HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

MFA APPELLANT

AND

THE QUEEN RESPONDENT

MFA v The Queen [2002] HCA 53
14 November 2002
S38/2002

ORDER

Appeal dismissed.

On appeal from the Supreme Court of New South Wales

Representation:

P Byrne SC with J E Barnett and P J D Hamill for the appellant (instructed by Legal Aid Commission of New South Wales)

R D Ellis with G E Smith for the respondent (instructed by S E O'Connor, Solicitor for Public Prosecutions (New South Wales))

CATCHWORDS

MFA v The Queen

Criminal law – Appeal – Indictment containing multiple counts of sexual offences with respect to one complainant – Verdicts of guilty on two counts and acquittals on the remaining counts – Whether verdicts unreasonable – Significance of acquittals when considering unreasonableness of guilty verdicts – Test for determination of unreasonableness of jury's verdict – Significance of disparities in evidence and failure of prosecution to call witness.

Criminal law and practice – Court of Criminal Appeal – Whether error shown in Court of Criminal Appeal's reasons – Whether proceedings should be returned to that Court – Whether High Court should perform appellate reconsideration.

Word and phrases – "unreasonable, or cannot be supported, having regard to the evidence".

Criminal Appeal Act 1912 (NSW), s 6(1).

1 GLEESON CJ, HAYNE AND CALLINAN JJ. The question raised by this appeal is whether the Court of Criminal Appeal of New South Wales erred in the manner in which it dealt with a contention that, in a case of multiple counts, verdicts of guilty on two counts were unreasonable having regard to the evidence in relation to those counts and having regard to verdicts of not guilty on the remaining counts.

2 In March 2000, the appellant was tried in the District Court of New South Wales before Acting Judge Ford and a jury. He was charged with nine offences of a sexual nature against a male complainant, LB. The alleged offences occurred over a period between December 1993 and January 1998. The nine counts in the indictment related to four separate occasions.

3 Counts 1 to 3, which involved one charge of indecent assault and two charges of homosexual intercourse, related to an occasion in 1993 or 1994 when the complainant (then aged 12), the appellant (then aged 34), and another adult named Hendrik Bosman, were together in a caravan that was parked at the rear of Mr Bosman's house. Counts 4 to 6, which also involved one charge of indecent assault and two charges of homosexual intercourse, related to an occasion in 1995 or 1996, when the complainant, two other juveniles, the appellant, and Mr Bosman were together in the same caravan. Count 9, which was a charge of homosexual intercourse, related to an incident that was said to have occurred early in the morning of New Year's Day 1998, in a tent near Mr Bosman's house. The jury returned verdicts of not guilty on all those counts.

4 The jury returned verdicts of guilty on counts 7 and 8. Those counts related to an occasion in mid-1997 when the complainant (then aged 15), the appellant (then aged 37), and another juvenile, MA (then aged 12), were together in the caravan.

5 Count 7 alleged that the appellant indecently assaulted the complainant. No further particulars were contained in the indictment. The evidence of the complainant was that he and MA were alone in the caravan having a pillow fight on the bed when the appellant entered. The complainant said the appellant joined MA and the complainant on the bed, and "started touching mine and [MA's] penis". According to the complainant, the appellant put his hand down the inside of the front of the complainant's pants for several minutes. At the conclusion of the evidence, in the absence of the jury, the trial judge asked the prosecutor to clarify the various charges. In relation to count 7, the prosecutor said that "we say the [appellant] place[d] his hand inside the complainant's pants … and touche[d] the complainant's penis."

6 Count 8 alleged that the appellant had homosexual intercourse with the complainant, being a male between the ages of 10 and 18 years. No further

particulars were contained in the indictment. The evidence of the complainant was that, following the episode the subject of count 7, the appellant fondled MA's penis, "and then he asked us to suck his penis." The complainant then described acts of fellatio, performed first by MA, and then by the complainant, upon the appellant. In relation to count 8, the prosecutor, before the summing-up, said that the alleged homosexual intercourse took the form of "the [appellant] placing his penis in the complainant's mouth."

7 In relation to count 8, the appellant was sentenced to imprisonment for three years and six months, with a non-parole period of two years and six months. In relation to count 7, the appellant was sentenced to a concurrent fixed term of two years and six months. He appealed against the convictions and sentences. The appeal against sentence was successful and resulted in a reduced sentence. That aspect of the matter is presently immaterial.

8 There was only one ground of appeal against conviction. It was as follows:

> "The verdicts of guilty on counts 7 and 8 are unreasonable and cannot be supported having regard to the evidence and to the verdicts of not guilty on counts 1, 2, 3, 4, 5, 6 and 9."

9 Section 6(1) of the *Criminal Appeal Act* 1912 (NSW) ("the Criminal Appeal Act") so far as presently relevant, provides:

> "The court on any appeal under section 5(1) against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal …"

10 The ground of appeal was based on the first part of that provision. The verdicts of not guilty on seven of the nine counts in the indictment were said to provide an additional reason for finding the verdicts on counts 7 and 8 to be unreasonable. However, it could not have been, and was not, suggested that there was any legal or technical inconsistency between the verdicts of not guilty and the verdicts of guilty. In order to explain the basis upon which it was contended that the verdicts on counts 7 and 8 were unreasonable, it is necessary to refer in more detail to the evidence, and to the course of the trial.

11 The trial lasted for two days. After the jury was empanelled, the trial judge gave the jurors brief instructions as to their task. They had already heard

the charges, and the pleas of not guilty. The judge told the jurors that ultimately they would have to consider all of the charges and, in each case, decide whether the prosecution had proved the elements of the offence beyond reasonable doubt. He stressed that in each case there could only be a finding of guilt if there was a unanimous agreement that guilt had been established beyond reasonable doubt.

12 The complainant was the first witness. At the time of the trial he was aged 18. He said he first met the appellant in 1994 at Hendrik Bosman's house. There was a caravan in the backyard. Both the appellant and the complainant were frequent visitors to the house. They used to play games and engage in recreational activities together. The appellant then described the incidents giving rise to the various charges in the manner summarised above. It is unnecessary for present purposes to go into the detail of the evidence concerning the counts on which the appellant was found not guilty. The complainant gave evidence of sexual encounters with the appellant on the occasions referred to. There was no suggestion that he ever complained about what was going on, or endeavoured to put a stop to the activity. In cross-examination he adhered fully to his evidence in chief. It was put to him in relation to each of the incidents he described that no such incident ever occurred. He asserted, in relation to each incident, that his evidence was true. The complainant was then confronted with a statement that he had made to the police in May 1998. In that statement he said that he and the appellant were friends, and that the appellant had never touched him in any way. The judge asked the complainant how the matter came to the notice of the police. The complainant said that the police approached him in April 1998. He said that he made no complaint at that stage because he was afraid that the appellant was going to do something to him. He said that his statement to the police, to the effect that the appellant had never touched him, was untrue, and that he made it because he was scared. He said that he had been told about a threat that the appellant had made to someone else.

13 The complainant's mother was called as a witness. She confirmed that they lived near the Bosman house, that there was a caravan near the house, and that the complainant was a frequent visitor to the premises.

14 At that stage of the trial, a question arose as to the position of the next witness for the prosecution, MA. The prosecutor indicated to the trial judge that there was reluctance on the part of the witness, and arrangements were made for him to give evidence on closed circuit television.

15 At the time of the trial, MA was 15. He said that, on an occasion in May or June of 1997, he and the complainant and the appellant were together on a bed in the caravan earlier mentioned. The three of them engaged in sexual activity. He said that he saw the appellant touching the complainant "on the outside of his pants". He then said that he saw the appellant sucking the complainant's penis.

