SUPREME COURT OF QUEENSLAND

CITATION:	*R v Peggie* [2017] QCA 93
PARTIES:	**R** **v** **PEGGIE, Mitchell Cameron** (appellant)
FILE NO/S:	CA No 236 of 2016 DC No 847 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 12 August 2016
DELIVERED ON:	19 May 2017
DELIVERED AT:	Brisbane
HEARING DATE:	24 April 2017
JUDGES:	Sofronoff P and Morrison JA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was charged with three counts of rape and three counts of sexual assault – where the appellant was acquitted at trial on counts one, two and three and convicted on counts four, five and six – where the appellant submitted that on the evidence at trial no reasonable jury could have found that the mistake of fact defence was negatived – whether the verdict was unreasonable or insupportable having regard to the evidence CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where the appellant was charged with three counts of rape and three counts of sexual assault – where the appellant was acquitted at trial on counts one, two and three and convicted on counts four, five and six – where the appellant submitted the difference in verdicts defied logic and common sense and led to a miscarriage of justice – where the complainant gave evidence she said "no" between the commission of count 3 and count 4 – whether the verdicts were inconsistent

MacKenzie v The Queen (1996) 190 CLR 348; [1996] HCA 35, cited

COUNSEL:	J M Sharp for the appellant S J Farnden for the respondent
SOLICITORS:	Legal Aid Queensland for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of Atkinson J and with the order her Honour proposes.

[2] **MORRISON JA:** I have read the reasons of Atkinson J and agree with those reasons and the order her Honour proposes.

[3] **ATKINSON J:** The appellant, Mitchell Peggie, was convicted on 12 August 2016 after a four day trial in the District Court on three counts on a six count indictment. He was acquitted on counts 1 (sexual assault), 2 (sexual assault) and 3 (rape) and convicted on counts 4 (rape), 5 (rape) and 6 (sexual assault). He appealed his convictions on two related grounds:

(1) The verdicts of guilty were unreasonable and were not supported by the evidence; and

(2) The verdicts of guilty on counts 4, 5 and 6 are inconsistent with the verdicts of not guilty on counts 1, 2 and 3.

[4] Essentially the argument for the appellant was, on ground 1, that on counts 4, 5 and 6, no reasonable jury could have found that the mistake of fact defence was negatived; and for ground 2, that the difference in verdicts between counts 1, 2 and 3 on the one hand and counts 4, 5 and 6 on the other defied logic and common sense and had led to a miscarriage of justice.

The factual background

[5] The uncontroversial facts of this case are that the appellant and the complainant met on an online dating website and after exchanging a number of text messages arranged to meet at night for a drink in a hotel in the Brisbane CBD. After about a half an hour the appellant suggested that they go for a walk in the city and the complainant agreed. When they reached the grounds of St Stephen's Cathedral, which was nearby, a number of sexual encounters took place between the complainant and the appellant which she gave evidence were non-consensual and he gave evidence were consensual.

[6] The prosecution case was that each of the sexual encounters between the complainant and the appellant were not consensual and, as the learned trial judge said in her summing up to the jury, about which there is no complaint:

> "The real question is whether the Crown has proved, beyond reasonable doubt, a lack of consent, or, alternatively, whether the Crown has negatived that [the appellant] had an honest and reasonable but mistaken belief in consent."

The prosecution evidence

[7] The evidence before the jury consisted of the oral evidence given by a number of people including the complainant and the appellant; downloaded iMessages and

SMSs between the complainant and various people including the appellant; oral evidence from the people with whom the complainant exchanged such messages and from others who spoke to or examined her after the events in question; CCTV footage from the hotel and also from outside St Stephen's Cathedral and various photographs.

[8] The iMessages between the complainant and the appellant were exchanged on 24 August 2015 before the offences were alleged to have taken place. The first message was at 11.55 in the morning. They engaged in a fairly flirtatious conversation as one might expect for people about to go on a date however on occasions when he became explicit about sexual activity with her she assured him fairly clearly that she was "not that easy" and that she would only be there for the drinks and does not have sex on her first date. She agreed to meet him in the bar of a hotel after she was finished her training that evening for the SES.

