NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA250/2023
[2024] NZCA 54

BETWEEN	BENJAMIN NILESH GOUNDAR Appellant
AND	THE KING Respondent

Hearing:	14 February 2024 (further submissions received 15 February 2024)
Court:	Collins, Woolford and Mander JJ
Counsel:	K Lakshman for Appellant T G Bain Respondent
Judgment:	12 March 2024 at 10.30 am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Collins J)

Introduction

[1] Mr Goundar appeals a conviction for assault. He maintains the jury's verdict was unreasonable because it cannot be reconciled with not guilty verdicts on other charges determined by a different jury.

Background

[2] Mr Goundar was charged with nine offences allegedly committed against a cellmate. The charges comprised five charges of sexual violation by unlawful sexual connection, two charges of threatening to kill, and two charges of assault.

[3] In November 2020 a jury found Mr Goundar guilty on all charges. He was sentenced to preventive detention with a minimum period of imprisonment of 10 years.[1] Mr Goundar successfully appealed his convictions to this Court and a retrial was ordered.[2]

[4] The second trial commenced in June 2022 but had to be abandoned when three jurors became ill with COVID-19.[3]

[5] The third trial commenced in October 2022. A guilty verdict was returned by a majority of the jury on charge 4, which was a representative charge of assault. The jury could not reach agreement on the other eight charges.

[6] The fourth trial took place in April 2023. The jury returned not guilty verdicts in relation to the remaining eight charges. Mr Goundar was sentenced to three months' imprisonment in relation to the conviction for assault.[4]

Grounds of appeal

[7] Mr Lakshman, counsel for Mr Goundar, submitted that the guilty verdict in trial three could not be reconciled with the not guilty verdicts in trial four. This submission was predicated upon the Crown case being that the assault alleged in charge four was committed to compel the complainant to submit to sexual violations. It was submitted that the not guilty verdicts in trial four completely undermined the guilty verdict in trial three.

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1 *R v Goundar* [2021] NZHC 312.
2 *Goundar v R* [2021] NZCA 544.
3 *R v Goundar* HC Wellington CRI-2019-096-3345, 17 June 2022.
4 *R v Goundar* [2023] NZHC 923 [Sentencing notes]. This was to be served concurrently with his existing term of imprisonment.

[8] Mr Lakshman also submitted that the untenable status of the guilty verdict in trial three was further underscored by the fact that in trial four Mr Goundar was given permission pursuant to s 49(2)(a) of the Evidence Act to adduce evidence "tending to prove that [he] did not commit the offence for which [he] was convicted" in trial three.[5] Isac J, the trial Judge, also directed the jury that the issue as to whether or not Mr Goundar had assaulted the complainant was to be determined without reference to the conviction from trial three. Mr Lakshman contended:

> The jury's unanimous verdicts of not guilty in respect of the eight charges at the fourth trial must therefore include their decision that the appellant did not … assault the complainant.

Legal principles

[9] In *B (SC12/2013) v R* the Supreme Court explained the principles relevant to inconsistent verdict cases.[6] We need only refer to two of the principles stated by the Court:

(a) An appeal ought only to be allowed on the basis of inconsistent verdicts when the different verdicts are "an affront to logic and common sense" or where "the evidence on one count is so wound up with the evidence on the other that it is not logically separable".[7]

(b) "The obligation to establish inconsistency rests with the person challenging their conviction".[8]

Analysis

[10] There is an issue as to whether or not the principles governing inconsistent verdicts are apt where the verdicts in question arise from two separate trials.

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5 *R v Goundar* HC Wellington CRI-2019-096-3345, 17 April 2023 [Section 49 decision].
6 *B (SC12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261.
7 At [68(e)], citing *MacKenzie v R* [1996] HCA 35, (1996) 190 CLR 348 at 368 and *R v Pittiman* 2006 SCC 9, [2006] 1 SCR 381 at [8].
8 *B (SC12/2013) v R,* above n 6, at [68(f)].

[11] The issue of inconsistent verdicts has arisen in New Zealand primarily in relation to separate trials for co-offenders,[9] and is much less common in relation to a single offender across multiple trials.

[12] One example of the latter is *P (CA354/2017) v R*, where the appellant appealed his convictions on the basis that a guilty verdict by a first jury was inconsistent with a not guilty verdict by a second jury in relation to a related charge.[10] The relevant events were that P was alleged to have assaulted both his partner and his daughter in a single incident. The first jury found him guilty of the assault on his daughter but were unable to reach a verdict on the assault on his partner. The second jury found him not guilty of the assault on his partner.

[13] The Court considered *B (SC12/2013) v R* was the relevant authority and assessed whether the category of "when the evidence on one count is so wound up with the evidence on the other that it is not logically separable" was applicable.[11] The Court dismissed the appeal on the basis that the evidence supported the different verdicts, because there was stronger evidential support for the assault on the daughter than that on the partner.[12]

[14] The United Kingdom,[13] Australia,[14] and Canada,[15] take a similar approach to the Supreme Court in *B (SC12/2013) v R*. If there is a logical basis upon which the verdicts can be reconciled, then there is no basis for appellate intervention.

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9 See, for example, *McMaster v R* [2016] NZCA 612, which concerned five men accused of gang-raping a single complainant. Four of the men were found guilty as principals, and the fifth was acquitted as a party at a retrial, despite evidence of the co-offenders' convictions being adduced under s 49 of the Evidence Act. The Court found the verdicts were not inconsistent because they could be explained by the nature and scope of the evidence at the second trial being different from that at the first trial. In those circumstances, it was open for a different jury considering the same events to reach a different verdict, see [78]–[86].

