

Introduction

[1] KL was tried by a jury on seven charges alleging sexual and violent offending against his six-year-old son (TL).¹ The jury found KL guilty of one representative charge of doing an indecent act on a child under 12 (Charge 1).² The jury found KL not guilty on the other six charges, being five further charges of doing an indecent act on a child under 12 and one charge of assault on a child.³

[2] KL now appeals his conviction on Charge 1 on the following grounds:

- (a) The jury's verdict was unreasonable and inconsistent with its verdicts on the other charges.
- (b) There was a miscarriage of justice because further evidence has become available which might have led to a finding of not guilty on Charge 1 if it had been put before the jury.

[3] Our task is to decide whether the jury's verdict on Charge 1 was unreasonable or inconsistent with the other verdicts, or whether otherwise there has been a miscarriage of justice.⁴ A miscarriage of justice will have occurred if there has been any error, irregularity, or occurrence that has created a real risk that the outcome of the trial was affected, or that has resulted in an unfair trial.⁵

The charges

[4] TL gave two evidential video interviews (EVIs). Their contents founded the charges faced by KL. In summary, the charges were:

- (a) Charge 1. Indecent act on TL. (Representative charge).

¹ KL does not have name suppression. Notwithstanding, we have anonymised this judgment following the approach in *H v R* [2019] NZSC 69, [2019] 1 NZLR 675 at [54]–[58] to enable it to be republished online without identifying the complainant.

² Crimes Act 1961, s 132(3).

³ Section 194(a).

⁴ Criminal Procedure Act 2011, s 232(2).

⁵ Section 232(4).

“Particulars: Contact with the child’s penis by the defendant’s hand(s) when in the bed.”

- (b) Charge 2. Indecent act on TL. (Representative charge).

“Particulars: Grabbing the child’s hand(s) and moving it toward the defendant’s penis in the bed.”

- (c) Charge 3. Indecent act on TL. (Representative charge).

“Particulars: Contact with child’s penis by the defendant’s hand(s) in the shower.”

- (d) Charge 4. Indecent act on TL. (Representative charge).

“Particulars: Grabbing the child’s hand(s) and moving it towards the defendant’s penis in the shower.”

- (e) Charge 5. Indecent act on TL.

“Particulars: Contact with the child’s penis on the occasion when squeezed child’s throat.”

- (f) Charge 6. Assault on TL.

“Particulars: Squeezing throat.”

- (g) Charge 7. Indecent act on TL on 30 June 2019.

“Particulars: Contact with the child’s penis.”

The evidence

[5] When an appeal against conviction is brought on the grounds of an unreasonable verdict and inconsistent verdicts it is necessary to examine the relevant evidence that was before the jury in detail. This is particularly necessary for TL, who was six years old when he gave both of his EVIs. We will quote relevant passages to

illustrate how he gave his answers to questions in the context of the issues we have to answer.

[6] TL was the principal witness for the prosecution. After the Crown opened, his two EVIs were played to the jury. In the first, conducted on 19 July 2019, are these passages:

JM Pretty cool. So you know you and I have only just met haven't [we TL]. So how about, [TL], how about you tell me some of the fun things you like to do.

TL So I like playing in the playground. Some people attack me but I just, I'm too fast for them so that's lucky. Yeah. But at home when my dad gets into bed with me and then he starts touching my private parts. That's what's bad about my dad so he, so my mum and my dad are living away from each other.

...

JM Okay. So tell me some more about the touching of the private parts.

TL So when he gets into bed with me he touches (inaudible) private parts so and I don't know why he does that.

JM Oh, so what do you mean by private parts?

TL He touches my willy.

JM Oh and what's the job of your willy?

TL Nothing, he just touches it for no reason.

JM Okay. [TL].

TL What.

JM Tell me more about dad touching your willy.

TL I don't know any much more. I don't know how to explain the rest.

JM It can be hard to explain these things can't it, okay. So tell me all about dad getting into bed with you.

TL So when my dad gets into bed with me because he really, really likes me. He really, he just (inaudible) so he hops into bed with me. And then he just, and he just (inaudible) but he's afraid of dark so then he, so then he starts touching (inaudible) willy.

...

JM Okay, okay. So you said daddy, dad hops into bed, into your bed and what's the very next thing?

TL He just starts touching my willy.

JM I, I sort of need to know more about that touching of the willy and how it all happens. Can you help me?

TL I don't really know how to explain it.

...

JM Okay. So what does dad touch your willy with?

TL With his hands.

JM Tell me all about dad's hands when he's touching your willy.

TL He, he said he's touching it by accident when he's touching it on purpose.

JM Oh, tell me about that purpose.

TL Ah he never listens to me. So he doesn't really (inaudible) and he's really mean.

JM So you said he touches your willy with his hand. Tell me all about his hand when it's doing that touching.

TL He like squeezes it.

JM Ah ha and then what happens?