In addition, he said he saw the appellant have anal intercourse with the complainant. The evidence as to the act of anal intercourse was given without objection. It was not the subject of any charge against the appellant, and was not a matter of which the complainant had spoken. It may be that there was no objection because it suited counsel for the appellant to emphasise the extent of the inconsistencies between the evidence of MA and that of the complainant. There were a number of such inconsistencies. First, in relation to count 7, the complainant said that the appellant touched him on the inside of his pants, whereas MA said that the appellant touched the complainant on the outside. Secondly, in relation to count 8, the complainant said that he performed an act of fellatio upon the appellant, whereas MA said that the appellant performed an act of fellatio upon the complainant. Thirdly, the complainant made no mention of anal intercourse on that occasion. Furthermore, the complainant gave evidence of a pillow fight with MA, which MA did not mention, and the complainant also spoke of an act of masturbation by the appellant which was not mentioned by MA.

16 In relation to the matter the subject of count 9, MA gave evidence that he attended a New Year's Eve party at the Bosman house with the appellant, the complainant and other people, and that, after the party, in the early hours of the morning, he slept in a tent that was also occupied by the complainant and the appellant. He said that he went to sleep and did not see anything happen between the other two.

17 As with the complainant, there was no suggestion that, before being interviewed by the police, MA had ever complained to anybody about sexual activities in the caravan. The complainant had given evidence that he had seen MA engaging in such activities with the appellant, but MA was not asked questions about that matter. He also was cross-examined about a statement he had made to the police when first interviewed. He originally denied that he had seen any sexual activities in the caravan. His evidence was that he had lied to the police about that matter. He explained his conduct by saying that he was afraid that his parents would learn of what he had done, and that he felt ashamed about it.

18 The appellant gave evidence. He said that he knew, and was friendly with, the complainant and Hendrik Bosman. He denied the evidence of the complainant about each and every act of sexual misconduct alleged against him. He said that he, the complainant, and MA were just friends, and that although they saw one another fairly frequently at the Bosman house and in or around the caravan, and although they once both slept in a tent, there had never been any physical contact of the nature alleged by the complainant and MA.

19 Neither Hendrik Bosman nor the two juveniles who were allegedly present on the second occasion gave evidence. The judge, in his summing-up to the jury, took them in detail through the evidence in relation to each count. He pointed out that there was no evidence to confirm or support what the complainant said in relation to the first, second or fourth occasions. He examined closely the evidence of the complainant and MA in relation to the third occasion, and pointed out the similarities and the inconsistencies. He said that it would be a matter for the jury, upon a consideration of the detail of the evidence, to decide whether they were satisfied that the evidence of MA supported or confirmed the evidence of the complainant.

20 At the request of counsel for the appellant, the judge reminded the jury that, according to the complainant, other persons had been present on the occasions the subject of counts 1 to 6, and that they had not been called as witnesses. At that stage, the judge said that the only inference that could be drawn was that those persons would not add anything to the evidence that had been presented. After the jury retired to consider their verdict the jurors sent a note to the trial judge expressing a wish to be told why Mr Bosman and the two other juveniles had not been called to give evidence. In the absence of the jury, the prosecutor informed the trial judge that Mr Bosman himself was to stand trial for similar offences in a short time, and that the view had been formed that the two juveniles were not reliable witnesses. The judge recalled the jury and responded to their question by pointing out that there was no evidence to indicate whether or not the three persons to whom they had referred were available. After some prompting by counsel for the appellant, the judge then went on to tell the jury that they could draw the inference that, because those persons had not been called to give evidence, their evidence would not have assisted the prosecution case. This was a *Jones v Dunkel*[1] direction.

21 In due course, the jury returned verdicts of not guilty on counts 1 to 6, and 9, and guilty on counts 7 and 8.

22 As the judge observed in his remarks on sentence, the most likely explanation of the differences in the verdicts is that the jury took the view that, notwithstanding the fact that there were inconsistencies between the evidence of MA and the complainant in relation to counts 7 and 8, the evidence of MA was substantially supportive of the complainant, and that counts 7 and 8 were the only counts in which the complainant's evidence was supported by another witness. Furthermore, in relation to counts 1 to 6, not only was the evidence of the complainant unsupported, but the judge told the jury that they could infer that

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1 (1959) 101 CLR 298.

if the other persons said by the complainant to have been present had been called as witnesses, their evidence would not have assisted the prosecution case. In relation to count 9, the other person present on the occasion, MA, said that he went to sleep and saw nothing.

23 The case was one in which the jury's assessment of the three principal witnesses, the complainant, MA, and the appellant was vital. The alleged offences arose out of sexual activities between the appellant and boys of a much younger age. The activities were not brought to notice as a result of any complaint by the boys. When first approached by the police, they denied the activities. In court, they sought to explain this by fear and shame. Furthermore, in evaluating the effect of the evidence of MA, the jury were entitled to take account of his age at the time of the alleged events, and the possibility of some confusion on his part. None of this relieved the Court of Criminal Appeal of its responsibility in scrutinising the evidence, and making its own assessment of the reasonableness of the guilty verdicts. However, in making that assessment, the Court would properly have been conscious of the fact that there were aspects of the case that would not be reflected adequately in the written record.

24 In the Court of Criminal Appeal and in this Court, reliance was placed on the combined effect of two features of the case: first, the inconsistencies between the evidence of the complainant and MA; secondly, the contrast between the verdicts on counts 7 and 8 and those on the other counts. Smart AJ, with whose reasons Heydon JA and Barr J agreed, said:

> "The appellant submitted that the verdicts of not guilty on counts 1 to 6 and 9 involving the non-acceptance of the complainant's evidence beyond reasonable doubt on those counts necessarily impacted upon the credibility of the complainant's evidence on counts 7 and 8. It does raise a query requiring the careful examination of the evidence of the complainant and that of MA.
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> The appellant further submitted that the evidence of MA did not support the evidence of the complainant as each gave a substantially different account of what took place during the third incident. However, although the particulars given by each varied significantly, both gave evidence of sexual malpractice on the appellant's part. The judge was impressed by the youthfulness of MA and was prepared to make considerable allowances for him on that account.
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> The Crown pointed out that while there were significant inconsistencies between the evidence of the complainant and MA as to the nature of the activity and who did what to whom, their evidence in some important areas was consistent, namely:

(a) Both said that the appellant touched the complainant on the penis in a caravan in the backyard of Bosman's house in mid-1997.

(b) Both said the appellant touched MA's penis as well.

(c) Both said at certain stages all three were on the same bed.

It is true that their evidence differs as to whether the appellant touched the penises on the inside or outside of the boys' pants. The jury may not have regarded that as a matter of significance. The essence of the charge was the appellant touching the complainant's penis.

As to count 8 (the complainant sucking the appellant's penis on his orders) the evidence of MA was that the appellant was sucking the complainant's penis. In other words the supporting evidence of MA does not extend to the allegation that the appellant made the complainant suck the appellant's penis and the complainant did so. The jury did not accept the appellant's evidence that no incident occurred. As to count 8, the supporting evidence confirms that a sexual incident involving the appellant and the complainant occurred. Thus the evidence in support of count 8 is not as strong as that in support of count 7.

There is considerable force in the appellant's submissions as to the weakness of the Crown case because of the inconsistencies between the evidence of LB and that of MA, their lack of complaint and their contradictory first statements to the police and the verdicts of not guilty on counts 1 to 6 and 9. However, I am of the opinion that at least as to count 7 it was reasonably open to the jury to be satisfied beyond reasonable doubt of the guilt of the appellant on that count.

The considerations affecting count 8 are more difficult. There is no direct supporting evidence from MA or anyone else of the complainant sucking the appellant's penis. At most there was evidence of an extended sexual incident at which MA was present involving the complainant and the appellant preceded by the appellant touching the complainant's penis. The judge gave the jury ample warnings. The discrepancies and the weaknesses in the Crown case were brought home to the jury. The jury were obviously satisfied that a sexual incident took place in the caravan and rejected the appellant's evidence to the contrary. While the supporting evidence as to count 8 was not as strong as that relating to count 7 I am of the opinion that it was reasonably open to the jury to be satisfied beyond reasonable doubt as to the guilt of the appellant on count 8. Like the judge, in evaluating the evidence I would bear in mind the age of MA at

> the time of the incident, about 12, and his age at the time of the trial, about 15, and the difficulties he experienced in giving evidence."