10 *P (CA354/2017) v R* [2018] NZCA 361 [*P v R* (CA)]. Leave to appeal to the Supreme Court on the issue of inconsistent verdicts between trials was declined in *P (SC 88/2018) v R* [2019] NZSC 1.

11 *P v R* (CA), above n 10, at [15].

12 At [16]–[17].

13 *R v Fanning* [2016] EWCA Crim 550, [2016] 1 WLR 4175 at [15]–[19]. Note the Court of Appeal in this decision clarified the position, confirming the approach taken in the earlier cases of *R v Stone* [1955] Crim LR 120 and *R v Durante* [1972] 1 WLR 1612 are correct.

14 *MacKenzie v R*, above n 7; and *MFA v R* [2002] HCA 53, (2002) 193 ALR 184 at [84]–[86].

15 *R v Pittiman*, above n 7, at [6]–[11], cited recently with approval in *R v RV* 2021 SCC 10 at [28]–[31] and [36]–[38].

[15] In *Connelly v DPP,* Lord Devlin observed:[16]

> The appellant presses this point so hard as to submit that inconsistent verdicts in two trials ought to be dealt with in the same way by the Court of Criminal Appeal as it deals with inconsistent verdicts in the same trial; and that on that ground the court ought in this ease to have quashed the second conviction for robbery. I cannot accept that. … the ground for quashing inconsistent verdicts in the same trial is not that there is no room for different conclusions on the same facts, but because, if the same body of men reach inconsistent conclusions on the same evidence, there is good ground for thinking that they were subject to confusion of thought affecting their judgment as a whole. I cannot agree, therefore, that inconsistent verdicts in two trials will necessarily produce a miscarriage of justice … But I accept that it is something which in the interests of justice it is very desirable to avoid.

[16] The approach advocated by Lord Devlin has not always been followed by the Court of Appeal for England and Wales.[17]

[17] It is not, however, necessary for us to resolve this point because the appeal can be determined by reference to the evidence.

[18] When he was interviewed by the police, the complainant made clear that while a number of the alleged assaults were linked to Mr Goundar's alleged sexual offending, some assaults, namely slaps to the complainant's head, were triggered by Mr Goundar's anger over the complainant having not tidied up their cell. Those particular assaults were not a precursor to Mr Goundar's alleged sexual offending.

[19] In his ruling in trial four concerning the application under s 49 of the Evidence Act, Isac J set out the Crown position in relation to the guilty verdict in trial three:[18]

> [11] … Moreover, [the Crown] accepted that even if Mr Goundar's application [to adduce evidence tending to disprove the facts underpinning his conviction for assault] was declined, and the charge was to be admitted as conclusive evidence of guilt, the jury would also need to be advised that the previous jury's verdict could have related to an assault entirely unrelated to the subsequent alleged sexual offending. That concession was responsibly made, given that in his original evidential interview, [the complainant] stated that there was an occasion or occasions when he was struck by the defendant for simply failing to keep their cell in Rimutaka Prison clean and tidy. Accordingly, the evidence before the last jury left it open to them to convict Mr Goundar of assault in circumstances that had no connection to an attempt

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16 *Connelly v Director of Public Prosecutions* [1964] AC 1254 (HL) at 1353–1354.

17 See for example *R v Andrews* [1967] 1 WLR 439 (CA) and *Warner v R* [1966] 50 Cr App R 291 (CA).

18 Section 49 decision, above n 5.

> to overcome the resistance of the complainant to the alleged sexual assaults that followed.

[20] Similarly, when sentencing Mr Goundar, Isac J again explained the basis on which the jury in trial three convicted Mr Goundar of assault.[19]

> [4] The factual circumstances for sentencing must make sense of a previous jury's verdict in light of the evidence before them. They were unable to reach a verdict on eight charges for which you have recently been acquitted but they did convict you on one representative charge of assault. While the victim's evidence was that the assaults generally were a precursor to serious sexual assaults committed by you, his evidence was that the assaults were not confined to occasions when sexual violence took place. He said that you would on a couple of occasions slap his face because he had not cleaned your cell as you had wanted. There is no evidence of significant physical injury arising from those assaults but I accept [Crown counsel's] submission for the Crown that there was an element of overbearing on your part in that there is evidence accompanying the assaults to suggest that you referred to the victim on occasion as your bitch and would direct him to undertake relatively menial personal tasks on your behalf. So I proceed to sentence you on that basis.

[21] In summary, the jury in trial three could reasonably have concluded that Mr Goundar was guilty of having assaulted the complainant in circumstances unconnected to the alleged sexual offending. The jury in trial four were not satisfied beyond reasonable doubt of Mr Goundar's guilt in relation to the alleged sexual offending, the threats to kill the complainant and one other charge of assault. Those not guilty verdicts are consistent with the jury in trial three having found Mr Goundar guilty of assault when he slapped the complainant in circumstances unrelated to alleged sexual offending.

[22] Mr Goundar's conviction in trial three for assault and his acquittals in trial four are consistent and the antithesis of an affront to logic and common sense.

Result

[23] The appeal is dismissed.

Solicitors:
Crown Solicitor, Wellington for Respondent

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[19] Sentencing notes, above n 4.