DISTRICT COURT OF QUEENSLAND

CITATION:	*R v HZG* [2020] QDC 108
PARTIES:	**R** **v** **HZG** (Defendant)
FILE NO/S:	DIS-909/19(0)
DIVISION:	Criminal
PROCEEDING:	Trial
DELIVERED ON:	5 June 2020
DELIVERED AT:	Warwick
HEARING DATE:	28 and 29 May 2020
JUDGE:	Barlow QC DCJ
VERDICT:	**Guilty**
CATCHWORDS:	CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – INDECENT ASSAULT AND RELATED OFFENCES – defendant charges with indecent treatment of a child under 16, under 12, who is a lineal descendant, under care – whether complainant's account of event reliable – whether Crown proved the defendant's guilty beyond reasonable doubt
COUNSEL:	E Kelso for the Crown J Goldie for the Defendant
SOLICITORS:	Office of the Director of Public Prosecutions for the Crown Phillip E Crook Lawyers for the Defendant

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Introduction

[1] The defendant is charged that, on a date unknown between 17 January 2013 and 2 June 2014, he unlawfully and indecently dealt with the complainant, a child under 16 years, who was under 12 years and who was, to the knowledge of the defendant, his lineal descendant; and the defendant had her under his care for the time being.

[2] On 1 May 2020, an order was made pursuant to s 615 of the *Criminal Code Act* 1899 (the Code) that the defendant be tried by a judge sitting without a jury.

[3] The defendant has pleaded not guilty. I have conducted the trial. It is my role to determine on the evidence whether the defendant is guilty or not guilty of the offence charged.

Preliminary principles

[4] In a trial by a judge sitting without a jury, the judge must apply, so far as is practicable, the same principles of law and procedure as would be applied in a trial by jury.[1] If statute or the common law requires that information, a warning or an instruction be given to a jury, the judge in a trial by a judge sitting without a jury must take that requirement into account if it is relevant to the trial.[2]

[5] In reaching a verdict, the judge may make any finding or give any verdict that a jury could have made or given if the trial had been before a jury. Any finding made or

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1 Code, s 615B(1).
2 Code, s 615B(3).

verdict given by the judge has the same effect as a finding or verdict of a jury.[3] The reasons for the verdict must include the principles of law that the judge has applied and the findings of fact relied upon.[4]

[6] A defendant in a criminal trial is presumed to be innocent. The Crown has the burden of proving the defendant's guilt of the offence charged beyond reasonable doubt. Before I may find the defendant guilty, the Crown must satisfy me, beyond reasonable doubt, of all the essential elements of the offence.

[7] In conducting the trial and in considering the verdict, I also adopt, with respect, the principles set out by Smith DCJA in *R v MMH* [2020] QDC 70 at [10].

[8] I must reach my verdict only on the evidence presented in court. The evidence comprises what the witnesses said from the witness box or on video tape, the admissions that have been made and the other exhibits. Nothing else is evidence.

Elements of the alleged offence

[9] In order to convict the defendant of indecent treatment of a child under 16, the Crown must prove, beyond reasonable doubt, all the following facts.[5]

(a) The defendant dealt with the complainant.

"Deals with" means any act which, if done without consent, would constitute an assault as defined by the Code.[6] "Assault" constitutes, among other things, striking, touching, moving or otherwise applying any force of any kind to the body of another person, either directly or indirectly, without the other person's consent.[7] It includes a touching of the child by any part of the defendant's body.

(b) The dealing was indecent.

"Indecent" bears its ordinary everyday meaning and is what the community regards as indecent.[8] Indecency must always be judged in light of the time, place and circumstances.[9]

(c) The dealing was unlawful: that is, not justified, authorised or excused by law.

(d) The complainant was under 16 years.

[10] In order to prove the circumstances of aggravation of the offence, the Crown must prove, beyond reasonable doubt, the following additional facts.[10]

(a) The complainant was under the age of 12 years.

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3 Code, s 615C(1).
4 Code, s 615C(3).
5 Code, s 210(1)(a).
6 Code, s 210(6).
7 Code, s 245.
8 *R v Schneiders* [2007] QCA 210, [17]-[19].
9 *R v Dunn* [1973] 2 NZLR 481.
10 Subsections 210(3), (4).

This was not disputed. It was formally admitted between the parties that the complainant was born on 18 January 2007 so, during the relevant period, she was between 5 and 7 years old.

(b) The complainant was, to the knowledge of the defendant, her lineal descendant.

The prosecution must prove the child was a direct descendant of the defendant. It was formally admitted between the parties that the defendant is the complainant's biological father.[11]

(c) The defendant, for the time being, had the child under his care.

"Under his care" is an ordinary English expression. It means that, at the time alleged, the defendant was responsible for the control and supervision of the child. In determining that, I should take into account such things as the age of the child, how the child came to be with the defendant and why the child was with the defendant.[12]

The prosecution must prove that the defendant had the child under his care at the time of the alleged indecent dealing; that is, he was looking after the child at the time. The prosecution does not have to prove that he was the only person looking after the child at the relevant time.