TL Ah, ah I just, I push him out of my bed and I say it's mine. That's all. That's all I do to him when he does that. He's the strongest person in our family. So he is, so he can beat me up easily.

JM Okay so when he squeezes your willy, how does that feel?

TL It feel good, he's the strongest.

JM Pardon?

TL He's the strongest in the family.

...

[7] TL is then asked for more detail and he repeats, in a similar way and with age-appropriate discursions, the core allegation of KL touching TL's penis when he is in bed at night. That evidence is the foundation for Charge 1 (KL touching TL's penis in bed).

[8] Later in the first EVI, TL gives the evidence which founds Charge 2 (moving TL's hands towards his penis in bed):

JM Mm okay. So tell me more about his willy.

TL My dad's willy?

JM Mm.

TL Oh he forces me to touch his when I just (inaudible) my hand away.

JM Mm, [TL] tell me more about dad forcing you to touch his.

TL He's not really (inaudible) and I don't really know how to explain it.

JM How does dad force you to do that stuff with his willy?

TL He just, he just holds my hand and he pulls it towards him which I rip it out of his hands. Every time he squeezes it.

JM Ah ha.

TL So I have a sore shoulder from doing that.

JM Ah ha.

TL He can break my arm if I, he can break my arm he's so strong.

JM Mm, so he forces you to touch his willy and then what happens?

TL I kick him out of bed.

JM Okay so tell me about, about his willy when that's happening.

TL Um he just, he just brings his willy away.

JM Oh I don't understand that [TL], can you help me a bit more.

TL I don't really know how to explain it.

JM So when he brings his willy away, what do you mean by away?

TL So he's like, he's (inaudible), he's that way but his head's facing behind him and he's putting his hand in my pants.

JM Ah ha.

TL That's what he, that's what he was meaning.

JM Oh okay. So does, when you say dad gets you to do stuff with his willy, what sort of stuff happens?

TL He just grabbed my hand that's all.

JM He grabs your hand.

TL Pulls it towards him and his willy (inaudible) and stuff.

JM So he pulls it towards his willy and then what happens?

TL Nothing else. He, I just (inaudible) my hands away.

JM Okay. So does your willy get to his, does your hand get to his willy or not?

TL No.

[9] Charges 3 and 4 (KL touching TL's penis and moving TL's hands towards his own penis while in the shower) are also founded on TL's evidence in his first EVI. The following passages are relevant:

- JM Okay so have you ever seen your dad's willy?
- TL In the shower.
- JM Ah ha okay. And when he pulls your hand to his willy, where is his willy?
- TL His willy.
- JM Where is his willy when he pulls your hand to his willy?
- TL His willy's right like there, his willy's there.
- JM Ah ha and is his willy inside his clothes or outside his clothes or something else?
- TL He's in the shower, wanting me to touch it in the shower and in the bed.
- JM Oh okay, 'cos I, I didn't understand that, okay. So can you tell me more about what happens in the shower?
- TL Um just (inaudible) happens.
- JM You said he forces you to?
- TL Touch his willy in the shower.
- JM In the shower.
- TL As well as the bed.
- JM As well as in the bed. So in the shower, tell me all about dad and what he's like in the shower.
- TL Um, he's (inaudible) he is all crazy. He takes (inaudible), he takes my dinner. So that's what he always does.
- JM So dad, so dad is in the shower and then what happens?
- TL He, I, I just, I just go over to the shower and tell, tell on him.
- JM What do you tell on him about?
- TL That he been touching my willy (inaudible).
- JM Mm, [TL], where are you in the shower?
- TL In the corner, he pushes me out of the hot water and I just gotten in.
- JM He pushes you out of the hot water, ae, and then what happens?
- TL I get really cold.
- JM Mm and then what happens?

TL They don't, he didn't, he never lets me go into the shower.

JM Ah ha.

TL My mum sends me in with him and I, and I don't like, when I don't want him in with me.

JM Mm. So you're in the shower with, with dad and he puts you in the corner and you get cold and then what happens?

TL I get out of the shower.

JM Okay.

TL I haven't had a shower. I've just had one this morning.

JM So does anything happen with willies in the shower?

TL He just gets, does the same thing as in bed.

JM Ah ha tell me about that, what does he do?

TL Just does same thing as he just (inaudible) my willy.

JM Okay. How many times has he done that in the shower?

TL Seven.

JM Mm okay. And tell me all about dad's willy when he's in the shower?

TL Um he just washes his willy then he pulls his hand, then he pulls my hand.

JM Pulls your hand. Tell me more about him pulling your hand in the shower.

TL Pulls my hand to his willy.

JM Ah ha and then what happens?

TL I just, I didn't know that he pulled my, that he was pulling my hand to his willy so I forgot to rip it away.

JM Okay and then what happened?

TL Then I just got out of the shower, told my mum, then I went to bed.

JM So when you didn't rip your hand away, what happened next?

TL I was, I was (inaudible), I was writing a picture on the glass and then my dad forced my hand to touch his willy and then I had to run out of the shower to tell my mum.