25 Where it is argued that the verdict of a jury is unreasonable, or cannot be supported, having regard to the evidence, the test to be applied is that stated by Mason CJ, Deane, Dawson and Toohey JJ in their joint judgment in *M v The Queen*[2]. That test was accepted and applied by this Court in *Jones v The Queen*[3]. In *M*, it was pointed out[4] that it was once common for expressions such as "unsafe or unsatisfactory", or "unjust or unsafe", or "dangerous or unsafe" to be used in place of the language of s 6(1) of the Criminal Appeal Act, and corresponding statutes in other jurisdictions, and that such expressions might cover different parts of the statutory provision, referring, for example, either to a verdict that is unreasonable, or cannot be supported, having regard to the evidence, or to a miscarriage of justice because an accused has not had a fair trial according to law. Speaking of cases where what is in question is whether a verdict is unreasonable, or cannot be supported having regard to the evidence, the joint judgment said[5]:

> "Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it 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."

26 The test, as formulated in *M*, should not be confused with the question whether a trial judge ought to have directed a verdict of not guilty. This is made clear by the opening words of the above passage. The difference between the function of an appellate court in reviewing the totality of the evidence at a trial in order to determine whether a verdict of guilty was unreasonable, and the function of a trial judge in considering whether as a matter of law there is evidence on

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2 (1994) 181 CLR 487.

3 (1997) 191 CLR 439. See also *Gipp v The Queen* (1998) 194 CLR 106 at 123 [49] per McHugh and Hayne JJ.

4 (1994) 181 CLR 487 at 492-493.

5 (1994) 181 CLR 487 at 493.

which an accused could be convicted, was explained in *R v R*[6], a decision which was approved by this Court in *Doney v The Queen*[7].

27 It was submitted that the repeated references by Smart AJ to a "sexual incident" discussed by the complainant and MA indicated that his Honour, in evaluating the evidence, failed to attend sufficiently to the differences between the evidence of those two witnesses, and for that reason, failed to scrutinise the evidence with the necessary care. However, a fair reading of the whole of what his Honour said shows that he was giving careful consideration to the inconsistencies, and that he used the expression "sexual incident", not to blur the differences in the evidence, but as a compendious description by way of background to an examination of the differences.

28 Bearing in mind that the appellant, in his evidence, completely denied any physical contact with the complainant of a kind that could possibly have had sexual overtones, the fact that MA gave evidence of extended sexual activity between the complainant and the appellant, activity in which MA himself participated, might well have been regarded as more significant than the differences between the complainant and MA as to precisely what was involved in that activity. In their assessment of the witnesses, which would have been influenced by the witnesses' respective ages and degrees of maturity, the jury could reasonably have considered that MA provided strong support for the complainant's position on the fundamental point of conflict between the complainant and the appellant, and that the reliability of the complainant's evidence as to the detail of what occurred was not significantly diminished by the discrepancies between his evidence and that of MA.

29 As to count 7, the touching described was not a brief episode that might have been merely accidental, and open to misinterpretation. As both the complainant and MA described it, it was part of an extended sexual encounter in which all three participated. The matter of detail on which MA differed from the complainant could reasonably have been regarded as trivial.

30 As Smart AJ recognised, the difference in relation to count 8 was much more substantial. Even so, the evidence of the complainant was cogent and unequivocal, and it was not inherently implausible. The evidence of MA supported the complainant in his contention that, while the three of them were together on the bed, the complainant and the appellant engaged in an act of oral

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6 (1989) 18 NSWLR 74.

7 (1990) 171 CLR 207.

sex, and the jury might well have been satisfied that, despite the differences between the complainant and MA as to the respective roles of the parties to that act, the evidence of the complainant should be accepted.

31 It was then submitted that, in the opening part of the passage quoted above, Smart AJ failed to give adequate weight to what was said to have been the non-acceptance of the complainant's evidence on counts 1 to 6 and 9 and the impact of that upon the complainant's credibility.

32 It was argued that, in considering the significance to be attached to the verdicts of not guilty, Smart AJ failed to give effect to the decision of this Court in *Jones v The Queen*[8]. This in turn gave rise to debate as to the principle for which *Jones* is authority. That was a matter discussed at some length by the Court of Criminal Appeal of New South Wales in *R v Markuleski*[9]. It was submitted that the Court of Criminal Appeal in that case misunderstood or misapplied the reasoning in *Jones*, and that *Markuleski* was wrongly decided. That submission should be rejected.

33 In *MacKenzie v The Queen*[10], Gaudron, Gummow and Kirby JJ stated a number of general propositions concerning the significance that may properly be attached to what is sometimes referred to as factual inconsistency between verdicts. In that respect, it is to be noted that, where an accused is charged with multiple offences, differences between the verdicts may not, in truth, involve inconsistencies even of a factual kind. In the present case, if there had been a verdict of guilty on count 2 and not guilty on count 3, where the charges were supported by substantially the same evidence, then there would have been factual, even though not technical or legal, inconsistency. However, the evidence in support of counts 7 and 8 was materially different from the evidence in relation to counts 1 to 6 and count 9. The complainant was, to a significant extent, supported by MA.

34 Since the ultimate question concerns the reasonableness of the jury's decision, the significance of verdicts of not guilty on some counts in an indictment must necessarily be considered in the light of the facts and circumstances of the particular case. Furthermore, it must be considered in the context of the system within which juries function, and of their role in that

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8 (1997) 191 CLR 439.

9 (2001) 52 NSWLR 82.

10 (1996) 190 CLR 348 at 366-368.

system. A number of features of that context were emphasised in *MacKenzie*. They include the following. First, as in the present case, where an indictment contains multiple counts, the jury will ordinarily be directed to give separate consideration to each count. This will often be accompanied by a specific instruction that the evidence of a witness may be accepted in whole or in part. Secondly, emphasis will invariably be placed upon the onus of proof borne by the prosecution. In jurisdictions where unanimity is required, such as New South Wales, every juror must be satisfied beyond reasonable doubt of every element in the offence. In the case of sexual offences, of which there may be no objective evidence, some, or all, of the members of a jury may require some supporting evidence before they are satisfied beyond reasonable doubt on the word of a complainant. This may not be unreasonable. It does not necessarily involve a rejection of the complainant's evidence. A juror might consider it more probable than not that a complainant is telling the truth but require something additional before reaching a conclusion beyond reasonable doubt. The criminal trial procedure is designed to reinforce, in jurors, a sense of the seriousness of their task, and of the heavy burden of proof undertaken by the prosecution. A verdict of not guilty does not necessarily imply that a complainant has been disbelieved, or a want of confidence in the complainant. It may simply reflect a cautious approach to the discharge of a heavy responsibility. In addition to want of supporting evidence, other factors that might cause a jury to draw back from reaching a conclusion beyond reasonable doubt in relation to some aspects of a complainant's evidence might be that the complainant has shown some uncertainty as to matters of detail, or has been shown to have a faulty recollection of some matters, or has been shown otherwise to be more reliable about some parts of his or her evidence than about others. Thirdly, there is the consideration stated by King CJ in *R v Kirkman*[11], and referred to in later cases[12]: it may appear to a jury, that, although a number of offences have been alleged, justice is met by convicting an accused of some only. And there may be an interaction between this consideration and the two matters earlier discussed.

35 It appears from the review of decisions of trial judges and intermediate appellate courts undertaken in *Markuleski*[13] that some judges have taken *Jones* as authority for the proposition that where multiple offences are alleged involving the one complainant, then verdicts of not guilty on some counts necessarily reflect a view that the complainant was untruthful or unreliable, and that an

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11 (1987) 44 SASR 591 at 593.

12 eg *MacKenzie v The Queen* (1996) 190 CLR 348 at 367-368.

