Court File No: 38854

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

HER MAJESTY THE QUEEN

Appellant on appeal as of right
Applicant (on application for leave)
(Respondent in Court of Appeal,
Appellant on cross-appeal)

– and –

R.V.

Respondent
(Appellant in Court of Appeal,
Respondent on cross-appeal)

APPELLANT'S FACTUM

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APPELLANT'S FACTUM
[On Appeal as of Right]

PART I - STATEMENT OF THE FACTS & OVERVIEW OF APPELLANT'S POSITION

1. This appeal as of right raises issues of public importance regarding appellate review of allegedly inconsistent verdicts returned by a jury.

A. Summary of the Evidence

2. The respondent was charged with sexual assault, sexual interference and invitation to sexual touching in relation to allegations that he sexually abused his step-daughter when she was between the ages of seven to 13 years old. He was tried by a court composed of a judge and jury. There was only one witness – the complainant. She described the respondent doing the following:[1]

- grabbing her hand and moving it to touch his penis;

[1] Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 9, para. 6. See also Tab 4: Charge to the Jury, pp. 154-59.

- touching her breast over her clothing;
- touching her vagina over her clothing;
- holding her hand and using it to masturbate himself;
- lying underneath her while he was unclothed and she was clothed, simulating intercourse and ejaculating on his stomach;
- lying underneath her while he was clothed and she was unclothed, simulating intercourse; and
- touching her head and pushing it down towards his penis.

3. The same facts underlay each of the charges of sexual assault, sexual interference and invitation to sexual touching. As a matter of logic, a finding of guilt on one count ought to have inevitably resulted in a finding of guilt on the others.[2]

B. The Charge to the Jury

i. The Original Instructions

4. Defence counsel at trial did not ask the trial judge to give the jury an "all or nothing" instruction, nor was one included in the jury charge. The jury was not told that as a matter of logic they had to decide all counts in the same way.[3]

5. Regarding the burden of proof, the jury was told:[4]

> To prove [R.V.]'s guilt of the offences charged, Crown counsel must prove each and every essential element of that offence (but only the essential elements), as I will explain them to you, beyond a reasonable doubt…
>
> You must find [R.V.] not guilty of the offence unless Crown counsel proves all of the essential elements of the offence beyond a reasonable doubt.

6. Regarding the concept of reasonable doubt, the jury was then instructed:[5]

> If, at the end of the case, after considering all of the evidence, you are sure that [R.V.] committed an offence, you should find [R.V.] guilty of it, since you would have been satisfied of his guilt of that offence beyond a reasonable doubt.

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[2] Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 54, paras. 131-33; p. 62, para. 151.
[3] Appellant's Record – Tab 4: Charge to the Jury.
[4] Appellant's Record – Tab 4: Charge to the Jury at p. 142. See also D. Watt, *Watt's Manual of Criminal Jury Instructions*, 2nd ed. (Toronto: Carswell, 1995) at 259-60.
[5] Appellant's Record – Tab 4: Charge to the Jury at pp. 143-44. See also D. Watt, Watt's Manual of Criminal Jury Instructions, 2nd ed. (Toronto: Carswell, 1995) at 261-63.

> If, at the end of the case, based on all of the evidence or the lack of evidence, or the credibility of the witness or the reliability of her evidence, you are not sure that [R.V.] committed the offence, you should find him not guilty of it.

7. With respect to the duties of the judge and jury, as in every case, the jury was told "your first duty is to decide what are the facts in this case… Deciding the facts is your job… You, not I, decide what happened in this case".[6]

8. The jury was told their second duty "is to accept all the rules of law that I tell you [to] apply in this case… [I]t is very important that you accept the law from me and follow it without question". The jury was then told, "Finally, it is your duty to apply the law that I explain to you to the facts that you find to reach your verdict."[7]

9. Regarding the charge of sexual assault, the trial judge instructed the jury that the Respondent may be found guilty if they conclude:

(i) The Respondent intentionally applied **force** to the complainant; and
(ii) The **force** the Respondent applied took place in circumstances of a sexual nature.

The jury was told that whether the complainant consented to the activity "is not an essential element of the offence" as the complainant was between the ages of 7 to 13 years old at the time of the alleged incidents[8] [see s. 150.1(1) of the *Criminal Code*[9]].

10. With respect to the element of "force", the jury was instructed:

> The force applied may be violent, or even gentle. Force includes any physical contact with another person, even a gentle touch. To be an assault however, [R.V.] must apply the force intentionally. An accidental touching is not an intentional application of force.[10]

11. The jury was then instructed that if they are satisfied the Appellant intentionally applied force to the complainant, they must go on to consider the second element of sexual assault –

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[6] Appellant's Record – Tab 4: Charge to the Jury at pp. 134-35. See also D. Watt, Watt's Manual of Criminal Jury Instructions, 2nd ed. (Toronto: Carswell, 1995) at 231-32.
[7] Appellant's Record – Tab 4: Charge to the Jury at pp. 134-35. See also D. Watt, Watt's Manual of Criminal Jury Instructions, 2nd ed. (Toronto: Carswell, 1995) at 231-32.
[8] Appellant's Record – Tab 4: Charge to the Jury at p. 153.
[9] All references to statutory provisions in this factum are to the *Criminal Code,* R.S.C. 1985, c. C-46, unless otherwise stated.
[10] Appellant's Record – Tab 4: Charge to the Jury at p. 154.

whether the application of force occurred in circumstances of a sexual nature. The trial judge explained that a sexual assault is "any intentional application of force, any intentional physical contact with another person, even an intentional but gentle touching, which occurs in circumstances of a sexual nature so that the sexual integrity of [T.S.] is violated".[11] The evidence on point was then summarized:[12]

> [T.S.] testified that the incidents involved the following: her hand **touching** [R.V.]'s penis, his hand **touching** her breast area, his hand **touching** her vagina while she was wearing clothes, her pelvis **touching** his (once when she was clothed and he was not and once when he was clothed and she was not), and his hand **touching** her head and pushing it down to his penis. [emphasis added]

12. Immediately following the above passage, the jury was instructed:[13]

> If you are not satisfied beyond a reasonable doubt that [R.V.] intentionally applied **force** to [T.S.] in circumstances of a sexual nature, you must find [R.V.] **not guilty of sexual assault, but guilty of assault**.
>
> If you are satisfied beyond a reasonable doubt that [R.V.] intentionally applied **force** to [T.S.] in circumstances of a sexual nature, you must find [R.V.] guilty of sexual assault.

Although the jury was told that guilty of simple assault was an available verdict, no instructions were given regarding how that verdict was available on the evidence before them. Further, no instructions were given on the element of non-consent regarding simple assault. Unlike the sexual assault charge, for which consent was not a defence due to the complainant's age [ss. 150.1 and 271], the Respondent could not be found guilty of simple assault unless they found the complainant did not consent to the Respondent's applications of force [ss. 265 and 266].

13. Instructions were then provided regarding the charges of sexual interference [s. 151] and invitation to sexual touching [s. 152]. On the charge of sexual interference, the jury was told that the Appellant may be found guilty if they found beyond a reasonable doubt:[14]

(i) The complainant was under 16 years old at the time;
(ii) That the Appellant **touched** the complainant; and
(iii) The **touching** was for a sexual purpose.

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[11] Appellant's Record – Tab 4: Charge to the Jury at p. 160, l.5 to p. 161, l.5.
[12] Appellant's Record – Tab 4: Charge to the Jury at p. 161, ll.5-15.
[13] Appellant's Record – Tab 4: Charge to the Jury at p. 161, ll.15-27.
[14] Appellant's Record – Tab 4: Charge to the Jury at p. 162, l.20 to p. 163, l.15.

14. Regarding the element of touching, the trial judge instructed the jury that:

> Touching involves intentional physical contact with any part of [T.S.]'s. The contact may be direct, for example, touching with a hand or other body part, or indirect, for example, touching with an object. **Force is not required** but accidental touching is not enough. It does not matter whether [T.S.] agreed to the touching. [emphasis added]

Similarly, with respect to the charge of invitation to sexual touching, the jury was told:

> The proposed touching must involve intentional physical contact with any part of a person's body. **Force is not required** but accidental touching is not enough. [emphasis added]

Above were the last two instructions provided to the jury on the meaning of touching regarding the charges of sexual interference and invitation to sexual touching – "Force is not required".[15]

ii. The Decision Trees and Original Verdict Sheet

15. The trial judge provided the jury with decision trees for all three charges.[16] The decision tree for sexual assault showed guilty of simple assault as an available verdict. It did not, however, instruct the jury that they had to find the application of force to the complainant was non-consensual before a verdict of guilty could be returned on that included offence.[17] Further, the decision tree for sexual assault directed the jury to consider whether the Respondent applied "force" to the complainant, without noting that force includes "touching". In contrast, the decision trees for sexual interference and invitation to sexual touching directed the jury to consider whether the Respondent "touched" the complainant or invited the complainant to "touch" him.[18]

16. The jury also received a verdict sheet which set out possible verdicts of not guilty or guilty for all three charges. In contrast with the charge to the jury and the decision tree, the verdict sheet did not identify guilty of the included offence of simple assault as an available verdict for the sexual assault count.[19]

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[15] Appellant's Record – Tab 4: Charge to the Jury at p. 164, ll.2 to 22; p. 167, l.25 to p. 168, l.32.
[16] Appellant's Record – Tab 9: Ex. A1, Decision Tree and Original Verdict Sheet.
[17] Appellant's Record – Tab 9: Ex. A1, Decision Tree and Original Verdict Sheet at p. 223.
[18] Appellant's Record – Tab 9: Ex. A1, Decision Tree and Original Verdict Sheet.
[19] Appellant's Record – Tab 9: Ex. A1, Decision Tree and Original Verdict Sheet at p. 222.

iii. The Question from the Jury, the Trial Judge's Response and the Verdict

17. Shortly after the jury began their deliberations, the jury sent the following question to the trial judge:[20]

> THE COURT: Good afternoon. We have a question from the jury. I'm going to read it. "Question: On the decision tree for count one, sexual assault versus the verdict sheet. There are only two choices to make on the verdict sheet, whereas the decision tree provides for three verdicts. Number one, guilty of sexual assault. Number two, not guilty of sexual assault but guilty of assault. Number three, not guilty. What do we do? Juror Number Five"