JM Okay, so what was it like when you touched his willy?

TL It was hard slimy.

JM Ah ha. Tell me more about dad's willy when you touched it in the shower?

TL It was hard and slimy and (inaudible).

JM Okay so he, he got you to touch his willy. How did you have to touch his willy?

TL Um he just rip, he rips my hand towards his willy. He just does that (demonstrates).

JM Ah ha. And you said it was hard and slimy. Tell me about it being slimy.

TL It's slimy because he always, because he always sticks in shower before he rips my shower to it.

JM So he gets you to touch it and it feels hard and slimy and then what happens?

TL Um just get out of the shower.

JM Okay, okay so tell me of anything else that happens with dad.

TL No nothing else.

...

[10] The second EVI, conducted on 4 September 2019, led to Charge 5 and Charge 6 (KL squeezing TL's throat while touching TL's penis). TL said:

JM Okay. So you've come back about your Dad. Tell me more about your Dad that you've come back about.

TL He's been squeezing my throat.

...

JM Uh huh.

TL So that's how my Dad, that's how my, how my Dad would touch my penis and I called out for Mum. But he didn't let me because I, he was holding my throat.

JM Oh okay.

TL He cleans fingers. (*Referring to play dough*)

JM So you told me about some of that stuff last time eh. So what's, what's the bit you've come to tell me about this time.

TL Been choking a throat (*Inaudible*).

JM Oh okay.

TL And it was really scary.

JM Uh huh.

TL Cause I couldn't breathe.

JM Okay. Well you know what, [TL]?

TL And he's been forcing me to go to school. Get ready quick. And I got very upset with (*Inaudible*).

JM Mmm.

...

[11] TL went on to say that this was a single incident which happened in his bed "in the brewery". That is a reference to an outbuilding near the family home which was used for fermenting specialist foods which were sold by TL's parents as part of a business they were establishing.

[12] After TL's two EVIs were played, TL was asked questions in examination-in-chief before being cross-examined. He maintained his allegations.

[13] The defence case was that TL's mother (VS) had decided to leave KL more than a year before she did. VS did not want to share custody of TL with KL and therefore coached TL to make false allegations against his father. The following passages of cross-examination of TL are relevant to this theory:

Q. [TL], I was asking you about the break when you went into Oranga Tamariki and talked with Ethan and Charlene okay?

A. Mhm.

Q. Before you went and talked with Ethan and Charlene, was Mummy telling you that Papa was a bad man?

A. Yes.

Q. Yeah. And had Mama been asking you if Papa did bad things to you?

A. Yes.

Q. Did it feel like Mama wanted you to say something bad about Dad?

A. Um, a bit.

Q. Yeah. You like making Mama happy?

A. Yeah.

Q. Right. And to make Mama happy, did you tell Mama that Papa had asked to touch your penis?

A. Pardon?

Q. Did you tell Mama that Papa had asked you about touching your penis, or Papa touching your penis?

A. Um, no.

Q. Nothing like that?

A. No. He just did it.

- Q. Sorry?
A. He just did it.
- Q. So he didn't ask for permission, he didn't say: "Can I do this [TL]?"
A. No, he didn't, he just did it.
- Q. Right, and what I'm asking you about is, did you tell Mama that Papa asked if he could touch your penis?
A. Um, no.
- Q. Are you sure about that?
A. Yes, I am sure.
- Q. Okay. When you talked with Ethan and Charlene, had Mama told you what to say?
A. Ah, yeah.
- Q. Had Mama told you to tell Ethan and Charlene that Papa had been touching your willy at night?
A. Yeah.
- Q. Right. And so you told Ethan and Charlene that Papa had been touching your willy at night in bed?
A. Yeah.
- Q. Yeah? But that wasn't true, was it?
A. It was true.
- Q. So you really only saying what Mama wanted you to say?
A. Yeah.
- Q. Mama wanted you to tell a lie?
A. She didn't want me to tell a lie, she wanted me to, um, say that Dad's been touching my penis, because he was been touching my penis.
- Q. You told us that Mama said to you that Papa was a bad man?
A. 'Cos he is.
- Q. Right. Does Mama still tell you that?
A. Yeah.
- Q. Right. And does Mama still tell you that Papa's a liar?
A. Yeah.

...

[In re-examination:]

- Q. So, you said to us just before that Mama did tell you what to say at the first interview with Ethan and Charlene. Do you remember saying that?
A. Yeah. I didn't know what to say then, so she just told me what to say.
- Q. Okay. How did Mummy know what to say?

- A. Because I told her that Dad has been squeezing my penis and stuff, and she just told me to talk about that and stuff.

