

# CHILDRENS COURT OF QUEENSLAND

CITATION: *R v NJ, NBC & RO* [2020] QChC 12

PARTIES: **THE QUEEN**

**v**

**J**  
(defendant)

and

**C**  
(defendant)

and

**O**  
(defendant)

FILE NO/S: 147/19

DIVISION: Criminal

PROCEEDING: Trial

ORIGINATING COURT: Childrens Court of Queensland

DELIVERED ON: 1 May 2020

DELIVERED AT: Cairns

HEARING DATE: 28 & 29 April 2020

JUDGE: Morzone QC DCJ

VERDICT:

**1. For count 1, the offence of rape:**

- a. I find the J not guilty.**
- b. I find the C not guilty.**
- c. I find the O not guilty.**

**2. For count 2, the offence of making child exploitation material:**

- a. I find the J not guilty.**
- b. I find the O not guilty.**

**3. Each defendant is discharged in respect of those counts in accordance with the verdicts.**

**CATCHWORDS:** CRIMINAL LAW – JUDGE ALONE TRIAL – serious indictable offence – the child elected a trial to a Childrens Court judge sitting without a jury – whether the defendants are guilty or not guilty of count 1 rape – carnal knowledge, absence of consent, and whether defence of mistake of fact as to the complainant’s consent and/or age excluded - whether defendants guilty or not guilty of alternative verdict for unlawful carnal knowledge – whether defence of mistake of fact as to the complainant’s age excluded – whether defendants guilty or not guilty of count 2 making child exploitation material – whether actors actually made child exploitation material – whether defendants aided in offending of “making child exploitation material.”

**Legislation**

*Evidence Act* 1977 (Qld), ss 21A, 21AO, 21AQ, 93A, 102  
*Criminal Code* 1899 (Qld), ss 7(1)(a) & (c), 349(1) & (2)(a)  
*Youth Justice Act* 1992, ss 98 & 103

**Cases**

*R v Beck* [1990] 1 Qd R 30.  
*R v Clarkson, Carroll, and Dodd* (1971) 55 Cr App R 445  
*R v Francis* [1993] 2 Qd R 300  
*R v Licciardello* [2018] 3 Qd R 206  
*R v MMH* [2020] QDC 70  
*Robinson v R* (1999) 197 CLR 162  
*Wedd* (2000) 115 A Crim R 205

**COUNSEL:** E Coker for the crown  
M Dalton for the defendant J  
J Sheridan for the defendant N  
J Trevino for the defendant O

**SOLICITORS:** Office of the Director of Public Prosecutions for the crown  
Richardson Eckersley Lawyers for the defendant J  
Osborne Butler Lawyers for the defendant N  
Legal Aid Queensland for the defendant O

**Summary**

- [1] One evening between 14 September 2017 and 1 October 2017, when her parents were absent, L, a 15 year old girl, hosted a small gathering of friends at her family home. She invited her two girlfriends – A who was 15 and the complainant who had just turned 13. She also invited the defendants J, C and O who were aged 16, 17, 16 respectively.
- [2] Each of the children became intoxicated to varying degrees during the evening. The girls had started drinking alcoholic drinks before the boys arrived, and all of the children continued

drinking alcohol together until L went to bed. The remaining two girls and the three boys then continued drinking, used the spa, and socialised together until A went to bed. The complainant then remained in the company of the three boys.

- [3] At one point she was in the bathroom with the three boys when it is alleged she was raped and depicted in child exploitation material. The prosecution alleges that J raped the complainant, and that he was aided by the presence and encouragement of O, and also C who recorded some of the conduct on a mobile telephone. The prosecution further alleges that C, J and O by their actions also made child exploitation material, or alternatively J and O aided C in doing so. C later distributed the phone recording over social media.
- [4] The defendants, J, C and O are charged variously as follows:
- Count 1: That on a date unknown between 14 September 2017 and 1 October 2017 at Cairns in the State of Queensland, J, C and O raped the complainant.
- Count 2: That on a date unknown between 14 September 2017 and 1 October 2017 at Cairns in the State of Queensland, J, C and O made child exploitation material.
- Count 3: That on a date unknown between 14 September 2017 and 1 October 2017 at Cairns in the state of Queensland, C distributed child exploitation material.
- [5] J pleads not guilty to counts 1 and 2. C pleads not guilty to count 1, but guilty to counts 2 and 3. O pleads not guilty to counts 1 and 2.
- [6] The trial proceeded over two days in accordance with the defendants' elections of a trial before a judge sitting without a jury.<sup>1</sup> The issues in the case involved disputation of carnal knowledge, whether consent was given, mistake of fact as to complainant's consent and/or age, and culpability of the defendants as parties to the offending. I have considered all the evidence and applied the same principles of law and procedure as a trial by jury.<sup>2</sup>
- [7] As to count 1, rape - I am not satisfied beyond reasonable doubt that the defendant, J, had carnal knowledge of or with the complainant; and I have a reasonable doubt that the complainant did not consent. It must follow that the prosecution failed to prove the guilt of J for count 1 – rape, and C and O are not culpable as parties to any offending, and the alternative verdict of unlawful carnal knowledge is not open.
- [8] As to count 2, making child exploitation material - I have accepted the defendant C's plea of guilty; but I am not satisfied beyond reasonable doubt that J and O made child exploitation material, or that J and O by their knowledge, conduct and encouragement, aided C in making child exploitation material for want of the requisite degree of knowledge that the complainant was 16 years or older.
- [9] For count 3, I have accepted the defendant C's plea of guilty of distributing child exploitation material.
- [10] Therefore, I am duty bound to acquit each defendant of counts 1 and 2, and the alternative count of unlawful carnal knowledge.