18. Defence counsel immediately responded:[21]

> MS. MCLEOD: I agree, my friend's whispering, it's a very odd question. And it must, I can only think it's sort of, without trying to diminish the importance of an administrative kind of question in the sense that **I don't know how the jury could ever come to a decision of a lesser and included guilty of simple assault**. I mean....
>
> THE COURT: It was in the instructions.
>
> MS. MCLEOD: It was.
>
> THE COURT: It was.
>
> MS. MCLEOD: I just don't know how they could ever get there. I appreciate there wasn't anything that was, I can't think of anything that [T.S.] testified to that would be not in a sexual context but nonetheless....
>
> THE COURT: There's an inconsistency. …. [emphasis added]

19. A "somewhat confused discussion" followed,[22] during which the trial judge and counsel considered multiple possible amendments to the verdict sheet, some of which were rejected on the basis that they would leave the jury "confused". At one point, the trial judge exclaimed, "Now I'm getting confused." Ultimately, the solution originally suggested by defence counsel and settled on by all was to provide the jury with a new verdict sheet with three options regarding the sexual

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[20] Appellant's Record – Tab 4: Charge to the Jury at p. 184, ll.5-22; Tab 10: Ex. C, Question from the Jury, pp.227-28; Tab 9: Ex. A1, Decision Tree and Original Verdict Sheet at p. 222.
[21] Appellant's Record – Tab 4: Charge to the Jury at p. 184, l.24 to p. 185, l.8.
[22] Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 15, para. 25.

assault charge: (i) guilty of sexual assault; (ii) not guilty of sexual assault but guilty of assault; and (iii) not guilty.[23]

20. The amended verdict sheet was provided to the jury. The trial judge told them "there are now three verdicts available to you" regarding the sexual assault charge. As had occurred during the jury charge, the trial judge provided no instructions regarding how the Respondent could be found guilty of simple assault based on the evidence they heard.[24]

21. The jury returned verdicts of not guilty on the charge of sexual assault, but guilty on the charges of sexual interference and invitation to sexual touching.[25]

C. Proceedings in the Court of Appeal for Ontario

22. The Respondent launched an appeal against his convictions. He argued the convictions were inconsistent with the sexual assault acquittal based on the same evidence, and therefore unreasonable and that, in the absence of a successful Crown appeal of the acquittal, his convictions must be quashed and acquittals, not a new trial, should be ordered in their stead.[26]

23. The Crown responded that the facial inconsistency in the verdicts is explained by confusing jury instructions, which led the jury to erroneously believe that the "force" required for proof of sexual assault was different than the "touching" required for sexual interference and invitation to sexual touching. The Crown also cross-appealed the sexual assault acquittal due to conflicting authority as to whether it is necessary before inconsistent verdicts can be rationalized due to jury misdirection underlying the acquittal.[27]

24. The Court of Appeal unanimously held that, based on this Court's authoritative obiter in *R. v. J.F.*,[28] where inconsistent verdicts are alleged, the defence conviction appeal cannot be resisted on the basis that a facially inconsistent acquittal was the product of misdirection. Instead,

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[23] Appellant's Record – Tab 4: Charge to the Jury at p. 185, l.8 to p. 191, l.1; Tab 12: Ex. F, New Verdict Sheet, pp. 231-32.
[24] Appellant's Record – Tab 4: Charge to the Jury at p. 192, ll.14-23.
[25] Appellant's Record – Tab 4: Charge to the Jury at p. 193, l.15 to p. 194, l.30; Tab 14: Ex. I: Verdict Sheet Returned by the Jury.
[26] Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 7, para. 1.
[27] Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 8, paras. 2-3.
[28] *R. v. J.F.*, 2008 SCC 60 at paras. 21, 23, 39-41.

the Crown must cross-appeal the acquittal before the impact of erroneous jury instructions may be considered. Further, any authority to the contrary, including the Court's prior decision in *R. v. S.L.*,[29] should not be followed in Ontario.[30]

25. The majority of the Court of Appeal (*per* Strathy CJO, Pardu and Trotter JJA) allowed the conviction appeal, quashed the guilty verdicts and entered acquittals in their stead. The majority also dismissed the Crown's cross-appeal against the sexual assault acquittal.[31]

26. The dissent (*per* Rouleau and Miller, JJA) agreed with the majority that the verdicts were inconsistent and on that basis the convictions could not stand. The dissent disagreed however, "on the appropriate disposition of the Crown cross-appeal of the acquittal on the charge of sexual assault and on the appropriate remedy of the appeal of the convictions".[32] In the dissent's view, the jury charge, considered in the context of the decision trees, verdict sheet and answer to the jury's question, was so unnecessarily confusing as to amount to an error of law that had a material bearing on the acquittal, as the confusion in the charge was by far the most likely explanation for the inconsistent verdicts.[33] The dissent would have allowed the conviction appeal and the Crown's cross-appeal and ordered a new trial on all charges.[34]

D. Summary of the Crown's Position Before this Court

27. The Crown brought this appeal as of right based on the dissent pursuant to s. 693(1)(a) *Criminal Code*.[35]

28. The Crown also launched a separate application for leave to appeal on additional issues of public importance which may not arise in a narrowly defined appeal as of right, including: (a) whether a court of appeal should consider the actual instructions received by the jury in the context of a defence appeal before concluding verdicts are unreasonable due to inconsistency and granting

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[29] *R. v. S.L.*, 2013 ONCA 176.
[30] Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 57, paras. 142-44.
[31] Appellant's Record – Tab 1: Formal Judgment of Court of Appeal for Ontario, C 61866; Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 61, para. 150.
[32] Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 62, paras. 151-52.
[33] Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 64, paras. 158.
[34] Appellant's Record – Tab 1: Formal Judgment of Court of Appeal for Ontario, C 61866 at p. 4; Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 63, para. 154.
[35] Appellant's Record – Tab 6: Notice of Appeal to Supreme Court As of Right.

relief, (b) whether a Crown appeal is necessary before the issue of misdirection may be considered by an appellate court and (c) what is the correct disposition of inconsistent verdict appeals where jury misdirection reconciles the verdicts.

29. The Court of Appeal was unanimous that an inconsistent verdict analysis proceeds on the hypothetical basis that the jury was properly instructed and the issue of misdirection can only be raised by the Crown by means of a cross-appeal – there was no dissent on this point. Consequently, the submissions in this factum proceed on the basis that a reviewing court cannot consider the actual jury instructions unless a cross-appeal is before the court.

30. The Crown's position before this Court is that, largely for reasons provided in the dissenting judgment, the majority of the Court of Appeal erred in law in allowing the conviction appeal, dismissing the Crown's cross-appeal and substituting acquittals for the convictions. The majority's errors flowed from their failure to recognize the following errors at trial:

(i) The trial judge erred in law by failing to give the jury an "all or nothing" instruction – the jury ought to have been told that based on the evidence they heard and as a matter of logic, all counts in the indictment had to be decided in the same way.

(ii) The charge to the jury was so unnecessarily confusing as to amount to an error of law that had a material bearing on the acquittal. The confusion in the charge was by far the most likely explanation for the inconsistent verdicts. The confusion was exacerbated by discreet errors:

   a. The trial judge erred in leaving the included offence of simple assault with the jury when it was not an available verdict based on the evidence they heard.

   b. The trial judge erred in not providing the jury any legal instructions regarding how a verdict of simple assault was available on the evidence.

   c. The trial judge erred in providing the jury with a decision tree regarding the sexual assault charge that provided incorrect instructions regarding the included offence of simple assault.

   d. Once alerted to the inconsistency between the decision tree and original verdict sheet regarding the sexual assault charge, the trial judge erred in amending the verdict sheet by adding simple assault, rather than instructing that simple assault

was not an available verdict on the evidence, leaving the original verdict sheet with the jury and deleting simple assault from the decision tree.

The cumulative effect of the erroneous and confusing instructions was to leave the jury confused as to the meaning of force, and whether force required for proof of sexual assault was something other than touching required for sexual interference and invitation to sexual touching.

(iii) If a Crown cross-appeal against acquittal is allowed in inconsistent verdict cases, it is legal error to also allow the conviction appeal and order a new trial on all counts. The correct disposition is to simply dismiss the conviction appeal. The cross-appeal is brought solely to resist the substance of the conviction appeal – the two appeals are inextricably linked. If the cross-appeal is allowed, the basis for finding the conviction unreasonable – an inconsistent acquittal – no longer exists and the source of inconsistency has been removed.

PART II - STATEMENT OF THE QUESTIONS IN ISSUE

31. The question in issue is the following: [36]

Did the Majority of the Court of Appeal err in law (i) in finding there was no error of law in the jury instructions that had a material bearing on the acquittal on the charge of sexual assault, (ii) in dismissing the Crown's cross-appeal against the acquittal, and (iii) in quashing the convictions for sexual interference and invitation to sexual touching and directing verdicts of acquittal on both counts?

[36] Appellant's Record – Tab 6: Notice of Appeal to Supreme Court As of Right.

PART III - STATEMENT OF ARGUMENT

A. Standard of Review and Legal Test for Inconsistent Verdicts

33. Inconsistent verdicts are a "sub-species" of unreasonable verdicts.[37]

34. The authority for a court of appeal to determine whether a jury reached an unreasonable verdict is found in s. 686(1)(a)(i) of the *Criminal Code*, R.S.C. 1985, c. C-46, which reads:

> 686. (1) On the hearing of an appeal against a conviction ... 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,...

