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The Six-Minute Criminal Court Judge 2020

Summary of *R. v. R.V.*, 2019 ONCA 664

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Court of Appeal for Ontario

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Prepared for the Law Society of Ontario's Six-Minute Criminal Court Judge Program
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OVERVIEW

This case reviewed and clarified the law on inconsistent verdicts. The test for an inconsistent verdict asks whether a reasonable jury, properly instructed, could have rendered the verdicts based on the evidence before it. This analysis is partially objective. It is not concerned with whether the jury was properly instructed in fact. The question is whether a hypothetical, reasonable jury that is properly instructed, could return the verdicts it did.

To resist an inconsistent verdict argument, the Crown can show the convictions are not genuinely inconsistent (i.e. reasonable). Verdicts may be reconciled based on temporal, qualitative, or evidentiary distinctions between the offences. If the Crown wants to respond to an inconsistent verdict argument by asserting an acquittal resulted from erroneous jury instructions, the Crown must appeal against the acquittal itself. Otherwise, the Crown would be undermining the legitimacy of the acquittal as a declaration of legal innocence, while leaving the acquittal intact.

Lastly, if there is a genuinely inconsistent verdict and the acquittal is upheld, a retrial is not an appropriate remedy. A retrial would simply invite a jury to return convictions that are inconsistent with the now-final acquittal. In these situations, issue estoppel bars a retrial.

FACTS

The appellant was charged with sexual assault, sexual interference, and invitation to sexual touching of his partner's daughter. The allegations of abuse spanned approximately six years. The counts were not particularized with specific dates or details of acts allegedly committed.

The trial judge gave standard jury instructions for all three counts. She also gave the jury a decision tree for each of the three charges, and a verdict sheet. The decision tree for sexual assault identified guilty of simple assault as an available verdict, but the verdict sheet did not.

After deliberating for a little over an hour, the jury asked the trial judge what to do about the inconsistency between the decision tree and verdict sheet. With counsel's agreement, the trial judge added the possibility of guilty of simple assault to the verdict sheet and informed the jury of this change. She instructs the jury on how the appellant could be convicted of simple assault, based on the evidence led at trial. The next morning, the jury found the appellant not guilty of sexual assault, but guilty of sexual interference and invitation to sexual touching.

ISSUES

The appellant appealed against his convictions. He argued that a reasonable jury, properly instructed, could not have acquitted him of sexual assault while also convicting him of the other charges. As the verdicts were patently inconsistent, his convictions must be quashed and acquittals entered. Relying on the Supreme Court of Canada's decision in *R. v. J.F.*, 2008 SCC 60, [2008] 3 S.C.R. 215, and his acquittal on the sexual assault count, the appellant submitted that issue estoppel barred a retrial on the sexual interference and invitation to sexual touching counts.

The Crown cross-appealed on the acquittal of sexual assault. It submitted that the trial judge's instructions confused the jury by leaving them with the impression that the "force" required for sexual assault is different from the "touching" required for sexual interference. The trial judge also erred in leaving simple assault as an available verdict, since it was not actually available on the evidence. These errors caused the jury to erroneously believe that sexual assault requires force, in the layperson's sense. The Crown also argued that the appellant was relying on *obiter dicta* from *J.F.*, which was also inconsistent with the Supreme Court's previous decisions.

As such, the issues on appeal were:

1. Is *J.F.* binding authority or *obiter dicta* and inconsistent with previous Supreme Court decisions?
2. What is the authority, if any, of the Court of Appeal's previous decision that have not followed *J.F.*?
3. Given the answers to the foregoing, how should this appeal be resolved?

ANALYSIS

1. *J.F.* is consistent with previous Supreme Court decisions and authoritative *obiter*.

Similar to this case, *J.F.* involved a jury convicting and acquitting the accused at the same trial of the same offence committed in the same way against the same victim. Specifically, the jury convicted the respondent of manslaughter by criminal negligence but acquitted him of manslaughter by failing to provide the necessities of life.

The Court of Appeal found the verdicts inconsistent, overturned the conviction on the manslaughter by criminal negligence count, and ordered a new trial on that count. The Crown appealed, arguing the Court of Appeal erred in law by finding inconsistent verdicts. The respondent cross-appealed the order for a new trial.

The Crown argued, amongst other things, that allegedly erroneous jury instructions could explain the inconsistency. The majority of the Supreme Court disagreed, finding that the trial judge had not misdirected the jury. The majority also rejected the Crown's arguments by noting:

- "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 original): *J.F.* at para. 21.
- "[V]erdicts are deemed inconsistent...if no *properly instructed* jury could reasonably have returned them both. ... Improper instructions do not make improper verdicts proper. Nor do they make inconsistent verdicts consistent" (emphasis original): *J.F.* at para. 23.

