NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Brady*, 2017 NSCA 41

Date: 20170525
Docket: CAC 451526
Registry: Halifax

Between:

William Leigh Brady

Appellant

v.

The Attorney General of Canada,
representing Her Majesty the Queen in Right of Canada

Respondent

Judge:	The Honourable Justice Elizabeth Van den Eynden
Appeal Heard:	November 28, 2016, in Halifax, Nova Scotia
Subject:	**Inconsistent/unreasonable jury verdicts**
Summary:	Mr. Brady was charged with four offences under the *Controlled Drugs and Substances Act* (*CDSA*). Although all charges arose from the same evidentiary base, the jury only convicted Mr. Brady of the two trafficking offences related to marijuana. Because the charges Mr. Brady was acquitted of are so tightly wound with the charges he was convicted of, serious and legitimate questions arise respecting the reasonableness of the verdict.
Issues:	1. Are the inconsistent jury verdicts unreasonable? 2. If so, what is the appropriate remedy? A new trial or acquittal?
Result:	The inconsistent verdicts are unreasonable and cannot be reconciled. Appeal allowed and acquittals entered.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 14 pages.

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Respondent

Judges:	MacDonald, Beveridge, and Van den Eynden JJ.A.
Appeal Heard:	November 28, 2016, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Van den Eynden, J.A.; MacDonald, C.J.N.S. and Beveridge, J.A. concurring
Counsel:	Adam Rodgers, for the appellant Leonard MacKay, for the respondent

Reasons for judgment:

Overview

[1] Mr. Brady was charged with four offences under the *Controlled Drugs and Substances Act* (*CDSA*)—two related to trafficking cannabis marijuana and two related to trafficking cannabis resin. Although all charges arose from the same evidence, the jury only convicted Mr. Brady of the two trafficking offences related to marijuana. The jury acquitted on the trafficking offences related to cannabis resin.

[2] The drugs were contained in two suitcases. One suitcase contained cannabis marijuana; the other contained both cannabis marijuana and cannabis resin. Both suitcases were found in a motor vehicle owned by Mr. Brady, and the jury heard evidence of Mr. Brady's suspicious involvement both before and after the suitcases containing the drugs were seized from his vehicle. Mr. Brady claims the verdicts reached by the jury were inconsistent and, hence, unreasonable. The Crown asserts the jury might have made certain determinations of fact which could support the differing verdicts.

[3] Because the charges Mr. Brady was acquitted of are so tightly wound with the charges he was convicted of, serious and legitimate questions arise respecting the reasonableness of the verdict. Did the jury get confused? Did they make a compromise?

[4] In my view, the inconsistent verdicts are unreasonable and cannot be reconciled. For reasons that follow, I would allow the appeal and enter acquittals.

The Charges

[5] Mr. Brady was charged with:

1. Possession (over three kilograms) for the purpose of trafficking in cannabis marijuana, contrary to s. 5(2) of the *CDSA*;
2. Trafficking (over three kilograms) in cannabis marijuana, contrary to s. 5(1) *CDSA*;
3. Possession (under three kilograms) for the purpose of trafficking in cannabis resin contrary to s. 5(2) of the *CDSA*;

4. Trafficking (under three kilograms) in cannabis resin marijuana, contrary to s. 5(1) *CDSA*.

[6] The charges arose from events which occurred on November 14, 2012. The trial was held February 1-4, 2016. Justice Denise Boudreau presided. As noted, the jury only convicted Mr. Brady of the cannabis marijuana offences. During Mr. Brady's sentencing hearing, held on April 27, 2016, the Crown suggested the trial judge stay the conviction under s. 5(2) based on the *Kienapple* principle.

[7] The trial judge entered the stay and sentenced Mr. Brady on the remaining conviction—under s. 5(1) of the *CDSA*. He received an 18 month conditional sentence with compulsory conditions.

Issues

[8] Mr. Brady framed his inconsistent verdict ground of appeal as follows:

> The different verdicts reached by the Jury were unreasonable on the basis that they are inconsistent, and cannot be reconciled on any rational or logical basis. Specifically, the evidence regarding possession of the cannabis resin (in relation to which Mr. Brady was found not-guilty) was so wound up with the evidence regarding possession of the cannabis marihuana (in relation to which Mr. Brady was found guilty) that they were not logically separable.

[9] I would restate the issues as:

1. Are the inconsistent jury verdicts unreasonable?
2. If so, what is the appropriate remedy? A new trial or acquittal?

[10] Mr. Brady also sought leave to appeal his conditional sentence. Because of Mr. Brady's success in having his conviction overturned and acquittals entered, I will not address the grounds of appeal respecting sentence.

