to hold it there. She said "no", the appellant put it away, and they watched a bit of television.
- [9] When the complainant was asked whether she had told anyone, she referred to a friend, her mother, her mother's friend, and an employee and a teacher at the complainant's school. The complainant had told her mother that she needed to tell her something, that the appellant had been touching her in wrong places, she felt really uncomfortable, and he had been touching her in wrong places with a cream and massaging her. When asked why she had told her mother, the complainant said it was because her mother had said that the appellant was leaving because he was sick of the complainant's mother.
- [10] The police officer asked the complainant whether, at any time when the appellant was rubbing her and with the vibrator, he had put part of his fingers inside her body. The complainant responded "yes". It had happened the nights he had rubbed her; when he rubbed her he put his fingers in her vagina. He had done so on all of the four or five times he had rubbed her. He pushed his thumb against her vagina and put his four fingers inside her one at a time for about a minute each.
- [11] In the complainant's second police interview two days later, the complainant was again asked about the massages (count 1). She substantially repeated what she had

said in the first police interview. When specifically asked about where the appellant's hands went, she said the appellant was using his fingers. He rubbed her in her vagina. The complainant added that his fingers only went up a little bit. That had happened around five times. When asked where she got that number from, the complainant said that it hadn't been like two times and it hadn't been like ten times or like seven times. She could not remember the first time. The last time was definitely in the previous year. She remembered it happening around her birthday and her step-sister's birthday, both of which are in July.

- [12] The complainant also described the vibrator incident (count 3) in terms similar to those she used in her first police interview. The complainant said that when the appellant pulled out the vibrator there were batteries that came out of it and he had to change them. He got the batteries from the top drawer as well. She explained where the batteries went in the vibrator.
- [13] The complainant was also asked about the shower incident (count 2), and again made statements similar to those in her first police interview. The complainant added that when she was rubbing the appellant's doodle she was looking away at the wall. Subsequently, when the complainant was asked what she saw, she said that the appellant's doodle was up. She added that she thought that the appellant did not have any balls. She just had a quick peek at the appellant's doodle.
- [14] The complainant was subsequently asked what she meant in the first interview when she had mentioned fingers inside. The complainant said that the appellant, "just put his fingers inside my vagina a little bit ... [I]ike not too far ... he started to put his fingers inside me and I said ouch that hurts and he's like does it and I'm like yes so then he just he just kept doing it ... just putting them". The appellant asked the complainant whether she had ever explored her vagina. She said she had not because that was disgusting, and the appellant told her she should do it. In response to further direct questioning, the complainant said that the appellant put his fingers in and felt around and did not stop when she told him to stop.
- [15] The complainant said that she had told her mother that the appellant had put his fingers inside her. When asked to say how the complainant had explained that, she said that she told her mother that when she had been at work the appellant had been "touching me in places". When her mother asked her to go into detail she went into detail for her. In response to direct questions, the complainant said that she told her mother that the appellant had been "putting his fingers inside of me just a little bit ... cause it was only a little bit". The complainant said that her vagina was hurting and it hurt her to urinate.
- [16] In the complainant's pre-recorded evidence, when she was asked in evidence in chief whether, after listening to the first police interview, everything she had told the police officer was true, the complainant said that it happened two to three times, not four to five. When asked why she said that, the complainant answered that it was because she could remember it that way. Otherwise the complainant confirmed the truth of what she had said in the police interviews. In cross examination, the complainant confirmed that it happened two to three times, rather than four to five times. When asked whether she had a clear memory that it had only happened two or three times, she responded that it was not a clear memory but it was two or three times but not four or five. When she told police it was about four to five times that was not correct. When asked what the complainant remembered happening in the

two or three times, the complainant said that the shower and the vibrator incident happened at the same time and the massage occurred once or twice.