The meeting in the bar

[9] The complainant's evidence was that they met outside the bar and then walked inside together. He had a glass of red wine and she had a non-alcoholic drink because she was driving. He talked to her about various sexual exploits he had including having sex the day before in the shopping centre toilets at Carseldine. After they finished their drinks he suggested they go for a walk to the Botanic Gardens but she declined and they went for a walk towards St Stephen's Cathedral instead. She denied that he suggested and that she agreed that they go for a "sexy walk".

[10] There is CCTV footage of them sitting opposite each other at a table in the bar of the hotel which was played to the jury and which I have watched. The footage shows that he ordered a drink for each of them and they conversed sitting opposite each other at a small table. He appears to do most of the talking. It was put to the complainant in cross-examination that they made physical contact with their legs touching; but the footage does not reveal any physical contact. At one point they both stand up briefly and then sit down again. He is seen to be considerably taller than her. She agreed in cross-examination that he made a comment that she had large breasts. However, she denied that she allowed him to touch them. The footage confirms her denial that he touched her breasts in the hotel bar.

The walk from the hotel to St Stephen's Cathedral

[11] The hotel where they met is in Queen Street and St Stephen's Cathedral is only a block away in Elizabeth Street. According to the complainant's evidence they took a path through Post Office Square from the hotel to the front of the Cathedral in Elizabeth Street. The complainant's evidence was that during that walk the appellant put his hand on her buttocks and she pushed his hand back and moved away. She said they talked about relationships and what made a good relationship. She cannot remember if she said anything when he touched her on the buttocks. Her evidence is they walked up the front steps of the Cathedral and through an archway to a place in the Cathedral grounds where there were some stone monuments.

Count 1

[12] The complainant's evidence was that when they reached the monuments he pushed her against the monuments and started kissing her and groping her breasts and she told him that she was not that easy and was not the type of girl to have sex on a first date, pushed him back and walked away towards the rotunda. She accepted under cross-examination that at first she returned his kisses although during later questioning she said she was "more stunned than anything".

Count 2

[13] After the first encounter near the monuments the complainant's evidence was that she walked off but he came up behind her and grabbed her wrist. Before she reached the rotunda in the grounds of the Cathedral he grabbed her and pulled her in towards the rotunda and proceeded to kiss her and push her up against a wall. She said that at first his hands were grabbing her breasts and then his hands went down the front of her pants. She pushed his hand away and told him she was not that easy. She said she pushed him back and walked off. She believes she said "you have to work for it" and then something along the lines of "more dates". She said he said that he was working for it.

Count 3

[14] The appellant put his hands down the complainant's pants again and inserted his fingers into her vagina. She said she tried to push his hand back but does not remember saying anything to him.

[15] A man walked past them but the complainant did not say anything to him as she did not think he would stop and help. She said she was, by that time, terrified.

[16] The complainant's evidence was that the next thing she remembers was the appellant undoing his pants, and putting a hand on her shoulder and trying to push her down and telling her to go down to which she said "No". He tried to push with his hand again and told her to go down again, and again she said "No". Prior to that, after he had undone his pants, she was going to give him a "hand job" to try to see if that would satisfy him and he would not go any further. She accepted in cross-examination that she masturbated his penis. She said she was frightened given their difference in size. Then he asked her to go down. She said no twice.

Count 4

[17] The next thing that happened was the appellant pulled the complainant's pants down and spun her around so that she was facing the Cathedral. He gripped her breasts and was trying to hold her head still by putting his hand around the front throat area of her face. He used pressure but her evidence was she could still breathe. He told her to arch her back and pushed on her upper back to bend her over and then he spat on his hand and rubbed it against her vagina before inserting his penis into her vagina. She did not think he ejaculated; then he pulled away and pulled up his pants. She said that as she was pulling her pants, he was walking away as if he was "just done with me". Her evidence was that she was terrified that if she tried to fight back, he would hurt her.