13 (2001) 52 NSWLR 82 at 96-99.

appellate court should consider the reasonableness of guilty verdicts on the basis that the complainant is a person of damaged credibility. That view is erroneous. It overlooks the attention to factual detail in the reasoning of *Jones*. It also overlooks the principles stated in *MacKenzie*, which were not qualified in *Jones*, and the considerations mentioned in the preceding paragraph in these reasons. *Jones* is not to be understood as establishing a set of legal propositions, separate or different from the test formulated in *M*, which must be applied in deciding whether a conviction on one or more counts of sexual offences, when the accused was acquitted on other counts, is unreasonable, or cannot be supported, having regard to the evidence[14].

36 The test established by s 6(1) of the Criminal Appeal Act is unreasonableness, not inconsistency. In the present case, there is an obvious explanation of the differences between the verdicts on the various counts in the indictment. The jury might reasonably have considered that, notwithstanding the differences between the evidence of the complainant and MA, and making due allowance for the age of MA, and the possibility of some confusion on his part, the evidence of the complainant in relation to the occasion the subject of counts 7 and 8 gained significant support from the evidence of MA. There was no such support in relation to any of the other counts; and in relation to counts 1 to 6 there was the unexplained absence of evidence from people who were said to be eye-witnesses, and the resulting *Jones v Dunkel* warning. In those circumstances, it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt on two counts notwithstanding their unwillingness to convict him on the others.

37 The conclusion of the Court of Criminal Appeal has not been shown to be in error. The appeal should be dismissed.

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14 *Markuleski* (2001) 52 NSWLR 82 at 98 [64] per Spigelman CJ.

38 McHUGH, GUMMOW AND KIRBY JJ. This appeal[15] concerns the test to be applied in determining whether a jury's verdict in a criminal trial is "unreasonable" or "cannot be supported, having regard to the evidence". Such a determination authorises and requires[16] a court of criminal appeal to quash the conviction that has followed such a verdict and to enter an acquittal.

39 The appellant, MFA, was tried in the New South Wales District Court upon an indictment containing nine counts involving sexual offences against LB ("the complainant"). At the time of the alleged offences, the complainant was an under-age male. The appellant was acquitted by the jury on counts 1 to 6 and on count 9. However, he was convicted on counts 7 and 8. He appealed against the convictions to the Court of Criminal Appeal of New South Wales.

40 Before that Court, and in this Court, the appellant made no complaint about the directions of law which the trial judge gave to the jury. Nor did he make any complaint concerning the conduct of the trial. His sole ground of appeal was that "[t]he verdicts of guilty on counts 7 and 8 [were] unreasonable and [could not] be supported having regard to the evidence and [having regard] to the verdicts of not guilty on counts 1, 2, 3, 4, 5, 6 and 9".

41 The Court of Criminal Appeal dismissed the appellant's appeal against his convictions. The reasons of that Court were given by Smart AJ (with whom Heydon JA and Barr J concurred). However, their Honours granted leave to appeal against sentence. The sentence imposed on the appellant in relation to his conviction on count 7 (indecent assault) was reduced. The appeal against sentence in relation to count 8 (homosexual intercourse) was dismissed. In consequence, the reduction of the sentence in respect of count 7 was immaterial to the period of imprisonment that the appellant was actually obliged to serve.

42 Special leave to appeal to this Court was granted upon arguments that the Court of Criminal Appeal had erred in its approach to the determination of the appellant's complaint that the jury's verdicts of guilty were unreasonable; that the formulation of that Court's reasons was defective; and that the test it had applied in determining whether the verdicts of guilty were unreasonable or unsupported in the relevant sense was erroneous.

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15 From a judgment of the New South Wales Court of Criminal Appeal: *R v MFA* [2001] NSWCCA 71.

16 *TKWJ v The Queen* [2002] HCA 46 at [62] per McHugh J referring to *Pattinson and Laws* (1973) 58 Cr App R 417 at 426.

43 The appellant has demonstrated an error on the part of the Court of Criminal Appeal. It necessitates a reconsideration by this Court of the matters canvassed in that Court. However, when this Court applies the correct test and surmounts the error of reasoning which the appellant has demonstrated, the outcome is unchanged. The appeal to this Court should be dismissed.

The test for unreasonable verdicts

44 *Application of the statutory test*: The *Criminal Appeal Act* 1907 (UK) introduced a major legal reform. It swept away many of the imperfect procedures that had been developed by the common law (and enacted by statute) to permit post-conviction examination of the conduct and outcome of criminal trials[17]. That Act was quickly copied in all of the Australian States. Relevantly, in New South Wales, it resulted in the enactment of the *Criminal Appeal Act* 1912 (NSW) ("the Act"). By s 6(1) of that Act, which mirrors the original version of s 4(1) of its progenitor, the Court of Criminal Appeal of New South Wales is required to set aside a conviction if it is[18]:

> "of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice".

45 The original formula in England was changed in 1966 to substitute a different expression, which obliged the appellate judges to consider whether the impugned verdict was "unsafe or unsatisfactory"[19]. There was no equivalent amendment to the New South Wales Act. Relevantly, it has remained expressed in the terms in which it was first enacted. Nevertheless, Australian judges, using to their advantage decisions of the English courts in criminal appeals, fell into the habit of adopting the expression "unsafe or unsatisfactory". This Court too used

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17 cf *Conway v The Queen* (2002) 76 ALJR 358 at 360-361 [7]-[8]; 186 ALR 328 at 330-331.

18 See *Hargan v The King* (1919) 27 CLR 13 at 23 per Isaacs J; *Fleming v The Queen* (1998) 197 CLR 250 at 257-258 [16]-[17].

19 See *Criminal Appeal Act* 1966 (UK), s 4(1). Section 4 of the *Criminal Appeal Act* 1907 (UK) was later re-enacted as s 2(1)(a) of the *Criminal Appeal Act* 1968 (UK). See *R v Chalkley* [1998] QB 848.

that expression[20], although in *M v The Queen*[21] it was noted that the phrase "unsafe or unsatisfactory" did not appear in s 6.

46 It was not until an opinion was expressed in *Gipp v The Queen*[22] and *Fleming v The Queen*[23] that it was safer to return to the words of the statutory formulation in the place of attempted synonyms, that the requirement to test disputed verdicts against the actual language of the criminal appeal legislation was restored. In recent years, in many contexts, this Court has insisted upon close attention to the language of applicable legislation in preference to other formulations derived from pre-statutory expositions, post-statutory explanations and (in this case) the language of foreign legislation[24].

47 When attention is focussed on the actual language of s 6(1) of the Act, it appears to confer a very large power to be applied by reference to criteria that are not stated in restrictive or narrow terms. On the face of things "unreasonable", in particular, seems to state a very broad test.

48 Two indications in s 6(1) suggest that this seeming amplitude is to be restricted somewhat having regard to the context. The first such consideration is that the subject matter of the appellate court's decision is a "verdict of the jury". Conventionally, the jury has been described as the constitutional tribunal for

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20 It is sometimes still used: *TKWJ v The Queen* [2002] HCA 46 at [69], [72].

21 (1994) 181 CLR 487 at 492. In 1995 the English statute from which this phrase was adopted by various judges, was amended to remove "or unsatisfactory": *Criminal Appeal Act* 1995 (UK), s 2(1).

22 (1998) 194 CLR 106 at 147-150 [120]-[127].

23 (1998) 197 CLR 250 at 255-256 [11] citing *Gipp v The Queen* (1998) 194 CLR 106 at 114, 146-150.

24 eg *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* (2001) 207 CLR 72 at 77 [9], 89 [46]; *The Commonwealth v Yarmirr* (2001) 75 ALJR 1582 at 1587 [14]-[15], 1630 [249]; 184 ALR 113 at 122, 180; *Western Australia v Ward* (2002) 76 ALJR 1098 at 1105 [2], 1108-1109 [16], 1110 [25], 1216 [588]; 191 ALR 1 at 11-12, 16, 19, 164; *Wilson v Anderson* (2002) 76 ALJR 1306 at 1315-1316 [47], 1331 [137], 1332-1333 [144]-[146]; 190 ALR 313 at 326, 347, 350; *Attorney-General (Q) v Australian Industrial Relations Commission* [2002] HCA 42 at [113].

deciding contested facts[25]. In respect of the specified cases, the jury occupies an undoubted constitutional status in the federal offences to which s 80 of the Australian Constitution applies[26]. A jury is taken to be a kind of microcosm of the community. A "verdict of [a] jury", particularly in serious criminal cases, is accepted, symbolically, as attracting to decisions concerning the liberty and reputation of accused persons a special authority and legitimacy and hence finality.

