

SUPREME COURT OF QUEENSLAND

CITATION: *R v DCY* [2026] QCA 144

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

FILE NO/S: CA No 265 of 2025
DC No 12 of 2025
DC No 17 of 2025

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: Childrens Court at Mount Isa – Date of Conviction:
4 October 2025 (Kahler DCJ)

DELIVERED ON: Date of Orders: 18 June 2026
Date of Publication of Reasons: 4 August 2026

DELIVERED AT: Brisbane

HEARING DATE: 15 June 2026

JUDGES: Bowskill CJ, Mullins P, Henry J

ORDERS: **Date of Orders: 18 June 2026**

- 1. Appeal allowed;**
- 2. Set aside the convictions on counts 7, 10 and 11;**
- 3. Order a new trial on counts 7, 10 and 11; and**
- 4. Reasons to be published at a later date.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – CONDUCT OF TRIAL JUDGE – where at the end of a five day trial, counsels’ addresses commenced after 4 pm on the Friday, were followed by the summing up which commenced at 6.15 pm and the jury were required to commence their deliberations at 8.20 pm – where the jury were permitted to go home at 9.20 pm on the Friday night and required to return to continue their deliberations on the Saturday morning, and reached a verdict on Saturday afternoon – where the trial judge’s summing up did not follow the structure recommended in the Criminal Directions Benchbook and departed from the standard directions in a number of respects, in a manner which risked confusion and misunderstanding on the part of the jury – whether the timing of the end of the trial implicitly placed pressure on the jury in breach of the fundamental rule that a jury must be free to give the issues in the trial the free

deliberation to which the accused and the Crown are entitled – whether the structure and content of the summing up, and the timing of the end of the trial, were errors or irregularities in the conduct of the trial which were material, resulting in a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – INCONSISTENT VERDICTS – where the appellant was charged with seven offences arising out of a single sexual encounter, five counts of rape and two related counts of assault – where the sexual encounter was not disputed, but the central issue was consent and, in relation to one of the counts of rape, accident – where the appellant was convicted of one count of rape, but acquitted of the other counts of rape and the related counts of assault – where the appellant was also convicted of two separate offences involving recording the complainant dressing after the sexual encounter and distributing that recording, and acquitted of another two separate counts of sexual assault – whether the verdict of guilty on the one count of rape was inconsistent with the acquittals on the other counts arising from the single sexual encounter – whether there is a proper way by which the appellate court may reconcile the verdicts, including that the jury took a merciful view of the facts or reasoned that although multiple counts were charged arising out of the one encounter, justice was sufficiently met by convicting the appellant of one count

Alford v Magee (1952) 85 CLR 437; [1952] HCA 3, cited
Black v The Queen (1993) 179 CLR 44; [1993] HCA 71, cited

Brawn v The King (2025) 99 ALJR 872; (2025) 423 ALR 69; [2025] HCA 20, cited

Cesan v The Queen (2008) 236 CLR 358; [2008] HCA 52, cited

HML v The Queen (2008) 235 CLR 334; [2008] HCA 16, cited

Holland v The Queen (1993) 67 ALJR 946; [1993] HCA 43, cited

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

McKell v The Queen (2019) 264 CLR 307; [2019] HCA 5, cited
R v Micallef; R v Lourens [\[2025\] QCA 21](#), cited

R v R [\[1998\] QCA 83](#), cited

R v Sunderland (2020) 5 QR 261; [\[2020\] QCA 156](#), cited

RPS v The Queen (2000) 199 CLR 620; [2000] HCA 3, cited

COUNSEL: J A Gregory KC, with J M Hine, for the appellant
 M B Lehane for the respondent