[18] The complainant handed the appellant her wallet and phone so she could pull her pants up. She described that in evidence as a "stupid decision". She said while she was pulling up her pants he said "hold it right there" and she looked up and he was pointing his phone at her. She told him "Don't you dare" and he laughed. They then both walked towards the steps at Charlotte Street. When she reached the bottom of the steps she realised she was going the wrong way to her car.

Count 5

[19] Once the complainant realised her car was in the other direction she turned around and went up the steps. The appellant was behind her and told her to stop on the steps,

and then he put his hand down the back of her pants and she said "No" but he did it anyway and then inserted his fingers into her vagina and told her to keep walking. After they got to the top of the steps his hand left her body and they walked to her car. Her car was about 100 metres away.

[20] Her evidence was that the appellant wanted to go somewhere else and she was around by the driver's door which was by the curb when he grabbed her wrist and tried to pull her into an alleyway which was near where she was parked. She said she remembered digging her feet in and saying no a number of times while he tried to drag her in there and that he eventually gave up.

Count 6

[21] The complainant said the appellant walked around to the passenger side door and got in as she got into the car. She said she drove him back to his place with him directing her. She said that at every red light he would try to force his tongue down her throat and tried to get his hands between her pants again and grope her breasts. She said she was just trying to maintain control of the vehicle and not get hysterical. When she dropped him off at his place he asked her to come upstairs and she told him no because her mother expected her to be home at about 11.00 pm.

Complainant's behaviour after the events

[22] The complainant gave evidence that while she was still in the car that night after the appellant left, she called Kids Helpline and had a conversation with a counsellor about what had happened that night. She said she then went home and had a really long hot shower.

[23] Matthew Williams is a counsellor working at Kids Helpline. He gave evidence that he spoke to the complainant at about 11.36 pm on 24 August 2015 for about 13 minutes. He was asked about her demeanour while she was speaking to him over the phone and he said "She was quite upset. She could be heard crying and sobbing throughout the call."

[24] Soon afterwards the complainant was able to get in touch with a friend, Simon Gray. She informed him by text message about her experiences saying "He forced me against a wall and even though I said no he had sex with me". Mr Gray encouraged her to go to the police. Amongst the other things she said were, "I didn't try hard to escape. He was six foot three and I was in heels." She said that she felt disgusting and that she was going to have a hot water shower to get his smell off her skin.

[25] The complainant also exchanged iMessages with a friend, Mr Branko Ruzic, later that night. She said she had been sexually assaulted and was, "bawling my eyes out in the car". She said, "He forced me against a wall and even though I said no he had sex with me." She said it happened in the city and it was the first time she had met him. Mr Ruzic also again encouraged her to report it to the police. He asked her what the appellant had done when it was finished and she replied, "He walked me back to my car. Asked for a lift. I said no. He wanted to pull me into an alley way. I pulled back against him said no like five times then he gave up. I took him home and the whole time he tried to get his hand down my pants and kept forcing me to kiss him at every red light. When I got to his he begged me to come up to his and kiss him on his bed. When I refused he said that I was giving him blue balls and it was a bad experience (or something like that) and he left and I locked my doors". She said she would message Mr Ruzic again after she got out of the shower. Later she reported that she was like a lobster after her hot water shower but she still felt gross.

[26] The complainant said she also exchanged text messages with Tory Webb, a friend from school. He texted her asking enquiring how it went at the SES. She confided in him that she had been sexually assaulted and he also encouraged her to go to the police saying it was the right thing to do.

[27] The following day she exchanged text messages with a former partner James Anderton. She told him that she went out for drinks with "a guy". She did not drink but he did. "He wanted something. I said no. He got it anyway". Mr Anderton asked her "He forced you?" and she replied "More like sexually assaulted." She said she had spoken to a psychologist and had blood tests done and that the appellant had not used protection.

[28] The complainant said that she went to speak to a psychologist and later she went to the police and made a written statement.