- [17] The complainant agreed that she had found the vibrator a couple of years earlier in her mother's drawer. She agreed that on the occasion when the appellant used the vibrator he did not have to change the batteries. She did not recall telling police in her first interview that the appellant had to change the batteries. If she had said that it would not have been correct. The complainant said that she did tell her aunt (apparently a reference to her mother's friend) that the appellant put his fingers into her vagina. That was her memory. The complainant said she had not told her class teacher for grade 6 that the appellant had slapped her across her face. The appellant had never slapped her. She disagreed that she told her mother that the appellant did not penetrate her vagina. The complainant agreed that when she spoke to her mother the first time she was trying to tell her mother everything that she remembered and she was being truthful. That was also so when she spoke to her mother's friend.
- [18] The complainant agreed that she used to get on well with the appellant but that he was the strict one in the family. He tried to impose rules and wanted the complainant to respect him and the complainant's mother. She did not like the appellant trying to make her do things around the house, pick up after herself, and take her washing to the laundry. The complainant agreed that she pushed time limits imposed by the appellant. It was the appellant who disciplined her about that, rather than her mother. When the appellant or the complainant's mother made her go over and stay at the complainant's biological father's place on weekends that made the complainant angry. She did not want to stay with her father. When the complainant was younger, her father was stabbed by his girlfriend whilst she was present. Subsequently she was given help by school counsellors and others to support her and make her safe. The complainant agreed that she could tell them anything bad that happened to her. She knew from the previous incident when she had spoken to police that the police would sort things out if bad things happened to her. She had a very close relationship with her mother and could tell her anything.
- [19] The complainant agreed that she continued to massage the appellant's back, and he continued to massage her back while she was wearing her clothes in the presence of the complainant's mother. This occurred until the appellant left the house after the complainant had spoken to police. She was happy to continue giving the appellant back rubs. For the whole time when the appellant was living at the complainant's house they went on holidays as a family and she was happy to go with him.
- [20] The complainant was aware that, very shortly before she first complained that the appellant had touched her, the appellant and the complainant's mother were arguing over the complainant not respecting the rules. The appellant was cross about the complainant not having come home on time. Her mother told her about the appellant wanting to leave. When asked whether that made her pleased, she said, "Yes, but then no. I'm not that sure, really." She agreed that she was fighting with the appellant who was trying to make her do things that her mother did not. The first time the complainant ever told her mother that the appellant had done anything sexually inappropriate was when the complainant's mother told her that the appellant was not going to leave anymore.

- [21] The complainant disagreed that from the day when she first complained she thought that the appellant was going to be allowed back into the house. She was happy that he was not in the house. She agreed that she was supposed to stay at her father's place on the weekend immediately following her complaint so that her mother could go to work. She did not like that idea and she refused to stay with her father. She stayed with the appellant. It was like any other Friday night, as if nothing had been said by her. On the Sunday she went to the beach with the appellant and her mother. It was like any other day at the beach. The appellant was teaching her to surf.
- [22] It was only after that weekend that the complainant told a teacher that she had been sexually abused. The complainant disagreed that she just wanted the appellant out of the house.
- [23] After the complainant spoke to police the appellant was not allowed to live in the house anymore, her mother would not get cross with the complainant if she came home late, she did not have to visit her father, and she did not get into as much trouble as she would have if the appellant had been home when she did not do her chores around the house.
- [24] The complainant agreed that she did not think that "telling this story would get as big as it actually has" and she did not think it would end up in court. She knew that it was serious but not as serious as it became. The complainant agreed that she would like to have the appellant come back and live with her but it would have to be "a really slow move in". She had written to the appellant that she really wanted to be a family again. She really missed the appellant and did not want him to go to jail. The complainant wanted the appellant to see a picture of her graduating from the primary school. She sent him such a picture from her mother's phone. The complainant gave other evidence about wanting to share things with the appellant and wanting him to be with her.
- [25] The complainant agreed that earlier in the year when she went to the police she had got into trouble for telling lies at home. She had made up a story that her grandmother was going through her mother's drawers when her grandmother was looking after her. She did not want to get her grandmother into trouble. She was not quite sure why she made up the story. The complainant denied that she had made up the stories of sexual abuse by the appellant. She adhered to her evidence of the offending.
- [26] On the second occasion upon which the complainant gave pre-recorded evidence, the complainant agreed that when she spoke to her grade six class teacher she told him that her parents had broken up on the preceding night. She denied that she told him that the appellant had struck her across the face. She could not remember whether or not she had told her teacher on that occasion that the appellant had sexually abused her. The complainant agreed that on the following day, a school employee took the complainant out of her class to have a conversation with her and asked whether she wanted to talk to her about the problem she had told her class teacher about. The complainant did not want to talk to her at that time. On the Monday of the following week, the complainant did talk to that employee and made disclosures to her. The complainant agreed that she did not want to talk to the guidance officer but wished to talk to that employee and her classroom teacher instead.