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<sup>1</sup> *Youth Justice Act* 1992 ss 98 & 103.

<sup>2</sup> Cf. *R v MMH* [2020] QDC 70 per Smith DCJA.

## Legal Framework

- [11] Each defendant is presumed to be innocent. The burden rests on the prosecution to prove the guilt of the defendants. For the prosecution to discharge its burden of proving the guilt of a defendant, it is required to prove beyond reasonable doubt every element that goes to make up the offence charged and similarly exclude any possible defence. Of course, there is no burden on a defendant to establish their innocence or any fact, save for any defence under s 215(5) of belief on reasonable grounds, that the complainant was of or above the age of 16 years in respect of an offence of unlawful carnal knowledge of a child under 16 years.
- [12] Since there are multiple charges, I will consider each charge separately, evaluate the evidence relating to that particular charge to decide whether I'm satisfied beyond reasonable doubt that the prosecution has proved its essential elements. Although the defendants are being tried together, I give the cases against, and for, each of them separate consideration and separately consider the evidence admitted in relation to that defendant. In respect of each charge, each defendant is entitled to have the case decided on the evidence, and on the law, that applies to him, and as it relates to each particular charge. And so I will return separate verdicts in respect of each defendant and separate verdicts on each charge.
- [13] The circumstances of the alleged offending are different. My general assessment of the complainant and other witnesses will be relevant to count 1. The prosecution also relies on answers given by the defendant, C, in an interview with police as supporting its case against him for count 1.
- [14] The evidence comprises the witnesses' testimony, exhibits and express admissions. For the most part the facts can be proved by direct evidence, as well as circumstantial evidence capable of providing a proper basis for the court to draw inferences. The court must only draw reasonable inferences from basal facts proved by the evidence, where there is a logical and rational connection between those facts and the inferences or deductions or conclusions. In a case where the outcome (or an essential element such as unlawful carnal knowledge for count 1) is based entirely or substantially upon circumstantial evidence, where there is an inference reasonably open which is adverse to the defendant (i.e. one pointing to his guilt) and an inference in his favour (i.e. one consistent with innocence), I may only draw an inference of guilt if it overcomes any other possible inference so as to leave no reasonable doubt to my mind.<sup>3</sup>

## Complainant's Testimony

- [15] The complainant's testimony comprised of her three recorded conversations with police at the police station made on 5 October 2017, 4 March 2018 and 12 April 2019.<sup>4</sup> I have had regard to that recorded evidence, which was played during the course of the trial when the court was closed. I received a copy of the respective transcripts as an aide only.
- [16] Recorded evidence was also taken from the complainant during the course of the trial.<sup>5</sup> At that time the complainant gave her evidence by an audio/visual link between a separate room and the courtroom. There was an independent support person sitting in the room, and no other person, and I am satisfied that the complainant was unable to see the defendants who

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<sup>3</sup> *Wedd* (2000) 115 A Crim R 205, 214.

<sup>4</sup> *Evidence Act* 1977 (Qld) ss 93A & 102.

<sup>5</sup> *Evidence Act* 1977 (Qld) ss 21AO and 21AQ.

were present in the court room at the time. The court was closed during the recorded evidence.

- [17] All of these measures used for taking and showing of the complainant's evidence were in accordance with the standard and routine procedure of the court.<sup>6</sup> I assess this evidence in the same way as the other probative evidence in the case.
- [18] The complainant, who was then 13 years old, was a reluctant participant when she spoke to police on 5 October 2017 and refused to talk about any events. When asked for any particular reason why she did not "*want to talk about it*", she blandly responded – "*and mum thinks it was rape but it technically wasn't if I did not tell them to stop.*" The complainant disclosed feeling uncomfortable about telling her mother "*things*", and explained that she "*lost most of her friends*" after her parents "*took action*". The complainant explained what rape meant to her stating: "*When they force you to do it ... and you don't want to do it.*"; and by "*it*" she meant "*sex*", which she explained as "*... when a man and a woman interact with each other as in like, um, I know what it is, um, it's just really embarrassing.*" And after the officer reflected her answer, she added: "*He didn't force me to do it. I never said no to it.*"
- [19] The complainant was still 13 years old when she again spoke to police five months later on 4 March 2018 in the wake of police investigating video footage subject of counts 2 and 3. She remained a reluctant participant still not wanting to talk about the content of the video or participate. Whilst the complainant made it clear that she was unaware of the recording, she knew that it was happening, saying "*then didn't really, like I didn't know that it was recording, but like, I knew that it was happening*". But despite being pressed by the officer, she "*didn't want to say*" what was being videoed.
- [20] In the early stages of the second interview the complainant, unprompted by any questions, spoke of a conversation about ages saying: "*And this is one thing me and A should have not done, but we told them that we were sixteen. ... which they, and they told us they were seventeen, which I don't even know if they*". When later asked why she so misrepresented her age, the complainant explained: "*I don't know ... because like, I felt uncomfortable like, not uncomfortable but it would be like, shamed to tell them my real age 'cause we were so much younger than them.*"
- [21] During the course of that second interview, the complainant said "*Well I didn't drink a lot, A and the girls drank a lot*". She later described the extent of her drinking saying that she started drinking "*Smirnoffs ... lime and vodka or something like that*" later, and she had "*four*" that night "*about an hour before the thing hap-, the whole thing, the video happened*". She described "*I felt tipsy, as you would say. ... Well I couldn't walk str-, like in a proper straight line. ... But I could like, like t-, if I really tried and concentrated*". She said - "*and I thought like I'd sober up if I had a shower.*"
- [22] When again brought back to the events, the complainant told the officer that she had gone for a shower "*and then one of them came in*" but said "*I'm not saying more than that*", but added "*and then the other two came in ... well, but, it only happened with the two and then one was recording*". Later the complainant gave some temporal context to what happened in the bathroom saying: "*Well I went to have a shower after I had them drinks, me and A went to lay down to watch an episode of a movie ... And then I went for a shower, and the boys were still drinking outside. And then I don't know, I think one of them needed the toilet and I did*"