The complainant's evidence

Preliminary matters

[11] The complainant is an "affected child".[13] Her evidence constituted video recordings of two interviews that she had with a police officer – first, on 12 April 2017[14] and secondly on 23 June 2019[15] – and a video recording of her evidence in court given on 16 July 2019.[16] While the complainant gave the latter evidence, the courtroom was closed. The courtroom was also closed when the video recordings of both her interviews and her evidence were played before me.

[12] The taking and playing of the complainant's evidence in this manner are routine practices of the court and I do not draw any inference as to the defendant's guilt because these measures were used to take and present her evidence. The probative value of the evidence is not increased or decreased, and I do not give this evidence any greater or lesser weight, because these measures were used.[17]

[13] In considering my verdict, I have reviewed the transcripts of the complainant's evidence, but I have done so only for ready reference. The actual evidence is contained in the recordings and the transcripts are simply an aid to my understanding and recollection of those recordings.[18] I have also replayed each of

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11 Formal admissions read into the record on 29 May 2020: T2-13:17-27.
12 *R v FAK* [2016] QCA 306, [64]-[87], [129]-[138], [144]-[149].
13 *Evidence Act* 1977, s 21AC.
14 Exhibit 1; admissible under the *Evidence Act*, s 93A. The transcript was marked A for identification.
15 Exhibit 2. The transcript was marked B for identification.
16 Exhibit 3, recorded pursuant to and in accordance with the *Evidence Act*, s 21AK. The transcript was marked C for identification.
17 *Evidence Act*, s 21AW.
18 *Butera v Director of Public Prosecutions (Vic)* (1987) 164 CLR 180, 188.

the interviews and the complainant's evidence in court for the purpose of refreshing my memory, but I do not, as a consequence, give that evidence any greater weight than the other evidence presented in court, nor than I otherwise would have given it.

The police interview on 12 April 2017

[14] In her interview with the police on 12 April 2017,[19] the complainant said that, when she was six or seven years old, or in year two or three at school, she was at the defendant's house. The complainant thought it was a weekend and her father, her father's partner, HW and her brother, B, were at home.

[15] The complainant said that she woke up from an afternoon nap in her bedroom and HW sent her to see the defendant in the spare bedroom. The complainant recalled HW saying "go down to your father" and pointing towards the spare room. She recalled that the spare room was downstairs on the opposite side of the house to the defendant's and HW's bedroom. She thought it was the afternoon and recalled that it was still light. HW did not follow her to the spare bedroom.

[16] The defendant was sitting on the bed in the spare bedroom when the complainant arrived. The defendant was clothed. He told her to take off her underwear and pants. The complainant recalls wearing her pyjamas at the time. She took off her clothes as directed, so she was still wearing her shirt. She lay on the bed. The defendant then pulled his "doodle" out of his underwear and shorts and knelt on the bed either in front of or over the top of the complainant.[20] The defendant put his "doodle" on her vagina and starting doing the "humping thing," which she described as holding his penis in both hands and moving his penis backwards and forward on the complainant's vagina. (While saying that, she demonstrated by moving her hands up and down with fingers together.) While this was happening, the defendant told her to keep it a secret. The complainant shook her head when asked if the defendant's penis went inside her vagina. She nodded when asked if it was just on the outside.

[17] The complainant saw some white clear stuff came out of the end of the defendant's penis. She said the defendant had toilet paper[21] underneath them and wiped his "doodle" with it. The complainant recalled some of the "clear stuff" going onto the tip of her vagina. After the defendant wiped himself with the toilet paper, the complainant thought he put it in a bin that she thought was next to the door to the room.

[18] The complainant said the defendant had his penis on her vagina for two or three minutes. After the defendant finished, the complainant said she put her clothes back on and went upstairs to wait for B to wake up. The complainant said HW was upstairs at the time.

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19 My summary of her evidence is taken from her full statement. Not surprisingly, what she said was not in the same order as I record it, nor was it strictly chronological. I have recorded what she said in various parts of the interview as if it were in a logical progression in order to assist in considering the whole of her evidence.

20 The complainant said he knelt in front of her, not on her, but seemed to have difficulty describing how the defendant was kneeling.

21 The complainant originally referred to this as a "paper thing" or "towel", and later described it as tissues.

[19] The complainant said this was the first time her father had done this to her and it did not happen again after. She stated that the first person she told was at her school in a photocopy room.[22] She also said she told her grandad in January or February 2017. It appears the complainant decided that she wanted to talk to police shortly before the interview took place.

[20] At the end of the interview, the complainant said that, for being brave, her grandad was going to get her a treat, being a new Xbox game.

The police interview on 23 June 2019

[21] In her interview with the police on 23 June 2019, the complainant said that, after she woke up from a nap, HW told her to go down to the room where the defendant was. When she got there, the defendant closed the door, sat down and told her to take off her underwear and pants. The defendant then told her to lie on the bed, before taking his penis out of his underwear and pants. He put it a "little bit" in her vagina. The complainant appeared to indicate a distance of about one centimetre with her fingers.[23] She said she had a vivid memory of both seeing and feeling it in her vagina.