Standard of Review

[11] This Court has the power to set aside a jury verdict. Section 686(1) of the *Criminal Code* provides:

> 686 (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
>
> (a) may allow the appeal where it is of the opinion that

> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
>
> (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
>
> (iii) on any ground there was a miscarriage of justice;

[12] This Court recently reviewed the principles an appellate court considers when assessing whether a verdict is unreasonable based on inconsistency. In *R. v. Lawther*, 2016 NSCA 48, Scanlan, J.A. wrote:

> [12] In *R. v. Pittiman*, 2006 SCC 9, the Supreme Court of Canada discussed principles to consider when assessing whether verdicts are inconsistent and, therefore, unreasonable. The Court referenced s. 686(1)(a)(i) of the *Criminal Code* which provides the court may allow an appeal where it is of the opinion that the verdict should be set aside on the ground it is unreasonable and cannot be supported by the evidence, saying that before an appellate court may interfere with a verdict on the ground it is inconsistent, the court must find that the verdict is unreasonable. The appellant bears the onus of showing that no reasonable jury whose members applied their minds to the evidence could have arrived at that conclusion. (*R. v. McLaughlin* (1974), 15 C.C.C. (2d) 562 (Ont. C.A.)). The Court in *Pittiman* said:
>
> > 7 The onus of establishing that a verdict is unreasonable on the basis of inconsistency with other verdicts is a difficult one to meet because the jury, as the sole judge of the facts, has a very wide latitude in its assessment of the evidence. The jury is entitled to accept or reject some, all or none of any witness's testimony. Indeed, individual members of the jury need not take the same view of the evidence so long as the ultimate verdict is unanimous. Similarly, the jury is not bound by the theories advanced by either the Crown or the defence. The question is whether the verdicts are supportable on any theory of the evidence consistent with the legal instructions given by the trial judge. Martin J.A. aptly described the nature of the inquiry in *R. v. McShannock* (1980), 55 C.C.C. (2d) 53 (Ont. C.A.), at p. 56, as follows:
> >
> > > Where on any realistic view of the evidence, the verdicts cannot be reconciled on any rational or logical basis the illogicality of the verdict tends to indicate that the jury must have been confused as to the evidence or must have reached some sort of unjustifiable compromise. We would, on the ground that the verdict is unreasonable alone, allow the appeal, set aside the verdict, and direct an acquittal to be entered.

Analysis

[13] Mr. Brady bears the onus of establishing that no reasonable jury, properly instructed and applying their minds to the evidence, could arrive at these verdicts. To determine whether the verdicts are unreasonable, it is necessary to review the evidence.

The evidentiary context

[14] Mr. Brady came to the attention of the RCMP through his communications with a suspected drug dealer, Dawson Richards. Mr. Richards was one of several targets in an RCMP investigation. The investigation included interception of electronic communications and police surveillance.

[15] The RCMP monitored telephone calls and text messages between Mr. Brady and Mr. Richards. These communications lead to surveillance for suspected drug activity. Specifically, in the late afternoon/early evening of November 14, 2012, police observed Mr. Brady's motor vehicle drive down a fairly remote and secluded rural road in Antigonish County that leads to a wharf. Minutes later, Mr. Richards' motor vehicle was seen in the same area. Mr. Richards is apparently a fisherman.

[16] The surveillance did not capture Mr. Brady and Mr. Richards actually meeting, nor either of them handling the suitcases in question which contained the drugs. However, shortly after the RCMP observed their vehicles in the same vicinity, both vehicles were seen leaving the area and, within a few minutes, Mr. Brady was observed meeting up with Marco Wood, someone he knew well. Mr. Wood was driving a van owned by Mr. Brady. They met up in a parking lot adjacent to the highway. The RCMP observed activity between Mr. Brady and Mr. Wood.

[17] It was dark and visibility was limited; however, the RCMP officer observed both men exiting their vehicles and moving about. Although the officer did not observe the exchange of any items, including suitcases, he observed the trunk of Mr. Brady's car being opened and closed and the sliding door of the van being opened and closed.

[18] Later that evening, RCMP pulled over the vehicle Mr. Wood was driving. In it they found two suitcases. One contained 7 kg of marijuana—packaged in multiple bags and contained in two larger bags. The other suitcase had six bags of

marijuana (four approximately one pound each and two approximately ½ ounce each) plus two bags containing vials of resin—approximately one pound each. Mr. Wood was arrested and the drugs were seized by police. Mr. Wood contacted Mr. Brady shortly after his arrest to advise what had occurred, and Mr. Brady came to pick him up.