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<sup>6</sup> Evidence Act 1977 (Qld) s 21A.

*not lock the door when I went for a shower.” The complainant also declined to identify the defendants saying: “Cause I just don’t want to., I don’t want to get in trouble. ... like I get called so much shit when I do things by A and T ‘cause we’re not friends anymore ... and they like, they just bully me. So yeah, I’m not going to tell any of their names”.*

- [23] By the time of her third interview with police on 12 April 2019, the complainant had turned 14 years old. At that time the complainant broadly claimed *“I don’t remember what happened”* and explained *“the last thing I remember, ‘cause we were all drinking that night, and the last thing I remember was going to lay down ... and don’t remember anything after that but when I woke up L and the girls told me what happened and I said I didn’t believe them,. Then they showed me a video. ... When I got up in the morning.”* She said she’d started drinking *“probably two hours”* before the boys arrived at *“around 8:30 or 9:00 ish”*. She described in more detail her consumption of liquor – *“roughly five or four of each drink”*; starting with apple cider, then Cruisers *“They’re like a lollipop sort of drink”*, *“and then we had the Smirnoffs. And then there was UDLs”* *“... and then the Jack Daniels ... in a cup ... probably like a whole wine glass.”* She claimed *“I remember laying down and then I don’t remember anything after that.”* She accepted that this was a few hours after the boys arrived saying – *“we were all sitting outside on the table drinking and then we went for a swim. ... and then we had cones ... [off] weed.”* *“all of us did [that] ... probably three grams to all of us.”* Later in the interview the complainant recalled *“Oh and we did hop in the spa as well. All of us girls. L had a spa um, behind her table”* *“... probably just after we got out of the pool”* and the boys *“where in there with us girls”*.
- [24] The complainant described her state before lying down as *“a bit sick”* ... *“Like I was going to spew”* ... *“crying ... probably ‘cause we were that, pretty drunk”* *“...Well I wasn’t really walking in a straight line ... and dizzy.”*
- [25] The complainant estimated that she went to sleep *“like two minutes, three minutes after”* drinking the Jack Daniels. When asked *“... had anything happened with any of the boys prior to you going to sleep”*, she answered – *“no”*.
- [26] She maintained that: *“I don’t, like I didn’t remember anything that night until after like, when I went to sl-, like when I went to lie down, I don’t remember anything after that. And then when I woke up, the girls said to me like, what happened and I said, that’s not true, And then L said there’s a video and she went and grabbed her phone and showed me.”*
- [27] She recanted from her version given in the second interview of telling the boys that she was 16 saying – *“That’s not true. A told me to lie to yous because she didn’t want to get them in trouble.”* When asked if she told the boys her age or not, the complainant explain:

*COMPLAINANT: “I told them how old I was. They knew how old I was.”*

*OFFICER: “Okay, yep. And how old was that at the time?”*

*COMPLAINANT: “Twelve.”*

*OFFICER: “Yep. Um, was it, was it before or –”*

*COMPLAINANT: “or thirteen. Twelve or thirteen –”*

*OFFICER: “Okay.”*

COMPLAINANT: *“Thirteen, I think. I just turned it.”*

- [28] The complainant also implicated A for influencing the diluted version about her alcohol intake given during the second interview. As to her explanation about going to the shower when a boy entered the bathroom to go to the toilet, she explained that she did not remember saying that and *“probably just wasn’t thinking at the time, I guess”*.
- [29] During her evidence, the complainant was only asked by the prosecutor, and she accepted that, she told the truth in the third and final interview. In cross examination the complainant conceded that she’d lied to police in her earlier interviews, although “most” of the second interview was true.
- [30] The complainant maintained that she was intoxicated and had no memory of going for a shower, interacting with the boys in the bathroom, talking with A beforehand, later drinking and jumping on the bed with A or vomiting in the bedroom. She accepted that she was in the spa at one point in the evening but could not recall others in the spa or whether she was wearing her underpants and a bra. As to discussion of ages, she rejected that she told the boys that she was 16 years old and asserted that *“I told them how old I was”*, but could not remember J told her he was 16 years old. The complainant accepted that she was *“drunk”* but thought herself still able to walk and talk to people, and not falling over. The complainant did acknowledge that she had a Facebook conversation with another child wherein she said she *“never got raped”* in response to a query whether it was true you got gang raped. and when asked – *“Well, why did you tell the cops that?”* – she responded *“well, I didn’t”*. During cross examination the complainant recanted from and explained that she was afraid that she was going to tell the boys’ sisters and they were going to do something.