[22] The complainant said that, while this was happening, the defendant was talking to her, but she could not remember what he said. The complainant could not remember, on this occasion, whether the defendant was moving his penis around. This went on for a minute "and [a] bit". The defendant got a tissue from a tissue box next to the bed and held the tissue under his penis so the "weird clear stuff" went onto the tissue.

[23] The complainant said, initially, that HW knocked on the door and the complainant recalls her saying something, perhaps asking if they were finished. The defendant put his penis back in his pants and told the complainant to put on her underwear and pants. Just as the complainant finished getting dressed, HW opened the door. The complainant left the bedroom with the defendant and HW and went upstairs, where B was now awake. Later in the interview, she recalled that HW did not in fact knock on the door, but she then recalled HW being upstairs with B when she left the room.

Evidence in court

[24] In her evidence in court on 16 July 2019, the complainant said that she had reviewed the police interviews and confirmed that everything she had said was the truth, except she retracted her statement that HW knocked on the door of the spare bedroom, as described in the police interview.

[25] During cross-examination, the complainant confirmed that what she said about, after the incident occurred, HW knocking on the door and asking, in effect, "Are you finished in there?" was incorrect. The complainant affirmed that HW had told her to go downstairs to see the defendant after her nap. She recalled seeing HW and B standing at the end of the hallway upstairs when she left the spare bedroom.

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22 In the course of telling this person, the complainant said she was asked to dot, presumably on a diagram, where the defendant touched her.

23 The Crown agreed with this conclusion, although the defence counsel did not confirm if the defendant agreed that the complainant indicated this.

[26] When asked about when the offence occurred, the complainant could not remember, but said she was quite sure she was six years old. She accepted, when asked about a conversation with Amy Hagan from the Department of Child Safety in June 2014, that she had told Ms Hagan that she was five years old at the time, but said she had a poor memory and maintained that she was six or seven years old when the offence occurred.

[27] She also accepted that she stopped having daytime naps when she was four years old. She rejected the proposition that she would not have been wearing her pyjamas for a daytime nap, and said she would have done so and then changed back into other clothes afterwards. She agreed that, generally, she would not have worn pyjamas for a daytime nap when she was three or four years old, but maintained that she was wearing pyjamas on this occasion. It was put to her that generally, in the evening, she would have dinner and then a bath and after her bath she would put her pyjamas on for the first time that day, with which she agreed. However, she again maintained that she was wearing her pyjamas at the time of the event she described.

[28] The complainant agreed that the master bedroom, which was located on the same level as the spare bedroom, was further away from the neighbouring property and was more private than the spare bedroom. She rejected the proposition that there was no bin in the spare room. She said that the defendant did not have to go upstairs to get the tissues (and she did not remember saying that to Ms Schmitt).

[29] The complainant agreed that she had told Kirsten Schmitt, Amy Hagan, MG and Det Sgt Hauff (on the first occasion) that the defendant's penis was on her vagina. She agreed that in 2019 she said, for the first time, that the defendant's penis had gone into her vagina. She said that each time she had previously said "on" she would have meant it went inside. She recalled telling the Crown that the defendant's penis had been soft at the time.

[30] A series of questions was put to the complainant regarding her relationship with her stepmother, HW. The complainant agreed that she did not get along with HW. HW was strict and they often had arguments in which the defendant would often take HW's side. The complainant agreed that there had been a disagreement between her and HW on the day of the offence, when she refused to eat pumpkin soup, following which she was told to go to her room.

[31] She was also asked about her mother's partner, Luke. The complainant agreed that Luke was mean to her and that, on one occasion, she had seen Luke "put his D on Mum's T."[24] The complainant agreed that she told the defendant about Luke and that was when she and B started living with the defendant and HW. It was put to her that, shortly after moving in with the defendant and HW, she would do sexual things with her stuffed toys, such as touching the toys between the legs. She accepted that she used to do that at the time, but said that was when she was only little. She also agreed that she had touched her brother, B, around his private parts, but again only when she was little. She also accepted that the defendant had spoken to her about touching her own private parts shortly after she started living with them.

[32] It was put to her that there was an incident, while she was living with the defendant and HW, when they visited HW's brother, George. She was in the bathroom with

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[24] The complainant consistently referred to a penis as a man's D or doodle and a vagina as a woman's T or tinkle.

HW, B and George's daughter. George walked into the bathroom and the complainant became very upset that a male whom she did not know was in the bathroom. She agreed that she became quite worked up.

[33] In response to a series of questions, she agreed with propositions puts to her that, at the time of the offence, she was lying on her back and the defendant was leaning over her with his knees on either side of her, but he was not putting any body weight onto her. She recalled telling the Crown that the defendant had to stop for about five seconds and then started again.

[34] She denied that the defendant never touched her in a sexual way ever in her life. She said this was the only time.

Other Crown evidence

Kirsten Schmitt

[35] In 2014, Ms Schmitt[25] was employed by Education Queensland as the Head of Department of Student Services[26] based at a local primary school. She would work on occasions, as part of a circuit, at the school that the complainant was attending. In 2014, the complainant was in year 2 at that school.