[19] The Crown also relied on intercepted text messages exchanged between Mr. Brady and Mr. Richards after the drug seizure. The two communicated as follows:

> Mr. Brady: *"A friend of mine borrowed my van on wed n was stopped n arrested n Baddeck n charged with possession for the purpose. They released him n kept my van."*
>
> Mr. Richards: *"With the stuff"*
>
> Mr. Brady: *"Afraid so. Mine too. And van."*
>
> Mr. Richards: *"Omf this is not good did anyone one know he was goin"*
>
> Mr. Richards: *"OK we meet sometime tomorrow"*
>
> Mr. Brady: *"Text me"*

[20] Mr. Brady testified in his own defence. He acknowledged initiating contact with Mr. Richards, and the two then met to discuss whether Mr. Brady might be able to grow marijuana for Mr. Richards. Mr. Brady claimed he was legally permitted to grow under four licenses, but only had three. He had heard that Mr. Richards had a license to grow 50 marijuana plants, so he wanted to discuss growing for Mr. Richards.

[21] In essence, Mr. Brady's defence was that apart from his initial discussion about growing marijuana for Mr. Richards, which he claimed did not materialize, his ongoing dealings with Mr. Richards were simply to buy fish. Mr. Brady said that the text messages he exchanged with Mr. Richards prior to meeting up with him on November 14 (the night the drugs were seized from Mr. Brady's van) were simply to arrange a place and time to meet so he could buy fish from Mr. Richards.

[22] These text messages did not mention fish or drugs. They were brief and to the point, confirming their meeting time and that Mr. Brady would be alone. Mr. Brady said he met up with Mr. Wood, right after his meeting with Mr. Richards, to provide Mr. Wood with some fish—hence the opening of his car trunk and the van's door.

[23] But no fish product was found in the van when the police pulled it over later that night. The explanation provided by Mr. Brady was that the fish product was frozen and Mr. Wood decided not to take any fish—that could wait until the next day. As to why Mr. Wood was driving Mr. Brady's van, Mr. Brady explained that Mr. Wood's vehicle was not working well and Mr. Wood needed a vehicle to visit someone in Cape Breton.

[24] As to the two suitcases found in his van, Mr. Brady claimed they were not his, he had never seen them before and had no idea how they ended up there. Mr. Wood did not testify at Mr. Brady's trial.

[25] Respecting the incriminating text messages exchanged between Mr. Brady and Mr. Richards, following Mr. Woods' arrest and seizure of the suitcases containing the drugs (see ¶ 19), Mr. Brady's explanation was that he simply had no recollection of these text messages.

[26] At the time of the offences, Mr. Brady and his spouse were active marijuana growers. Mr. Brady had a licence issued by Health Canada to produce and consume marijuana for his medical use, and he and his spouse grew marijuana for others under other medical licenses. Under the various licences, he and/or his spouse were permitted 104 plants (they had 103) and were permitted to store 10 pounds of dried marijuana on their premises. At the time of arrest, there were only a few ounces at Mr. Brady's premises.

[27] The jury heard expert evidence tendered by the Crown to the effect that the cryptic manner and method of how Mr. Brady and Mr. Richards communicated both prior to and after the drug seizure on November 14th, 2012, the amount of drugs involved and how they were packaged, and the fact that a courier was used was evidence that supported Mr. Brady's intention to traffic drugs. Mr. Brady was characterized as a mid-level drug dealer.

[28] Based on the evidence, the Crown's theory presented to the jury was that Mr. Brady and Mr. Richard were drug dealers. They were jointly involved in the trafficking of both cannabis marijuana and cannabis resin and each provided drugs. They were not meeting up on November 14, 2012 to buy/sell fish. They met so Mr. Brady could collect drugs from Mr. Richards. When Mr. Brady met up with Mr. Wood, drugs were moved from Mr. Brady's motor vehicle to his own van, for further transport by Mr. Wood. Mr. Wood was Mr. Brady's trusted drug courier. The Crown contended that Mr. Brady was in possession of both suitcases seized

from his van and thereby in possession of both drugs. Further, he had the intent to make these drugs available (traffic) to others.