49 In that context, and against the background of the tradition of the jury trial over the centuries, the setting aside of a jury's verdict is, on any view, a serious step. Hence, it is a step that assigns to the words "unreasonable" or "[un]supported" in s 6(1) of the Act a strictness of meaning that, in isolation or in other contexts, those words might not enjoy.

50 The second contextual indication of what s 6(1) of the Act is driving at is given by the reference to the demonstration, "on any other ground whatsoever", of a "miscarriage of justice". These words suggest that the kind of "unreasonable" verdict or verdict that "cannot be supported, having regard to the evidence" with which s 6(1) is concerned is one that leaves the appellate court believing that, notwithstanding the verdict, there has been a "miscarriage of justice".

51 These contextual indications, obliging a measure of restraint on the part of courts of criminal appeal in taking the serious step of setting aside a conviction based on the verdict of a jury, have led to judicial attempts to re-state, in other words, what s 6(1) states in the words of Parliament. Such attempts were understandable enough given that every year, in almost every jurisdiction of this country[27] (and many elsewhere where the *Criminal Appeal Act* 1907 (UK) was copied), hundreds of decisions must be made responding to submissions that, in

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25 *David Syme & Co v Canavan* (1918) 25 CLR 234 at 240; *Hocking v Bell* (1945) 71 CLR 430 at 440; *Naxakis v Western General Hospital* (1999) 197 CLR 269 at 287 [53]; *Liftronic Pty Ltd v Unver* (2001) 75 ALJR 867 at 877 [64]; 179 ALR 321 at 334.

26 cf *Crampton v The Queen* (2000) 206 CLR 161 at 208 [127].

27 In *TKWJ v The Queen* [2002] HCA 46 at [62] the provisions of the legislation of other States and the Northern Territory are set out. In *Conway v The Queen* (2002) 76 ALJR 358 at 359 [4], 371-372 [68]-[72]; 186 ALR 328 at 329, 346-347 it is pointed out that the applicable legislation is different in relation to the Australian Capital Territory.

the particular case, the verdict of the jury should be set aside on the nominated grounds. It was perhaps inevitable that courts of criminal appeal should struggle for verbal explanations of their own, in effect to express the reasons that they considered sufficient to justify overturning the verdict of the jury in a particular case. Such formulae would signal the advantage that the jury enjoyed over the appellate court, and the undesirability of effectively replacing jury trial of serious criminal charges with trial before a court of criminal appeal comprising (normally) three judges who ordinarily see no witnesses, hear no evidence and decide the reasonableness and supportability of the verdict by reference to selected passages of evidence to which attention is drawn by the parties.

52 *Judicial formulations of the test*: There have been a number of attempts in this Court to state the approach that it is proper for a court of criminal appeal to take in this regard. The formulae adopted have varied. The stronger formulations have provided a verbal indication that restraint is required of a court of criminal appeal before it sets aside a conviction under a provision such as s 6(1) of the Act. Other formulae have been more ample in the expression of the circumstances in which appellate intervention is warranted.

53 The differences between individual Justices of this Court, concerning such formulae, were examined in *M*[28] and more recently in *Jones v The Queen*[29]. Before either of these cases, in *Chidiac v The Queen*[30], Dawson J gave expression to a common formula representing what might be called the "strong" position. He said[31]:

> "If upon the whole of the evidence a jury, acting reasonably, was *bound* to have a reasonable doubt, then a verdict of guilty will be unsafe and unsatisfactory."

54 His Honour drew attention, as had been done earlier in this Court, to the fact that, unlike the later, wider powers conferred under the amended statutory provision in England, "the legislation which prevails in this country [does not] empower a court to set aside a verdict upon any speculative or intuitive basis"[32].

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28 (1994) 181 CLR 487.

29 (1997) 191 CLR 439.

30 (1991) 171 CLR 432.

31 (1991) 171 CLR 432 at 451 (emphasis added).

32 *Chidiac v The Queen* (1991) 171 CLR 432 at 451-452 citing *Whitehorn v The Queen* (1983) 152 CLR 657 at 689.

To similar effect was the minority view expressed by McHugh J in *M*[33]. In that case, his Honour said that the correct test for determining whether a court of criminal appeal should set aside the conviction based on a jury verdict, on the ground that it was unreasonable, was "whether a reasonable jury *must* have had a reasonable doubt about the accused's guilt"[34]. His Honour criticised the formulation adopted by the majority[35].

55 Nevertheless, in *M*, the majority of this Court favoured what might be termed a "broader" test for unreasonableness or unsupportability of a verdict. Instead of asking whether the jury "must"[36] or were "bound to"[37] have a reasonable doubt about the accused's guilt, the majority posed the question whether it was "open to the jury" to be satisfied of the accused's guilt, applying the criminal standard of proof beyond reasonable doubt, acting as a reasonable jury and reaching their verdict "upon the whole of the evidence".

56 The majority in *M* pointed out that "[i]n most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced"[38]. In such a case of doubt, it is only where the jury's advantage of seeing and hearing the evidence can explain the difference in conclusion about the accused's guilt that the appellate court may decide that no miscarriage of justice has occurred[39]:

> "If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a *significant possibility* that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence."

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33 (1994) 181 CLR 487 at 524-525.

34 *M v The Queen* (1994) 181 CLR 487 at 525 (emphasis added).

35 *M v The Queen* (1994) 181 CLR 487 at 493 per Mason CJ, Deane, Dawson and Toohey JJ, with whom Gaudron J, at 508, agreed on this point.

36 *M v The Queen* (1994) 181 CLR 487 at 525 per McHugh J.

37 *Chidiac v The Queen* (1991) 171 CLR 432 at 451 per Dawson J.

38 (1994) 181 CLR 487 at 494.

39 *M v The Queen* (1994) 181 CLR 487 at 494 (emphasis added, footnote omitted).

57 The foregoing difference of opinion concerning the test to be applied was brought to a head in *M* because of the criticism voiced by McHugh J in that case to the effect that the adoption of the formula whether a verdict was "open to the jury" had the potential to constitute "an unwarranted intrusion into the jury's right to determine the facts in a criminal trial"[40]. However in *Jones*, when this Court returned to the question of the applicable test, McHugh J participated in the joint reasons that said[41]:

> "[T]he test formulated by the majority in *M* must now be accepted as the appropriate test for determining whether a verdict is unsafe or unsatisfactory."

58 The reference to "unsafe or unsatisfactory" in this last passage followed the language conventional of the time when *Jones* was written. Those words are to be taken there as equivalent to the statutory formula referring to the impugned verdict as "unreasonable" or such as "cannot be supported, having regard to the evidence".

59 The result of this decisional history is that, until the Act, and other legislation like it, is amended by Parliament (whether along the lines of the 1966 amendment in England or otherwise) or until this Court re-expresses the formula to be applied, courts of criminal appeal in Australia are bound to apply the statutory provision as elaborated in the way stated by the majority in *M*. Ultimately, the additional formulations exist only to assist courts of criminal appeal to discharge their statutory functions. Those functions are stated, relevantly, in s 6(1) of the Act. In the end, that sub-section is designed to afford a mechanism against a prospect that our community and its courts continue to regard as intolerable, namely that an innocent person has been wrongly convicted upon unreasonable and unsupported evidence and has thereby suffered a miscarriage of justice[42]. The interpretation and application of the sub-section must always keep that purpose in mind. But it involves a function to be performed within a legal system that accords special respect and legitimacy to

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40 (1994) 181 CLR 487 at 525.