[14] The next significant witness of fact was VS. In evidence-in-chief she referred to the evening of 30 June 2019 (when the incident leading to Charge 7 occurred) and described the appellant putting TL to bed:

- A. I could hear them mucking around down in the bedroom and playing up, and [KL] had a habit of winding [TL] up right before bed, which wasn't helpful to getting him to sleep, and he was difficult to sleep anyway. So, that was tricky and we still had a lot of work to do, so I did want [TL] to settle and [KL] to be able to come back to help, so that we could get the work done, and so I called out down the hallway and said: "Come on guys settle down, it's bedtime". Sorry I've forgotten the question.
- Q. That's fine. So, you call out and say settle down it's bedtime. Do they settle down?
- A. Yes, yep. They do settle down. I hear [KL] say something minimising about me stopping all their fun and then they do settle down, yes.
- Q. And then what happens? What was brought to your attention?
- A. Then I hear [TL] call out: "Ouch, stop, you're pinching my penis" or words to that effect.
- Q. What do you do?
- A. Yeah, a bit of a shock and I stood up and go straight down there, because I think it doesn't feel right.
- Q. Do you go into [TL's] room?
- A. Yeah, the lights are out and I go in, and [KL] is getting out of [TL's] bed and into the chair that we had in the bedroom, and I stand in the hallway, in the doorway and I just said: "What's going on? [TL], are you okay? What's going on?" and his – and his little voice says: "Yeah, I'm okay Mummy". I kind of look over to where [KL] is sitting now in the chair. He hasn't said anything. I said: "What's going on? Everything okay" and he just – he had this way he would just dismiss me. He wouldn't – often wouldn't have conversation with me, and he had his phone and he was sitting in the chair, and he was looking at his phone like it was much more important than what was going on in the room. I don't know what he was doing on his phone, most probably, I don't know, reading news or playing a game, I don't know.

[15] VS said that after two days of domestic tension she took TL and left the appellant, travelling to stay with friends in Tauranga. She said that two or three days later TL disclosed he had been abused by the appellant:

- A. ... And when we got down to Tauranga and we were staying with [friends], on the Sunday morning it was, I remember all that quite

vividly time-wise, um, [TL] was asleep on a mattress on the floor in the spare bedroom and he, as little ones do, woke up really early and the [friends] work really hard ... and they do long days and they're older people, and he was awake bouncing around at 6 o'clock in the morning, so I said: "Just quiet, you know, shhh, come into bed with Mummy", and I put a podcast on my phone under the pillow for him. And he was listening to this podcast and, um, and he started to, um, fondle himself, his private area himself, in a way that he shouldn't really be doing at his age, and in bed next to me, and I said: "What are you doing? You can't do that, you must stop", you know, "You can't do that in bed with me." And he said: "Well why not? Papa does it with me all the time?"

Q. So when he said that to you, what did you do?

A. My blood just ran cold really, because I could believe that to be true, and my mind racing, just racing, and I thought well I've got to figure out whether that's accidental, is it – has he – is it an accidental brush or, you know? That's what's going through my mind and he's stopped, he's listening to the podcast, and I'm basically freaking out, but not showing him that, just keeping calm.

Q. Well what do you do?

A. I said: "Well, you know, what do you mean?" And he said: "Well he – you know, we do this all the time, we, this happens, touching." I said: "Do you – what do you mean? Does Papa touch you, or do you touch him?" And he said: "Well both." I'm thinking: "Oh, my God." And I thought, well... Sorry.

Q. That's okay, take your time.

A. I said: "Um, well what does it feel like?", thinking was he, you know, he shouldn't, you know, he's so little, "What does it feel like?", trying to stay calm, and he said: "Hard and slimy", and I thought, "Oh, God."

Q. So when you said to him: "What does it feel like?", did you identify what you were asking it felt like?

A. No, I just said: "What does it feel like when that touching's happening?" "What do you mean?" "What does it feel like?" He said: "Hard and slimy", and I thought: "Well that's not right", and, um, I only – I knew that I had to not ask him any more questions, I just knew that this was out of my field of – this is – I needed to talk to somebody else, and I only asked him one more question, I just said: "Has Papa ever taken any photos of you without your clothes on?", and he said: "No."

[16] In cross-examination, Mr Dodds put the defence case to VS effectively. It is difficult to be sure as an appellate court reading the transcript of the evidence, but Mr Dodds made significant progress in portraying VS as a person who had a motive to coach TL to make false complaints, or to embroider them.

[17] The defence called KL, who gave evidence sympathetic to his case and who was not shaken in cross-examination, and then a series of witnesses who variously

attested to the outwardly warm relationship between TL and KL, and statements made by VS which tended to support the defence theory that VS had a plan to leave the appellant and a wish not to share with him the care and custody of TL.

First ground of appeal — unreasonable and inconsistent verdict on Charge 1

KL's submissions

[18] KL submits there is a logical link between Charge 1, Charge 2 and Charge 5. There is a particularly strong link between Charge 1 and Charge 2 in that Charge 1 alleges the appellant touched TL's penis while in TL's bed and Charge 2 alleges that on these occasions the appellant grabbed TL's hand and moved it towards the appellant's penis. The conviction on Charge 1 is therefore inconsistent with the acquittals on Charges 2 and 5.