[36] Ms Schmitt first spoke with the complainant on 26 May 2014.[27] On 2 June 2014, she spoke to the complainant again and the complainant told her about some things that she said had happened with the defendant. Ms Schmitt could not recall the whole conversation in detail, but had taken notes of the conversation immediately afterwards.[28]

[37] During the conversation, Ms Schmitt asked the complainant to identify family members and how she felt about them. The complainant said she felt safe living with the defendant and HW because "Dad and [HW] got me away from Luke, the mean boy", being the complainant's biological mother's partner. The complainant was unable to explain why Luke was a "mean boy", but when prompted with a picture of a girl, the complainant drew dots on the chest area.

[38] Ms Schmidt asked the complainant if Luke had touched her there. The complainant told her Luke hadn't, but he punched her. In the course of the conversation, the complainant said she had once seen Luke put his "D" in her mother's "T".[29] The complainant said it had happened while she was sleeping in the same room. When asked if Luke had ever done that to her, the complainant said, "No" and in the next breath said, "Dad did." The complainant told Ms Schmitt that, when she was six, the defendant had put "his D on my T".

[39] Ms Schmitt recounted that the complainant told her that HW had told the complainant that the defendant wanted to see her, the defendant told HW to check

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25 At the time, Ms Schmitt's surname was Cameron. In the trial she was often referred to by that surname.

26 Ms Schmitt gave evidence that her role involved supporting students with their social and emotional wellbeing, behaviour support and supporting the schools to support children.

27 There was no evidence about that conversation.

28 The witness was given leave to refer to her notes. The rest of her evidence was given with the assistance of those notes.

29 Ms Schmitt clarified with the complainant that a D is a doodle and a T is a tinkle and "what a girl has".

on B and the defendant went upstairs and got a tissue so "it wouldn't drip." The defendant put the tissue "under his D". She was lying down, with her bottoms pulled off and her arms above her head and the defendant moved "it" up and down on her. The complainant said he did not put his D in her tinkle, just on top. The complainant told Ms Schmitt that it did not happen again. When Ms Schmitt asked her when it happened, the complainant said, "When the sun was half down and I was in my pyjamas." Following this conversation, Ms Schmitt reported what the complainant had told her to the department and the principal.

[40] During cross-examination, Ms Schmitt accepted that her recollection was largely based on her notes. She conceded that the part of the conversation about whether Luke had touched the complainant on her chest was not in her notes.

Amy Hagan

[41] Ms Hagan has worked at the Department of Child Safety, Youth and Women since 2012 and is currently a child safety officer.

[42] Ms Hagan met the complainant with another child safety officer on 4 June 2014. During that conversation, the complainant said the defendant had put his "D" on her "T".[30] The complainant said a "D" is "what boys have" and she referred to a "T" as a vagina. That was the extent of the conversation on that occasion.

[43] Ms Hagan met the complainant again, with another child safety officer, on 11 June 2014. On this occasion, the complainant gave further details.[31] The complainant told Ms Hagan that she was five or six at the time. She had been called into the room by the defendant and was wearing her pyjamas at the time. The complainant initially told Ms Hagan that the defendant got a tissue and put it under his "D" so the bed would not get wet. She later told Ms Hagan the tissue was on the bed when the complainant entered the room.

[44] In relation to the defendant putting his "D" on her "T", the complainant said he was moving it back and forward. She told Ms Hagan that she was on her back with her arms above her head at the time. She also told Ms Hagan that lots of wet stuff, which she called "wee saliva", came out of his "D". She said that he put the tissue in the bin. She also recounted details such as pulling her underwear and pyjamas up afterwards and B waking up after the event.

[45] The complainant told Ms Hagan this happened in the "second space bedroom", a long time ago in April or May.

[46] During cross-examination, Ms Hagan conceded that her statement to police was based off her notes. In relation to the first conversation, Ms Hagan agreed that the complainant had told her that she was five at the time of the offence. In relation to the second conversation, Ms Hagan accepted that the complainant told her that the offence happened in the evening, before dinner. Ms Hagan also accepted that the complainant told her that she was called into the spare room by her father.

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30 Ms Hagan could not recall anything else from the conversation and was given leave to refer to notes taken by the other child safety officer but reviewed by her shortly after the conversation. The rest of Ms Hagan's evidence was given with the assistance of those notes.

31 Having said this, Ms Hagan was again given leave to refer to notes taken by the other child safety officer but reviewed by her shortly after. The rest of Ms Hagan's evidence was given with the assistance of those notes.

MG

[47] The complainant is MG's step-granddaughter.[32] The complainant has been living with MG and her grandmother for almost five years. MG gave evidence that, in 2011 to 2014, the complainant was living with the defendant.