- [27] The complainant's mother gave evidence that, on a date which was shortly before the complainant spoke to police, the complainant said that there was something she had to tell but was not sure how to. The complainant's mother told the complainant that she could tell her anything. The complainant said that when the appellant was giving her a massage he touched her "fefe" (a word the complainant used for her vagina). The complainant said it had happened three times. When asked whether anything had happened, the complainant said that she lay down on the bed and the appellant put a vibrator just in between her legs, and the appellant had got in to the shower with her. In response to other questions, the complainant said that the vibrator had been there about ten seconds, it had not been inserted into her, and she had her clothes on. In relation to the shower, the complainant said that when she was having a shower the appellant got into the shower with her and asked her to scrub his back. The complainant scrubbed his back, he got out, and the complainant continued to wash her hair before she got out. She did not provide any further details about that incident.
- [28] Later that day, the complainant's mother was present when the complainant spoke to the mother's friend. The complainant again said that it had happened two to three times. When asked what had happened, the complainant said that the appellant massaged her and touched her "fefe". The complainant's mother said that "we asked her if he had put his – what part of his hand he had used". The complainant responded, "Just his hand". When asked if there were fingers involved, the complainant said "no". The complainant's mother said that the appellant and the complainant used to give each other "rubs". The appellant suffered from a sore back and it was more of a crunch than a rub. Those massages took place in the lounge room and the complainant's mother was present. The complainant's mother said that the complainant stopped receiving the massages on the day the complainant made disclosures to her.
- [29] In cross examination, the complainant's mother gave evidence that was very similar to the evidence given by the complainant about her relationship with the appellant and the friction between them. The complainant's mother and the appellant argued about the complainant not respecting what people said and about trying to change it. During this argument the complainant's mother said that it was not a big deal. The appellant said it was and kicked a coffee table. The appellant said that he was going to leave that weekend and the complainant's mother told him that the door was open. Later the same night, the complainant's mother told the complainant that the appellant wanted to leave that weekend. The complainant's mother said that it was because of herself rather than the complainant. On the following morning the appellant said that he was trying to achieve respect and consideration at all times and to put boundaries in place for the complainant. The complainant was nearby and overheard the conversation. After the appellant went to bed, the complainant asked whether the appellant was leaving, to which the complainant's mother replied that he was not and he was just a bit cranky at the moment. It was at that time when the complainant disclosed the appellant had given her a massage and touched her "fefe".
- [30] The complainant's mother said that she recalled during the conversation where her friend and the complainant were present that the complainant's mother's friend asked whether the appellant put his fingers inside the complainant. The complainant's answer was that he did not.

- [31] After the complainant made her disclosure about the vibrator, the complainant's mother went into the bedroom. She turned on the vibrator but it did not work. There were no batteries in it. She put some batteries in it and it worked. Spare batteries were not kept in the drawer to use with the vibrator. The complainant's mother said that the appellant at the relevant time had pubic hair and testicles.
- [32] The complainant's mother referred to some occasions when the complainant had told lies to her. The complainant's mother also gave evidence that was similar to the evidence given by the complainant about spending a weekend with the appellant after the complainant had made disclosures of the offending.
- [33] The complainant's mother's friend said that when the complainant made disclosures in the presence of her mother, the complainant said that the appellant had touched her on her private part two or three times. When asked how the appellant had touched her the complainant responded, "With his hand". When asked whether it was with fingers or the palm, the complainant said "No fingers" and "Just palm". The complainant said this happened while her mother was at work. When the complainant was asked whether the appellant used anything else, the complainant said the appellant used a "purple thing" that was in her mother's drawer. The complainant said she wasn't aware of what it was at the time. The complainant's mother's friend could not recall the complainant saying anything else.
- [34] In cross examination the complainant's mother's friend said that when the complainant made the disclosures the complainant fidgeted, there were no tears, and it was like general conversation more than anything. The complainant's mother's friend thought she had directly asked whether the appellant put his fingers in the complainant's vagina or just touched it. The complainant's answer was that the appellant had just touched it.
- [35] An employee of the state school the complainant attended gave evidence that a teacher had alerted her to something that might have happened at the complainant's home. The complainant told her that she did not want to talk about it. On the following Monday, she spoke to the complainant again. She took the complainant outside the classroom and asked if she wanted to talk. The complainant disclosed that in the previous year she was sexually abused by her step-father and had told her mother about it. The complainant said that her step-father had touched her in her private area three or four times. The complainant said that she had told her mother, her aunty and her best friend. She was giving her step-father a massage, because he works really hard. Following the massage her step-father asked her to take off her clothes and lie down and he touched her private areas. In cross examination, she agreed that the complainant said she had been giving the appellant a massage when it happened and that sometimes or most times it began with a massage. The complainant said no when asked whether she wanted to say anything else. The complainant did not mention anything to do with a vibrator or a shower or that her vagina was penetrated with fingers.
- [36] The complainant's class teacher gave evidence of a conversation shortly before the complainant made disclosures. The complainant was clearly distressed and not herself. The complainant said that her parents split up and there was a fight and she got hit across the face. On the following Monday the complainant was still not herself. When the teacher asked the complainant if she was okay, the complainant said she was fine. After school the complainant waited at the door and asked if she