35. Whether an appeal court erred in finding a conviction is unreasonable or cannot be supported by the evidence pursuant to s. 686(1)(a)(i) raises a question of law and gives rise to a further appeal to this Court pursuant to s. 693(1).[38]

36. In *R. v. Biniaris*, this Court affirmed that when considering whether the verdict of a jury or the judgment of a trial judge is unreasonable or cannot be supported by the evidence pursuant to s. 686(1)(a)(i), the test to be applied is what was stated in *R. v. Yebes*: "whether the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered".[39]

37. An unreasonable verdict analysis presumes a properly instructed jury.[40] This is clear from *Biniaris*:[41]

> 38 The exercise of appellate review is considerably more difficult when the court of appeal is required to determine the alleged unreasonableness of a verdict reached by a jury. **If there are no errors in the charge, as must be assumed, there is no way of determining the basis upon which the jury reached its conclusion.** But this does not dispense the reviewing court from the need to articulate the basis upon which it finds that the conclusion

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[37] *R. v. Pittiman*, 2006 SCC 9 at para. 6; *R. v. Catton*, 2015 ONCA 13 at paras. 21-2.
[38] *R. v. Biniaris*, 2000 SCC 15 at p. 396, para. 19; p. 397, para. 23; p. 403, para. 35.
[39] *R. v. Yebes*, [1987] 2 S.C.R. 168 at p. 185c; *R. v. Biniaris*, 2000 SCC 15 at p. 405, para. 36; *R. v. W.H.*, 2013 SCC 22 at para. 26.
[40] *R. v. R.J.M.*, 2019 ABCA 386 at p. 2, para. 15. See also *R. v. W.H.*, 2013 SCC 22 at para. 13; *R. v. J.S.R.*, 2012 ONCA 568 at paras. 71-73, 81-82; *R. v. Bromley*, 2004 NLCA 30 at para. 21.
[41] *R. v. Biniaris*, 2000 SCC 15 at p. 407, paras. 38-9. Similarly, see *R. v. Monteleone*, [1987] 2 S.C.R. 154 at pp. 161h-i and 167a-b regarding the phrase "properly charged jury".

> reached by the jury was unreasonable. It is insufficient for the court of appeal to refer to a vague unease, or a lingering or lurking doubt based on its own review of the evidence. This "lurking doubt" may be a powerful trigger for thorough appellate scrutiny of the evidence, but it is not, without further articulation of the basis for such doubt, a proper basis upon which to interfere with the findings of a jury. In other words, **if, after reviewing the evidence at the end of an error-free trial which led to a conviction, the appeal court judge is left with a lurking doubt or feeling of unease, that doubt, which is not in itself sufficient to justify interfering with the conviction, may be a useful signal that the verdict was indeed reached in a non-judicial manner**. In that case, the court of appeal must proceed further with its analysis.
>
> 39 **When a jury which was admittedly properly instructed returns what the appeal court perceives to be an unreasonable conviction, the only rational inference, if the test in *Yebes* is followed, is that the jury, in arriving at that guilty verdict, was not acting judicially**… **[A]fter the jury has been adequately charged as to the applicable law**, and warned, if necessary, about drawing possibly unwarranted conclusions, it remains that in some cases, the totality of the evidence and the peculiar factual circumstances of a given case will lead an experienced jurist to conclude that the fact-finding exercise applied at trial was flawed in light of the unreasonable result that it produced. [emphasis added]

In other words, before a conviction may be found unreasonable, the jury must have been properly instructed in fact; otherwise, the unreasonable verdict test has no application to the case. An error-free trial is a precondition to a finding of unreasonableness.

38. As stated, inconsistent verdicts are a "sub-species" of unreasonable verdicts.[42] Where inconsistent verdicts are alleged, the issue is not whether the guilty verdict, viewed in isolation, is unreasonable based on the evidence at trial and applicable law. Nor is it contended that the guilty verdict is unsupported by the evidence – it invariably is. Rather, the issue in inconsistent verdict cases is whether the jury acted unreasonably during their deliberations and / or by also returning the inconsistent verdict of acquittal.

39. The inconsistent verdict test was described by this Court as follows in *R. v. Pittiman*:[43]

> 6 … [B]efore an appellate court may interfere with a verdict on the ground that it is inconsistent, the court must find that the verdict is *unreasonable*. The appellant bears the onus to show that no reasonable jury whose members had applied their minds to the

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[42] *R. v. Pittiman*, 2006 SCC 9 at para. 6; *R. v. Catton*, 2015 ONCA 13 at paras. 21-2.

[43] *R. v. Pittiman*, 2006 SCC 9. See also: *R. v. Koury*, [1964] S.C.R. 212 at pp. 217-18, 219-20; *R. v. Ertel*, 1987 CanLII 183 (ON CA); *R. v. Dhanda*, 2005 BCCA 295 at paras. 21-22; *R. v. Thomas*, 2003 CanLII 20606 (ON CA) at paras. 6, 7, 9, 12; *R. v. Catton*, 2015 ONCA 13 at paras. 21-22; *R. v. Plein*, 2018 ONCA 748 at paras. 32, 38-51; *R. v. Tyler*, 2015 ONCA 599 at paras. 8-13; *R. v. R.T.K.*, 2014 ABCA 167 at paras. 8-15.

> evidence could have arrived at that conclusion: *R. v. McLaughlin* (1974), 15 C.C.C. (2d) 562 (Ont. C.A.).
>
> 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...
>
> 10 The test remains the same in each case: are the verdicts irreconcilable such that no reasonable jury, properly instructed, could possibly have rendered them on the evidence? …
>
> 13 While an appellate court inevitably compares the basis for acquittals as well as convictions in assessing inconsistent verdicts, the decisive question is not whether the acquittals are reasonable, but whether the conviction was not … [emphasis added]

40. The inconsistent verdict test stated in *Pittiman* is faithful to *Biniaris* in that the ultimate issue – whether the verdict of guilty was unreasonable – is assessed in the context of the actual legal instructions given by the trial judge.[44]

41. This Court subsequently considered the inconsistent verdict test in *R. v. J.F.*, where the Crown argued before this Court that the inconsistent verdicts in issue could be reconciled on the

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[44] See also *R. v. Turningrobe*, 2007 ABCA 236 *per* Fraser C.J.A. (dissenting) at para. 111, where it was observed: "Any jury verdict is driven by the content of the jury charge itself. Thus, it would not be unexpected that an erroneous charge might well lead to an unreasonable verdict". An appeal to this Court was allowed "[s]ubstantially for the reasons of Fraser C.J.A.": 2008 SCC 17.

basis of erroneous jury instructions underlying the acquittal. Fish J for the majority rejected this argument for the following reasons:[45]

> … reading the judge's charge as a whole, **I am not persuaded that he misdirected the jury with respect to the count on which the respondent was acquitted. In any event**, as a matter of legal process and the legitimacy of verdicts, **I would decline to uphold the respondent's conviction on the ground that it can be reconciled with his acquittal on another count of the same indictment *on the basis of a legal error at trial***. [**emphasis added**, *original emphasis*]

In this context, Fish J went on to hold:

> 23 As I have already made plain, I would not allow the appeal on the basis of what the Crown characterizes as an erroneous instruction in law. On an allegation by the Crown that the trial judge erred in this regard, the appropriate recourse would have been for the Crown to appeal the acquittal and not for this Court to uphold the conviction on another count. This is particularly true where, as mentioned earlier, Crown counsel expressly acquiesced in the instruction now said to be erroneous. Finally, verdicts are deemed inconsistent – and therefore unreasonable as a matter of law – if no *properly instructed* jury could reasonably have returned them both: *R. v. Pittiman*, [citation omitted]. Improper instructions do not make improper verdicts proper. Nor do they make inconsistent verdicts consistent. [*original emphasis*]

42. Respectfully, *R. v. J.F.* seems inconsistent with prior authorities of this Court including *Biniaris*, *Pittiman* and *R. v. Koury*.[46]

B. Summary of the Court of Appeal's Analysis of the Inconsistent Verdicts Test

43. The majority defined "genuinely" inconsistent verdicts as including where a jury "simultaneously convicts and acquits an accused for the same act, committed against the same person, in the same circumstances".[47]

44. The majority explained that the legitimacy of the verdicts in these circumstances is called into question for two reasons. First, the acquittal – a "declaration of legal innocence" – is inconsistent with the conviction as it appears the jury simultaneously declared the accused did and did not commit the same criminal act, a contrary result that is manifestly improper and unfair.[48]

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[45] *R. v. J.F.*, 2008 SCC 60 at paras. 18, 21, 23.
[46] *R. v. Koury*, [1964] S.C.R. 212 at pp. 217-218, 219-220.
[47] Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 18, paras. 37-38.
[48] Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 19, para. 38.

45. Second, a jury that renders genuinely inconsistent verdicts "necessarily acts unreasonably", because "there are only a few ways in which a jury can reach genuinely inconsistent verdicts in the case of a single accused charged with multiple offences, and **"all of them entail a violation of the court's instructions**"" [emphasis added].[49] Three possible bases for inconsistent verdicts were identified:[50]

- The jury misunderstood the evidence or the trial judge's instructions;
- The jury unjustifiably compromised, *i.e.* unable to achieve unanimity for either not guilty or guilty on each count, the jury splits the difference and obtains unanimous support for a negotiated mix of not guilty and guilty verdicts; or
- Nullification – the "rare situation" where the jury chooses not to apply the law and acquits regardless of the strength of the evidence. This may produce inconsistent verdicts where the jury refuses to convict on another count because it believes an additional conviction would be excessive.

46. This discussion concluded as follows: "… A jury that renders genuinely inconsistent verdicts, **and thereby fails to follow its instructions**, acts unreasonably. Guilty verdicts produced by juries acting unreasonably are themselves unreasonable" [emphasis added]. However, the question arises – what if the jury didn't ignore the instructions, but the instructions were incorrect? In limiting the causes of inconsistent verdicts to only the above three possibilities, a more viable possibility is ignored – an acquittal attributable to misdirection.

47. Further, if the verdicts are reconciled based on erroneous instruction, it cannot be said that the jury "simultaneously convict[ed] and acquit[ed] an accused for the same act, committed against the same person, in the same circumstances".[51] For example, if misdirection caused the jury to understand the elements of the two offences are different, then logically it cannot be said the acquittal on one charge was a "declaration of legal innocence" by the jury on the other.[52] The actual record, as opposed to facial inconsistency, demonstrates otherwise.

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[49] Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 19, para. 39.
[50] Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 19, paras. 40-42.
[51] Contrast Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 18, paras. 37-38.
[52] Contrast Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 18, paras. 37-38.