[29] That evening at about 8.00 pm she was examined by a nurse at the Royal Brisbane and Women's Hospital. Evidence was given by Kelly Flatley, a Registered Nurse employed at the Clinical Forensic Medicine Unit in Brisbane. She did not find any physical injuries to the complainant's genitalia but her evidence was that the absence of any injury did not assist in determining whether any sexual intercourse was consensual or non-consensual. She had noted that the complainant had complained of soreness in the right side of her neck.

[30] DNA evidence was called from a forensic biologist, Rhys Parry, who gave evidence that he tested DNA on swabs taken from the left side of the neck of the complainant. On those swabs he found DNA consistent with that of the appellant.

The appellant's evidence

[31] The appellant gave evidence at the trial. His evidence was that he was encouraged to be sexually explicit in his initial text messages with the complainant because she appeared to be quite interested in him. He said at the bar they had general conversation and also sexually explicit conversation initiated by the complainant. He said they were "playing footsies" under the table. He said that after they stood up he remarked on the size of her breasts and then "I think I went to, like, briefly touch her breasts".

[32] This was different from what was put to the complainant in cross-examination but the difference in evidence might well be accounted for by the fact that, by then the CCTV footage which showed that he did not touch her had been played to the court. When cross-examined about the question of whether or not he had touched her breasts at the bar, he said he believed he had and he had prepared his testimony not having seen any footage and not based on that footage, just based on the best of his recollection. He agreed that it was not shown on the footage.

[33] The appellant said he suggested they go for a "sexy walk" around the city. He agreed that she said she did not want to go to the Botanic Gardens but agreed to go for a "sexy walk" and then come back to the hotel.

[34] The appellant said that as they crossed the street outside the hotel he "grabbed her left arse cheek with [his] right hand". He said that she "sort of" lent in towards him. He said they then walked hand-in-hand to the next street and across the road to the Cathedral. She did not try to pull away or say no when he held her hand. They walked up the stairs of the Cathedral and into the grounds to where there were stone monuments and he said he "more or less led her to the last stone monument" and then

with his hands on her waist "gently pushed her against the stone monument, so her back was towards the stone monument". He said from there "I went in for the first kiss". He said she returned his kiss. He said he then put his hands on her breasts and started squeezing her breasts and stopped kissing her and led her towards a rotunda area in the Cathedral grounds.

[35] The appellant said he gently backed the complainant against a wall and kissed her again and she reciprocated. He then grabbed her breasts and her crotch and asked her if she wanted to go down on him and according to him she said "not yet. You have to work harder". He then said she grabbed his genital region outside his pants and a man walked past a few metres away and the appellant and the complainant "giggled at each other" and the man grinned at them.

[36] After the man walked by, the appellant said he inserted one of his fingers into her vagina. By then he had unbuttoned the top button of his jeans and she put her hand down his pants and grabbed his penis. He said he was not wearing underwear. He said he had lost his erection at that moment but she started masturbating him. He said she "more or less whispered to me fuck me".

[37] The appellant said then "taking [his] chances" he told her to turn around and pull down her pants, which she did. His evidence was that she put her palms up against the wall and bent over. He then said he started to pull down her pants and she reached back and kept pulling down her leggings. He told her to arch her back, which she did. He said that "during all this, she was just more of less moaning". He inserted his penis into her vagina without using a condom and after a couple of minutes he stopped, pulled up his pants and said to her that they had better get going as he did not want to get caught with another stranger walking past.

[38] The complainant handed him her keys and phone and wallet so that she could bend over to pull up her pants. He said that as she was pulling up her pants he had taken her phone and yelled out to her that this would make a great photo and she turned around the looked at him and said "don't you dare" but, he said, she was laughing. He said he did not take photo because it was her phone, not his.

[39] They started walking off and then changed direction to go to her car. He said he was behind her on the stairs when he says he thinks he said "stop. Wait a minute. I'm going to finger you as you walk up". He said she was completely fine about that.

[40] He said they then walked across the church yard quite close to each other. She was smiling at him and he was smiling at her. There is, however, CCTV footage of that part of those events. It does not show that kind of closeness or interaction between them.