[29] The defence theory presented to the jury was along the lines that Mr. Brady was a target because of his legitimate marijuana grow operation. He had the pure misfortune of becoming acquainted with Mr. Richards, a fisherman who happened to be under RCMP surveillance. The RCMP misinterpreted his legitimate business and wrongfully connected Mr. Brady to their broader drug investigation. The RCMP mistook a simple encounter to pick up fish as a drug deal. And overall, given the evidence advanced by the Crown was mainly circumstantial, there was reasonable doubt as to Mr. Brady's guilt.

What did the Crown have to prove? How did the trial judge instruct?

[30] In her instructions to the jury, Justice Boudreau extensively covered the elements of each charge which the Crown had to prove beyond a reasonable doubt. She related the evidence to the elements of the offences. No issue was raised, either at trial or on appeal, respecting the adequacy or correctness of her charge to the jury. I will briefly summarize her instructions on key elements.

[31] Respecting the cannabis marijuana charge under s. 5(2) *CDSA* (possession for the purpose of trafficking), the judge outlined that the Crown had to prove: Mr. Brady was in possession of a controlled substance; the substance was cannabis marijuana; Mr. Brady knew the substance was cannabis marijuana or a substance he was not allowed to traffic in; and he possessed the drug for the purpose of trafficking.

[32] She repeated these required elements for the cannabis resin charge under s. 5(2) *CDSA* (possession for the purpose of trafficking) with the necessary change to the third element—being Mr. Brady knew the substance was cannabis resin or a substance he was not allowed to traffic in.

[33] Respecting the two trafficking charges under s. 5(2) (one for cannabis marijuana the other for cannabis resin), the judge also outlined in detail all the required elements: Mr. Brady trafficked in a controlled substance; the substances were cannabis marijuana/cannabis resin; he knew the drugs were these substances or a substance in which trafficking was not allowed; and he intended to traffic the controlled substance. She related the evidence to the elements of these offences.

[34] As noted, respecting an accused's requisite knowledge (*mens rea*), the judge instructed that it was sufficient if Mr. Brady knew the substance was something he was not allowed to traffic. That instruction was correct.

[35] As a general statement, in Canada the law of possession does not require specific knowledge of the type of the controlled drug. All that is required is knowledge of being in possession of a prohibited drug.

[36] There are a multitude of cases in a trafficking/possession context that confirm an accused must only know the substance was **a** prohibited drug, rather than the specific drug. In *R. v. Aiello* (1978), 38 C.C.C. (2d) 485 (Ont. C.A.), aff'd (1979), 46 C.C.C. (2d) 128 (S.C.C.), the accused knew the package contained a drug, but did not know it was specifically heroin. The Ontario Court of Appeal stated:

> 8 **In our view the trial judge should have directed the jury that if they were satisfied beyond a reasonable doubt that the respondent assumed control of the package, knowing that it contained a drug, the trafficking in which was prohibited, or was wilfully blind to it being such a drug or was reckless as to whether it was such a prohibited drug, then the knowledge necessary to constitute the offence was established.** The trial judge in our view should have further directed the jury that it was not necessary for the prosecution to prove the required knowledge by direct evidence, but that it could be inferred from the surrounding circumstances, such as, for example, the finding of the drug on the accused's person in his trouser pant leg, his evidence that he figured that it must be a drug, the circumstances in which, and the place where he had picked up the package.
>
> [Emphasis added]

[37] In *R. v. Blondin* (1970), 2 C.C.C. (2d) 118 (B.C.C.A.), aff'd (1971), 4 C.C.C. (2d) 566 (S.C.C.), the court held that the Crown was only required to prove beyond a reasonable doubt the accused knew the substance in his possession was a narcotic. He did not need to specifically know it was cannabis resin. (See ¶ 4 and 45.)

[38] In *R. v. Burgess*, [1970] 3 C.C.C. 268 (Ont. C.A.) the unanimous court concluded at ¶ 2:

> My brothers and I are all of the opinion that in these circumstances where the evidence is clear and consistent only with the conclusion that the accused knew the substance that he had in his possession was indeed a drug the possession of

> which was contrary to the statute, the fact that he mistakenly believed the drug to be hashish rather than opium is of no moment.

[39] Applying these principles to the cannabis resin charges (on which Mr. Brady was acquitted), the jury only had to find that Mr. Brady knew the suitcase contained a substance in which trafficking is not allowed rather than specific knowledge of what the drug was.

[40] In retrospect, it might have been helpful to the jury had the judge, in explaining the knowledge element of the offences, placed greater emphasis on the fact that specific knowledge of the drug was not required. That said, I am satisfied the judge's instructions to the jury, taken as a whole, were correct; and it is worth repeating that neither party criticized the judge's instructions in any way, at any time.