### **Evidence of L**

- [31] L testified that she hosted the gathering at her home. L was 15 years old at the time. She accepted, as she told police, that – *“I would say she looked about my age, and back then, she would have looked about 15 or 16.”*
- [32] She described that she was drinking with the girls A and the complainant before the boys arrived. She remembered that she had “quite a few” Vodka Cruisers by the time the boys arrived, and that everyone continued drinking together into the night. She recalled that she drank *“maybe ten ... twelve”* vodka cruises. She recalled that the complainant and A also drank bourbon straight from the bottle. She was the first to go to bed in her mother’s room (not sure of the time), as the others continued to drink outside *“in the pool area”*, and at that time the complainant was - *“a bit – quite drunk” ... “slurring” ... “Stumbling, sort of.”*
- [33] L testified that she was awoken by C during the night and went into her own room where A was asleep on the bed and the complainant was asleep on the floor; and saw they had *“vomited everywhere”*. L then explained how she got the girls into the bathroom and gave them a shower before returning to her mother’s room to sleep until the following morning. She later discovered the recording made by C on her mobile phone. During cross examination, L accepted that she was truthful and had a fresher memory when she told the police on 3 April 2018, that – *“After the boys left my house the next day, [the complainant] said ‘I got with J and O in the bathroom’”*.

### **Evidence of A**

- [34] A was also 15 years old at the time, and had been staying at L's home for "*Like, three nights*". She recalled "*hanging out*" with the other two girls before the boys arrived on the day of the alleged offences. That's when she started drinking. She recalled that she and the complainant were drinking rum mixed with soft drink, and that she'd consumed "*three, four cups*" by the time that L went to bed about two hours later. She estimated that L went to bed at about 6 pm or 7 pm "*when the sun went down*" and that she continued drinking with the complainant and the three boys. She testified that she went swimming with the complainant and that the two girls got into the spa and C joined them. In cross examination she stated the complainant wore "*a bra and undie*". A further testified that she left C and the complainant in the spa, and later saw them kissing in the spa at about 10 pm. At that time she described herself as "*Pretty drunk. Like, 85 per cent out of a hundred,*" and that the complainant was "*Just as drunk as I was or more.*"
- [35] A recalled a conversation she had with the complainant in the hallway after telling her she wanted to go to bed, which was about 10 minutes after the complainant got out of the spa, and after some more drinking together.
- [36] A testified that as she was walking with the complainant in the hallway towards L's bedroom one of the boys "*asked if we wanted to take a photo or something*" in the bathroom and that the complainant "*said she was going to go in, and I said, no, let's go to bed, like, I'm tired. Like, I couldn't even walk properly at the time. I was kind of stumbling, so.*" She described that "*I think everyone just walked in, but I walked away. I didn't really look back. She just said she was staying, and I went to bed.*"
- [37] A was cross examined about this conversation in the hallway. She was initially defensive of an earlier more detailed account she gave to police, but she later resigned to accept as truthful, despite not recalling that she told the police officer that:

*"And before she went into the bathroom, I actually grabbed her and said, "Where are you going?" And she's like, "Into the toilet." And I was like, "With?" And she pointed – them. And I was like, "Why?" And she just, like, "None of your business." And I was like, "[the complainant], don't do this." ....*

- [38] A also accepted as a truthful and a more fresh memory (in her statement to the police) that she grabbed the complainant and said:

*I told her, like, "If you want to do it, do it yourself." Again, and she got angry at me, and she's like, "It's my body, not yours. I don't know why you care." I was like, "Whatever." I got angry at her and left."*

- [39] A testified that she was asleep within a "*couple [of] minutes*" of reaching the bedroom, but recalled later waking up to see the complainant lying naked in the bedroom, and that they both vomited which drew the wrath of L who came in, but A had no recollection of L showering them in the bathroom. This account was also challenged in cross examination, premised on her acceptance of giving a truthful account of what happened to police in 2 May 2018, as follows:

*"And do you agree that you told Senior Constable Curtis about having a conversation with [the complainant] at the bathroom door. Yes?---Yes.*

*Where she spoke to you about it being her body and she can do what she likes?---Yeah.*

*Yes. And you got angry with her?---Yeah.*

*And you went to bed?---Yeah.*

*You went into L's room to sleep?---Yep.*

*And [the complainant] went into the bathroom with the boys?---Yep.*

*Yes. And the next thing that happened is that [the complainant] came into your room?---Yep. The room I was sleeping in.*

*That's right. And she was with J?---Yeah.*

*You woke up?---Yeah.*

*You spoke to her at that point?---Yep.*

*And she wanted to keep drinking?---When we were laying on the bed.*

*That's right?---No.*

*And I suggest that she sat on the bed and she lay down and then you told Senior Constable Curtis that you said:*

*I was like, "Get up" and she got up. We had another argument. I'm pretty sure she dressed.*

*Do you remember saying that to Senior Constable Curtis?---No.*

*If I can have a copy of – I'll show you this document. I'll open it to page 4. Could you read that passage that I have tabbed - - -?---Which passage? - - - with the yellow marker, beginning "she didn't care" – can you read that to yourself?---Yep.*