[41] The appellant said that when they got to her car he kissed her against the driver's door and asked her if she wanted to come back to his place. She said no but she would on the next date. He said he then mockingly grabbed her by the hand and sort of pulled her for one or two seconds and said "well, come on, let's go back and finish up then". She laughed and said no and then he asked for a lift to the bus stop and she agreed and later offered him a lift home.

[42] The appellant said during the car ride home he put his right hand on her left thigh and rubbed it and they also engaged in passionate kissing. He said he began to get "a bit of a vibe that maybe she wasn't as excited about it as I was", referring to having sex in public. When they got to his house he invited her in and she said that she would not come in and then after he got home he sent her a text saying "I had a really great time tonight and hope to catch up with you again".

The summing up

[43] As referred to earlier in these reasons, the learned trial Judge correctly told the jury:

> "The real question is whether the Crown has proved, beyond reasonable doubt, a lack of consent, or, alternatively, whether the Crown's negatived that [the appellant] had an honest and reasonable but mistaken belief in consent."

[44] The learned trial Judge then went through the evidence given by each of the complainant and the appellant about each of the counts on the indictment. Her Honour went through all of the evidence that was relevant to whether or not the Crown had negatived an honest and reasonable belief that the complainant was consenting. The learned trial Judge also went through the evidence of preliminary complaint instructing the jury that it was relevant only to the complainant's credibility. Her Honour also directed the jury as to the use they could make of the evidence of her distressed condition after the events in question: that is, if they found the distress was genuine then it could be used by them as evidence that supported her account.

[45] It appears that not long after the jury retired they asked for a copy of the transcript of the evidence of the complainant and the appellant. They were helpfully given a copy of the transcript of all of the oral evidence led at trial.

[46] The verdicts are consistent with the expression of the relevant facts expressed by the experienced trial Judge when sentencing. Her Honour said:

> "In my view, the jury's verdict is that they were not satisfied beyond reasonable doubt that the Crown had negatived a section 24 defence in relation to counts 1, 2 and 3, but that from the time that she indicated she wasn't interested in oral sex with you and you decided to pursue your intention to have sex with her regardless, any belief in consent was not, at the very least, reasonable and not, given the circumstances of her communications that she wasn't interested, in my view, honest. You just decided to have sex with her and pursue your desires regardless of her protests and her lack of interest.
>
> The sex was in a public place. So it would have been quite humiliating, as well as distressing. There was a stranger who had walked past, but you persisted with your intentions after he left. The rape going up the stairs would also have been incredibly humiliating for the complainant, and does show some persistence; as does the sexual assaults in the car."

The appellant's submissions

[47] The appellant submitted that although, *prima facie*, there was an identifiable logic in the different verdicts in that the jury could not exclude a mistake of fact but only up to the point of intercourse (count 4), it was contended that the differentiation was not rational and was therefore an affront to common sense. It was submitted that that was because the nature and quality of the evidence was unchanged suggesting a compromise or confusion in the minds of the jury.

[48] If not inconsistent, it was submitted that the verdicts of guilty were unreasonable and not supported by the evidence. The evidence did not provide a proper basis for the jury to exclude, beyond reasonable doubt, the possibility that the appellant was operating under a mistake of fact throughout.

The respondent's submissions

[49] The respondent submitted that upon a review of the evidence for each count, and accepting that the jury carefully applied the learned trial judge's directions, it was open to the jury rationally to distinguish between the counts on the indictment. It was not the case that an acquittal on one count could only have led to the view that the complainant was unreliable in relation to any other count. There was a clear explanation in this case for the different verdicts. The positive statement of "no" between the commission of counts 3 and 4 provided a rational basis for the acquittals on the first three counts and convictions on the last three counts. The respondent submitted that it is apparent that up to the point where the complainant first said "no" the jury had a doubt about whether the Crown had negatived that the appellant had an honest and reasonable mistaken belief that she was consenting.