could tell him something that she had told the school employee earlier that day. To the best of the teacher's knowledge, the complainant said that she was sexually abused in the previous year by her step-father. In cross examination about the first conversation, the teacher agreed that the complainant told him before school started that her parents had decided to break up on the previous night and she was struck across her face by her step-father. The complainant also mentioned a situation involving her step-mother, when someone in the house was stabbed. She made no mention of any sexual abuse by her step-father on that day. The teacher agreed that when the complainant made disclosures that she had been sexually abused she did not give any further details.

[37] The appellant did not give or call evidence.

The appellant's argument

[38] The appellant argued that the differences amongst the preliminary complaint evidence were significant. Important aspects of the evidence of the complainant undermined her credibility and reliability. It was submitted that there was no reasonable explanation for the change in the complainant's evidence about the number of offences from four or five to two or three, this change having occurred after the complainant had viewed her statements in her police interviews in preparation for trial. The complainant gave evidence of her familiarity with school staff and others who she knew could assist her if she felt that she was unsafe; but she had not complained that the appellant had sexually offended against her until after the argument between her mother and her step-father and when she learned that the appellant was to stay in the house. It was important background that the complainant was upset with the discipline imposed by her step-father. The appellant referred also to the lies which the evidence suggested the complainant had told, including about the appellant having slapped her (although the complainant denied that in cross examination) and about the complainant's grandmother's behaviour. The appellant submitted that it was significant that after the complainant made disclosures to her mother she interacted in the ordinary way with her step-father during a weekend at the beach, and she agreed in cross examination that she missed the appellant and wanted him to be part of her family life. The complainant's evidence denying that she had ever told her class teacher that her step-father slapped her across the face was wrong, particularly because the teacher had the advantage of referring to notes whilst he gave his evidence.

[39] The appellant argued that the most significant inconsistency in the complainant's evidence was that, although she made it clear in her evidence that the appellant penetrated her vagina with his fingers and she said that she told her mother and her mother's friend about the penetration, they gave evidence that when the complainant was asked specifically about penetration she had made it clear that the appellant only used his palm and not his fingers. The appellant argued that the complainant's evidence about penetration was very specific, and she referred to having been hurt when the appellant's fingers went inside her. The appellant also relied upon the inconsistency between the complainant's evidence that the appellant did not have pubic hair or testicles and her mother's evidence to the contrary; and the apparent inconsistency between the complainant's evidence that her step-father replaced the batteries in the vibrator and her mother's evidence that there were no batteries in the vibrator when she found it after the event. The complainant's acceptance in cross examination that her evidence that the appellant replaced the

batteries was simply incorrect was characterised as a significant shift in her evidence made to correct what she must have known by the time of cross examination were mistakes in her original evidence.