48. Nevertheless the majority, applying this Court's authoritative *obiter* in *R. v. J.F.*,[53] held that inconsistent verdicts cannot be rationally reconciled by the presence of misdirection in the context of a defence appeal against conviction. The following passage from *J.F.* was emphasized in the majority's reasons:[54]

> Finally, verdicts are deemed inconsistent – and therefore unreasonable as a matter of law – if no *properly instructed* jury could reasonably have returned them both: *R. v. Pittiman*, [2006] 1 S.C.R. 381, 2006 SCC 9. Improper instructions do not make improper verdicts proper. Nor do they make inconsistent verdicts consistent. [underline added (by Court of Appeal)]

49. The majority made clear that based on *J.F.*, the inconsistent verdict test in a conviction appeal is essentially objective, confined to an examination of the evidence and the elements of the offences: "The court does not ask whether the jury was properly instructed in fact. Rather, the question is whether a hypothetical, properly instructed jury could reasonably have returned the verdict(s) it did."[55]

50. The majority went on to hold that on the authority of *J.F.*, it would be "procedurally improper" to permit the Crown to raise the issue of misdirection absent a Crown cross-appeal of the inconsistent acquittal. The majority reasoned that, as inconsistent verdict appeals are brought on the basis that the conviction is unreasonable, the question of whether the jury had been misdirected (*i.e.* whether the trial judge erred in law) is not in issue. The Crown must cross-appeal before that issue may be considered.[56]

51. A compelling countervailing position is that where an appellant seeks to set aside a conviction due to inconsistency, the correctness of the jury instructions is necessarily placed in issue. This follows from the inconsistent verdict test: "Are the verdicts irreconcilable such that no reasonable jury, properly instructed, could possibly have rendered them on the evidence?" If the jury was not properly instructed in fact, then the inconsistent verdict test has no application to the appellant's case.

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[53] *R. v. J.F.*, 2008 SCC 60 at paras. 21, 23, 39-41.
[54] Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 32, para. 74.
[55] Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 33, para. 77.
[56] Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 39, para. 95.

52. It is noted that on the authority of *Biniaris*, when a conviction is alleged to be unreasonable, whether the jury was properly instructed in fact is squarely in issue.[57] Further, when a conviction is said to be unreasonable by reason of inconsistent verdicts, on authority of *Pittiman* "[t]he question is whether the verdicts are supportable on any theory of the evidence consistent with the legal instructions given by the trial judge"[58] – seemingly the actual trial judge, not a hypothetical one.

53. The Court of Appeal also endorsed the following statement of principle from its prior decision in *R. v. Walia*: "There is no benefit to speculating how the jury came to its inconsistent verdicts, whether by way of unprincipled compromise or in response to the flawed instructions".[59]

54. Pursuant to *Biniaris* however, if the jury instructions were not error free, then that can explain the seemingly unreasonable result – no further speculation is required.[60]

55. Nevertheless, the Court of Appeal was unanimous that an inconsistent verdict analysis proceeds on the hypothetical basis that the jury was properly instructed and the issue of misdirection can only be raised by the Crown by means of a cross-appeal – there was no dissent on this point. Consequently, it may be argued that the Crown does not have an appeal as of right on this issue and leave must be granted before the Crown may argue that no cross-appeal is required.

56. This may be an unduly narrow interpretation of the issues. It may be argued that whether a cross-appeal is necessary in the first place is "inextricably linked" with the matters this Court must resolve.[61] However, the Crown has brought a separate application for leave to appeal on this preliminary issue to ensure it may be addressed should leave be granted.

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[57] *R. v. Biniaris*, 2000 SCC 15 at p. 407, paras. 38-9.
[58] *R. v. Pittiman*, 2006 SCC 9 at para. 7.
[59] Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p.55, para. 134. See also *R. v. Walia*, 2018 ONCA 197 at para. 15.
[60] *R. v. Biniaris*, 2000 SCC 15 at p. 407, paras. 38-9.
[61] *R. v. Keegstra*, [1995] 2 S.C.R. 381 at paras. 24, 31.

57. Accordingly, the submissions in this factum proceed on the basis that pursuant to this Court's authoritative obiter in *J.F.*, a cross-appeal is required before the Crown may resist an inconsistent verdict allegation by demonstrating that the acquittal was the product of misdirection.

C. The Court of Appeal Erred in Law in Allowing the Conviction Appeal, Dismissing the Crown Cross-Appeal and Substituting Acquittals

58. Applying the hypothetical, properly instructed jury test within the context of the conviction appeal, the majority of the Court of Appeal concluded: "On the evidence presented to this jury, if the appellant was guilty of either sexual interference or invitation to sexual touching, he was necessarily guilty of sexual assault. No properly instructed jury could reasonably have reached a different conclusion".[62] The majority went on to hold:[63]

> [134] In my view, the cause of the inconsistent verdicts in this case is a matter of pure speculation in light of the evidence, the positions of trial counsel and the trial judge's instructions. As this court said in *Walia*, "[t]here is no benefit to speculating about how the jury came to its inconsistent verdicts, whether by way of unprincipled compromise or in response to the flawed instructions": para. 15. Moreover, in the words of Fish J. in *J.F.*, "[i]mproper instructions do not make improper verdicts proper": para. 23. The allegedly "confusing" instruction on sexual assault cannot reconcile the verdicts and, therefore, the convictions must be set aside.

59. Turning to the Crown cross-appeal, the majority found: "[A]n appeal of the acquittal of sexual assault cannot succeed. The trial judge gave a legally correct instruction. The jury was expressly told, twice, that any physical contact, even a gentle touch, could amount to the "force" necessary for sexual assault… Moreover, in her instruction on sexual assault, the trial judge repeatedly linked "force" with "touching"…"[64] After providing examples of these 'links', the majority concluded that "the sexual assault instruction was not "so unnecessarily confusing that it constituted an error of law"",[65] citing this Court's judgment in *R. v. Hebert*,[66] and the Court's own judgment in *R. v. Pintar*.[67] The majority also cited the trial Crown's non-objection to the content

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[62] Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p.54, paras. 131-3.
[63] Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p.55, para. 134.
[64] Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p.55, para. 135 to p.56, para. 136.
[65] Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p.56, para. 137.
[66] *R. v. Hebert*, [1996] 2 S.C.R. 272 at para. 8.
[67] *R. v. Pintar* (1996), 30 O.R. (3d) 483 (C.A.) at p. 497.

of the jury charge, and opined that leaving simple assault as an available verdict did not taint the acquittal.[68]

60. Finally, the majority held that because the acquittal on sexual assault must stand, acquittals must be entered on the other two counts. The majority reasoned that ordering a retrial on either of the other two counts would invite the new jury to return a verdict inconsistent with the appellant's acquittal and would give rise to a claim of issue estoppel.[69]

61. The dissent agreed with the majority that the verdicts were inconsistent and on that basis the convictions could not stand. The dissent disagreed however, "on the appropriate disposition of the Crown cross-appeal of the acquittal on the charge of sexual assault and on the appropriate remedy of the appeal of the convictions".[70] In the dissent's view, the jury charge, considered in the context of the decision trees, verdict sheet and answer to the jury's question, was so unnecessarily confusing as to amount to an error of law that had a material bearing on the acquittal, as the confusion in the charge was by far the most likely explanation for the inconsistent verdicts.[71] The dissent would have allowed both the conviction appeal and the Crown's cross-appeal and ordered a new trial on all charges.[72]

62. It is the Crown's position that, largely for reasons provided in the dissenting judgment, the majority of the Court of Appeal erred in law in allowing the conviction appeal, dismissing the Crown's cross-appeal and substituting acquittals for the convictions. The majority's errors flowed from their failure to recognize the following errors at trial:

(i) The trial judge erred in law by failing to give the jury an "all or nothing" instruction – the jury ought to have been told that based on the evidence they heard and as a matter of logic, all counts in the indictment had to be decided in the same way.

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[68] Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 57, paras. 138-9.
[69] Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 57, para. 140.
[70] Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 62, paras. 151-52.
[71] Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 64, paras. 158.
[72] Appellant's Record – Tab 1: Formal Judgment of Court of Appeal for Ontario, C 61866 at p. 4; Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 63, para. 154.

(ii) The charge to the jury was so unnecessarily confusing as to amount to an error of law that had a material bearing on the acquittal. The confusion in the charge was by far the most likely explanation for the inconsistent verdicts.

63. Regarding the appropriate disposition of an inconsistent verdict appeal where the Crown cross-appeal is successful, the dissent would have allowed both the conviction appeal and the Crown's cross-appeal and order a new trial on all charges.[73] While not entirely clear from the majority's reasons, presumably they would have done the same given that the conviction appeal was allowed and the convictions set aside before the majority considered the Crown's cross-appeal.[74]

64. It is the Crown's position that the above described disposition is legal error. The cross-appeal is brought solely to resist the substance of the conviction appeal – the two appeals are inextricably linked. Once a Crown cross-appeal against acquittal is allowed, the appropriate disposition is to dismiss the conviction appeal, as the basis for a finding of unreasonableness – an inconsistent acquittal – no longer exists.

i. The trial judge erred in law by failing to give the jury an "all or nothing" instruction

65. It is implicit in the guilty verdicts on the charges of sexual interference and invitation to sexual touching that the jury found, as a fact, the Respondent did all or some of the things that the only witness in the trial said he did.[75] The jury was told: "Your verdict must be based on the facts as you find them from all the evidence introduced at trial, and on the law that I have told you applies in this case".[76]

66. In other words, the jury fulfilled their primary duty to decide what are the facts in this case. The charge contained a mandatory direction to the effect that the jury are the "masters of the facts and it is for them to make the factual determinations",[77] and it is apparent from their guilty verdicts

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[73] Appellant's Record – Tab 1: Formal Judgment of Court of Appeal for Ontario, C 61866 at p. 4; Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 63, para. 154.
[74] Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 54, paras. 131-35.
[75] *R. v. Daley*, 2007 SCC 53 at p. 545, para. 27; *R. v. W.H.*, 2013 SCC 22 at para.34 (p. 195).
[76] Appellant's Record – Tab 4: Charge to the Jury at p. 94, l.30.
[77] *R. v. Daley*, 2007 SCC 53 at p. 546, para. 29.

that they did as instructed. The same can be said in any case where inconsistent verdicts are alleged involving a single accused charged with multiple counts on the same indictment.