[50] As to whether or not the verdicts were unreasonable, the respondent submitted that the complainant's credibility was supported by the consistent complaint evidence she made via text message to people. It was open to the jury to reject the appellant's evidence that the complainant was an active participant in the sexual activity especially in the circumstances of her recent distress. At the point that the penile rape, which is count 4, commenced, it was clear that the complainant was not consenting to the sexual activity. She repeatedly said "no" thereafter and pushed the appellant away. She explained the reason she gave the appellant a ride home being that he just got into her car, she was numb and thinking about other things and just drove him. As soon as he exited her car she made a complaint to friends and rang a help line.

Consideration

Inconsistent verdicts

[51] When an appellant seeks to have a conviction set aside on the basis that a verdict of guilty on one or more counts is inconsistent with an acquittal on one or more other counts, the appellant must show that the different verdicts represent an affront to logic and common sense which is unacceptable and appellate intervention is necessary to prevent a possible injustice. The High Court in *MacKenzie v The Queen*[1] discussed the role of an appellate court in such a situation as follows:[2]

> "Where, as is ordinarily the case, the inconsistency arises in the jury verdicts upon different counts of the originating process in a criminal trial, the test is one of logic and reasonableness. A judgment of Devlin J in *R v Stone* is often cited as expressing the test:
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> > 'He must satisfy the court that the two verdicts cannot stand together, meaning thereby that no reasonable jury who had applied their mind properly to the facts in the case could have arrived at the conclusion, and once one assumes that they are an unreasonable jury, or they could not have reasonably come to the conclusion, then the convictions cannot stand.'
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> Nevertheless, the respect for the function which the law assigns to juries (and the general satisfaction with their performance) have led courts to express repeatedly, in the context both of criminal and civil

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1 (1996) 190 CLR 348; [1996] HCA 35.

2 Ibid at 366-368.

trials, reluctance to accept a submission that verdicts are inconsistent in the relevant sense. Thus, if there is a proper way by which the appellate court may reconcile the verdicts, allowing it to conclude that the jury performed their functions as required, that conclusion will generally be accepted. If there is some evidence to support the verdict said to be inconsistent, it is not the role of the appellate court, upon this ground, to substitute its opinion of the facts for one which was open to the jury. In a criminal appeal, the view may be taken that the jury simply followed the judge's instruction to consider separately the case presented by the prosecution in respect of each count and to apply to each count the requirement that all of the ingredients must be proved beyond reasonable doubt. Alternatively, the appellate court may conclude that the jury took a 'merciful' view of the facts upon one count: a function which has always been open to, and often exercised by, juries. … In *R v Kirkman*, in the Supreme Court of South Australia, King CJ (with the concurrence of Olsson and O'Loughlin JJ) observed:

> '[J]uries cannot always be expected to act in accordance with strictly logical considerations and in accordance with the strict principles of the law which are explained to them, and courts, I think, must be very cautious about setting aside verdicts which are adequately supported by the evidence simply because a judge might find it difficult to reconcile them with the verdicts which had been reached by the jury with respect to other charges. Sometimes juries apply in favour of an accused what might be described as their innate sense of fairness and justice in place of the strict principles of law. Sometimes it appears to a jury that although a number of counts have been alleged against an accused person, and have been technically proved, justice is sufficiently met by convicting him of less than the full number. This may not be logically justifiable in the eyes of a judge, but I think it would be idle to close our eyes to the fact that it is part and parcel of the system of administration of justice by juries. Appellate courts therefore should not be too ready to jump to the conclusion that because a verdict of guilty cannot be reconciled as a matter of strict logic with a verdict of not guilty with respect to another count, the jury acted unreasonably in arriving at the verdict of guilty.'

We agree with these practical and sensible remarks.