41 (1997) 191 CLR 439 at 452 per Gaudron, McHugh and Gummow JJ.

42 In this sense, s 6(1) of the Act is another instance of the law's recognition that exceptions are needed to the inflexible exercise of lawful power: cf *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In liq)* (1999) 73 ALJR 306 at 332 [93.7]; 160 ALR 588 at 621-622; *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 at 465 [73].

jury verdicts deciding contested factual questions concerning the guilt of the accused in serious criminal trials.

60 *The correct test was applied*: The appellant raised a number of complaints about the way that Smart AJ stated the test to be applied by the Court of Criminal Appeal. His Honour said[43]:

> "I am of the opinion that it was reasonably open to the jury to be satisfied beyond reasonable doubt as to the guilt of the appellant".

61 There is no error in this formulation. Indeed, it involved the accurate transcription of the test expressed by this Court in *M* and in *Jones* rather than the "stronger" or more stringent test obliging an appellant to establish that the jury were "bound to" or "must" have entertained a reasonable doubt. It follows that the complaint about this aspect of the reasons of the Court of Criminal Appeal fails.

The error in the appeal court's reasoning

62 *Disparity of supporting evidence*: The appellant then argued that, if the Court of Criminal Appeal used the correct verbal formula for considering his appeal, an analysis of its reasons indicated that, in substance, the judges had failed to do as the Act required. This argument was advanced along two lines: first, that there was a critical inconsistency within the reasons of Smart AJ; and, secondly, that a re-examination of the features of the case relied on by the appellant would demonstrate that the guilty verdicts were "unreasonable" and unsupported by the evidence.

63 At the trial, the prosecution relied on the evidence of a juvenile, MA, to support the allegations of the complainant in respect of the two counts (counts 7 and 8) upon which alone the appellant was convicted. There is no doubt that the evidence of MA fell short of confirming the offences charged in those counts as each of them had been particularised before and during the trial and as each was described in the oral testimony of the complainant.

64 Put shortly, in respect of count 7, the particulars and the complainant's evidence alleged that the appellant had put his hand *inside* the front of the complainant's pants and touched his penis for about 10 minutes. The complainant also alleged that the appellant had put his hand *inside* MA's pants and touched his penis. However, MA's evidence was that the appellant had

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43 *R v MFA* [2001] NSWCCA 71 at 12.

touched the *outside* of the complainant's pants and his own, in the vicinity of the penis. So far as count 8 was concerned, the complainant's evidence was that he had been required by the appellant to perform an act of fellatio on the appellant's penis. On the other hand, MA gave evidence that it was the appellant who had performed the act of fellatio on the complainant. MA followed this evidence with testimony of two extraneous, uncharged, sexual acts. These were that the complainant had performed fellatio on him, MA, and that the appellant had "put his penis up [the complainant's] backside". No such conduct on the part of the appellant was referred to in the counts of the indictment, particularised by the prosecution or alleged by the complainant himself.

65 Addressing these inconsistencies, Smart AJ was not impressed by the disparities in the evidence relevant to count 7, concerning whether the appellant had touched the penises of the complainant and MA on the *inside* or *outside* of their pants. He said that "[t]he jury may not have regarded that as a matter of significance. The essence of the charge was the appellant touching the complainant's penis."[44] However, the disparities in respect of count 8 were clearly more troubling to his Honour. In his reasons, Smart AJ acknowledged this, concluding that "at least as to count 7 it was reasonably open to the jury to be satisfied beyond reasonable doubt of the guilt of the appellant on that count". He went on[45]:

> "There is *no direct supporting evidence* from MA or anyone else of the complainant sucking the appellant's penis. At most there was evidence of an extended sexual incident at which MA was present involving the complainant and the appellant preceded by the appellant touching the complainant's penis … While the supporting evidence as to count 8 *was not as strong* as that relating to count 7 I am of the opinion that it was reasonably open to the jury to be satisfied beyond reasonable doubt as to the guilt of the appellant on count 8."

66 There is an obvious inconsistency between Smart AJ's acknowledgment that there was "no direct supporting evidence" in respect of count 8 and his statement that "the supporting evidence" as to that count was "not as strong" as that relating to count 7. In so far as Smart AJ first accepted that there was "no direct supporting evidence" from MA to the charge as particularised, his analysis was accurate. MA's testimony supported acts of homosexual intercourse. However, they were different from that charged, particularised and described by

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44 *R v MFA* [2001] NSWCCA 71 at 11.

45 *R v MFA* [2001] NSWCCA 71 at 11-12 (emphasis added).

the complainant. Moreover, MA added for good measure two further and different offences, one of them (anal penetration) an aggravated offence. In so far, therefore, as Smart AJ dismissed the appellant's appeal against conviction on the footing that there was "supporting evidence as to count 8", he erred. Obviously, the existence of supporting evidence is an important consideration in judging the "reasonableness" of, and evidentiary "support" for, a verdict.

67 *An error of reasoning is shown*: The common law requirement of corroboration of the evidence of minors as to sexual offences has been abolished by statute in New South Wales[46]. Nevertheless, the *Evidence Act*[47] applicable in that State makes the existence of supporting evidence a relevant consideration for the proof of an offence to which the evidence relates. The error in Smart AJ's reasoning cannot, therefore, be considered immaterial. In our view, it undermines the reasoning in the conclusion that the Court of Criminal Appeal reached. The error is also significant because, to the extent that the appellant could sustain his attack on the guilty verdict in respect of count 8, a question would arise as to whether, if his conviction in that respect were set aside, the conviction based on the verdict in respect of count 7 would not also be vulnerable. The two offences were alleged to have happened at the same time and place. As we have said, disparities, although relatively minor, between the evidence of the complainant and MA in support of count 7 were also shown.

68 *The resulting disposition*: The foregoing conclusion establishes a defect in the performance by the Court of Criminal Appeal of its function under s 6(1) of the Act. To cure that defect, this Court might return the matter to the Court of Criminal Appeal, so that it could reconsider the appellant's appeal, freed from the demonstrated error. Or it might perform, for itself, the appellate function that miscarried below.

69 In favour of the first course is the fact that the appeal to this Court is a strict appeal and that the Court of Criminal Appeal has primacy in such matters, as well as the experience and time to perform the functions assigned to it by

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46 *Crimes Act* 1900 (NSW), s 405C (since repealed) and *Evidence Act* 1995 (NSW), s 164. See *Carr v The Queen* (1988) 165 CLR 314 at 318-319; *Longman v The Queen* (1989) 168 CLR 79 at 91-94; *B v The Queen* (1992) 175 CLR 599 at 616-617; *BRS v The Queen* (1997) 191 CLR 275; cf *Robinson v The Queen* (1999) 197 CLR 162 at 168-169 [21] concerning s 632 of the *Criminal Code* (Q) and citing *R v Murray* (1987) 11 NSWLR 12 at 19.

47 *Evidence Act* 1995 (NSW), s 55.

s 6(1) of the Act[48]. In favour of the latter course are the considerations of finality and the desirability of concluding the uncertainty hanging over the appellant who has been released on bail pending the outcome of this appeal. As well, any appellate reconsideration would be carried out on the record. That record is available to this Court and, in this case, is not extensive.

70 In our view this Court should perform the function that miscarried in the Court of Criminal Appeal[49]. It should evaluate the appellant's arguments and consider whether, by reference to the record, he is entitled to the relief that he seeks under s 6(1) of the Act.

Arguments as to the verdicts' "unreasonableness"

71 *The appellant's arguments*: In support of his claim for relief, the appellant pointed to six considerations which, separately and in combination, he submitted, demonstrated that the verdicts of guilty on counts 7 and 8 of the indictment were "unreasonable" or could not be "supported, having regard to the evidence". In effect, the appellant suggested that those verdicts represented a compromise on the part of the jury who, ultimately like the Court of Criminal Appeal, had failed to address the particularity of the charges alleged against him as they had been elaborated by the prosecution before and during the trial. On that footing, the appellant claimed that he had been the victim of a miscarriage of justice.