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

- [1] **THE COURT:** The appellant was convicted of raping the complainant (count 7), recording the complainant in breach of her privacy (count 10) and distributing that recording (count 11). The appellant, who was 16 at the time, had not previously met the complainant, who was then a 21 year old university student. They met for the first time on the dance floor of a bar at the rodeo grounds in Mt Isa. It was alleged the appellant sexually assaulted the complainant on the dance floor, twice, by reaching under her shirt and touching her breast (counts 1 and 2); and then, after they left the bar together, that a sexual encounter took place between them on a hill nearby, which resulted in five charges of rape (counts 3, 4, 6, 7 and 9) and two charges of assault (counts 5 and 8). It was not in dispute that a sexual encounter took place; the critical issue was consent and, in relation to count 6, accident. It was then alleged that the appellant secretly recorded the complainant as she dressed after the sexual encounter and distributed the recording (counts 10 and 11). The appellant was acquitted of all but counts 7, 10 and 11.
- [2] The trial took place in the Childrens Court at Mt Isa over five days, punctuated by many adjournments. The closing addresses commenced just after 4 pm on the Friday afternoon, and concluded at 5.45 pm. The trial judge commenced his summing up at 6.15 pm and concluded about two hours later. The summing up did not follow the structure recommended in the Criminal Directions Benchbook and departed from the standard directions in a number of respects. The jury retired to consider their verdicts at 8.20 pm on Friday night. They were permitted to go home an hour later, at 9.20 pm, and required to return at 9 am the next day. The verdict was returned at about 3 pm on Saturday.
- [3] The appellant appeals against his conviction of counts 7, 10 and 11 on three grounds. The first two grounds were articulated in the amended notice of appeal. The third was added at the start of the appeal hearing, following an exchange with the bench:
1. Ground 1: That the timing of the closing addresses, summing up and jury deliberations was an irregularity that constituted a miscarriage of justice as:
 - (a) it infringed the fundamental rule that the jury must be free to deliberate without any form of pressure; and
 - (b) it was unfair to the presentation of the defendant's case.
 2. Ground 2: The verdict of the jury on count 7 was inconsistent with the acquittals on counts 3, 5, 6, 8 and 9.
 3. Ground 3: The structure and content of the summing up amounted to a miscarriage of justice.
- [4] Shortly after the hearing of the appeal, the Court made the following orders:
1. Appeal allowed.
 2. Set aside the convictions on counts 7, 10 and 11.
 3. Order a new trial on counts 7, 10 and 11.
 4. Reasons to be published at a later date.
- [5] The cumulative effect of the errors and irregularities the subject of grounds 1 and 3 was at least material, if not fundamental, resulting in a miscarriage of justice. The

errors and irregularities could realistically have affected the reasoning of the jury to the verdicts of guilty.¹ They could also have affected the reasoning of the jury to the verdicts of acquittal, but there is no appeal available to the Crown. The convictions of counts 7, 10 and 11 must therefore be set aside. As we are not persuaded that the verdict of the jury on count 7 was inconsistent in the relevant sense² with the acquittals of the other counts, there should be a new trial on each of counts 7, 10 and 11.

- [6] These are our reasons for making those orders.

The course of the trial

- [7] The trial commenced shortly after 9 am on Monday, 29 September 2025.
- [8] The jury was empanelled, and the judge delivered the usual opening remarks to the jury. This included telling the jury that the daily sitting hours were usually 9.30 am to 1 pm and 2 pm to 4.30 pm. The determination of jury sitting hours is a matter for the discretion of the trial judge. The jury's needs and capacity, including its capacity to concentrate without distraction for prolonged periods, are relevant considerations in that determination. Such considerations explain why the daily jury sitting times commonly adopted by trial judges tend to be 10 am to 1 pm and 2.30 pm to 4.30 pm (with appropriate breaks). The usual jury sitting hours flagged at the outset by the trial judge in this case would have been an hour longer per day than that. However, as will be seen, the hours about which the jury were informed (and no doubt were taken into account by them in their plans for the week) were very different to what happened throughout the week and particularly on the Friday.
- [9] The jury were told the trial was expected to last "about four to five days".
- [10] After the empanelment and opening remarks, the jury were sent away, at about 10 am, and told to return at 2 pm, as there were some legal matters to be addressed.
- [11] The jury returned at 2 pm, and were told the legal matters were taking longer than expected, so the trial would not in fact begin until the following morning. The judge asked them to return at 8.45 am the next day, Tuesday, for a 9 am start.
- [12] The trial recommenced, with the jury, at 9.30 am on Tuesday. The complainant was called to give evidence at 9.50 am on that day. Having been declared a special witness, she gave her evidence by audio-visual link from the Townsville courthouse. The complainant gave evidence over the course of two days, with many interruptions.
- [13] The second day of the trial adjourned at 5 pm. The trial resumed on Wednesday, at 9 am. However, due to further legal issues, including an application for a mistrial brought by the prosecution, following a ruling by the trial judge about an aspect of the complainant's evidence, the jury were not brought into court until midday. The court again adjourned at 5 pm.
- [14] The fourth day of the trial, Thursday, commenced at 9 am. The Crown closed its case at 12.30 pm. The appellant was called upon and elected to neither give nor call evidence. The court then adjourned for lunch at 12.45 pm, with instructions to the jurors to return in time for a 2 pm start.