[19] KL submits also that the conviction on Charge 1 was unreasonable because TL's reliability and/or veracity had been so undermined that there was no proper basis for accepting the Charge 1 allegation. The submission is that the doubts that must have led to the acquittals on Charges 2 and 5 were just as germane to Charge 1.

[20] The basis for KL's submission that TL's reliability was significantly undermined is:

- (a) There was a "tunnel" or passageway linking the wardrobe in TL's bedroom with that in his parents' bedroom. KL had it constructed when the house was built as a play area for TL. However, contrary to TL's evidence, it never had a door, a lock or a light. TL's evidence that he tried to block the tunnel to try to stop his father coming into his bedroom, but that his father just "breaks it" and now there is a "rip in the tunnel" is untrue.

Further, KL points to TL's reaction when shown photographs of the tunnel which make it clear that his account is inaccurate. TL's response was to defend his position by saying, "[they have] basically redone the tunnel", that the damage caused by his father

breaking into the tunnel had been repaired by painting, and that his mother did not want the lock there but KL kept putting the lock back on. Finally, TL retreated to saying KL had told him there was a door there “but I didn’t really see it”:

Q. Okay. And did you not see Dad smash this door?

A. No, I didn’t, but Mum told me he did.

Q. Ah, Mum told you?

A. Yeah.

- (b) TL’s statement that KL had offended against him for his whole life, or since he was two years old, is also wrong since the house in which the alleged offending occurred was not completed until shortly before TL’s 4th birthday.
- (c) TL’s oral evidence at trial as to the frequency of the allegations covered by Charge 1 and Charge 2 differed materially from the frequency described in his EVIs. In evidence, TL said the squeezing of his penis had occurred about 10 times and that in bed KL had pulled TL’s arm to the appellant’s penis once. In his EVIs he said that both happened on six occasions.
- (d) In his evidence at trial, TL differed also from his EVIs as to when the abuse occurred. In his oral evidence he said it occurred since he was “about 6 and a half or something”.

[21] KL also submits also that TL’s credibility was seriously compromised by his evidence about sleeping in the brewery and being offended against in the brewery. In his second EVI on 4 September 2019, TL said that he was in his bed in the brewery, that KL was also in the bed and that is when KL squeezed TL’s throat and touched TL’s penis. As we said, these allegations founded Charges 5 and 6.

[22] TL said that this happened once and that he told his mother in the morning. In his oral evidence, TL said that his mother would let him sleep in the brewery when he had had enough of his father and that he slept on a mattress that his mother brought down to the brewery.

[23] The evidence of VS is that on rare occasions while they were working late at night in the brewery she and KL would take a mattress to the brewery so that TL could go to sleep there rather than be left alone in the house. They would return him to his bed when they left. Further, VS confirmed that TL never told her about any offending by KL until after she had left KL and taken TL away. We have already quoted VS's evidence of the disclosure of sexual touching. Her evidence of the disclosure of the squeezing to the throat was that it came completely "out of the blue" some days after the initial EVI.

[24] Similarly, for Charges 3 and 4 (the offending in the shower), TL said that he would tell his mother about this offending. VS said he did not.

[25] KL further submits that TL's credibility in relation to Charges 3 and 4 is also compromised by inconsistencies in the reported number of occasions it occurred. In his first EVI, TL said the offending had occurred on seven occasions. At trial, that number rose to about 10 times in the shower when KL squeezed TL's penis and about three times in the shower when KL pulled TL's hand to his penis.

[26] The overall submission is that the very factors which led the jury to acquit on Charges 2 to 7 were equally operative in respect of Charge 1. The conviction on Charge 1 is therefore said to be unreasonable and inconsistent.

[27] Mr Dodds suggested that the verdict of guilty on Charge 1, in these circumstances, has the hallmarks of an illegitimate compromise by the jury.

Discussion

[28] An unreasonable verdict is one where the jury could not reasonably have been satisfied beyond reasonable doubt that the appellant was guilty.⁶

[29] The test to be applied was set out by this Court in *R v Munro*:⁷

⁶ *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37 at [17].

⁷ *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87. This case discussed the approach to a ground of appeal under s 385(1)(a) of the Crimes Act, the predecessor to s 232 of the Criminal Procedure Act. However, the Supreme Court has confirmed that s 232 does not make any material change to the approach taken to conviction appeals under s 385: see *Haunui v R* [2020] NZSC 153 at

[86] The correct approach to a ground of appeal under s 385(1)(a) is to assess, on the basis of all of the evidence, whether a jury acting reasonably ought to have entertained a reasonable doubt as to the guilt of the appellant. We consider the word “ought” is a better indication of the exercise to be conducted than the word “must” used in *Ramage*.⁸ It emphasises the task that the court has to perform. This test also, in our view, accords with the statutory wording.