72 *The original denial to police*: The appellant gave evidence. He categorically denied all of the accusations of sexual misconduct made against him by the complainant and MA. The complainant had made a statement to police on 21 May 1998. In that statement he had denied that the appellant had touched him sexually at all. He said that he had not seen the appellant touch anyone else in that way. Similarly, on 20 May 1998, MA had made a statement to police in which he said that he had never seen the appellant touch the complainant, in the sense of interfering with him sexually. On 27 May 1998, MA made a second statement to police in which he denied that he had ever been in the caravan with the appellant and the complainant together, confirming that he had never been there when any sexual activity took place.

73 It was only later that the complainant and MA approached the police, withdrew their earlier statements and described the offences on the part of the appellant that resulted in the counts of the indictment. The complainant's later

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48 cf *Crampton v The Queen* (2000) 206 CLR 161 at 217 [157].

49 *Judiciary Act* 1903 (Cth), s 37.

statement was made four days after his first denial. None of the statements was in evidence at the trial. It is fair to infer that the evidence given at the trial by MA differed from, and had gone beyond, his last statement to police confirming the allegations of the complainant.

74 At the trial, both the complainant and MA were subjected to searching cross-examination about their change of story. The complainant's explanation was that he "was scared that something was going to happen". He said that he had "been told that [the appellant] had made a threat to one of the other people" and "was scared that something was going to happen to [him]".

75 The appellant invited this Court to infer that the original statements made by the complainant and MA when they were first approached by police were truthful and that subsequently they had put their heads together to concoct false accusations. That is, of course, a possibility. However, each of them was young at the time of the offences alleged in counts 7 and 8 – the complainant 15 and MA 12. The trial judge drew the attention of the jury to their change of story. The jury had the relevant factual questions placed squarely before them. Moreover, the jury had an important advantage which an appellate court does not enjoy. The jury saw the complainant, MA and the appellant give their evidence. They were therefore in a better position to judge the acceptability of the explanation that the boys were "scared" of the appellant. If the jury accepted that explanation – or believed that the initial denial and subsequent change of story were the result of shame, embarrassment or fear of consequences[50] – it would have been open to the jury to accept as truthful the complainant's allegations in respect of counts 7 and 8. Upon this issue, an appellate court would have to hesitate long before substituting a different conclusion reached on the transcript to that which it was open to the jury to accept, with the advantages that they enjoyed.

76 *Disparities of evidence*: The appellant then repeated the complaints he made concerning the disparities between the accusations of the complainant in respect of counts 7 and 8 and the testimony of MA relevant to those counts. We will not repeat the disparities. It is proper to say that they are not trivial.

77 One line of reasoning that was clearly open to the jury was to dismiss the evidence of MA as unhelpful. He was, after all, still a juvenile, aged 15, at the time of the trial. The jury, who had the advantage of seeing the complainant, must, in respect of the incidents which founded counts 7 and 8, have believed his evidence to be truthful beyond reasonable doubt. They might have done so

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50 cf *Jones v The Queen* (1997) 191 CLR 439 at 463.

independently of the evidence of MA. Clearly, in respect of those counts, the jury must be taken to have rejected the appellant's blanket denial that any sexual activity whatsoever had taken place with the complainant. In cases of sexual offences, where corroboration is no longer required as a matter of law, it is open to a jury, after proper warnings and directions, to convict on the evidence of the complainant alone. In this case the trial judge told the jury to look at the evidence "very carefully" and "very closely". It is obvious that the discrepancies between the evidence of the complainant and MA were the subject of very strong defence submissions. The defence case at this trial was competently conducted.

78 An examination of the complainant's testimony at the trial shows that it was consistent with counts 7 and 8, as particularised. If the jury accepted the complainant as giving truthful evidence in relation to those counts they were entitled to convict the appellant on those counts, dismissing the evidence of MA as unreliable, confused and ultimately irrelevant to the substantial issue before them.

79 *Failure to call witnesses*: A third consideration relied on by the appellant arose out of a question which the jury asked. This related to the failure of the prosecution to call two brothers, cousins of the complainant, as well as the occupant of the residence adjoining which the caravan was situated when the incidents, the subject of counts 7 and 8, were alleged to have taken place. The jury asked why those witnesses "were not called by either legal side".

80 The three witnesses were not specifically relevant to the events alleged in counts 7 and 8 that were said to have taken place within the caravan in which only the appellant, the complainant and MA were alleged to have been present. However, the missing witnesses were directly relevant to the alleged offences the subject of counts 4, 5 and 6 of the indictment, of which the appellant was acquitted. The explanation given by the prosecutor, in the absence of the jury, for the failure to call these witnesses was that, on his instructions, they were "in the camp of this accused … In other words, they are not persons whom the Crown would place any weight upon for the reason that they seem to be unreliable."

81 This statement by the prosecutor may suggest a misapprehension concerning the ordinary duty to place before a jury all relevant and material evidence concerning a charge[51]. It is not the law that a witness is to be treated as "unreliable" simply because he or she is "in the camp of" the accused. Had the appellant been convicted of the offences to which the three witnesses related, this

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51 *R v Apostilides* (1984) 154 CLR 563 at 575-577.

apparent error might have been reason enough for this Court to consider relief upon that ground. However, the trial judge gave the jury correct directions concerning the failure of the prosecution to call the witnesses. Those directions were not, ultimately, the subject of any complaint in the appeal. The jury appear to have approached the absence of those witnesses in a sensible way, in accordance with the judge's directions. They found the appellant not guilty on the relevant counts.

82 In the telescoped statement by the prosecutor of the reasons for his failure to call the three witnesses, it is possible that the true explanation for their suggested "unreliability" was not elaborated. We do not overlook the fact that, had the witnesses been called, and had they affirmatively cast doubts upon the allegations of the complainant in respect of counts 4, 5 and 6, this fact might have been to the appellant's forensic advantage in respect of the complainant's testimony relating to counts 7 and 8. However, it was open to the jury to consider that the incidents to which counts 7 and 8 related were distinct and separate from those for which the evidence of the missing witnesses was pertinent. Although a mistake of approach may well have occurred on the part of the prosecution, it is not one that renders the verdicts on counts 7 and 8 "unreasonable", or leaves them "unsupported" in the statutory sense.

83 *Differentiated verdicts*: The appellant then submitted that his conviction on counts 7 and 8 was inconsistent with his acquittal on the other counts of the indictment. In effect, the appellant argued that the acquittals constituted a rejection of the accusations against him by the complainant in respect of the other incidents the subject of those charges. If the jury disbelieved the complainant in respect of such incidents, there was no logical or reasonable basis, so it was put, upon which they could have accepted the complainant's accusations founding counts 7 and 8.

84 In support of this submission, the appellant invoked observations in the reasons of the majority of this Court in *Jones*[52]. That was a case where an accused had been charged with three counts involving sexual offences alleged by a single complainant. The jury found the accused not guilty on the second count but guilty on the first and third counts. By majority, this Court set aside the convictions in respect of the first and third counts on the ground that those verdicts were unreasonable. It entered an acquittal. Kirby J dissented on the basis that the differences between the jury's verdicts were explicable upon rational grounds founded in the differentiation of the evidence relevant to the respective counts. He cited the reasons of this Court in its then recent decision in

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52 (1997) 191 CLR 439.

MacKenzie v The Queen[53]. In that case, this Court had examined the authorities on suggested inconsistency between verdicts.

85 The principles in *MacKenzie* apply to the present case. This is not an instance of "legal or technical inconsistency", whereby the jury have returned two or more verdicts which, in law, cannot stand together[54]. Nor is it a case where "logic and reasonableness" necessarily dictated a common approach to the several verdicts concerned[55]. In judging suggested inconsistency, this Court said in *MacKenzie* 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"[56]. The Court cited with approval the remarks of King CJ in *R v Kirkman*[57] to the effect that juries may not always act "in accordance with strictly logical considerations" or even "in accordance with the strict principles of the law which are explained to them". Juries sometimes give effect to "their innate sense of fairness and justice"[58] as well as to their sense of proportion and compassion[59].