Consideration

- [40] It is apparent from the complainant's evidence that, notwithstanding the conduct of the appellant of which she complained and about which she said she was uncomfortable, she wished him to remain part of her family life. She gave that evidence very frankly. The jury could regard that as supporting rather than detracting from her credit. It did not necessarily detract from the force of her evidence that she happily participated in a family weekend with the appellant after the complainant had made her disclosure. The significance of a point of that kind is pre-eminently for a jury to consider.
- [41] The inconsistency between the complainant's evidence and the evidence of her class teacher about whether the complainant said that the appellant had struck her in the face did not concern the sexual offence of which the appellant was convicted. It was a matter capable of bearing upon the complainant's credibility but it did not require the jury to harbour any doubt about the complainant's evidence that the appellant had indecently assaulted her.
- [42] The appellant emphasised the inconsistency between the complainant's evidence that she complained to her mother and her mother's friend about digital penetration and their evidence that she did not make such a complaint. That point deserved the jury's consideration. In relation to this and some other points made by the appellant, however, it must be borne in mind that the complainant gave her evidence about one year after she made those complaints. That is a very significant period of time in the life of a girl as young as the complainant was at the time.
- [43] Whether the evidence about the content of the complaint given by the complainant's mother and mother's friend should be accepted, in preference to the evidence of the complainant, was a matter for the jury. If the evidence of the complainant's mother and mother's friend resulted in the jury doubting the complainant's evidence that she had complained to them that the appellant had digitally penetrated her vagina, the jury, acting reasonably, could regard that as an innocent mistake by the complainant attributable to the passage of time and her young age. Further, if the jury considered that the complainant denied to her mother and her mother's friend that the appellant digitally penetrated her, the jury were not bound to conclude that the complainant's evidence of that conduct was not true. In that respect the jury could accept and take into account the complainant's young age and her evidence to the effect that she was conflicted: she wanted the appellant to remain part of the family but she also wanted him to stop his sexual abuse of her. The jury might nonetheless have reasonably decided that the evidence as a whole was insufficiently compelling to find the appellant guilty beyond reasonable doubt of the offence of rape. Accordingly, whilst the evidence given by the complainant's mother and the mother's friend about the topic provides a logical explanation for the jury's decision to acquit upon the charge of rape, it does not follow that it necessarily should have generated a doubt in the jury's mind that the appellant was guilty of indecent treatment in the course of the massage.
- [44] The jury may well have accepted the complainant's mother's evidence that the appellant had both pubic hair and testicles and considered that the complainant must

have been mistaken about that evidence. Such conclusions might have contributed to the jury harbouring a doubt about whether the appellant was guilty upon count 2, but it again does not follow that the jury should have regarded this as undermining the complainant's credit generally. The complainant's evidence suggests that she looked towards the appellant's genitals only for a very short time. The jury could have reasoned that the complainant simply made a mistake. The jury might have considered that her evidence upon count 2 was probably correct but that, bearing in mind the demanding standard of proof required of the Crown, they should harbour a doubt about the appellant's guilt of that offence.

- [45] Another circumstance that might have contributed to the jury having such a doubt is that, although the complainant's mother gave evidence that the complainant said that the appellant got into the shower with her and she complied with his request to scrub his back, the complainant's mother said that the complainant did not provide any further details about that incident. The complainant's mother's friend gave evidence of disclosures which included no reference to count 2, as did the teacher, and the school employee. The jury were not obliged to regard this as undermining the complainant's credit generally, but the absence of preliminary complaint evidence and the inconsistency about the appellant's pubic hair and testicles supply a logical explanation of the acquittal on count 2.
- [46] The evidence of the complainant's mother that, after the complaint, she found that there were no batteries in the vibrator may have contributed to the inability of the jury to reach a verdict upon count 3. That evidence again did not require the jury to conclude that the complainant's evidence about the indecent treatment during the massage lacked credibility. Contrary to the appellant's argument, the jury were not bound to conclude that, when the complainant gave evidence that her earlier statement about the batteries was incorrect, she did so as a deliberate attempt to rectify what she must have known was an obvious mistake in her original statements to police. The two bodies of evidence were not necessarily irreconcilable. It again must be recalled that there was a long gap between the occasion when the complainant said that the offence occurred and when she gave her evidence and there may also have been a gap of many months between the occasion when the complainant said the offence occurred and when she made her disclosures. The complainant originally told police that she saw batteries because when he pulled out the vibrator he had to change them to make it work. When she gave evidence about a year later, she said "no" when asked whether she remembered telling the police that he had to change the batteries in the vibrator. The jury reasonably could regard that as a truthful answer which explained her preceding answers that it was not the case that the appellant found that the vibrator did not work and had to change the batteries.
- [47] The complainant's omission to disclose the indecent treatment in the massage earlier than she did despite knowing that there were a number of sympathetic people to whom she could complain is explicable by her evidence of her relationship with the appellant and his threat that disclosure by the complainant would fracture his relationship with her mother. In light of the complainant's evidence to the effect that she wished the family to remain together, the circumstance that the complainant made disclosures in the context that her mother said that the appellant would be staying after her mother had argued with the appellant does not seem to be a significant point. The complainant's evidence that the complaint had led to more serious consequences than she had anticipated could reasonably be regarded by the jury as

having no particular bearing upon her credit. The evidence which justified the jury in finding that the complainant had told some lies, including a lie about her grandmother's conduct, also could be regarded by the jury as not bearing adversely upon the complainant's credibility. Indeed, the frankness of the complainant's admission of the lie could have been regarded as bolstering her credit.