[48] MG recounted a conversation in about January 2017, in which the complainant asked to have a "serious talk". The complainant told him that she had been asleep with B, they woke up and HW told her to go downstairs to see the defendant. When she went into the room, the defendant told her to get on the bed and take her pants off before touching her with his "P".[33] The complainant told MG that the defendant was "going back and forwards with it" and he put "tissue paper" under her bottom and she saw white fluid coming from his penis. She said that the defendant asked her if she liked it and she said "sort of".

[49] MG's evidence was that he reported this to Child Safety and another group,[34] but did not tell the police until sometime later, when the complainant came to him and said she felt comfortable enough to see the police.

[50] During cross-examination, MG maintained that the complainant came to him and he did not approach her and ask her to tell him about the incident. He denied telling the complainant that, if she spoke to police, she would get a reward. When asked about the Xbox game that the complainant referred to in the police interview on 23 June 2019, MG insisted the game was not framed as a reward for talking to the police.

HW

[51] HW is the defendant's wife and has been in a relationship with the defendant since 2010. HW said the complainant and B lived with them from November 2011 until June 2014.

[52] In response to a series of questions, HW gave evidence that the complainant did not like her and often argued with her. She would discipline the children and send them to their bedrooms until the defendant got home from work, at which time he would discipline them. HW denied ever saying to the complainant words to the effect of, "Go and see your father".

[53] During cross-examination, HW recalled that the complainant and B starting living with them when the complainant was four years old. HW said the complainant stopped having routine daytime naps when she was three years old, but conceded that she might have had a daytime sleep on other occasions after this. When asked what the complainant would generally wear for a daytime nap, HW said, "Just whatever she's got on to. She never, ever got into PJs."

[54] HW was asked about the evening routine with the children and gave evidence that she thought they would generally have a bath or shower and put their pyjamas on before dinner, which was at about 7.00pm.

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32 MG is the stepfather of the complainant's biological mother.

33 The complainant confirmed, at the time, that "P" meant the defendant's penis and he touched her "V" (vagina) with it.

34 It is not clear who or what MG was referring to.

[55] HW gave evidence that there were four bedrooms in the house, one of which was spare, but denied that there was, at any stage, a bin in the spare bedroom. She said that the spare bedroom was close to the neighbour's fence line.

[56] A series of questions was asked about HW's disciplining of the complainant. She agreed that she and the complainant would fight a lot and that she was strict. When asked if there was an occasion when she had sent the complainant to the spare bedroom for discipline, she said she had "never ever" done so. HW said she had not witnessed any inappropriate sexual behaviour between the defendant and the complainant in the house.

[57] HW gave evidence that the complainant and B lived with their biological mother and Luke from the start of 2011 until they came to live with the defendant and HW in November 2011. HW agreed that, when the complainant moved in, she demonstrated what HW described as sexualised behaviour, such as riding back and forth on B's backside while he was face down on the floor and doing things (which she did not describe) with her stuffed toys.

[58] HW also gave evidence about the incident involving her brother, George. HW described the incident as occurring while she and her brother were bathing George's daughter and B. When HW told the complainant to get undressed and get in the bath, the complainant starting "freaking out" and became "hysterical" as there was a male (George) in the bathroom. The complainant apparently took some time to calm down. At some stage, her sister-in-law came in and George left. HW recalled, after she and her sister-in-law had finished bathing the complainant, the complainant "climbed up [her sister-in-law] like a monkey".

[59] In re-examination, HW agreed there was never an occasion when the defendant and the complainant were alone in the spare room and she knocked on the door. HW gave evidence that she never saw the defendant the complainant alone in any room in the 3½ years that the complainant lived with them.

Detective Sergeant Julie Hauff

[60] Detective Sergeant Hauff is a member of the Queensland Police Service and was the investigating officer in this matter. She interviewed the complainant on 12 April 2017 and 23 June 2019.

[61] Det Sgt Hauff's evidence was that the first interview was instigated after she received information, not by MG bringing the complainant to the police station. In fact, Det Sgt Hauff said she contacted MG and arranged for the interview.

[62] Det Sgt Hauff gave evidence that, in 2017, following the interview with the complainant, she obtained statements from Ms Schmitt, Ms Hagan and MG but, although she attempted to take one from HW, she was unsuccessful. HW later provided a statement to another police officer on 16 July 2019.

[63] During cross-examination, Det Sgt Hauff confirmed that the complainant spoke to a police officer on 7 June 2014 but she made no disclosures. Det Sgt Hauff also confirmed that the defendant does not have a criminal history.

[64] In re-examination, Det Sgt Hauff confirmed that she was not the police officer who spoke to the complainant on 7 June 2014.

Defendant not giving evidence

[65] The defendant has not given or called evidence. That is his right. He is not bound to give or to call evidence. The defendant is entitled to insist that the Crown prove the case against him, if it can. The Crown bears the burden of proving the guilt of the defendant beyond a reasonable doubt and the fact that the defendant did not give evidence is not evidence against him. It does not constitute an admission of guilt by conduct and it may not be used to fill any gaps in the evidence led by the Crown. It proves nothing at all and I must not assume that, because he did not give evidence, that adds in some way to the case against him. It cannot be considered at all when deciding whether the Crown has proved its case beyond a reasonable doubt and most certainly it does not make the task confronting the prosecution any easier. It cannot change the fact that the Crown retains the responsibility to prove the defendant's guilt beyond reasonable doubt.[35]

Delay in making complaint[36]

[66] The complainant's long delay in reporting the incident she says happened a long time before her first complaint has an important consequence: her evidence cannot be adequately tested or met after the passage of so many months. By reason of that delay the defendant has lost some means of testing and meeting her allegations that would otherwise have been available.