*Do you agree that you told Senior Constable Curtis that [the complainant] came into the room, she lay down on the bed?---Yep.*

*Yes. And that's what happened?---Yep.*

*And then she got up, yes?---Yep.*

*She got dressed?---Yep.*

*She did that by herself. Is that right?---Yep.*

*She didn't have any assistance?---Yep.*

*And you had another argument with her. That's what you told Senior Constable Curtis, isn't it?---Yeah.*

*You were still unhappy about her choice that she'd made to go in the bathroom with the boys?---I think so.*

*And she was able to speak with you and put her side of the argument across?---I'm just saying yeah because I don't remember the statement, so.*

*Right. Well - - -?---At all.*

*- - - you told Senior Constable Curtis that you had another argument with [the complainant]. Is that correct?---Yeah, maybe.*

*And that's what happened, isn't it?---Yep.*

*And in that argument, [the complainant] was able to speak with you and put her side of the argument to you?---Yep.*

*And she told you then that she wanted to keep on drinking?---Yep.*

*And in fact that's what you and her did?---Yep.*

*You went into the kitchen - - -?---Can I take a break? I'm just saying yep because I don't remember saying this statement at all. I could have said it at the time, but my memory now – I don't remember saying that, so.*

*Okay. Well, let's take it one step at a time. You told Senior Constable Curtis on the 2nd of May 2018 that:*

*Me and [the complainant] went back into the kitchen, continued drinking.*

*Didn't you? Do you accept that's what you said to Senior Constable Curtis?---Yeah.*

*That's what happened?---Maybe.*

*Your memory of what had occurred on this night in 2017 would have been better when you were speaking to Senior Constable Curtis on the 2nd of May 2018. Do you accept that?---Yeah.*

*You went back into L's room, didn't you?---I don't remember.*

*Well, that's what you told Senior Constable Curtis on the 2nd of May 2018, isn't it? Yes?---I don't remember. Probably, yes.*

*Well, do you accept that's what you told Senior Constable Curtis on the 2nd of May 2018?---Yes.*

*And you were telling the truth to Senior Constable Curtis?---Yeah.*

*So that's what happened. You went back into the room and continued drinking with L – with [the complainant]. Isn't that right?---Yeah.*

*Is this jogging your memory about what happened that night?---No.*

*You went on to say to Senior Constable Curtis that you continued drinking in the room with [the complainant]. Do you accept that?---Yeah.*

...

*It's the case that you told Senior Constable Curtis that you were jumping on the bed together with L – with [the complainant]?---Yeah.*

*And it was after that point that the two of you were sick and vomited and threw up in the room?---Yeah.”*

[40] During cross examination, A recanted from her police statement of 20 February 2018 that - “So they were asking about our age. I said I was 15. She said she was 16”, saying that it was untruthful. She affirmed her recollection disclosed in her later police statement of 12 March 2020 that – “At some point in the afternoon, I think the boys asked how old [the complainant] and I were. [The complainant] said she was 15. I said I was 15, as well, because I was – I knew that [the complainant] wasn't that age yet.”

[41] She accepted that the following day, the complainant told L that she had got with J and O in the bathroom.

#### **Evidence of the complainant's mother**

[42] The complainant's mother testified about the complainant's responses when she tried to speak to the complainant about information she'd received. She recalled that on one occasion – “She just told me to mind my – mind my own business.” On another occasion she reacted violently. And before taking her to the police station the complainant's mother recalled – “I remember her telling me to mind my business, and I asked her, you know, about what had happened. ... She turned around and said, you know, “Just leave it be, mum. Maybe I wanted it.” ... She just told me to mind my business.”

#### **Defendant C's Recorded Police Interview**

[43] The prosecution relies on answers given by the defendant, C, in an interview with police as supporting the case against him. The evidence is in the form of a video recording which was played, and I was given a transcript as a mere aid to look at while the video was played with my own view of the evidence prevailing. I must consider whether those parts that the prosecution relies on as indicating guilt are true and accurate. During the course of the interview a number of questions were asked by the police officer of the defendant. The same reasoning applies here as questions by counsel of a witness. Since the defendant did not agree to or in some way accept the contents of a question asked of him, the question cannot become any evidence against him. So, for example, the police officer made contradictory propositions and put the effect of contrary evidence, but C did not accept such matters, and the propositions cannot be used as evidence of the defendant. In the course of the interview, it is said, the defendant C made statements which the prosecution rely on as pointing to his guilt. He also gave answers indicating his innocence. If I accept them as true I will give the defendant's answers appropriate weight, bearing in mind that they have not been tested by cross-examination (in court).

[44] None of the defendants gave or called evidence. That is their right. They are not bound to give or to call evidence. Of course, the fact that a defendant does not give evidence is not evidence against him, it proves nothing at all, it does not constitute an admission of guilt by

that conduct and it will not be used to fill any gaps in the evidence led by the prosecution or add in some way to the case against him. It cannot be considered at all when deciding whether the prosecution has proved its case beyond a reasonable doubt, prosecution retains the burden of proof to that standard.

[45] In this trial the prosecution must prove the elements of the offences and exclude any possible defence beyond reasonable doubt, I turn to these now.