67. The jury's verdicts of guilt here are impugned on the basis that they did not also return a finding of guilt on the sexual assault count. However, the jury was not told that they had to decide all the counts in the same way, nor did defence counsel ask for such an instruction. Instead, the jury was told that "[t]o prove [R.V.]'s guilt of the offences charged, Crown counsel must prove each and every essential element **of that offence** … beyond a reasonable doubt",[78] and further that:[79]

> If, at the end of the case, after considering all of the evidence, **you are sure that [R.V.] committed an offence**, you should find [R.V.] guilty of it, since you would have been satisfied of his guilt of that offence beyond a reasonable doubt.
>
> If, at the end of the case, …, **you are not sure that [R.V.] committed the offence**, you should find him not guilty of it.

68. Stated differently, the jury was told to consider each offence ("the offence") separately – if they are sure the Respondent committed "an offence", to find him "guilty of it", and if they are not sure he committed "the offence", "find him not guilty of it". The jury was also told that their "verdict on any count must be unanimous", that they may be satisfied of guilt "on a count" although they have different views of the evidence, or have a reasonable doubt about guilt "on a count" although they do not agree why, and that, "It matters not as long as your verdict with respect to [R.V.] on that count is unanimous."[80]

69. Consequently, it may be argued that rather than a reflection of unreasonableness, the verdicts in this case were open to the jury based on the instructions they received, notwithstanding the logical inconsistency of the result.

70. Guidance is found in the international jurisprudence on inconsistent verdicts. The leading case in the U.K. is *R. v. Fanning*,[81] where the Court of Appeal (Criminal Division) heard four

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[78] Appellant's Record – Tab 4: Charge to the Jury at p. 142. See also D. Watt, *Watt's Manual of Criminal Jury Instructions*, 2nd ed. (Toronto: Carswell, 1995) at 259-60.
[79] Appellant's Record – Tab 4: Charge to the Jury at pp. 143-44. See also D. Watt, *Watt's Manual of Criminal Jury Instructions*, 2nd ed. (Toronto: Carswell, 1995) at 261-63.
[80] Appellant's Record – Tab 4: Charge to the Jury, p. 178, ll.10-32.
[81] *R. v. Fanning* (David), [2016] EWCA Crim 550, 2016 WL 01659206.

inconsistent verdict appeals together and exhaustively reviewed the jurisprudence. The Court affirmed the test as set out in *R. v. Stone, R. v. Hunt* and *R. v. Durante*,[82] which collectively state: (i) the question in every case is whether the inconsistency is such that it would not be safe to allow the verdict, which *prima facie* is entirely a proper verdict, to stand; and (ii) the burden is on the appellant to satisfy the court that the verdicts cannot stand together, meaning no reasonable jury who had applied their mind properly to the facts in the case could have arrived at the conclusion.[83]

71. *R. v. Martyn W* is a case cited with approval in *Fanning* regarding the impact of jury directions in inconsistent verdict appeals. In *Martyn W*, the jury was directed to consider the evidence separately and give separate verdicts on each count. They were not told that as a matter of logic it was necessary to decide all counts in the same way, nor did the defence ask for such a direction. In this context it was observed:[84]

> As it is, it would be anomalous that a jury, directed that the facts were for them, that they should consider the charges separately without any obligation to decide all the counts in relation to each complainant the same way, and that they should not convict unless they were quite sure, should then be held to have returned irrational or logically inconsistent verdicts because they took the judge's direction at its face value and gave effect to it.

72. *R. v. Segal*[85] was cited in *Fanning* as "a good example of the proper application" of the inconsistent verdict test. The accused was convicted of driving at a dangerous speed, but acquitted of driving in a dangerous manner. Although the verdicts were logically inconsistent (as the jury necessarily found the speed was dangerous), the conviction was upheld. It was plain from the guilty verdict that the jury accepted the prosecution evidence and found the speed was dangerous. Although a verdict of not guilty was returned on the other count, "[a]s a matter of common sense and justice" the jury might have reached "a very reasonable conclusion", as they might have felt "it was quite unnecessary, and perhaps indeed unfair" to return a verdict of guilty on the second count as it "added nothing" to the appellant's guilt. The court concluded: "Inconsistent? Yes, in law. Unsafe, unsatisfactory or lacking in common sense? No, a perfectly understandable approach,

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[82] *R. v. Stone* (13 December 1954) (C.A.) [unreported]; *R. v. Hunt*, [1968] 2 QB 433, (1968) Cr App R 580; *R. v. Durante*, [1972] 1 WLR, (1972) 56 Cr App R 708, [1972] Crim LR 656.
[83] *R. v. Fanning (David)*, [2016] EWCA Crim 550, 2016 WL 01659206 at pp. 3-4, 12-13 (WL).
[84] *R. v. Martyn W*, (transcript 30 March 1999), reproduced in *R. v. Fanning (David)*, [2016] EWCA Crim 550, 2016 WL 01659206 at pp. 15-16 (WL). See also *R v. S.L.*, 2013 ONCA 176 paras.32, 35-36, 42-47.
[85] *R. v. Segal*, [1976] Crim LR 324.

in the view of this court. This is not a puzzling case… [T]he existence of a formal logical inconsistency does not lead us to doubt the safety of the verdict on speed".[86]

73. The leading authority in Australia is *MacKenzie v. R*, which adopts and applies the U.K. test.[87] The High Court noted that caution is called for when overturning convictions for inconsistency out of respect for the function of juries. The court further stated that the inconsistency may be explained by a judge's instructions to consider each count separately.[88] Finally, inconsistent acquittals may be the product of the jury's "innate sense of fairness and justice" whereby it appears that despite multiple counts having been technically proved against an accused, the jury concludes justice is sufficiently done by convicting him of only some charges. While this "may not be logically justifiable in the eyes of a judge it would be idle to close our eyes to the fact that it is part and parcel" of the jury system.[89]

74. The preceding comments regarding the nature of the jury system echo the following observations of Lord Bingham CJ in *Martyn W*:[90]

> "… the jury is not a precision instrument. It delivers its decision ordinarily in one or two words; it gives no reasons; it provides no explanation. While jurors ordinarily listen with obvious attentiveness to judicial directions, no one can be sure what they make of those directions in the course of their deliberations. It may be that if their thought processes were subjected to logical analysis, flaws would be found. If, however, a flawless process of reasoning were required, a jury would be a strange body from which to require it. As Evans LJ pointed out in *R v Van Der Molen* [1997] Crim LR 604 , 605, the court must be very careful not to usurp the role of the jury."

75. The leading authority in New Zealand is *B. v. R.*, where it was held: "We agree with the Supreme Court of Canada in *Pittiman* that the decisive question in a case such as the present is not whether the acquittal was reasonable but whether the conviction was unreasonable."[91] In applying the test, an appellate court is entitled to consider whether the jury may have departed from its instructions in giving a not guilty verdict out of an innate sense of justice. This explanation should

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[86] *R. v. Fanning (David)*, [2016] EWCA Crim 550, 2016 WL 01659206 at p. 5 (WL)
[87] *MacKenzie v. R*, (1996) 141 ALR 70 (HC) at p.83.
[88] *MacKenzie v. R*, (1996) 141 ALR 70 (HC) at p.83.
[89] *MacKenzie v. R*, at pp.83-84, citing *R. v. Kirkman*, (1987) 44 SASR 591 at 593."
[90] *R. v. Martyn W* (transcript 30 March 1999) reproduced in *R. v. Fanning*, [2016] EWCA Crim 550, 2016 WL 01659206 at pp. 2-3 (WL)
[91] *B. v. R.*, [2014] 1 NZLR 261 at para. 105.

only be accepted rarely however, and likely only in cases of factual inconsistency arising on a multiple count indictment involving both acquittal(s) and conviction(s) regarding a single defendant – a case like this one.[92]

76. The international jurisprudence recognizes that appellate review of inconsistent verdict allegations should take into account the realities of the jury system. If however a jury's verdicts may be impugned as unreasonable based solely on a facial demonstration of inconsistency – if an objectively "flawless process of reasoning" is required – then it is submitted that it is legal error for a trial judge to fail to give an "all or nothing" instruction.

77. Pursuant to *R. v. Daley*, the elements that should be covered in a jury charge include "the possible verdicts open to the jury".[93] If, based on the evidence the jury heard and elements of the offences charged, the jury should return the same verdict of guilty or not guilty on all counts, the jury should be told so.

78. This would not be violative of *R. v. Krieger*, where it was held that the trial judge usurped the function of the jury and violated the accused's right to trial by jury, by directing the jury to convict on the sole count on the indictment and saying they were bound "to abide by [that] direction".[94] In contrast, an "all or nothing" instruction does not direct a particular outcome. Rather, such an instruction helps the jury to understand that if, after fulfilling their primary duty as "master of the facts" they conclude the accused did the things alleged against him, as a matter of logic they should find him guilty of all charges; conversely, if they have a reasonable doubt that he did the things alleged he should be found not guilty of all charges. Such an instruction would go a long way towards addressing concerns underlying the inconsistent verdict test.

79. In making this submission, the Crown recognizes that it can be argued that an "all or nothing" instruction in multi-count cases against a single accused would, if followed, deprive the jury of the power of nullification in such cases, and thereby violate the accused's right to trial by jury.[95]

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[92] *B. v. R.*, [2014] 1 NZLR 261 at para. 105-106.
[93] *R. v. Daley*, 2007 SCC 53 at p. 546, para. 29.
[94] *R. v. Krieger*, 2006 SCC 47 at p. 503, paras. 1-2, p. 509, paras. 17-8.
[95] *R. v. Krieger*, 2006 SCC 47 at p. 511, paras. 27-9.

80. Similarly, the power of an appellate court to set aside a jury's guilty verdict on the basis that it is logically inconsistent with an acquittal returned by the same jury is violative of the jury's inherent power of nullification – the power to disregard the law – which is part and parcel of an accused's right to trial by jury.

81. In *R. v. Morgentaler*, this Court recognized that while the jury has no right to nullification, it has a *de facto* power to do so and that in limited circumstances such a decision would "constitute … the citizen's ultimate protection against oppressive laws and the oppressive enforcement of the law" and operate as a "safety valve".[96] In *R. v. Latimer*, it was also observed that "when [jury nullification] occurs, it may be appropriate to acknowledge that occurrence".[97]

82. By way of contrast, it is helpful to note the following observations in the Court of Appeal's dissent:[98]

> [173] Where, as here, the Crown elected to proceed with counts that are, in effect, duplicative, the trial judge might also consider advising the jury that it need not turn its mind to why there is more than one charge arising from the same allegations. The jury could be informed that it is the trial judge's role to sort out issues of duplication after the verdict is delivered.