Nevertheless, a residue of cases will remain where the different verdicts returned by the jury represent, on the public record, an affront to logic and commonsense which is unacceptable and strongly suggests a compromise of the performance of the jury's duty. More commonly, it may suggest confusion in the minds of the jury or a misunderstanding of their function, uncertainty about the legal differentiation between the offences or lack of clarity in the judicial instruction on the applicable law. It is only where the inconsistency rises to the point that the appellate court considers that intervention is necessarily required to prevent a possible injustice that the relevant conviction will be set aside. It is impossible to state hard and fast rules. 'It all depends upon the facts of the case'." (citations omitted)

[52] This is not a case which requires appellate intervention because of any inconsistency in verdicts. It appears reasonably clear from the verdicts returned by the jury that they rejected the appellant's evidence that all the sexual activity was consensual. That left them to consider the evidence of the complainant. The jury must have accepted her evidence about counts 4, 5 and 6. In respect of counts 1, 2 and 3, it would have been reasonable for a jury to regard the complainant's evidence about what happened as different in quality from her evidence about what happened in relation to counts 4, 5 and 6. Her evidence about the latter counts involved nothing that could have constituted a basis for the appellant's formation of a reasonable and honest belief that the complainant was consenting to penile and digital penetration of her; at least, her evidence was capable of excluding such defence beyond any reasonable doubt. The sole basis for an acquittal on those counts could only have been by way of an acceptance of his evidence of actual consent; but his evidence had been rejected.

[53] Her evidence about counts 1, 2 and 3 was different. The complainant's own acts, which she acknowledged in her evidence, were capable of giving rise to an honest and reasonable, but mistaken, belief in the appellant that she was not objecting to his physical sexual overtures. This much is obvious from the matters referred to in paragraphs [12] to [16] of these reasons. Her omission during these events to demonstrate an unambiguous verbal or physical objection to his sexual interference of her was, of course, explicable by her shock, fear and distress and the absence of objection did not necessarily negate absence of consent. Nevertheless, the absence of patent opposition to what he was doing together with the other circumstances were capable of being regarded by a reasonable jury as justifying a conclusion that the prosecution had failed, on its own evidence, to negative the defence of mistake. But that was not so for the prosecution's evidence on counts 4, 5 and 6. At the moment of commencement of the penile rape, which was the subject of count 4, it was clear that the complainant had not consented and the appellant's consciousness of her lack of consent to this escalation of his assaults upon her is capable of being confirmed by his use of force to get his way.

[54] The difference in the verdicts suggest that the jury faithfully followed her Honour's directions that the burden of proof was on the Crown not only to prove lack of consent beyond reasonable doubt; but also to disprove an honest and reasonable, albeit mistaken, belief on the part of the appellant that the complainant was not consenting. It also suggests that the jury faithfully adhered to her Honour's directions that each count should be considered separately and, as the evidence on each count was different, the verdicts need not be the same.

[55] It is true that another jury may well have been satisfied that the appellant was guilty of all counts but that does not mean that there was no rational explanation for the different verdicts reached in this case.

[56] This ground of appeal must be dismissed.

Unreasonable verdicts

[57] Essentially the argument for this ground is that the evidence did not provide a proper basis for the jury to exclude beyond reasonable doubt the possibility that the appellant was operating under mistake of fact throughout. The earlier consideration of the justification for the different verdicts on counts 1 to 3 from those on counts 4 to 6 demonstrates that there was a proper basis for the jury to exclude the mistake of fact

defence on counts 4 to 6. By this time, the complainant's lack of consent was explicit and no jury could have regarded the appellant as operating under an honest and *reasonable* but mistaken belief as to consent. As I have already observed, the verdicts are consistent with the complainant's evidence, that she did not consent to any of the sexual activity beyond perhaps the first kiss, but the jury also accepted that until she explicitly and repeatedly said no to the appellant's further advances, they could not be satisfied beyond reasonable doubt that he was not operating under a reasonable mistaken belief that she was consenting.

[58] The likelihood of her evidence being true was supported in this case by the evidence of the complaints of sexual assault which she made to a number of people immediately after the events in question and her distressed condition when she spoke to the Kids Helpline counsellor.

[59] The submission that the verdicts of guilty on counts 4 to 6 were unreasonable is also without merit. This ground of appeal must also fail.

Order

I would order that the appeal be dismissed.