- The Crown had not appealed the acquittal. As such, ordering a new trial “would deprive the respondent of the benefit of that acquittal, now final, and expose him on the new trial to a finding that he did in fact commit the offence of which he was acquitted, definitively, by the jury in this case”: *J.F.* at para. 41.

In this case, majority of the Court of Appeal summed up paras. 21, 23, and 41 of *J.F.* as follows:

- if the Crown wants to respond to an inconsistent verdict argument by asserting that the acquittal was the result of a legal error in the instructions for that offence, it must appeal the acquittal;
- if the Crown fails to appeal the acquittal, and cannot otherwise reconcile the verdicts, they remain inconsistent because the inconsistency cannot be cured simply by asserting error of law in the acquittal;
- the inconsistent verdict analysis is partially objective – it asks whether, assuming it was properly instructed, a reasonable jury could have rendered the verdicts based on the evidence before it; and
- the preeminent policy considerations underlying the inconsistent verdict analysis are “legal process” and “the legitimacy of verdicts”.

The majority of the Court of Appeal found that *J.F.* was consistent with the Supreme Court’s previous jurisprudence on inconsistent verdicts. Notably, the statements in *J.F.* suggesting that “[i]mproper instructions do not make improper verdicts proper” aligns with the partially objective test for inconsistent verdicts. This test does not ask whether a jury was properly instructed in fact. Rather, the court asks whether a hypothetical reasonable jury, assuming it was properly instructed, could return the verdict it did.

The aforementioned statements in *J.F.* were also intended as guidance for appellate courts. As such, they are authoritative *obiter* that ought to be followed. To understand why, it is important to note that an acquittal is a declaration of legal innocence for the purposes of subsequent criminal proceedings. Should the Crown fail to do this, the acquittal and its meaning will become final.

If a person appeals their conviction based on inconsistent verdicts, and the Crown does not appeal the acquittal, the Crown is not allowed to collaterally attack the acquittal in order to reconcile its inconsistency with the conviction. The Crown in *J.F.* attempted such a collateral attack by suggesting that erroneous jury instructions on the manslaughter by failing to provide explained the acquittal on this count. If successful, such a collateral attack would leave an acquittal technically intact, but undermine the acquittal's meaning as a declaration of innocence.

To be legitimate and respected, jury verdicts must have clear meaning. The majority in *J.F.* rejected the Crown's procedurally improper attack on the acquittal, in order to safeguard the acquittal's legitimacy as a declaration of legal innocence. This explains the majority's reference at para. 23 to the "legitimacy of verdicts" when they denied the Crown's argument in *J.F.*

The principle that acquittals are declarations of legal innocence also explains why a retrial would not be an appropriate remedy in *J.F.*, where the inconsistency was genuine and the acquittal was left intact. Allowing a retrial on the manslaughter by failing to provide count would invite the inconsistency that led to the quashing of the conviction on appeal. Issue estoppel bars a retrial in such circumstances.

2. To the extent that previous decisions of the Court of Appeal failed to follow *J.F.*, they should not be followed.

This case also did not decide whether the approach in *J.F.* should apply to judge-alone trials. However, in appeals based on inconsistent verdicts, the Crown should appeal an acquittal if it believes an error of law caused the acquittal. At the same time, the Crown need not appeal an acquittal in all cases in order to successfully resist an inconsistent verdict appeal. It is open to the Crown to show the convictions are not genuinely inconsistent (i.e. reasonable) by reconciling the verdicts based on temporal, qualitative, or evidentiary distinctions between the offences.

3. Here, the court found that the convictions should be quashed and acquittals entered.

On the record in this case, if the appellant was guilty of either sexual interference or invitation to sexual touching, he was necessarily guilty of sexual assault. As such, there

was a patent inconsistency between the appellant's convictions on the sexual interference and invitation to sexual touching counts on one hand, and his acquittal on the sexual assault count on the other.

The court found that the "confusing" yet legally correct jury instructions could not reconcile the inconsistent verdicts. It was speculative to conclude the acquittals resulted from jury confusion. Also, as per *J.F.*, improper instructions did not make the improper verdict proper.

As for the Crown appeal on the acquittal, the jury instructions did not amount to an error of law. The trial judge told the jury twice that physical contact, even a gentle touch, could constitute the "force" required for sexual assault. She also repeatedly linked "force" with "touching" in her instructions on the sexual assault count. At trial, the Crown did not object to the instructions. On appeal, the Crown could not establish that there was an error in law in the jury instructions, nor that leaving simple assault as an available verdict tainted the acquittal. The acquittal was upheld.

In turn, issue estoppel barred a retrial on either of the other counts. A retrial would have invited the jury to return verdicts inconsistent with the appellant's acquittal of sexual assault. Consequently, the Court of Appeal directed an acquittal on the counts of sexual interference and invitation to sexual touching.