[87] We consider that McLachlin J’s comments in *R v W(R)* encapsulate the main elements of the test.⁹ The test is not whether the verdict is one that no jury could possibly have come to. A verdict will be deemed unreasonable where it is a verdict that, having regard to all the evidence, no jury could reasonably have reached to the standard of beyond reasonable doubt The Court must always, however, keep in mind that it is not the arbiter of guilt, and that reasonable minds might disagree on findings of fact ...

[88] While we have rejected the English “lurking doubt” approach, we consider, like the Canadian Supreme Court, that that concept provides a useful trigger for a fuller review. A lurking doubt or uneasiness experienced by the appellate court may be an important indication that the verdict was not reasonable or unsupportable on the evidence. However, by itself a “lurking doubt” is not sufficient grounds on which an appeal court should deem a conviction to be unsafe. The law in New Zealand has always required an appellate court to recognise that reasonable minds might disagree on findings of fact and that the jury, not the appellate court, is the ultimate arbiter of fact. It is only where a jury’s verdict is unreasonable on all the evidence (in the sense described above at [86] – [87]) that an appeal court may properly differ from it.

[89] Finally, we note that an appellant must be able to point to a sufficient foundation for his or her submission that a ground of appeal under s 385(1)(a) exists before the Court is required to embark on the exercise of reviewing all of the evidence. Where the Crown case against an appellant is strong or indeed overwhelming, it will be very difficult to point to a foundation for an appeal under s 385(1)(a). Further, in performing any review of the evidence, regard must also be had to the existence of the jury verdict. The appellate court does not approach the review of the evidence *de novo*, but rather factors the jury verdict into its decision. It remains for the appellant to make out this ground of appeal: ...

(Footnotes added.)

[30] So far as inconsistent verdicts are concerned, these passages of the majority judgment of the Supreme Court in *B (SC12/2013) v R* are relevant:¹⁰

(c) In relation to factual inconsistency arising from “guilty” and “not guilty” verdicts on a multiple count indictment against one defendant, the test is one of “logic and reasonableness”. As the Court of Appeal said in *R v Irvine*:

[65]–[68].

⁸ *R v Ramage* [1985] 1 NZLR 392 (CA).

⁹ *R v W(R)* [1992] 2 SCR 122 (SCC).

¹⁰ *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [68] (footnotes omitted).

The question which we must ask ourselves is whether the acquittal on count one, in all the circumstances of this particular case, renders the verdict of guilty in respect of count two unsafe, in the sense that no reasonable jury could have arrived at different verdicts on the two different counts.

- (d) Courts are reluctant to conclude that jury verdicts are inconsistent, both because the jury's function must be respected and because there is general satisfaction with the way juries perform their role. If there is some evidence to support the verdict said to be inconsistent, an appellate court will not usurp the jury's function by substituting its view of the facts for that of the jury. We note in this connection that the Court of Appeal emphasised in *R v O (No 2)* that any reasonable explanation for the difference between the two verdicts "must be found in the evidence properly used". The Court said:

It will not be a reasonable explanation if it depends on a use of evidence or a process of reasoning which the law does not permit.

In addition, the majority judgment in *MacKenzie* acknowledged that an 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". The Court of Appeal accepted this view in *R v H*, a case to which we will return.

- (e) There will be cases where the different verdicts returned by a jury represent "an affront to logic and commonsense which is unacceptable and strongly suggests a compromise of the performance of the jury's duty". In such cases an appellate court will intervene. Hard and fast rules are not possible; rather, the assessment must be made on a case by case basis. In *R v Pittiman*, the Supreme Court of Canada said that inconsistent verdicts may be held to be unreasonable "when the evidence on one count is so wound up with the evidence on the other that it is not logically separable".
- (f) The obligation to establish inconsistency rests with the person challenging the conviction. Where inconsistency is established, the court must make such consequential orders as the justice of the case requires.

[31] TL, in his first EVI, said that KL had touched his penis on more than one occasion while TL was in bed at night. That was his core allegation. He did not change his evidence under cross-examination. He was six years old when he made his first EVI and seven years old when he gave evidence at the trial.

[32] The jury saw and heard TL give his evidence. It had to form a view of his reliability and his credibility having regard to all of the evidence. In doing so, the jury undoubtedly took into account TL's young age and how that influenced his ability to recount what happened to him.

[33] KL mounted a strong defence. He gave and called evidence that suggested VS had planned to leave KL for some time and that she did not want to share day-to-day care of TL. KL's case was that VS coached TL in what to say, and there was evidence that TL, as an even younger child, had been coached to appear in videos advertising the family's business.

[34] It is not unreasonable for the jury to have accepted TL's core allegation in Charge 1 but, because of the defence case, to have been left unsure on the rest of the charges. It is axiomatic that a jury does not have to accept everything that a witness says, or reject everything that a witness says. Indeed, there is a standard direction from the Judge to that effect.

[35] We do not accept Mr Dodds' submission that evidence given by TL as to the tunnel, the frequency of the offending, the sleeping in the brewery, and of making multiple complaints to VS, make TL's evidence so unreliable that it was unreasonable of the jury to accept anything TL said about KL's actions. The jury was entitled to assess TL's evidence in the context of his young age and to decide what parts of his evidence could be relied upon beyond reasonable doubt. That is part of the role of the jury.