[67] He has been denied the chance to assemble, soon after the incident is alleged to have occurred, evidence as to what he and other potential witnesses were doing when, according to the complainant, the incident happened. Had the complaint instead been made known to the defendant soon after the alleged event, it would have been possible then to explore the pertinent circumstances in detail and, perhaps to gather and to look to call at a trial, evidence throwing doubt on the complainant's story or confirming the defendant's denial.

[68] The fairness of the trial (as the proper way to prove or challenge the accusation) has necessarily been impaired by that delay. It would be dangerous to convict upon the complainant's testimony alone unless, after scrutinising it with great care, considering the circumstances relevant to its evaluation, and paying heed to this warning, I am satisfied beyond reasonable doubt of its truth and accuracy.

Factors relevant to the complainant's credit

Motive to lie

[69] In her address and her written submissions, counsel for the defendant submitted that the complainant had a motive to lie in her account about the defendant's conduct. Ms Goldie submitted that it was clear that the complainant and her stepmother, HW, did not get on. Both of them admitted as much. The complainant considered HW to be strict and mean. Her evidence was that, on the day of the incident, she had had a fight with HW, who had sent her to her bedroom. Ms Goldie suggested that the complainant's dislike of HW may have been sufficient to give her a motive to lie about the events in question.

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35 *Azzopardi v The Queen* (2001) 205 CLR 50 at [34], [51] and [67].

36 *Longman v The Queen* (1989) 168 CLR 79.

[70] I shall deal with that submission immediately. I accept that the complainant and HW did not get on and would fight regularly. The complainant would disobey HW frequently and would be sent to her room, to be dealt with by the defendant later if he was not at home at the time. The complainant agreed in cross-examination that she felt that HW was unfair to her and her dad always picked HW's side and told the complainant to do what HW said. Indeed, on this very occasion, the complainant said, she had had a fight with HW about the complainant's refusal to eat pumpkin soup and HW had sent her to her room as a consequence.

[71] Ms Goldie submitted, of course correctly, that the defendant does not have to prove or accurately submit the motivation for a false complaint. But when I consider the complainant's evidence I should not lose sight of her dislike for HW and the apparently strong alliance between the defendant and HW.

[72] Although Ms Goldie did not raise it, another possible motive would be to try to be removed from the household of the defendant and HW. Before moving to live with them, the complainant had been living with her mother and her partner (referred to as Luke). The complainant had apparently told her father that Luke was mean to her and had punched her sometimes. She had also told her father that she had once seen Luke put his "D" in her mother's "T" – apparently meaning that she saw them have sexual intercourse. That led to her father making arrangements for her to move to live with him and HW. That may have demonstrated to the complainant that, if she complained about her father acting inappropriately toward her, she might be moved away from this household, as had happened before.

[73] As I said in the course of Ms Goldie's address, it would make more sense for a seven year old girl who disliked her stepmother to make an allegation against her stepmother, rather than against her natural father. It seems a very convoluted suggestion that a girl of that age would see that getting at her father by making up a story about him assaulting her would be a way of getting at her stepmother. Even if she thought that making some sort of complaint might lead to her being removed from that household, it is far more likely that she would complain of her stepmother's behaviour toward her than of her father's conduct.

[74] Ms Goldie submitted that I should consider a possible motive to lie in the context that, by some of her evidence, the complainant appears to implicate HW in the offending, by saying that she sent her down to her father in the spare room and, at one stage, saying that HW knocked on the door to ask if they had finished. She used what the Crown submitted was child logic in saying, for example, that because HW sent her to see her father, the defendant and HW must have discussed what was to happen in the spare room. She said that, when she came out of the room, HW and her brother were "waiting patiently for me and my father to finish."[37]

[75] I do not consider it at all likely that a girl as young as the complainant would think to make up a story about such an event as a way of getting at her stepmother, or of getting at her father for siding with her stepmother. It was not suggested to the complainant in cross-examination that she was lying about the alleged incident in order to punish her father or her stepmother, or as a way of getting to live elsewhere. I consider it so unlikely that she had these (or any other) motives to lie about the incident as not to be a realistic possibility in this instance.

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37 Exhibit 3 at MFI-C, T1-4:4-5.

[76] Although I have rejected the motive to lie put forward on behalf of the defence and other possible motives, that does not mean that the complainant did not have such a motive. There may be many reasons why a person may make a false complaint and the defence cannot be expected to know of all possible reasons. Nor does the absence of an identifiable motive to lie mean that the complainant is telling the truth, nor that her evidence is reliable. The Crown must prove that the complainant is telling the truth, as it is the Crown's burden to satisfy me beyond reasonable doubt of the guilt of the defendant.