Are the verdicts supportable on any theory of the evidence consistent with the correct legal instructions of the judge?

[41] Mr. Brady bears the onus of establishing that no reasonable jury, properly instructed and applying their minds to the evidence, could arrive at the verdicts they did. I am satisfied he has met his burden.

[42] In my view, the inconsistent verdicts are unreasonable and cannot be reconciled on any logical or rational basis. The jury must have been confused about the evidence and/or their instructions. Had they understood and followed the correct legal instructions, which the judge did provide, that should have guarded against what are clearly inconsistent verdicts. Alternatively, they might have reached some sort of unjustifiable compromise.

[43] On appeal, the Crown argues the evidence could support different versions of fact that might explain the apparent inconsistent verdicts. For example: one suitcase only had one illegal drug, the other had two; Mr. Brady only acknowledged he was an active marijuana producer (not resin); the suitcases were of a different size and brand; the drugs in each suitcase were not identically packaged and the suitcases were found in different positions in Mr. Brady's van; and, perhaps the jury found the suitcase containing both the cannabis resin and cannabis marijuana was Mr. Richards' and Mr. Brady did not know that suitcase also contained resin.

[44] I do not share the Crown's view that there are plausible differing versions of fact which might explain the inconsistent verdicts. I say that for several reasons.

[45] Mr. Brady is a single accused, charged with multiple offences. The offences are not temporally distinct. Rather, the evidence confirms they are strikingly contemporaneous. Neither is this a case where different verdicts might be reconciled because offences might be qualitatively different in their surrounding circumstances. Just the opposite. The offences are not in any true sense qualitatively different. The evidentiary variations the Crown points to (¶ 43) are not in any way material.

[46] Mr. Brady argues that the evidence on all four charges is inextricably interwoven. I agree. The evidence on all four charges is effectively identical and, cannot be logically separated. As recognized by the SCC in *R. v. Pittiman*, 2006 SCC 9:

> [8] …when the evidence on one count is so wound up with the evidence on the other count that it is not logically separable, inconsistent verdicts may be held to be unreasonable.

[47] It is worth observing that during the sentencing hearing, where the trial judge determined the facts upon which the jury based its verdict, she found Mr. Brady was in possession of over 9000 grams of cannabis marijuana—that was the amount contained in both suitcases. Accordingly, it is not plausible, under any theory, to suggest Mr. Brady was not in possession of the cannabis resin. It was packaged together, in the same suitcase, with the marijuana he was found to be in possession of. Further as noted earlier, Mr. Brady did not have to know the exact substances contained in both suitcases, it was sufficient he knew they contained controlled drugs or substances in which trafficking is not allowed.

[48] The question is—are the verdicts supportable on any realistic view of the evidence consistent with the correct legal instructions of the trial judge? Given the same evidentiary base for all charges, it was not logical for the jury to convict on the cannabis marijuana charges and have reasonable doubt and acquit on the cannabis resin charges. They were either confused or perhaps reached an unjustifiable compromise. The evidence does not support any other rational conclusion.

What is the remedy? New trial or acquittal?

[49] Having found the verdict should be set aside on the ground that it is unreasonable, I turn to the remedy. Section 686(2) of the *Criminal Code* provides:

> Where a court of appeal allows an appeal under paragraph (1)(a), it shall quash the conviction and
>
> (a) direct a judgment or verdict of acquittal to be entered; or
>
> (b) order a new trial.

[50] In Mr. Brady's case, his acquittal on the cannabis resin charges has not been appealed by the Crown. Accordingly, the acquittals are presumed to be correct. If Mr. Brady were subject to a new trial, this would result in being retried on the same factual foundation or *gravamen* for which he was acquitted. This would simply invite another inconsistent verdict.

[51] From a review of relevant authorities, it is apparent that where appellate courts find that the jury rendered unreasonable inconsistent verdicts that stem from an error-free trial the usual remedy is an acquittal.