86 Nevertheless, cases do arise where different verdicts returned by a jury represent "an affront to logic and commonsense" and suggest a compromise in

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53 (1996) 190 CLR 348 at 369-370.

54 *MacKenzie v The Queen* (1996) 190 CLR 348 at 366 citing *R v Roach* [1948] NZLR 677; *R v Irvine* [1976] 1 NZLR 96.

55 *MacKenzie v The Queen* (1996) 190 CLR 348 at 366 citing *R v Stone* unreported, 13 December 1954 per Devlin J.

56 *MacKenzie v The Queen* (1996) 190 CLR 348 at 367 per Gaudon, Gummow and Kirby JJ (footnote omitted). See also at 351 per Dawson and Toohey JJ.

57 (1987) 44 SASR 591 at 593. See *MacKenzie v The Queen* (1996) 190 CLR 348 at 367-368 per Gaudron, Gummow and Kirby JJ. See also at 351 per Dawson and Toohey JJ.

58 *R v Kirkman* (1987) 44 SASR 591 at 593.

59 In Canada courts have said that an apparent inconsistency between verdicts may sometimes be explained by the fact that a jury erred in entering a verdict of acquittal: *R v Markuleski* (2001) 52 NSWLR 82 at 89 [25]. It is not necessary in this case to decide the submission of the appellant that *Markuleski* was wrongly decided.

the performance of the jury's duty[60]. Such a conclusion "depends upon the facts of the case". There can be no "hard and fast rules" except that the obligation to demonstrate inconsistency in jury verdicts rests upon the person making the submission[61].

87 Applying these principles to the present case, it is impossible to conclude that the differentiation in the verdicts returned in the appellant's trial constituted an affront to logic and common sense or was unreasonable to the point of obliging the intervention of this Court. The counts of the indictment that were rejected by the jury all related to allegations made by the complainant that were unsupported by any relevant confirmatory evidence. Even if the jury were inclined to believe the complainant's accusations against the appellant, attending to the warnings given concerning the duty of the prosecution to prove its case beyond reasonable doubt, they could well have rejected accusations lacking any degree of confirmation. For example, in the case of counts 4, 5 and 6 they would have been entitled, on the judge's directions, to reject those accusations as unproved given that the three witnesses relevant to those counts had not been called.

88 Whilst it is true that the evidence of MA was not confirmatory of the precise conduct on the part of the appellant that the prosecution had particularised, and to which the complainant had deposed in evidence, it was open to the jury to treat MA's evidence as confirmation that some sexual conduct had taken place in the caravan at the time alleged although its exact form was not confirmed.

89 The foregoing point of distinction between the counts upon which the appellant was acquitted, and those on which he was convicted, was noticed by the trial judge on sentencing and by the Court of Criminal Appeal[62]. In our opinion the distinction deprives the appellant of the argument that the jury's different verdicts are illogical and unreasonable. We would dissent from the proposition that *Jones* stands for a rule that, in cases of complaints of a number of sexual offences, a jury must either accept or reject the lot. It always remains for a court of criminal appeal whose jurisdiction is invoked to examine any differentiation in the verdicts to see if it can be justified. All that *Jones* decides is that, on the facts of that case, the necessary justification in logic and

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

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

62 *R v MFA* [2001] NSWCCA 71 at 10.

reasonableness was missing. *Jones* was a very fact-specific case. Indeed, all such cases are highly fact-specific[63]. In the facts of this case, there is a logical and reasonable basis for sustaining the differentiation that the jury drew.

90 *The jury's differences*: After the jury in this case had been deliberating for some hours, they returned with a question suggesting that they were "undecided" on the verdicts in relation to the charges. They sought directions on what they should do in that event. The judge gave such directions at 2.25 pm. There is no challenge to the accuracy of what he said. He suggested that the jury "try your hardest at least until 4 o'clock". They retired again at 2.35 pm. At 3.10 pm the jury returned with verdicts on all counts. Although the appellant did not raise a specific ground of appeal in relation to this chain of events, he suggested that it added to the impression that the jury might have compromised upon their verdicts.

91 The interpretation that the appellant advanced is not, in our view, the preferable one. The jury did not disclose whether they were undecided on all counts, only on counts 7 and 8, or on different counts. The question that they asked was expressed in general terms. It is true that the further deliberation was relatively short, being little more than half an hour. However, we would not derive an inference from this unelaborated exchange with the jury that they failed to perform their duty or reached their ultimate conclusion in conditions suggesting a miscarriage of justice.

92 *Non-particularity on appeal*: The appellant lastly complained that Smart AJ had brushed over his complaint concerning the inconsistencies between the testimony of the complainant and of MA by describing their evidence as at least establishing that some sexual activity had taken place. His Honour referred to the evidence as indicating "sexual malpractice"[64], "a sexual incident"[65], and "an extended sexual incident"[66]. The appellant complained that this language obscured, or ignored, the disparities in the evidence of the complainant and MA that were the chief foundation of the submission that the verdicts of guilty were "unreasonable" in the sense mentioned in the Act.

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63 *R v KET* [1998] VSCA 73 at [28]-[29]; *R v Markuleski* (2001) 52 NSWLR 82 at 93 [37], 128 [224]; cf at 145 [322].

64 *R v MFA* [2001] NSWCCA 71 at 10.

65 *R v MFA* [2001] NSWCCA 71 at 11.

66 *R v MFA* [2001] NSWCCA 71 at 12.

93 We understand the force of this submission. Its strength derives from the fact that the very ground of the suggested differentiation between the jury's verdicts of guilty and of not guilty was the presence of the evidence of MA in the counts where a guilty verdict was returned whereas such evidence, when examined, lacked particularity and thus its confirmatory value was weak or non-existent. The appellant submitted that this weakness was fatal. However, we do not believe that such a conclusion should be accepted.

94 Clearly, the jury rejected the appellant's sworn evidence denying any sexual activity whatsoever. Their verdicts of guilty on counts 7 and 8 could have been sustained by acceptance of the complainant's testimony alone. In so far as MA's evidence was concerned, the jury's attention was drawn to his age and they also saw him give his evidence. The point of factual differentiation in respect of count 7 was quite narrow. In the confusion about events of a sexual character, it would have been open to the jury, acting reasonably and performing their duty, to reach the opinion that MA, aged 12 at the time of the alleged offences, had told the truth about some sexual conduct occurring in the caravan but was confused and inaccurate as to precisely what the appellant and the complainant had respectively done. His evidence did not support the accusation of the complainant in respect of count 8. But believing the complainant and disbelieving the appellant, the jury could reasonably have reached the verdicts that they did.

Conclusion and orders

95 A number of further complaints were raised concerning the evidence tendered against the appellant. However, the foregoing captures the substance of the appellant's arguments. It is necessary to consider cumulatively all of the aspects of the evidence of which he complains, and to ask whether, in totality, it represents an instance of verdicts that are unreasonable or unsupported by the evidence so as to result in a significant possibility of a miscarriage of justice.

96 There are, it is true, some aspects of the evidence that are less than wholly satisfactory. But that is not uncommon in most trials[67]. Experience suggests that juries, properly instructed on the law (as they were in this case), are usually well able to evaluate conflicts and imperfections of evidence. In the end, the appellate court must ask itself whether it considers that a miscarriage of justice has occurred authorising and requiring its intervention. Although we accept that minds might differ on this question, as in any case that requires this Court to grant special leave to appeal, we are not ultimately convinced that the jury's verdicts were "unreasonable" or "unsupported" in the statutory sense.

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67 cf *Green v The Queen* (1997) 191 CLR 334 at 398.

97 Before parting with this case we wish to make it clear that there is no difference between us and the other members of this Court about the essential issues decided in this appeal. Upon the application of the test in *M*, the operation of the principles in *MacKenzie* and the significance of the decision in *Jones*, this Court speaks with a single voice.

98 The appeal should be dismissed.