Preliminary complaint

[77] The complainant told a number of people about the incident she alleges occurred, although not for some time after the event. Those people were the guidance counsellor at her school, Ms Schmitt, on 2 June 2014; two child safety officers on 4 and 11 June 2014; and her maternal grandfather, MG, in about January 2017.

[78] This evidence is only relevant to the complainant's credibility. Consistency between the respective accounts, by the people whom she told, of the substance of her complaint and between those accounts and the complainant's own evidence may be taken into account as enhancing the likelihood that her evidence is true. However, I cannot regard the things said in those out-of-court statements as proof of what actually happened; they do not independently prove anything.

[79] Likewise, any inconsistencies between the witnesses' accounts and between those accounts and the complainant's evidence may raise doubts about the complainant's credibility or reliability. But the mere existence of inconsistencies does not mean that I must reject the complainant's evidence. Some inconsistency is to be expected, because it is natural enough for people who are asked on a number of different occasions to repeat what happened at an earlier time, to tell a slightly different version each time. This is particularly the case with young children.

Submissions

Crown

[80] The Crown submitted that the complainant's evidence was cogent, credible and consistent with statements in her preliminary complaints; therefore I should accept it as reliable and find that the event occurred.

[81] The complainant did not seek to embellish her evidence or to paint herself in a positive light and her father negatively. She volunteered, in her police interview, that she had a tendency to get angry and to hit people with whom she was angry. She was careful to distinguish between what she recalled and what she did not recall so well or at all. While there were some inconsistencies in her evidence (such as whether the defendant used a towel, toilet paper or tissues during and at the end of the incident and whether HW came to the door and called "Are you finished?"), they were explicable because she was so young when the event occurred and when she first told people about it, as well as the delay between the incident and when she reported it. She was also careful and honest in correcting her statements when, on reflection, she considered them to be wrong: for example, in her evidence correcting her statement to the police that HW had come to the door.

[82] The Crown submitted that I should view HW's evidence with some scepticism. She clearly supports her husband. She volunteered evidence that the complainant never slept in her pyjamas when taking an afternoon nap (as if to cut off that suggestion at the pass). She denied, implausibly, that she ever said to the complainant, "Go and see your father," or words to that effect.

[83] Ultimately, the Crown submitted that the realism of the complainant's evidence sits comfortably with a witness describing something she saw and felt, particularly when regard is had to her age at the time and her presentation and evidence in her police interviews and in court. That evidence was consistent with what she told the preliminary complaint witnesses, which supports her credit and reliability. I should be satisfied that she told the truth and that the defendant is guilty.

Defence

[84] Ms Goldie submitted that the complainant's evidence is not reliable and therefore I should have reasonable doubts that the event occurred as she related it, or at all. It is entirely uncorroborated and therefore I should consider it with great care before relying on it.[38]

[85] Ms Goldie submitted that I should especially keep in mind ten aspects of the evidence that throw doubt on the complainant's reliability. While there may be satisfactory answers to some of the submissions in isolation, I should have regard to the cumulative nature of the matters she raised, bearing in mind that the onus is always on the Crown to prove its case beyond reasonable doubt.

[86] I shall refer sequentially to each of the points made by Ms Goldie. It is convenient to consider them immediately after setting them out, rather than later in my reasons.

[87] ***First***, she submits that the complainant's evidence about HW's involvement appears to be intended to inculpate her in knowingly sending the complainant to see the defendant for the purpose of the defendant assaulting her as alleged. That is, she is alleged to be an offender, yet she was neither charged nor warned before giving her evidence. This submission derives from the complainant's statements that HW told the complainant to go to see her father in the spare room; she later knocked on the door and asked if they had finished (although the complainant retracted this statement, both in the interview in which she first said it and at the start of her evidence); and that, when the complainant left the spare room after her father had finished with her, HW and the complainant's younger brother were standing at the end of the upstairs corridor near her brother's room and "she was like – him and – my brother and [HW] were waiting patiently for me and my father to finish."[39]

[88] I do not think the complainant was consciously attempting to implicate HW in the alleged offending. While her "child logic" may have led her, at one stage, to think that HW and her father had discussed what would happen, her evidence is equally (if not more) consistent with HW having sent her to see her father for a disciplinary discussion and then waited for that discussion to finish before they had dinner. Even

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38 I am conscious of these matters, having described above (at [68]) the caution with which I should treat the complainant's evidence, particularly in light of the delay between the alleged event and her preliminary complaints. But I also agree that, as the evidence is entirely uncorroborated, I must be especially careful before I accept it as true beyond reasonable doubt.

39 Exhibit 3, MFI-C, T1-4:4-5.

if she had knocked on the door, it could simply have been to ascertain whether the discussion had finished.

[89] I accept that the complainant's statements about this changed over time. I shall deal later with those inconsistencies in the light of all her evidence.