83. This is a reference to the *Kienapple* principle,[99] which has been described in the following terms:[100]

> … This appeal engages the *Kienapple* principle, which provides that where the same transaction gives rise to two or more convictions on offences with substantially the same elements, the accused should be convicted only of the most serious offence... The *Kienapple* principle is designed to protect against undue exercise by the Crown of its power to prosecute and punish: ... It applies where there is both a factual and legal nexus between the offences: ... The requisite factual nexus between the offences is established if the charges arise out of the same transaction, whereas the legal nexus is established if the offences constitute a single criminal wrong: ...

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[96] *R. v. Morgentaler*, [1988] 1 SCR 30 at pp. 78-9.
[97] *R. v. Latimer*, 2001 SCC 1 at paras. 58, 61.
[98] Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 72, para. 173.
[99] *Kienapple v. R.*, [1975] 1 S.C.R. 729.
[100] *R. v. Rocheleau*, 2013 ONCA 679 at para. 24.

84. In some cases jury nullification operates as a "safety valve" and "the citizen's ultimate protection against oppressive laws and the oppressive enforcement of the law".[101] This is the same rationale underlying the *Kienapple* principle – to protect against undue exercise by the Crown of its power to prosecute and punish. Further, in inconsistent verdict cases that involve a "genuinely" inconsistent acquittal, the complaint relates to a charge that was going to be stayed by the court in any event.

85. It would be contrary to the interests of justice and the remedial powers in s. 686(1)(a)(i) to set aside a sound conviction on the basis that the jury engaged in nullification – leniency – regarding another count on the same indictment.

86. What then is the miscarriage of justice remedied by the inconsistent verdict test? Inconsistent verdicts are a "sub-species" of unreasonable verdicts.[102] An unreasonable conviction within the meaning of s. 686(1)(a)(i) is "the most obvious example of a miscarriage of justice".[103]

87. In addition to nullification, the majority of the Court of Appeal identified two other possible causes of "genuinely" inconsistent verdicts: (a) jury confusion as to the evidence or the trial judge's instructions, or (b) unjustifiable compromise – a negotiated mix of guilty and not guilty verdicts.[104]

88. With respect to the former possibility – an inconsistent acquittal attributable to the jury having misunderstood the evidence or instructions – it is difficult to understand how an accused is prejudiced in such circumstances.

89. Regarding the possibility of the jury having negotiated a mix of guilty and not guilty verdicts, it is not unreasonable to expect that many accused might find compromise verdicts preferable to across-the-board convictions. Proceeding on the basis that compromise verdicts nevertheless occasion a miscarriage of justice, it is arguable that the existence of this speculative possibility alone should not justify setting aside a conviction which, viewed in isolation through the lense of judicial experience, is reasonable and supported by the evidence.

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[101] *R. v. Morgentaler*, [1988] 1 SCR 30 at pp. 78-9.
[102] *R. v. Pittiman*, 2006 SCC 9 at para. 6; *R. v. Catton*, 2015 ONCA 13 at paras. 21-2.
[103] *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), at p. 219.
[104] Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 19, paras. 40-42.

90. In *Biniaris*, this Court held that a "lurking doubt" is not a sufficient basis for an appellate court to find a conviction unreasonable. Further, where a conviction is overturned for unreasonableness, the reviewing court must "articulate as explicitly and as precisely as possible the grounds for its intervention", as the reasons are necessary for subsequent appellate review of that decision.[105]

91. This obligation cannot be met in the inconsistent verdict context. Following an error-free trial, the precise reason why a jury returned inconsistent verdicts cannot be identified; the cause is a matter of speculation. At most, a reviewing court can speculate that the inconsistent verdict was the product of one of three possibilities, one of which, nullification, is an unreviewable power held by the jury and another, an acquittal due to jury confusion, does not prejudice the accused.

92. It is noteworthy that the United States Supreme Court has held convictions cannot be challenged based on inconsistent verdicts.[106] The Court reasons that inconsistent verdicts should not necessarily be interpreted as a "windfall" to the Government at the accused's expense. It is equally possible that the jury, convinced of guilt, properly convicted on one charge and then through mistake, compromise or leniency returned an inconsistent acquittal on the other charge. This, coupled with the Government's inability to appeal acquittals in the U.S., weighs against ordering a new trial on the conviction "as a matter of course".[107]

93. Further, inconsistent verdicts are often the product of leniency, an outgrowth of "the jury's historic function, in criminal trials, as a check against arbitrary or oppressive exercises of power" by the state. The fact that this may be an "assumption of a power which [the jury has] no right to exercise… does not mean that such a collective judgment should be subject to review".[108] To permit a criminal defendant to challenge inconsistent verdicts on the basis that the verdict was not the product of leniency, but some other error that worked against them, would involve either pure speculation or an inquiry into jury deliberations which is undesirable.[109]

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[105] *R. v. Biniaris*, 2000 SCC 15 at p. 407, paras. 38-9, p. 411, para. 42.
[106] *Dunn v. United States*, 284 U.S. 390; *United States v. Powell*, 469 U.S. 57.
[107] *United States v. Powell*, 469 U.S. 57 at p.65.
[108] *United States v. Powell*, 469 U.S. 57 at pp.65-66.
[109] *United States v. Powell*, 469 U.S. 57 at pp.65-66.

94. Finally, criminal defendants in the United States are protected from jury irrationality or error by the independent sufficiency-review of the evidence by trial and appellate courts, to ensure the evidence at trial could support a rational determination of guilt beyond a reasonable doubt.[110]

95. In *Pittiman*, this Court observed that "the decisive question is not whether the acquittals were reasonable, but whether the conviction was not".[111] There are parallels between this statement of principle and the approach taken by the United States Supreme Court in *R. v. Powell*, and this Court in *R. v. Koury*:[112]

> There are, however, broader implications in the argument submitted in this case. The argument is that once it is shown on the face of the record that there is an inconsistency then the quashing of the conviction must follow automatically citing *Regina v. Sweetland* [(1957), 42 Cr. App. R. 62.]. That theory of inconsistent verdicts grew up at common law. I can well understand its application before the constitution of a Court of Criminal Appeal when the only mode of review, apart from the Court of Crown Cases Reserved, was the Writ of Error, which brought before the reviewing tribunal only the indictment, the plea and the verdict. With a vitiating inconsistency appearing on the face of this limited record, all that the Court of Queen's Bench could do was to quash the conviction.
>
> But a case does not now come before a provincial Court of Appeal on this limited record. We have, in addition, the Judge's charge to the jury and the whole of the evidence on which it is based. We can also see in a limited way from the objections made to the charge, how defence counsel wishes to have his defence put to the jury… To the extent indicated in these cases, the Court of Appeal then can sort out the inconsistency.

And later:

> To give effect to this submission would be to ignore the common sense of the trial. Courts of Appeal do not now operate under 19th century procedural limitations. On the evidence that we can now examine, the error, if any, is in the acquittal on the charge of conspiracy and not in the conviction on the substantive offence. We can say with assurance that on this record, which includes the whole of the evidence, the judge's charge and the objections of defence counsel to the charge, that this man was properly convicted and that his acquittal on conspiracy does not vitiate this conviction or give rise to any substantial wrong or

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[110] *United States v. Powell*, 469 U.S. 57 at p.67. There are parallels between the reasoning of the USSC and the approach taken by this Court in *R. v. Koury*, [1964] S.C.R. 212 at pp. 217-218, 219-220.

[111] *R. v. Pittiman*, 2006 SCC 9 at para. 13. See also *B. v. R.*, [2014] 1 NZLR 261 at paras. 105-106.

[112] *R. v. Koury*, [1964] S.C.R. 212 at pp. 217-218, 219-220. See also *R. v. Ertel*, 1987 CanLII 183 (ON CA); *R. v. Dhanda*, 2005 BCCA 295 at paras. 21-22; *R. v. Plein*, 2018 ONCA 748 at paras. 23, 32-37, 43-47, 51; *R. v. Horner*, 2018 ONCA 971

> miscarriage of justice. We are not compelled to defer to this acquittal for the purpose of quashing the conviction on fraud. We are not engaged in a process of logic chopping and we are entitled to look at the facts behind the record of the acquittal.

96. Despite the foregoing, it may be argued that continued recognition and application of the inconsistent verdict test is necessary to address the speculative possibility of jury compromise. If so, then this further supports recognition of an obligation to provide an "all or nothing" instruction to juries where the need arises. If inconsistent verdicts are returned despite clear instruction that all counts must be decided in the same way as a matter of law, then an appellate court would be positioned to identify with confidence the cause of purported unreasonableness – nullification, or the jury's unreviewable power to ignore the law – rather than speculation about a negotiated outcome.

97. In conclusion, the Court of Appeal held that in unreasonable verdict appeals, including where inconsistent verdicts are alleged, the test is as follows: "The court does not ask whether the jury was properly instructed in fact. Rather, the question is whether a hypothetical, properly instructed jury could reasonably have returned the verdict(s) it did".[113] Applying this test, the Court held that as a matter of logic: "On the evidence presented to this jury, if the appellant was guilty of either sexual interference or invitation to sexual touching, he was necessarily guilty of sexual assault. No properly instructed jury could reasonably have reached a different conclusion".[114] Due to the "patent inconsistency" between the Respondent's convictions and the acquittal on the sexual assault count, the Court set aside the convictions, without regard to the actual instructions given to the actual jury.

98. If the Court of Appeal was correct in both its description and application of the inconsistent verdicts test, then the trial judge erred in law in failing to give the jury an "all or nothing" instruction – the jury ought to have been told that based on the evidence they heard and the elements of the offences, all counts in the indictment had to be decided in the same way as a matter of law. Further, the Court of Appeal erred in failing to recognize this legal error, and that the inconsistent verdicts in this case can be attributed to the absence of such instruction. Finally, an

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[113] Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 33, para. 77.
[114] Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 54, para. 131.