### **Count 1 - Rape**

[46] Section 349(1) & (2)(a) of the *Criminal Code* provides for the offence of rape when a person has carnal knowledge with or of another person, and the person's consent to an act is not freely and voluntarily given if it is obtained, inter alia, by force. The prosecution relies upon s 7(1)(a) to prosecute J as actually committing the offending, and upon s 7(1)(c) to prosecute C and O as parties aiding him in the offending.

[47] The contested issues vis-à-vis the principal offending are:

1. Did the defendant, J, have carnal knowledge with or of the complainant?
2. Did the complainant not consent?
3. Has the prosecution excluded the defence of mistake of fact as to the complainant's consent and/or age?

### ***Did the defendant, J, have carnal knowledge with or of the complainant?***

[48] Carnal knowledge means the insertion of the defendant's penis into the genitalia of the complainant. Penetration to the slightest degree is sufficient and ejaculation is not necessary.

[49] The relevant evidence comprises the complainant's testimony and the two video recordings in Exhibit 6.

[50] I approach the complainant's evidence with care before relying on it,<sup>7</sup> because her memory was affected by alcohol and the passing of time, there are irreconcilable inconsistencies about her alcohol consumption, sobriety and conversations about her age, she lied and otherwise refused to disclose to the police "what happened" rather than assert a loss of memory, she claims no memory of any conduct with the boys in the bathroom despite these events likely occurring before her last memory of going to bed. Her evidence is both confused and confusing, and inherently unreliable. Although I accept L's evidence that the complainant acknowledged that *'I got with J and O in the bathroom'*, there is insufficient cohesive evidence of what she meant when she sought to refute her mother's assertions or her understanding of rape or "sex".

[51] I am left with the video recordings in Exhibit 6, which the defendants submit is insufficient to exclude competing inferences or a reasonable doubt about penile vaginal penetration. Where there is an inference reasonably open which is adverse to the defendant (i.e. one pointing to his guilt) and an inference in his favour (i.e. one consistent with innocence), I may only draw an inference of guilt if it so overcomes any other possible inference as to leave no reasonable

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<sup>7</sup> *Robinson v R* (1999) 197 CLR 162.

doubt to my mind.<sup>8</sup> The video evidence is in two parts, taken from different perspectives, of the defendant J and the complainant in the bathtub. The first shows the defendant and the complainant for about 4 seconds, and the second shows them for about 4 seconds in 3 segments of repetitive footage. The quality of the videos are poor, unfocused, moving, short and intermittent. While more subdued in the first video, the complainant is active, and responsive while moving and supporting herself in the second video. To my mind's eye the videos are consistent with penetrative sexual intercourse to give rise to the adverse inference that the defendant inserted his penis into the vagina of the complainant. This is supported by the juxtaposition and colocation their bodies, and the mutuality and synchronicity of their movement. Even so, the powers of observation of video footage is fallible, and the risk of mistake, conjecture and speculation is especially great with fleeting and poor images. I am unable to exclude a favourable inference of simulated but nonpenetrative sexual intercourse, which I think is reasonably and rationally open on the evidence. In the circumstances, I cannot conclude that the inference adverse to the defendant so overcomes another inference reasonably open, such as simulated but nonpenetrative sexual intercourse or external grinding, so as to leave no reasonable doubt in my mind that the defendant inserted his penis, even to the slightest degree, into the genitalia of the complainant.

- [52] Therefore, I am not satisfied beyond reasonable doubt that J did have carnal knowledge with or of the complainant. I am bound to conclude that all defendants must be acquitted of count 1 – rape, and the alternative verdict of unlawful carnal knowledge.

***Did the complainant not consent?***

- [53] Having regard to my doubt about carnal knowledge, it is unnecessary to deal with consent, however, I am also left with a reasonable doubt about this element.
- [54] Consent means consent freely and voluntarily given by a person with the cognitive capacity to give consent.<sup>9</sup> And without limiting that definition, a person's consent to an act is not freely and voluntarily given if it is obtained: by force; or by threats or intimidation; or by fear of bodily harm; or by exercise of authority; or by false and fraudulent representations about the nature or purpose of the act; or by a mistaken belief induced by an accused person that the accused person was the person's sexual partner. Consent does not need to be communicated verbally, consent can be communicated non-verbally and can be inferred from all of the circumstances. Cognitive capacity in this context means that at the time of the alleged offence, the complainant had sufficient understanding to know what was occurring in order to be able to give consent to it.
- [55] Carnal knowledge may be consensual notwithstanding that the consent is induced by excessive consumption of alcohol, and it is not enough to merely show that the complainant did not resist because her submission is due to the fact that she is drunk. The critical question in this case was whether the complainant had, by reason of sleep or a drunken stupor, been rendered incapable of deciding whether to consent or not. It is not correct as a matter of law that it is rape to have carnal knowledge of a woman who is drunk who does not resist because her submission is due to the fact that she is drunk.<sup>10</sup>

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<sup>8</sup> *Wedd* (2000) 115 A Crim R 205, 214.

<sup>9</sup> *Criminal Code* 1899 (Qld) s 348.

<sup>10</sup> *R v Francis* [1993] 2 Qd R 300, 305.

[56] The prosecution rely upon evidence of the complainant's alcohol intake, likely impact of alcohol given her age, stature, inexperience and escalated drinking during the night, indicia of intoxication with her slurred speech and unstable movement, her posture in the bathroom, vomiting in the bedroom and her black out of memory - to contend that consent was not freely and voluntarily given or that she lacked the cognitive capacity to consent.