¹ *Brawn v The King* (2025) 423 ALR 69 at 73-74 [9]-[11].

² *MacKenzie v The Queen* (1996) 190 CLR 348 at 367.

- [15] After the jury left the courtroom, there was a discussion with counsel about directions before court actually adjourned at 1.20 pm. When the Court resumed at 2 pm, the jury were sent home for the day, as the judge needed more time to prepare the summing up. The trial was set to resume at 10 am the following day, Friday, for closing addresses.
- [16] The trial resumed at 8.30 am on Friday, in the absence of the jury. A draft of the judge's summing up had been emailed to the parties on Thursday evening. Some submissions were put in writing by the prosecutor, in a responsive email sent later on Thursday night. The judge heard further submissions from both parties in court on Friday morning.
- [17] After raising various other suggested changes, counsel for the appellant submitted that count 4 was "latently ambiguous [duplicitous] because the complainant has given multiple versions of the number of penetrative acts, such that it's now no longer in a position where your Honour could adequately direct the jury about the evidence in accordance with the Crown's particularised case with respect to count 4". A directed verdict of not guilty on count 4 was sought. That was opposed by the Crown, and the judge then took some time to consider the issue.
- [18] The court resumed at 10.25 am, at which time the judge ruled in favour of the appellant's application for a directed verdict in relation to count 4. The jury were told at 11 am that there was still more work to do, and that they would not be required until 12 pm. At 12.30 pm, the jury returned to court. At this point, the trial judge directed the jury that there was no evidence on which they could find beyond reasonable doubt that the appellant was guilty of count 4, and that they must therefore return a verdict of not guilty on that count, which the jury duly did. The court was adjourned again at 12.40 pm for lunch.
- [19] We infer that, sometime after this, the judge's associate emailed another version of the summing up to the parties. Court resumed at 2.40 pm, in the absence of the jury, for further submissions about the summing up. Shortly before 3 pm, the judge said he proposed to stand down and make the changes which had been accepted as appropriate and then "submit a final draft" to the parties.
- [20] At this point, trial counsel for the appellant raised a "timetabling" issue – relevantly, that it was now 3 pm, and there were travel arrangements in place which required the lawyers to be at the airport at 5 pm. As it would be unfair to split the appellant's and prosecutor's addresses, it was submitted that addresses should be heard on the following Tuesday (Monday being a public holiday in Mt Isa).
- [21] In response, the trial judge asked whether the parties were "in a position to sit through tonight".
- [22] Counsel for the appellant asked for a moment – presumably to check if the travel arrangements could be changed. The court adjourned again, and resumed at 3.40 pm. The prospect of sitting into the night was not expressly revisited, although plainly that was the course adopted by the trial judge, without hearing further from the parties.
- [23] When the court resumed, there were two notes from the jury. One asked if they could "please be let out for a smoke". The other was a request from a juror, who said "I have a test due tonight, and will appreciate if I can be released early for it".