Unreasonable verdict

- [48] Counsel for the appellant referred to the summary of relevant principles concerning whether a verdict of a jury is unreasonable in *R v Clapham*,¹ which was adopted in *R v Latsamyvong*:²

“[4] The principles to be applied in determining whether a verdict of a jury is unreasonable, or cannot be supported having regard to the evidence, are collected in *SKA v The Queen*. The question is not whether there is as a matter of law evidence to support the verdict. Even if there is evidence upon which a jury might convict, the conviction must be set aside if “it would be dangerous in all the circumstances to allow the verdict of guilty to stand”. The Court is required to make an independent assessment of the sufficiency and quality of the evidence at trial and decide whether, upon the whole of the evidence, it was reasonably open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty of the offence of which he was convicted. In considering this ground of appeal the “starting point ... is that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, and the jury has had the benefit of having seen and heard the witnesses”, but:

“In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred.”

- [5] In *R v Baden-Clay* the High Court emphasised that the jury is “the constitutional tribunal for deciding issues of fact” and observed that, “the setting aside of a jury's verdict on the ground that it is ‘unreasonable’ ... is a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial”, “a court of criminal appeal is not to substitute trial by an appeal court for trial by jury”, and “the ultimate question for the appeal court ‘must always be whether the [appeal] court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty’.”

¹ [2017] QCA 99 at [4]-[5].

² [2017] QCA 174 at [136] (internal footnotes omitted).

- [49] I have referred to what appeared to be the most significant discrepancies and inconsistencies in the evidence upon which the appellant relied in support of his contention that the guilty verdict is unreasonable. The matters upon which the appellant relied substantially reflect those that were relied upon by defence counsel at the trial. The trial judge gave a specific warning to the jury to scrutinise the evidence of the complainant with great care before the jury could arrive at a conclusion of guilt. The trial judge referred to the inconsistencies and discrepancies upon which defence counsel relied; and directed the jury that they should only act on the evidence of the complainant, if after considering it with the warning the trial judge gave and all of the other evidence, the jury were convinced of its truth and accuracy.
- [50] The jury, who had the advantage of seeing and hearing the witnesses give evidence during the trial, did not regard the accumulation of those matters as giving rise to a reasonable doubt about the appellant's guilt. The complainant gave consistent evidence that the appellant touched her indecently and her evidence on that topic was consistent with the preliminary complaint evidence. For the reasons already given, the matters upon which the appellant relied did not require the jury to harbour a doubt that the appellant was guilty of the indecent treatment offence of which he was convicted. In my opinion, it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty of the offence of which he was convicted.

Inconsistent verdicts

- [51] I have identified ways in which the jury's conviction of the appellant of indecent treatment may be reconciled both with the jury's acquittal of the appellant of rape and the jury's acquittal of the appellant of the indecent treatment charged in count 2. The different verdicts are explicable by those matters and by reference to the trial judge's direction to the jury: to consider each charge separately, evaluating the evidence relating to that particular charge, and to decide whether they were satisfied beyond reasonable doubt that the prosecution had proved its essential elements; because the evidence in relation to the separate offences was different their verdicts need not be the same; and if the jury held a reasonable doubt concerning the truthfulness or reliability of the complainant's evidence in relation to one or more counts, that must be taken into account in assessing the truthfulness or reliability of her evidence generally.
- [52] Accordingly, there is in this case, "a proper way by which the appellate court may reconcile the verdicts, allowing it to conclude that the jury performed their functions as required".³ The failure of the jury to reach a verdict on count 3 is a positive indication that the guilty verdict is not a compromise of the performance of the jury's duty. This is not a case where there is an inconsistency between the verdicts which "rises to the point that the appellate court considers that intervention is necessarily required to prevent a possible injustice."⁴
- [53] The verdicts are logically and reasonably reconcilable.

Proposed Order

³ *MacKenzie v The Queen* (1996) 190 CLR 348 at 367.

⁴ *MacKenzie v The Queen* (1996) 190 CLR 348 at 368.

[54] I would dismiss the appeal.

[55] **MORRISON JA:** I agree with the reasons of Fraser JA and the order his Honour proposes.

[56] **MULLINS J:** I agree with Fraser JA.