[57] While it is clear that the complainant was intoxicated, I am not satisfied beyond reasonable doubt that she did not consent, or lack the cognitive capacity to do so because:

1. I accept A's account to police about the conversation with the complainant, shortly after kissing one boy in the spa, in the hallway and bathroom door area. In that exchange the complainant was assertive, independent and clear thinking.
2. While more subdued in the first video, the complainant is alert, active, and responsive while moving and supporting herself in the second video.
3. She refuted her mother's intervention and opinion by a reasoned assertion that she was not forced and inferred she did not engage in unwanted sex.
4. When asked about the video by police on 24 March 2018, the complainant made it clear that she was unaware of the recording, she knew that was happening, saying "*then didn't really, like I didn't know that it was recording, but like, I knew that it was happening*".
5. She apparently uttered to L – "*I got with J and O in the bathroom*".
6. On 17/7/18, her Facebook asserted that – "I never got raped ... everyone just believes what they want".
7. When the complainant went with J to the room where A was sleeping, she was able to dress herself and again defend her actions to A. She then drank some more with A in the kitchen before jumping around, and vomiting.

[58] Notwithstanding my finding about carnal knowledge, I find that the complainant did have the cognitive capacity to consent, but I am not satisfied beyond reasonable doubt she did not consent.

## **Count 2 – Making child exploitation material**

[59] Section 228B(1) of the *Criminal Code* provides for the offence of making child exploitation material. '***Child exploitation material***' means material that, in a way likely to cause offence to a reasonable adult, describes or depicts a person, or a representation of a person, who is, or apparently is, a child under 16 years in a sexual context, including relevantly here, engaging in a sexual activity, or in an offensive or demeaning context.<sup>11</sup> None of the defences prescribed by s 228E are relevant here.

[60] There is no dispute that N recorded count 1 in two video files. He accepts by his plea that those two files are the child exploitation material he made the recording J interacting with the complainant in the bathtub in the presence of himself and O.

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<sup>11</sup> *Criminal Code* 1899 (Qld) s 207A.

[61] The prosecution also rely upon s 7(1)(a) of the *Criminal Code* to inculcate J and O on the basis that each was involved in making the child exploitation material. Alternatively, the prosecution rely upon s 7(1)(c) to inculcate J and O as parties in the offending on the basis that each aided J to make child exploitation material by their actions.

***Did J and/or O make child exploitation material?***

[62] I do not accept the prosecution's argument that J and/or O are caught by s 7(1)(a) of the *Criminal Code*.

[63] Sub-section 7(1)(a) captures a person "*who actually does the act or makes the omission which constitutes the offence*". The act which constitutes the commission of the offence under s 228B(1) is the making child exploitation material. Sub-section 228C(4) defines "make child exploitation material" to include (a) produce child exploitation material; and (b) attempt to make child exploitation material.

[64] "Make" and "produce" in the context ought be given their ordinary everyday meaning, and connotes the actual brining into existence of the offending material. "Make" is defined in the Macquarie Dictionary<sup>12</sup> as, contextually relevant here: "1. to bring into existence by shaping material, combining parts, etc.: to make a dress. 2. to produce by any action or causative agency: to make trouble. 3. to cause to be or become; render: to make an old man young. 6. to bring into a certain form or condition: to make bookcases out of orange boxes. ... 10. to compose, as a poem. ... 12. to do; effect: to make a bargain. ..."

[65] "Produce" is defined in the Macquarie Dictionary as, contextually relevant here: "(1) to bring into existence; give rise to; cause: to produce steam".

[66] I find that neither J nor O brought the video into existence. Instead, C was in control of the mobile phone camera and he alone made or produced the material. In my view, an actor is not caught by the scope of s 228B(1), but may be relevant to a different offence under s 228A of involving a child in making child exploitation material – which is not the case here.

[67] I am not satisfied that J and O made child exploitation material, and they are entitled to be acquitted on this charge.

***Did J and/or O aid C to make child exploitation material?***

[68] The prosecution argue that pursuant to s 7(1)(c) of the *Criminal Code*, J and/or O aided C in the making of child exploitation material by encouragement.

[69] The onus remains on the prosecution to prove that the defendants J and/or O assisted C to commit the offence of making child exploitation material, that he intended to help him to commit the offence, and he had actual knowledge or expectation of the essential facts of the principal offence including the complainant was under 16 years of aged.

***Did the defendant assist C with intention to do so?***

[70] Whereas here the prosecution alleges aiding by encouragement, such being present at the time of the offence, the prosecution must prove both that the defendant as an aider did

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<sup>12</sup> <https://www.macquariedictionary.com.au>

actually encourage the perpetrator in the commission of the offence, and also that the defendant intended to encourage the commission of that offence by his presence.<sup>13</sup>

[71] In *R v Beck*,<sup>14</sup> said:

“Intentional encouragement may come from expressions, gestures “or actions intended to signify approval”. Voluntarily and deliberate presence during the commission of the crime without opposition or real dissent on the a scrutiny of the behaviour of the alleged aider and the principal offender and on the existence which might appear of a bond or connection between the two actors and their action. The fortuitous and passive presence of a mere spectator can be an irrelevance so far as an active offender is concerned. But, on the other hand, a calculated presence or a presence form which opportunity is taken can project positive encouragement and support to a principal offender. The distinction between a neutral and guilty presence of a person at the scene of a crime will be for the jury to access. Proof of guilt of the crime of aiding will not ordinarily be established by mere presence if no tell-tale acts are performed by the alleged person at the scene may be established by other evidence from which it is possible to say that a case of intentional encouragement or support of the principal offender is made out.”