[52] In *R. v. J.F.*, 2007 ONCA 500, MacFarland and Laskin JJ.A. found the jury had returned an unreasonable inconsistent verdict, as they had convicted the appellant of manslaughter by criminal negligence, yet acquitted him of manslaughter by failing to provide the necessaries of life. The majority ordered a new trial. The Crown appealed to the Supreme Court of Canada (*R. v. J.F.*, 2008 SCC 60) and the appellant cross-appealed against the order for a new trial. Justice Fish, for the majority, upheld the conclusion that the verdict was inconsistent, but allowed the cross-appeal and substituted an acquittal:

> 38 For all of these reasons, I agree with the majority in the Court of Appeal that the verdicts rendered at trial are inconsistent and that the respondent's conviction of manslaughter by criminal negligence must therefore be quashed.
>
> 39 Unlike the Court of Appeal, however, I would not order a new trial. **In an appropriate case, of which this is not one, a new trial may well be ordered where the verdicts at first instance are found to be inconsistent**.
>
> 40 Here, the respondent was found not to have committed manslaughter by failing to provide the necessaries of life. **His conviction of manslaughter by criminal negligence could only be supported on a new trial upon a finding, contrary to the jury's conclusion in this case, that the respondent did in fact**

> **fail in his duty to protect his child, the "necessar[y] of life" that was the factual foundation and the gravamen of both counts**.
>
> 41 The respondent's acquittal was not appealed. **To order a new trial in these circumstances would deprive the respondent of the benefit of that acquittal, now final**, and expose him on the new trial to a finding that he did in fact commit the offence of which he was acquitted, definitively, by the jury in this case.
>
> [Emphasis added]

[53] S. C. Hill, D. M. Tanovich, and L. P. Strezos in *McWilliams' Canadian Criminal Evidence*, 5th ed loose-leaf, (Toronto: Thomson Reuters, 2016) briefly covers remedies for inconsistent verdicts, relying on *J.F.* as authority, at §37:80:40:

> Where an appellate court finds that a verdict meets the test for inconsistency, it may enter an acquittal for the conviction, or order a new trial. Where the inconsistency related to verdicts involving a co-accused, the usual remedy should be a new trial. However, it appears that an appellate court has a broader discretion to enter an acquittal where the inconsistent verdict relates to multiple counts against an accused. In this context, a new trial on the convicted count would usually result in the accused being retried for the same "factual foundation and . . . gravaman" (sic) of the offence of which he or she was acquitted. In these circumstances, the entering of an acquittal will be appropriate. [citations omitted]

[54] In *R. v. McShannock* (1980), 55 C.C.C. (2d) 53 (Ont. C.A.) the accused was charged with confining and indecently assaulting the victim. The jury convicted on the confinement charge but acquitted on indecent assault. The court held:

> 8 The first ground upon which we called on the Crown for argument was that the verdicts were inconsistent. Mr. Greenspan, for the appellant, forcefully submitted that on the peculiar facts of this case the acts alleged to constitute a confinement of the complainant were so inextricably interwoven with the acts relied upon as constituting an indecent assault that the verdicts were inconsistent and could not be reconciled on any rational basis. **He argued that the events alleged to constitute the confinement, viewing the evidence realistically, occurred contemporaneously with the acts alleged to constitute an indecent assault.**
>
> 9 Where an indictment contains more than one count and the jury convicts on one count and acquits on another count an inconsistency in the verdicts does not of necessity require the conviction to be set aside. The onus is on the appellant to show that the verdicts are so at odds that no reasonable jury who understood the evidence could have properly arrived at that verdict. We think that onus on the peculiar facts of this case has been discharged. Where on any realistic view of the

> evidence, the verdicts cannot be reconciled on any rational or logical basis the illogicality of the verdict tends to indicate that the jury must have been confused as to the evidence or must have reached some sort of unjustifiable compromise. We would, on the ground that the verdict is unreasonable alone, allow the appeal, set aside the verdict, and direct an acquittal to be entered.
>
> [Emphasis added]

[55] For other cases where the verdicts were found to be inconsistent and an acquittal ordered see: *R. v. Bathgate*, [1997] A.J. No. 370 (C.A.); *R. v. McIntyre* (1992), 81 Man.R. (2d) 131 (C.A.); *R. v. Tillekaratna* (1998), 124 C.C.C. (3d) 549 (Ont. C.A.); *R. v. Wong* (2006), 209 C.C.C. (3d) 520 (Ont. C.A.); *R. v. TFE Industries Inc.*, 2009 NBCA 39; *R. v. Al-Kassem*, 2015 ONCA 320.

[56] Although an acquittal might appear to be an unpalatable remedy in light of the strength of the evidence, in my view the law mandates this remedy in these circumstances.

Conclusion

[57] I would allow the appeal and enter acquittals.

Van den Eynden, J.A.

Concurred in:

MacDonald, C.J.N.S.

Beveridge, J.A.