[36] Similarly, if the jury accepted TL's core allegation (as it clearly did) that KL touched his penis in bed at night, but was left unsure of what else happened, then the acquittals on Charges 2 to 7 are not inconsistent verdicts.

[37] Mr Dodds' strongest argument on inconsistency is the acquittal on Charge 2. The allegation being that KL grabbed TL's hand and moved it towards KL's penis on the occasions when TL said KL touched TL's penis. But TL's evidence on this charge was not very clear. He said that is what KL did, but said that he ripped his hand away. He never alleged any contact on those occasions between his hand and KL's penis. The jury could logically have considered that if KL was trying to put TL's hand on his penis then, given the disparity in strength, he would have succeeded. Further, TL did not explain how he knew that KL was trying to put TL's hand on KL's penis. We regard this acquittal as showing that the jury was conscientiously aware of the onus and standard of proof.

[38] Charges 3 and 4 related to KL showering with TL. There was no contest that the two showered together from time to time as a matter of household routine. KL gave evidence that when TL was very young he would wash TL all over, but that by the time of the alleged offending TL could wash his own body and KL would wash TL's hair. KL said that to rinse TL's hair he would pick him up to be nearer to the shower head, and that TL would draw designs in the condensation on the wall of the cubicle.

[39] It was open to the jury to find either that TL misrepresented innocent contact or there was a reasonable possibility that VS coached or influenced TL in this regard.

[40] Charges 5 and 6 (KL squeezing TL's throat while touching his penis) arose from the second EVI. There is an element of inherent incredibility in what TL describes, and the defence of coaching might well have left reasonable doubt.

[41] Charge 7, being the indecent act on TL on 30 June 2019, arises from TL's evidence in his first EVI as to the last time KL touched his penis. The charge specified the date of 30 June 2019. TL's evidence was it occurred on 1 July 2019. He was six years old when he gave the EVI. Charge 1, on the other hand, was a representative charge covering the period 16 April 2015 to 1 July 2019. It is not illogical, and not inconsistent with the conviction on Charge 1, for the jury to enter an acquittal on Charge 7 because it was unsure of the date on which the last incident of touching occurred, but it was sure that it was nevertheless covered by the period specified in Charge 1.

[42] We disagree with Mr Dodds' submission that the finding of guilty on Charge 1, and the acquittals on the other charges, point to illegitimate compromise. In other words, that in order to return verdicts on all charges one or more jurors found KL guilty on Charge 1 when that was not their true finding. In this case, all that the submission means is that logically the verdict on Charge 1 was unreasonable or inconsistent with the other verdicts. In our view, for the reasons already given, that is not so.

[43] The ground of appeal relating to unreasonable and inconsistent verdicts must accordingly fail.

Second ground of appeal — miscarriage of justice arising from further evidence

[44] Subsequent to the trial, KL obtained from Oranga Tamariki a Report of Concern (the ROC) made by a social worker of VS's first telephone call to Oranga Tamariki (on 7 July 2019) reporting TL's disclosure to her of KL's offending. This was disclosed to KL's counsel on 21 May 2021 following a ruling of the District Court as to non-party disclosure. KL applies for leave to adduce the record as fresh evidence to be considered in this appeal.

[45] Technically, the evidence is not fresh since it could have been obtained pre-trial through an application for non-party disclosure. But, we would admit it if it were credible and cogent to KL's contention at trial that VS influenced TL to make more serious disclosures. That would be required in the interests of justice. However, we have decided the evidence has insufficient cogency to be admitted as fresh evidence on appeal.

[46] The ROC relevantly summarises VS's call as follows:

This morning [TL] has disclosed that his father has asked him to touch his penis. She didn't want to ask too many questions and asked him "how did it make you feel", [TL] replied "it made me feel sad" and she told [TL] that it was not okay for anyone to touch his penis. She asked [TL] whether poppa has taken any photos of him without clothes on and he said "no".

[TL] and his mother were cuddling in bed together, he was wriggling and jiggling and he started to play with himself, the caller said that she told [TL] to go into his own room if he was going to play with himself as this is not what you should be doing with anyone present especially an adult, this is when [TL] said that poppa has asked him to touch his penis, this has happened on 2 occasions the most recent just before they left ...

[47] Mr Dodds submits that had the ROC been available at trial it would have added cogent weight to the defence case that TL's evidence was the product of VS's coaching. He argues that its absence from the trial created a real risk of a miscarriage of justice.