- [24] In discussion with the parties, the trial judge's immediate position in relation to the second question was that "whoever the provider is doing the test will understand that there is a legal obligation for that juror to be here and that there should be an appropriate extension or exemption sought for the test to be done at another time".
- [25] The jury were returned to court at 3.45 pm and told they would shortly be let out for a smoke break, but that the answer to the juror who had the test was, no, they could not be released early because "[t]here is a legal requirement for each member of the jury to serve on the panel for as long as I require and until you're excused".
- [26] The jury returned again at 4.10 pm – at which time the closing addresses commenced. Counsel for the appellant addressed until just before 5 pm. There was a short break, and then the prosecutor's closing address commenced at about 5.15 pm, continuing until 5.45 pm.
- [27] The jury were given another short break before the summing up commenced at 6.15 pm on Friday night. The summing up continued for two hours (with one short break after about 90 minutes) concluding at 8.20 pm, when the jury were told to retire to consider their verdicts.
- [28] After an hour, at 9.20 pm, the jury were brought into court and asked whether they were willing to continue sitting on that evening or preferred to return to court tomorrow morning (Saturday). The response from a juror was "Tomorrow. Tomorrow".
- [29] There is no reference on the transcript to any arrangements being made for dinner for the jury. Whilst it is possible some arrangement was made out of court, and not referred to in court, there was no time given to the jury to eat any meal which may have been provided. No enquiries were made with the jury as to whether they could stay on past 4.30 pm (the "usual" adjournment time they were told about at the start of the trial) or 5 pm, or whether they were able to resume deliberations on Saturday.
- [30] As noted above, the jury returned to continue their deliberations at 9.20 am on Saturday morning. There were some further redirections given, in response to questions from the jury, and a verdict was reached at about 3 pm.

The summing up

- [31] The trial judge's summing up did not follow the well-established format for a summing up which appears in the Supreme and District Court Criminal Directions Benchbook. Instead of the usual directions, commencing with an explanation of the functions of the judge and jury, an explanation of what is, and is not evidence, and the fundamental legal principles, the trial judge commenced by saying he would "explain the law as it relates to the offences". For each set of related counts, the judge began by saying "it is particularised for count 1 [etc]...that...", referring to the Crown's particulars, and then proceeded to summarise "the relevant evidence for this count...". The document setting out the Crown's particulars was the only document given to the jury, as an aide during the trial.
- [32] The way in which the evidence was summarised was also unorthodox. Rather than referring to what a witness had said (for example, by saying "you may recall the complainant gave evidence that ..."), the evidence was summarised as though it were

a statement of fact (for example, “the complainant did not give consent to the man touching her breast”). Summarising evidence in this way, intertwined with reference to the particulars of each charge, and before any instruction to the jury about what evidence is, of the jury’s role as the “constitutional tribunal for deciding issues of fact”,³ and of the distinction between a comment the judge may make about the facts, as opposed to the judge’s directions on the law, was confusing, to say the least.

- [33] Following that summary of the evidence, the judge proceeded directly, without signalling that he was now directing the jury about the law or explaining that he was outlining the elements of each relevant set of offences, to instruct the jury, in substance, about the elements of the offences. It was in this context, after commencing with counts 1 and 2, that the judge mentioned, for the first time, the need for the jury to “consider if the prosecution has proven [anything] beyond reasonable doubt”.
- [34] After dealing with each of the counts in this way, the trial judge proceeded to instruct the jury about mistake of fact. It was in this context that the trial judge first mentioned that the onus of proof [in any respect] was not on the defendant.
- [35] The judge then directed the jury about the defence of accident, which was raised in relation to count 6.
- [36] It was only after this that the trial judge commenced with the directions which are generally given at the beginning of the summing up in relation to the fundamental principles, namely, the presumption of innocence, the burden and standard of proof, the role of the jury as distinct from the role of the judge. The trial judge then addressed a range of other matters – including how to deal with inconsistencies in the complainant’s evidence, the evidence of preliminary complaint and the expert evidence, as well as drawing inferences – before addressing for the first time the requirement for the jury to decide the case according to the evidence, and explaining to the jury what is, and is not, evidence.
- [37] Even apart from the difficulties of structure, the trial judge adapted and in some instances truncated a number of the “standard” directions – including the direction in relation to the respective functions of the judge and jury, and the directions in relation to the burden and standard of proof. In light of the overall irregularity of the structure of the summing up, a detailed analysis of these directions was not the focus of the appeal.
- [38] The only apparent rationale for abandoning the well-established structure for a summing up in this case is that it reflected the judge’s practice. This emerged from an exchange between the judge and counsel. Trial counsel for the appellant said, when invited to make submissions in relation to a draft of the judge’s summing up, that:

“the order of your Honour’s summing up should include the general summing-up directions before the law. So the general summing up about what is evidence, what is not evidence, onus and standard and burden of proof; the general summing up that’s customarily given by trial judges first, before there is the body of the summing up, which includes the law and the specific defences available.”

³ *McKell v The Queen* (2019) 264 CLR 307 at 324 [49].

- [39] In response to this, the judge said he was content with the order that he had used, observing that he had “used this one multiple times previously without any issue or objections”.
- [40] It is convenient to deal with ground 3 first, before turning to grounds 1 and 2.

Ground 3 - the structure and content of the summing up amounted to a miscarriage of justice

- [41] The fundamental task of a trial judge is to ensure a fair trial of the accused. As the High Court has observed, that requires, among other things, the trial judge to instruct the jury about so much of the law as they need to know in order to deal with the issues in the case and that will require instructions about the elements of the offence(s), the burden and standard of proof and the respective functions of judge and jury.⁴
- [42] The object of the summing up is to help the jury. In order to be helpful, the directions in the summing up must be “custom built to make the jury understand their task in relation to [the] particular case”.⁵ A trial judge should not slavishly adopt the form of directions in the Benchbook. The judge should tailor the directions to fit the requirements of the particular case.⁶ Even so, the Benchbook provides invaluable guidance and assistance to judges, and care should be taken when customising directions to ensure essential requirements are not overlooked.
- [43] However, the requirement for customisation does not mean that it is appropriate for the well-established structure and format of the “general summing up directions”, set out in the Benchbook, to be abandoned. That structure is deliberately designed to assist members of a jury to understand their role, and the fundamental principles of law which apply to all criminal trials, before the issues in the particular case, and the law which applies to those issues, is explained to them. It provides context, before the crucial directions about the issues, and the law which applies to those issues, are given. It represents the wisdom and experience of many learned criminal trial judges, developed over an extensive period of time, and overseen by an expert committee of Supreme and District Court judges who proactively review and update the Benchbook on a regular basis, by reference to decisions of this Court and the High Court. More broadly, it reflects the well known and elementary need, in effectively explaining information to any audience, to provide the introductory context or framework within which that information falls to be understood.
- [44] Whilst trial judges must not slavishly adopt the suggested directions, without considering how they apply to the particular trial, it is proper to adopt the general structure of a summing up which is informed and guided by the Benchbook, and to deliver the standard directions on fundamental matters of law in the terms recommended in the Benchbook. This has the benefit of ensuring that essential matters of procedure and law are addressed in a consistent, correct and logical way, thus aiding jury understanding. For a trial judge to launch immediately into summarising the evidence in relation to multiple charges, and then outlining the elements of the offences, before explaining the respective roles of the judge and the jury, what evidence is, and how they assess evidence – let alone the burden and

⁴ *Alford v Magee* (1952) 85 CLR 437 at 466; *RPS v The Queen* (2000) 199 CLR 620 at 637 [41]-[42].

⁵ *Holland v The Queen* (1993) 67 ALJR 946 at 951-952, referring to *R v Lawrence* [1982] AC 510 at 519; *HML v The Queen* (2008) 235 CLR 334 at 386-387.

⁶ *R v Micallef*; *R v Lourens* [2025] QCA 21 at [87]; *R v Sunderland* [2020] QCA 156 at [55].

standard of proof – is not only unhelpful; it carries a significant risk of confusion and misunderstanding.