"all or nothing" instruction would promote focused – rather than speculative – appellate review of inconsistent verdict allegations.

ii. The erroneous and confusing jury instructions as to the meaning of "force" and "touching" reconcile the inconsistent verdicts

99. The Crown cross-appealed the inconsistent acquittal. The Crown argued that the facial inconsistency in the verdicts is explained by confusing jury instructions, which led the jury to erroneously believe that the "force" required for proof of sexual assault was different than the "touching" required for sexual interference and invitation to sexual touching.

100. The majority of the Court of Appeal dismissed the cross-appeal, primarily on the basis that the jury was given a "legally correct instruction" and was "expressly told, twice, that any physical contact, even a gentle touch, could amount to the "force" necessary for sexual assault".[115] Further, the sexual assault instruction was not "so unnecessarily confusing that it constituted an error of law".[116]

101. There are multiple prior appellate decisions where a conviction for sexual interference has been reconciled with an inconsistent acquittal for sexual assault in the same trial based in part on findings that the instructions caused the jury to understand that "force" necessary for sexual assault is something different than the "touching" requirement for sexual interference, including where the instructions regarding each offence, viewed in isolation, were correct.[117]

102. *R. v. S.L.* is illustrative of the reasoning in this line of authority. In *S.L.*, the instructions to the jury were legally correct but potentially confusing because they stated force is an element of sexual assault,[118] that touching is an element of sexual interference but force is not required, and did not specify that force and touching were functionally the same thing – "The reasonable

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[115] Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 55, para. 135.
[116] Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 36, para. 137.
[117] *R v. S.L.*, 2013 ONCA 176 at paras. 32, 35-36, 42-47; *R. v. Tyler*, 2015 ONCA 599 at paras. 8-13; *R. v K.D.M.*, 2017 ONCA 510 at paras. 30-39; *R. v. J.D.C.*, 2018 NSCA 5 at paras. 48-51, 53-55. *R. v. Tremblay*, 2016 ABCA 30 at paras. 24-25; leave to appeal refused, [2016] S.C.C.A. No. 200; *R. v. R.T.K.*, 2014 ABCA 167 at paras. 8-15.
[118] The jury in *S.L.* was told that the force applied could be "gentle" and that "the application of force included intentional touching": *R. v. S.L.*, 2013 ONCA 176 at paras. 39-40.

inference from these instructions is that the jury thought that application of force was required to convict on sexual assault but not required on sexual interference".[119] Further, the jury was not instructed to take an "all or nothing approach", but rather should consider each count separately.[120] Finally, it was noted that the conviction itself was not unreasonable and was supported by the evidence.[121]

103. It is the Crown's position that the majority of the Court of Appeal erred in failing to recognize that the inconsistent verdicts in this case were the product of the confusing instructions given to the jury. The jury charge, considered in the context of the decision trees, verdict sheet and answer to the jury's question, was so unnecessarily confusing as to amount to an error of law that had a material bearing on the acquittal. The confusion in the charge was by far the most likely explanation for the inconsistent verdicts.[122]

104. It is difficult to improve on the reasons in the dissenting judgment as to why the confusing instructions explain the inconsistent verdicts.[123] The Crown relies on those reasons and emphasizes and adds the following.

105. A jury charge may be so unnecessarily confusing as to constitute an error of law that might reasonably be thought to have had a material bearing on the acquittal.[124] In a case like this one that involves an assessment of the reasonableness of inconsistent verdicts returned by the jury in relation to multiple differently worded offences which are functionally the same, a reviewing court should focus on the overall effect the charge would have had on the minds of the jury and the ultimate understanding it conveyed.[125]

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[119] *R. v. S.L.*, 2013 ONCA 176 at para. 45.
[120] *R. v. S.L.*, 2013 ONCA 176 at para. 32, 42.
[121] *R. v. S.L.*, 2013 ONCA 176 at para. 47.
[122] Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 64, paras. 158, 175-76.
[123] Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 63, para. 155 to p. 73, para. 176.
[124] *R. v. Hebert*, [1996] 2 S.C.R. 272 at paras. 8, 13; *R. v. Youvarahah*, 2013 SCC 41 at para. 32.
[125] *R. v. Rodgerson*, 2015 SCC 38 at para. 51; *R. v. Daley*, 2007 SCC 53 at paras. 30-31; *R. v. Elkins* (1995), 26 O.R. (3d) 161 (C.A.) at pp. 169-70, leave refused [1996] S.C.C.A. No. 62; *R. v. Rowe*, 2011 ONCA 753 at paras. 54, 58.

106. The basic problem in cases like this, which involve charges of sexual interference and sexual assault against the same accused on the same indictment, is that it is not obvious and indeed counterintuitive to jurors that “touching” and “force” are the same thing. “Touching” requires no special explanation. However, jury charges regarding sexual assault often include careful instructions regarding the meaning of “force” because it is not readily apparent to the lay person that an assault can be something other than an overtly violent act. As observed in *R. v. Barton*:[126]

> "Force" is an easily misunderstood term. As a legal term of art...it includes touching. However, while lawyers and judges appreciate the nuances in this term, the word "force" confounds juries. And understandably so. Force in the colloquial sense is understood to mean using physical strength or power to compel a complainant to engage in sexual activity: *R v Tremblay*, 2016 ABCA 30 at para 15. Not only does "force" have this connotation, that connotation also happens to be consistent with the literal definition of "force" as a noun (and as a verb) in the dictionary. In this regard, "force" is typically defined as meaning "violence, compulsion or constraint exerted upon or against a person ...”

107. It is true that the instructions regarding the sexual assault count, on the one hand, and the sexual interference and invitation to sexual touching counts on the other, were correct *viewed in isolation*. However, the fundamental flaw in the instructions and the decision trees is that the jury was not clearly told that the differently worded offences were functionally the same on the evidence they heard and that “force” and “touching” were interchangeable terms.[127] This is not an idle concern given the multiple prior cases in which inconsistent verdicts have been rendered in cases with the same charges.

108. Unfortunately, the danger that the jury may not have appreciated the functional equivalence of the charges before them was exacerbated by errors made by the trial judge and less than fulsome instruction provided to the jury. The following passage from the dissent aptly summarizes the problems in the instructions and the effect they would have had on the jury:[128]

> [169] I am satisfied that, when viewed in context, the jury would not have understood that mere touching constituted the force necessary to make out the offence of sexual assault. I reach this conclusion based on several points, as follows:

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[126] *R. v. Barton*, 2017 ABCA 216 at para. 202. See also Appellant’s Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 67, para. 167.
[127] Appellant’s Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 72, para. 172.
[128] Appellant’s Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 68, para. 169.

1) As is clear from the following chart, the trial judge used the need for the use of "force" in describing the offence of sexual assault and only the need for "touching" in her description of sexual interference and invitation to sexual touching.

	Sexual assault	**Sexual interference**	**Invitation to sexual touching**
Elements of the offence	i. That [R.V.] intentionally applied **force** to [T.S.]; ii. That the **force** that [R.V.] intentionally applied took place in circumstances of a sexual nature.	i. That [T.S.] was under sixteen (16) years old at the time; ii. That [R.V.] **touched** [T.S.]; and iii. That the **touching** was for a sexual purpose.	i. That [T.S.] was under sixteen (16) years old at the time; ii. That [R.V.] invited [T.S.] to **touch** his body; and iii. That the **touching** that [R.V.] invited was for a sexual purpose.
Summary at the end of each count	If you are satisfied beyond a reasonable doubt that [R.V.] intentionally applied **force** to [T.S.] in circumstances of a sexual nature, you must find [R.V.] guilty of sexual assault.	If you are satisfied beyond a reasonable doubt that [R.V.] **touched** [T.S.] for a sexual purpose, you must find [R.V.] guilty of sexual interference.	If you are satisfied beyond a reasonable doubt that the **touching** that [R.V.] invited [T.S.] to do was for a sexual purpose, you must find [R.V.] guilty of invitation to sexual touching.

2) After her instructions relating to sexual assault, the trial judge gave instructions on sexual interference and on invitation to sexual touching. In her explanations of these counts, she defined "touching" in this context and stated that "[f]orce is not required" in order to constitute touching.[129] This remark effectively contradicted her earlier comment, made in the course of her instructions on sexual assault, that a gentle touch could constitute force.

3) Although the trial judge originally intended that the jury would have a copy of the charge in the jury room, the plan was changed just before final submissions and the jury

[129] Appellant's Record – Tab 4: Charge to the Jury at p. 164, ll.2 to 22; p. 167, l.25 to p. 168, l.32.

did not have a copy of the instructions during its deliberations.[130] The trial judge's instruction that force includes "a gentle touch" was made relatively early in the charge that was read out in court. That qualification to the word "force" may well have been forgotten or lost by the jurors by the time the charge was completed and they retired to the jury room.

4) In the jury room, the jury had a decision tree for each of the three offences. The decision tree for sexual assault referred only to the need for the use of "force", while the decision tree for both sexual interference and invitation to sexual touching referred only to the need for "touching".[131]

5) The decision tree for sexual assault provided for the possibility of a conviction for simple assault, if the force used was not of a sexual nature.[132] It was unnecessary to provide for this possibility, as on the facts of this case, it was not open to the jury. It could only serve to confuse the jury and reinforce the perception that "force" was distinct from "touching", since it could result in a conviction for assault.

6) The jury clearly focused on the possibility of an assault. It pointed out, in a jury question, that the decision tree it was provided indicated that a conviction for assault was possible, but that this option was not available on the verdict sheet it was given.[133] Rather than explain to the jury that simple assault was not an option on the facts of the case, and deleting it from the decision tree, the trial judge added it as a possible outcome on the verdict sheet.[134] Simple assault was, of course, not an option in the decision trees for sexual interference and invitation to sexual touching. The inclusion of this offence in the decision tree for sexual assault further highlighted the difference between the use of "force" and "touching".

109. Based on the foregoing, the jury in this case was not "properly instructed". In addition to the preceding summary and the absence of a clear instruction to the jury that the differently worded offences were functionally the same,[135] an error in the context of this case, the Crown adds the following.

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[130] The jury was not provided with a hardcopy of the charge at defence counsel's request:

Appellant's Record – Tab 4: Charge to the Jury at p. 100, l.20 to p. 102, l.25.