[48] We do not accept this submission for the following reasons:

- (a) The ROC is clearly not a verbatim record and it is ambiguous. It is not clear whose penis was to be touched, or how TL's reported remark related to TL touching his own penis at the time of the remark.
- (b) The defence case about escalating complaints due to coaching was before the jury anyway.
- (c) It is commonplace for child complainants to disclose abuse serially as they become more comfortable talking about the abuse.
- (d) Significantly, VS was cross-examined by Mr Dodds on making the report to Oranga Tamariki. VS accepted that she "would have told" Oranga Tamariki what TL had said to her. VS then agreed that the next step in the inquiry process was Oranga Tamariki arranging a child-focused interview. Mr Dodds asked VS:

Q. So, when Oranga Tamariki put the [child-focused interview process] in place the only disclosure at that stage [TL] had made was one that Papa had asked to touch his penis. That's the only disclosure he had made as at 16th July, isn't it?

A. I don't understand the question.

Q. Okay, well let me just take you back a bit. You say 7 July [TL] makes some disclosures to you and you make a report of concern to Oranga Tamariki, right?

A. That's correct.

Q. And then Oranga Tamariki as part of their process they have this child focused interview. At the time of the child focused interview the only disclosure [TL] had made was that his Papa had asked to touch his penis?

A. Are you saying is that the disclosure he made in the child focused interview?

Q. No, I am saying it was the only disclosure he had made to anyone before that child focused interview? The only disclosure [TL] had made to anyone to your knowledge before the [child-focused interview] took place, was that [TL] said his father had asked to touch his penis.

A. He had said to me in the [friend's] bedroom, when I had asked him to stop fondling himself in the bed with me and he said to me: "Why? Papa does it all the time." That's the original disclosure that he made to me. He also made a disclosure earlier than that in the house when he called out and said: "Ouch, you're pinching my penis. Stop", so I'm not entirely sure what you're asking, if you're asking a disclosure of me,

are you asking if I know that he has disclosed to anybody else, or are you asking about –

Q. – no. So, going back to what you say [TL] disclosed to you 7 July, are you telling us that [TL] was wriggling and touching his penis and that he said Papa does this all the time?

A. He was wriggling, yes, and fondling and basically masturbating at the age of six years old, and I said: “What are you doing? You can’t do that in bed next to me” and he said: “Why not? Papa does this with me all the time”. He said it like it was 100% normal to him and my blood ran cold, Mr Dodds, because it’s not normal.

Q. And is that all that he said to you?

A. No, that’s not all that he said to me. I did ask him a couple of questions to try to establish what he meant, because this is exactly what a mother doesn’t want to hear.

Q. Well, I will come back to that. So, are you telling us that this disclosure that [TL] made to you 7 July was not one where [TL] said to you that his father had asked to touch his penis?

A. I don’t understand your question. It’s not clear. What do you mean?

Q. *Well, on 7 July did [TL] say to you that his father had asked to touch his penis?*

A. *Yes. He said touching would go both ways.*

Q. *My question was whether [TL] had said to you whether his father had asked to touch his penis. Is that what he told you?*

A. *He told me that touching would happen both ways. He would touch him and they would – both ways, was my understanding. This was a conversation with a six year old boy who I was trying not to alarm, and I was trying not to show how upset I was, and I was also trying to establish what had happened, what he meant, why this sounded so normal to him.*

Q. *The only thing, [VS], that [TL] said to you on 7 July was that his father had asked to touch his penis, nothing else?*

A. *That’s not what I just said.*

(Emphasis added.)

[49] Mr Dodds then went on to confront VS with the evidence of the defence witnesses as to her plan to leave KL and her desire not to share day-to-day care of TL with him.

[50] Accordingly, if the ROC had been available, and if it was able to be put to VS, it would have had little effect. It was not a complete record, and although we accept it might have been of some assistance in challenging VS’s evidence of the disclosure,

VS had already accepted in cross-examination that TL said that his father had asked to touch his penis. The issue then would be why the author of the ROC had not recorded more. There could be various answers.

[51] We accept Ms Johnston’s submission for the Crown that the ROC would arguably have supported the Crown’s case. As quoted above, under cross-examination VS said that TL told her that the touching went both ways. She was challenged by Mr Dodds on the basis VS did not say that to the police in her statement. VS’s response was that this was a difficult time for her and she was doing the best she could. If the ROC had been admitted, the jury could have taken it as supporting VS’s evidence that TL disclosed to her that the alleged touching went “both ways”.

[52] In any event, the contents of the ROC were most relevant to Charge 2, but the jury acquitted on that charge.

[53] We conclude that the absence of the ROC from the trial did not lead to a real risk of a miscarriage of justice. It is not enough for an appellant to point to evidence helpful to the defence which was absent at trial, and assert it may have been helpful or may well have affected the result.¹¹ Nor is it enough to submit that cross-examination might have been more effective, provided the defence was put.¹²

Decision

[54] The application to adduce fresh evidence is declined.

[55] The appeal is dismissed.

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¹¹ *Loffley v R* [2013] NZCA 579 at [59], citing *R v Bain* [2004] 1 NZLR 638 (CA) at [22]–[25].

¹² *Hall v R* [2015] NZCA 403, [2018] 2 NZLR 26 at [74]–[75].