- [45] It is difficult enough for a jury, comprised of lay people from all walks of life, to listen carefully to and comprehend the detailed oral instructions and directions that trial judges are required to give them. That degree of difficulty, and its accompanying risk of audience confusion and misunderstanding, is unnecessarily compounded when the tried and tested, logical and rational order of summing up is not followed. It was further compounded in the circumstances of this case by the distracting circumstance that the summing up was delivered on a Friday evening before a long weekend, after counsels' addresses which had not commenced until 4.10 that afternoon and continued until 5.45 pm, with the jury not having been informed about the fact the trial would run beyond the usual adjournment time, let alone consulted about any inconvenience that would cause to the personal lives of the jurors.
- [46] The structure and content of the summing up in the circumstances of this case was an error or irregularity in the conduct of the trial, which was material, in the sense that it could realistically have affected the reasoning of the jury to their verdicts of guilty, due to the real risk of confusion and misunderstanding.⁷
- [47] There is another important point to be made. In this case, before the jury was empanelled, the trial judge informed both counsel that it was his "standard practice" to circulate a draft of his summing up to counsel, before closing addresses, "for careful consideration", "with the process repeated until counsel say, on the record, that there are no issues with my summing up". On the final day of the trial, after hearing submissions about the draft which had been provided on Thursday evening, the judge adjourned to make further changes before "submit[ing] a final draft" to the parties. The final addresses did not commence until that "final draft" had been prepared, by which time the jury had essentially been left waiting, since lunchtime the previous day. The preparation and content of the summing up is and remains at all times the trial judge's responsibility, as part of the duty to ensure a fair trial according to law. A trial judge should hear from the parties about the directions to be given. And there is no difficulty with a trial judge providing a draft of part or all of the summing up to counsel, for example, in complex trials, where the requirement to tailor the directions requires particular care. However, once the judge has heard the parties' submissions about what directions should be given, the final addresses should not be held up while the judge goes away to finalise the summing up. It is not the role of counsel to finalise or settle the summing up.

Ground 1 - the timing of the end of the trial was also a material irregularity

- [48] It is a fundamental rule that a jury must be free to give the issues in the trial the "free deliberation to which both the accused and the Crown" are entitled, without any pressure being imposed upon them.⁸ In this case, it is not said that anything expressly said by the trial judge in the summing up could be said to have infringed this fundamental rule. Rather, the appellant submits the timing of events, on the Friday afternoon and evening, and extending into Saturday, presented a real risk of the jury feeling pressured to deliver verdicts, whether by "trading of verdicts of guilty and not guilty" on some counts, or by a minority juror compromising their views in favour of

⁷ *Brawn v The King* at [10]-[11].

⁸ *Black v The Queen* (1993) 179 CLR 44 at 51 per Mason CJ, Brennan, Dawson and McHugh JJ.

a “democratic submission to the views of the majority”,⁹ or members of the jury simply feeling pressure to compromise their own independent views, to meet the convenience of others.¹⁰ As Dowsett J observed, in *R v R*, this does not reflect upon the conscientiousness of jurors; it merely recognises the “reality that many people feel obliged to meet the convenience of those around them”.

- [49] The timing of the tail-end of the trial was undoubtedly an irregularity. It was unfair – to the accused, the Crown, and their respective legal representatives, but most of all to the jury. No enquiry was made of the jury as to whether they were able to stay and sit on into the night on Friday. It is conceivable that members of the jury might have had family, caring or other responsibilities. They were given no opportunity to say, or to make alternative arrangements, if they did. We know that one juror had a test due, and was told they would have to miss it. As the upcoming weekend was a long weekend, members of the jury may have had family commitments or travel plans; or having spent five long days in a row, diligently performing their duty, may simply have been exhausted and wished to go home at an ordinary time.

- [50] It was improper to make no enquiry at all of the jury before deciding to sit on into the night on Friday. Members of the public perform an essential civic duty when called upon to perform jury service for the benefit of the community and the administration of justice. The task is an onerous one; yet hopefully rewarding, as most meaningful and important obligations are. But whilst asking our fellow citizens to perform this important duty, trial judges must at all times endeavour to be cognisant of the comfort and concentration of the jury, and ensure they are supported to perform their duty to the best of their ability.