[131] Appellant's Record – Tab 9: Ex. A-1, Decision Tree and Original Verdict Sheet.
[132] Appellant's Record – Tab 9: Ex. A-1, Decision Tree and Original Verdict Sheet.
[133] Appellant's Record – Tab 4: Charge to the Jury at p. 184, ll.5-22; Tab 10: Ex. C, Question from the Jury, pp.227-28; Tab 9: Ex. A1, Decision Tree and Original Verdict Sheet at p. 222.
[134] Appellant's Record – Tab 4: Charge to the Jury at p. 185, l.8 to p. 192, l.23; Tab 12: Ex. F, New Verdict Sheet, pp. 231-32.
[135] Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 72, para. 172.

110. First, the trial judge erred in leaving the included offence of simple assault with the jury as it was not an available verdict on the evidence. Doing so breached the trial judge's duty to set out the possible verdicts open to the jury.[136]

111. Second, the trial judge erred in providing no instructions to the jury as to how they could return a verdict of guilty of simple assault based on the evidence before them. This breached the duty to provide instructions regarding the relevant legal issues, including the charges against the accused, and the duty to review the evidence relating to the law.[137]

112. The trial judge repeated this error when, in response to the jury's question, she simply told them assault was now an available verdict without explaining how.[138] The last instruction they received is that they could now find the Respondent guilty of assault regarding the sexual assault charge. They were left to their own devices to figure out why. This increased the danger that the jury would resort to colloquial meanings of "assault" and "force" for guidance.

113. Based on the foregoing, the Court of Appeal erred in law in dismissing the Crown's cross-appeal against the sexual assault acquittal.

iii. What effect does a successful Crown cross-appeal of the acquittal have on the conviction appeal and appropriate disposition?

114. The dissent in the Court of Appeal observed that this appeal "raises important issues: first, how to address a Crown cross-appeal of the acquittal in a case involving inconsistent verdicts, and second, the appropriate disposition of the appeal should the Crown succeed on its cross-appeal."[139]

115. The dissent agreed with the majority that the verdicts were inconsistent and on that basis the convictions could not stand. The dissent however would also have allowed the Crown's cross-appeal and ordered a new trial on all charges.[140] While not entirely clear from the majority's reasons, had they allowed the cross-appeal presumably they would have done the same given that

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[136] *R. v. Daley*, 2007 SCC 53 at p. 546, para. 39.
[137] *R. v. Daley*, 2007 SCC 53 at p. 546, para. 39.
[138] Appellant's Record – Tab 4: Charge to the Jury at p. 192, ll.14-23.
[139] Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 62, paras. 152-53.
[140] Appellant's Record – Tab 1: Formal Judgment of Court of Appeal for Ontario, C 61866 at p. 4; Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 63, para. 154.

the conviction appeal was allowed and the convictions set aside before the Crown's cross-appeal was considered.[141]

116. The disposition of the appeals in the Court of Appeal reflects the bifurcated procedure established in *J.F.* for the resolution of inconsistent verdict appeals where misdirection is the cause and the consequent restriction of remedial powers pursuant to s. 686 of the *Criminal Code*.

117. It is counter-intuitive and contrary to the interests of justice to order a new trial on all counts once the premise of the conviction appeal – purported inconsistency – has been solved in the Crown's cross-appeal. If the verdicts have been reconciled by the outcome of the cross-appeal, then there should be no basis to set aside the conviction for unreasonableness.

118. It is submitted that it is error of law to order a new trial on all counts in these circumstances. Rather, the conviction appeal should simply be dismissed. The import of a successful Crown cross-appeal against a facially inconsistent acquittal is that it eliminates the acquittal; there is no longer any inconsistency. This approach is not violative of *J.F.* because examination of the jury instructions plays no direct role in the resolution of the defence appeal. Instead, it is the success of the Crown appeal, which is based on scrutiny of the jury instructions, that resolves the inconsistency by removing the source of it. The outcome should be that the defence appeal is dismissed, not allowed, and the convictions left to stand.

119. Support for this position is found in the Court of Appeal's prior decision *R. v. Plein*, where a purportedly inconsistent acquittal in a judge alone trial was attributable to clear legal error in the reasons for judgment. Justice Paciocco for the court stated: "In my view, the law does not require an otherwise unassailable conviction to be set aside in a judge alone trial because an inconsistent, demonstrably unsound acquittal has been entered on a functionally identical charge in the same

[141] Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 54, paras. 131-35.

proceedings."[142] Later, after noting that "things would have been cleaner in this case had the acquittal been appealed and set aside", Paciocco J.A. observed:[143]

> In my view, however, the Crown does not have to appeal and set aside the acquittal in order to resist Mr. Plein's challenge to the reasonableness of his criminal negligence conviction. When an accused person asks to have an inconsistent conviction set aside, the reasons for that inconsistency are put in issue. As I see it, where, on an examination of those reasons, the acquittal shows itself to be defective, an appeal court must take the fact the acquittal is wrongful into account in deciding whether to grant the relief the appellant requests.

Justice Paciocco later concluded:[144]

> Ultimately, it is not illogical or contrary to the interests of justice to uphold a demonstrably valid criminal negligence causing death conviction where there is a final but demonstrably wrongful acquittal registered after the same trial on a manslaughter charge that alleges the same essential offence. It would, however, be illogical, contrary to the interests of justice, and contrary to the appeal powers conferred by s. 686(1)(a)(i) to strike down that reasonable conviction because the trial judge happened to enter a wrongful manslaughter acquittal that was grounded on factual findings that are not inconsistent with the criminal negligence causing death conviction that Mr. Plein seeks to attack.[145]

120. It was noted in *Plein* that "things would have been cleaner if the acquittal had been appealed and set aside".[146] This alludes to the awkwardness of permitting a facially inconsistent acquittal to stand.[147] This should not be a true concern. Analysis of the *actual* record by the court in *Plein* demonstrated the facial inconsistency of the verdicts was the product of legal error underlying the acquittal. The trial judge's reasons demonstrated that he thought the elements of the two offences were different although they were functionally identical.[148] In these circumstances, the acquittal

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[142] *R. v. Plein*, 2018 ONCA 748 at para. 23. The court below held: "For the purposes of this appeal, it is unnecessary to determine whether *Plein*, and the decision of this court in *R. v. Horner*, 2018 ONCA 971, which followed *Plein*, should not be followed." See Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 58, para. 144.

[143] *R. v. Plein*, 2018 ONCA 748 at para. 47.
[144] *R. v. Plein*, 2018 ONCA 748 at para. 51.
[145] See also *R. v. Koury*, [1964] S.C.R. 212 at pp. 217-218, 219-220.
[146] *R. v. Plein*, 2018 ONCA 748 at para. 47.
[147] *R. v. Plein*, 2018 ONCA 748 at paras. 43-46.
[148] *R. v. Plein*, 2018 ONCA 748 at paras. 32-37.

was inconsistent with the conviction "in name only".[149] Thus, the acquittal on one count cannot be interpreted as a "declaration of legal innocence" on the other.[150]

121. When it comes to the disposition of inconsistent verdict appeals, there should be no distinction between the impact of erroneous self-instruction versus erroneous jury instruction. Juries are told they must apply the law as instructed and are presumed to do so.[151] If inconsistent verdicts are reconciled based on misdirection, this is the most obvious explanation rather than speculation that facial inconsistency means the jury must have been confused about the evidence or reached an unjustifiable compromise.

122. Further, the Crown does not launch a cross-appeal out of desire to set aside the acquittal and have a new trial ordered regarding a charge that was inevitably going to be stayed pursuant to *Kienapple*. The only reason the cross-appeal exists is because the authoritative obiter in *J.F.* directs that it is necessary before the reviewing court may consider an argument that is directly responsive to and potentially resolves the issue raised in the defence inconsistent verdict appeal. Consequently, disposition of the two appeals is inextricably linked. In these circumstances, success of the Crown's cross-appeal should lead to dismissal of the conviction appeal.

123. Where an appeal is allowed from a jury's verdict of acquittal, the only explicit remedy is to set aside the acquittal and to order a new trial; a conviction cannot be substituted for the acquittal [s. 686(4)(b)]. While a facially inconsistent acquittal no longer exists in such circumstances, concerns may be raised regarding a 'final' disposition of the charge underlying the acquittal. If so, an appellate court can exercise its power to make any order "that justice" requires pursuant to s. 686(8) to enter a stay of proceedings rather than ordering a new trial after allowing the Crown's appeal;[152] the Crown would not proceed with the charge, in any event.

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[149] *R. v. Plein*, 2018 ONCA 748 at para. 45.
[150] *R. v. Plein*, 2018 ONCA 748 at para. 45. *Contra* Appellant's Record – Tab 2: *R. v. R.V.*, 2019 ONCA 664 at p. 18, paras. 37-38.
[151] *R. v. Corbett*, [1988] 1 S.C.R. 670, at pp. 692-693, 695; *R. v. Barton*, 2019 SCC 33, at para. 177.
[152] *R. v. Hinse*, 1995 CanLII 54 (SCC) at p. 30, para. 30.

PART IV - SUBMISSIONS REGARDING COSTS

124. The Crown does not seek any order regarding costs.

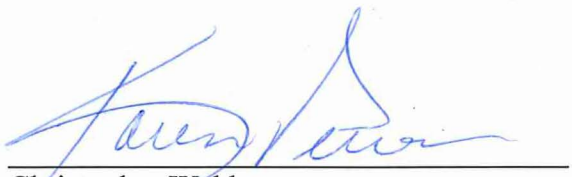
PART V - ORDER SOUGHT

125. It is respectfully requested that the appeal be allowed, the formal judgment of the Court of Appeal be set aside, and the Respondent's convictions be restored.

PART VI - SUBMISSIONS ON CASE SENSITIVITY

126. There is an order restricting publication in this proceeding under ss. 486.4(1) of the *Criminal Code*.[153] It is submitted that any judgment issued by this Court should not include any information capable of disclosing the identity of the complainant.[154]

ALL OF WHICH is respectfully submitted this 12th day December, 2019 by:



for Christopher Webb
Counsel for the Appellant

[153] Appellant's Record – Tab 1: Formal Judgment of Court of Appeal for Ontario, C 61866, p. 1; Tab 3: Indictment, p. 79.
[154] Appellant's Record – Tab 1: Formal Judgment of Court of Appeal for Ontario, C 61866, p. 1.

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