[72] In ascertaining the defendant’s intention, I draw an inference from the circumstances, and from the conduct of the defendant before, at the time of, or after he did a specific act.

[73] I find that all the defendants were in hearing distance of the conversation between A and the complainant in the hallway and bathroom area when one of the boys invited the complaint to take pictures in the bathroom.

[74] I am satisfied beyond reasonable doubt that J actively assisted C in making the child exploitation material by his naked sexualised conduct with the complainant in the bathtub in the presence of the two other defendants, playing up to the camera. Although the sexualised conduct had commenced as between J and the complainant, J actively continuing with his conduct and engagement with the camera demonstrating the requisite intention to assist C as being a main actor in the recording.

[75] I am also satisfied beyond reasonable doubt that O actively assisted C in making the child exploitation material by his separate conduct of acting in a demeaning way towards the complainant by thrusting his groin towards J and the complainant, taking his clothes off to be completely naked, and touching and puppeteering his own penis. He does all of this while dancing around the bathroom playing up to and engaging with the camera. This too demonstrated O’s requisite intention to assist C as being a support actor in the recording.

*Did the defendant have requisite Knowledge of the essential facts?*

[76] As to the requisite knowledge, McMurdo JA said in *R v Licciardello*:<sup>15</sup>

“To be criminally responsible under s 7(1)(b) or s 7(1)(c), a person must know of the offence which is being, or which is about to be, committed by the person he is aiding or intending to aid. That offence is constituted by the conduct (an act or omission)

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<sup>13</sup> *R v Clarkson, Carroll, and Dodd* (1971) 55 Cr App R 445; *R v Beck* [1990] 1 Qd R 30.

<sup>14</sup> *R v Beck* [1990] Qd R 30, 37.

<sup>15</sup> *R v Licciardello* [2018] 3 QdR 206, 30 per McMurdo JA (Sofronoff P and Douglas J, agreed).

of the other person which attracts criminal liability. If the principal offender's crime requires a specific intent, then s 7(1)(b) or s 7(1)(c) requires the aider to know that he is aiding the other to act (or omit to act) with that intent. But if "the offence" has no ingredient of an intent (or other state of mind) on the part of the person who does the act or makes the omission, all that the aider need know is that the conduct constituting the offence is occurring or will occur. Of course, what was not foreseen or foreseeable as a consequence might be relevant, in a certain case, for the purposes of s 23 of the Code."

- [77] It is plain that both J and O had actual knowledge or expectation of the nature and extent of their own conduct of a sexual and demeaning nature going to the essential facts of the principal offence of child exploitation material. The critical question is whether they had actual knowledge or expectation of essential facts that the complainant was under 16 years of age.
- [78] Since the defendants were not sufficiently acquainted with the complainant to glean her age before that night, it seems to me that their individual knowledge can only be informed by the presentation of the complainant, and conversations on that night.
- [79] I am unconvinced about the complainant's evidence about disclosing her age to the defendants, her evidence is uncertain, mixed and unreliable and I reject it. The complainant was unprompted when she initially spoke of a conversation about ages saying: "*And this is one thing me and A should have not done, but we told them that we were sixteen. ... which they, and they told us they were seventeen, which I don't even know if they*", and justified her misrepresentation in terms of personal discomfort. But she recanted from this version in the third statement saying – "*That's not true. A told me to lie to you because she didn't want to get them in trouble*" and in doing so she sought to justify this change of position out of a sense of not getting the boys into trouble and also implicating A. I'm sequestered about the complainant's candour on this issue. Even so, her evidence is left in an unsatisfactory state because she later asserts that "*I told them how old I was*", but there is no evidence of what she said, and she has a demonstrated history of misrepresenting an inflated age on social media.
- [80] During cross examination, A recanted from her police statement of 20 February 2018 that the complainant "*said she was 16*", admitting that it was untruthful. She affirmed her belated recollection disclosed in her later police statement of 12 March 2020 to the effect that the complainant "*said she was 15.*" This too leaves me in a state of considerable doubt.
- [81] As to the complainant's appearance - L testified, as she told police, that – "*I would say [the complainant] looked about my age, and back then, she would have looked about 15 or 16.*" L was 15 years old at the time.
- [82] Given the confused and confusing state of the evidence, I am left with a reasonable doubt about whether J and O knew the complainant was under 16 years old, and therefore, they did not have the requisite knowledge or expectation of the essential facts that the complainant was under 16 years of age. This can be contrasted with the C's culpability and acceptance of his plea to this offending since he harboured doubt about the complainant's age at the time.

## **Verdict**

- [83] For these reasons, my verdicts are:

1. For count 1, the offence of rape:
  - I find the J not guilty.
  - I find the C not guilty.
  - I find the O not guilty.
  
2. For count 2, the offence of making child exploitation material:
  - I find the J not guilty.
  - I find the O not guilty.

[84] Therefore, each defendant is discharged in respect of those counts in accordance with my verdicts.

**Judge D P Morzone QC**