- [51] We do not know the life and work experience of the members of this jury. But even the highest functioning person could not be expected to be able to concentrate on and, importantly, comprehend the closing addresses of counsel, and the trial judge’s summing up, at the end of a five day trial, during which they have endured many long adjournments, starting from 4 pm on a Friday afternoon; to say nothing of the absence of any meal break. To expect the jury to do so, without any enquiry of them whatsoever, was unreasonable and unfair.

- [52] The trial judge may well have felt under pressure because this Friday marked the end of the scheduled circuit in Mt Isa and because, given the appellant’s age, it was preferable for the trial to be concluded before he turned 18, so that, if convicted, he would be sentenced as a child.

- [53] However, objectively, neither of those factors presented insurmountable obstacles to conducting the trial in a regular manner. There were other options available. Subject to the enquiries made of the jury, as to their availability to return the following week, the trial could have been adjourned on Friday afternoon, once it became apparent that the two closing addresses could not be completed by a reasonable time, and continued the next Tuesday. It is not unheard of for a jury trial to continue beyond the end of a circuit. The break, over a long weekend, may have necessitated slightly more detail in the summing up, in terms of summarising the evidence and/or the rival contentions. But that could easily have been done. Had the enquiries of the jury revealed an unsolvable issue with availability the following week, the trial would have to have been abandoned and restart at another time. As undesirable as that would be, there

⁹ Ibid, at 55-56 per Deane J.

¹⁰ *R v R* [1998] QCA 83 at p 38 per Dowsett J.

was time, as the appellant did not turn 18 until January 2026. And, as this appeal demonstrates, pushing the trial to continue on the Friday night, and over to the weekend, in the circumstances of this case, has resulted in far greater delay in the long run.

- [54] An aspect of the role of the trial judge, to supervise and control the trial, is to ensure that the jury is not distracted from paying full attention¹¹ to the evidence, the arguments of the parties and the judge's summing up. In the present case, the inevitable effect of the timing of the closing addresses and summing up is that the jury would not have been in a position to pay full attention to those important parts of the trial. The overall effect of the timing of this part of the trial, including the requirement, without any enquiry, for the jury to commence deliberations late on Friday night and then continue on Saturday, was to place implicit, if not express, pressure on the jury, in breach of the fundamental rule.
- [55] Even if the summing up had been unassailable, the timing issue was in itself a material irregularity, given the implicit pressure placed on the jury.

There has been a miscarriage of justice

- [56] It is unnecessary to go further and consider whether either of these errors were fundamental.¹² We are firmly of the view that the timing (the subject of ground 1(a)) and the improper structure and content of the summing up (ground 3) are errors or irregularities which, in combination, were material, in the sense that they could realistically have affected the reasoning of the jury to their verdicts of guilty. There was therefore a miscarriage of justice, warranting the allowing of the appeal.
- [57] Given the conclusion reached in relation to grounds 1(a) and 3, it is unnecessary to specifically address ground 1(b), other than to say that the lack of fairness arising from the errors the subject of grounds 1(a) and 3 affected both the appellant and the Crown.

Ground 2 – the verdicts were not inconsistent

- [58] By ground 2, the appellant contends the verdict of the jury on count 7 (guilty, of rape) was inconsistent with the acquittals on counts 3, 4, 5, 6, 8 and 9. Each of these charges arose out of a single sexual encounter between the appellant and the complainant on a hill outside the rodeo grounds. That there was a sexual encounter was not in dispute; the critical issue was consent (and, in relation to count 6, accident). Count 3 was a charge of oral rape. Count 4 was a charge of vaginal rape, followed by count 5, an assault by applying pressure to the complainant's throat. Count 6 was a charge of anal rape. Count 7 was a further charge of vaginal rape, followed by a further allegation of assault (count 8) by placing pressure on the complainant's neck. Count 9 was a further charge of oral rape.
- [59] Counts 1 and 2 were quite separate, involving allegations of sexual assault on the dance floor at the rodeo. Likewise, counts 10 and 11 were separate, involving recording the complainant dressing after the sexual assault on the hill, and distributing that recording.

¹¹ *Cesan v The Queen* (2008) 236 CLR 358 at 388 [96] per French CJ, and at 390 [105] per Gummow J (a case in which it was the judge, who fell asleep during the trial, which was the source of the distraction).

¹² See *Brawn v The King* at [9], and the authorities there referred to.

- [60] The relevant principles are well-established, by reference to the High Court's decision in *MacKenzie v The Queen* (1996) 190 CLR 348. In cases such as this, of suggested factual inconsistency, the test is one of logic and reasonableness, the test requiring the appellant to:

“... 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 ...”¹³

- [61] However, respect for the function which the law assigns to juries means that this is an onerous test to satisfy and, 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”.¹⁴ Different verdicts may simply demonstrate that the jury followed the judge's instruction to consider each count separately, and that their verdicts did not need to be the same on each count; or it may be that the jury took a “merciful” view of the facts upon particular counts. Or it may be inferred that the jury has reasoned 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.¹⁵ This is a particularly apt consideration in the present case, in which the multiple charges of rape and assault arose out of one sexual encounter. Another possibility, relevant in this case, is that the jury misunderstood or were confused about the evidence or the law that applied. 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(s) will be set aside: where the different verdicts returned by the jury represent “an affront to logic and commonsense”.¹⁶

- [62] There is in this case a proper way to reconcile the conviction of count 7, with the acquittals of counts 3, 4, 5, 6, 8 and 9.

- [63] The judge directed the jury to return a verdict of not guilty to count 4. That left count 7, as the only other allegation of vaginal rape. There were, as the respondent submits, a number of supportive features in the evidence in relation to count 7, including the evidence of preliminary complaint, the evidence of the complainant's distressed condition, and the medical evidence which included evidence of abrasions to her back and buttocks and to the complainant's vagina. As the appellant accepts, the acquittal on count 6 (an allegation of anal rape) does not support the argument for inconsistency, given that the complainant did not complain of anal rape to any of the preliminary complaint witnesses, her evidence that the penetration was partial and that the appellant said something like “oh sorry, it keeps slipping”, leading to the availability of the defence of accident in relation to this count. In relation to the two charges of oral rape, it is possible, as the respondent submits, that although the legal definition of rape (extending to oral rape) has existed for some time, members of the community may still regard rape as having its previous meaning. The complainant's evidence of her lack of consent in relation to count 7 was also capable of being regarded as clearer, than in relation to the alleged oral rapes. It is rational that the

¹³ *MacKenzie v The Queen* at 366, referring to a decision of Devlin J in *R v Stone*.

¹⁴ *Ibid*, at 367.

¹⁵ *Ibid*, at 367-368, including reference to *R v Kirkman* (1987) 44 SASR 591 at 593 per King CJ.

¹⁶ *Ibid*, at 368.

jury may have taken the view the charge of assault associated with count 4 was not proved (given the verdict of acquittal they were directed to return on that count); and, in relation to the charge of assault associated with count 7, as the respondent acknowledges, the complainant's evidence (of the appellant releasing the pressure on her throat when she tapped his back) could well have led the jury to conclude the Crown had not negated mistake of fact as to consent. Since there was no medical evidence of injuries to the complainant's neck, anus or her mouth, the other counts also lacked the same quality of medical support which was present for count 7.

- [64] Overall, however, the jury's verdict has all the hallmarks of a merciful verdict, arrived at by a jury persuaded by the complainant's evidence that she was raped by the appellant on the hill, but that justice was sufficiently met by convicting him of one count of rape (count 7) arising from what was essentially one sexual encounter.
- [65] The irregularities the subject of grounds 1(a) and 3 rendered this trial unfair to both the accused and the Crown. In all the circumstances of this case, however, we are not persuaded that the jury's verdict of guilty on count 7 is inconsistent with the jury's verdicts of acquittal on the other counts arising out of the encounter on the hill. Ground 2 therefore fails.