[90] ***Secondly***, Ms Goldie submitted that the complainant was inconsistent in describing when the event occurred. At various times she said it occurred when she was five, six, seven or eight years old and at different times of day. She said that it occurred after she had had a daytime sleep, but HW said she did not usually have such sleeps by the time she was four or five years old and the complainant agreed that she had stopped having those sleeps when she was five and older. The complainant also said, at one stage, that she went to live with her grandmother later that day and never returned to her father's house, whereas it is clear that she did not go to live with her grandmother until after she had reported the incident in June 2014.

[91] These inconsistencies are not unusual in the statements and evidence of a seven year old child (at the time of the preliminary complaints) or a ten year old (when she made her first statement to police). Indeed, it is clear that the complainant was wrong in saying, when she did, that she was seven or eight years old at the time of the alleged offending, because she reported it when she was seven years and five months old. At that time, she told Ms Schmitt that she was six when it happened, she first told Ms Hagan that it had happened when she was five, and then she told her it happened "a long time ago," "in April or May," when she was five or six and in grade two or three at school. She told Det Sgt Hauff that it happened when she was seven or six. In her evidence she said she would have been six or seven years old.

[92] These inconsistencies in the chronology are not surprising, but most consistently the complainant said that she was six years old. Given that, at the time when she first reported it, she was seven years old and it happened "a long time ago", it seems likely that it happened when she was five or six years old. (She lived with the defendant and HW from November 2011, when she was four years and ten months, until June 2014, when she was seven years and five months.) I do not consider that the inconsistencies as to dates and ages adversely affect the reliability of the complainant's evidence.

[93] The ***third*** factor relied on by Ms Goldie was that the complainant said the incident occurred in the spare bedroom, which was closer to the neighbours' house than the main bedroom. Ms Goldie submits that, as the complainant alleges that the defendant had the full support and encouragement of his wife, it seems strange that he would have chosen the spare room rather than the room that was more distant from the neighbours and therefore less private.

[94] I do not consider that this has any effect on the complainant's credit. As I have said, I do not think her evidence implicates HW in any way. It seems natural that any suggested disciplinary discussion might take place in a separate room and, as there was a spare room available, it would be logical to use that room to disciple the child (and for HW to believe that that was what would occur). Alternatively, if the defendant had in mind doing what the complainant says he did, he is unlikely to do that on the marital bed, especially if HW did not know about it. If she did know, it is unlikely that either of them would want it to take place there. I do not consider

the suggested greater privacy of the main bedroom to be of any consequence. There is no evidence to suggest that the neighbours could see into the spare bedroom, nor whether the bedroom looked into the wall or the yard or another area of the neighbours' property, nor is there any suggestion that there was, or was likely to be, a great deal of noise generated by the alleged conduct. Therefore I dismiss this factor as relevant.

[95] The ***fourth*** factor is the inconsistencies in the complainant's evidence about where the tissues were that the defendant allegedly used. In June 2014, she told Ms Schmitt that he had to fetch tissues from upstairs. Nine days later she told Ms Hagan that the tissue was on the bed when she came in. In early 2017 she told her grandfather, MG (at least so far as he recalled), that the defendant put the tissue under her bottom. In June 2017 she told the police initially that he had a towel or paper thing, or toilet paper and later that he got a tissue out of a tissue box next to the bed. In her second police interview she said that he got a tissue out of the tissue box on the side bench. Finally, she told Ms Hagan in 2014 and Det Sgt Hauff in 2017 that, after the event, the defendant put the tissue that he had used into a bin in the spare room, whereas HW said there was never a bin in that room.

[96] It is unlikely that, at the time of the offence (if it occurred), the complainant was concentrating on where the defendant obtained the tissue that he used. It is not surprising that her memory of where he got it from is not clear. In her evidence under cross-examination, she said that he did not have to go upstairs to get the tissue. She was not otherwise tested on where the defendant obtained the tissue from, but only on whether he put it into a bin in the room. She maintained that there was a bin in the room.

[97] These matters are certainly relevant to the reliability of her evidence although, on their own, they are not substantial given that the provenance of the tissue (as opposed to the use made of it) was unlikely to be uppermost in importance to the complainant in the overall scheme of the alleged offence. I do take it into account in assessing the overall reliability of her evidence and whether it gives rise to a reasonable doubt.

[98] The ***fifth*** issue raised by Ms Goldie was the complainant's inconsistent evidence about whether the defendant's penis was on the outside of, or penetrated, her vagina. At all times until shortly before she gave evidence, she maintained that the defendant placed his penis and rubbed it on top of her vagina. Indeed, she shook her head when, at her first police interview, Det Sgt Hauff asked her if it had gone into her vagina she and nodded when asked if it was only on top. But on 23 June 2019, in her second police interview, she told Det Sgt Hauff that he put it "a little bit" in her vagina.[40]

[99] This is certainly not a minor inconsistency. Ms Goldie does not go so far as to say it was a recent invention, but it is surprising that, only years after the alleged event, the complainant had this new, vivid memory. It is highly relevant to the reliability of her evidence. However, I consider that it likely arises from changing memories over time, rather than a deliberate lie. I will consider it further in terms of her overall reliability.

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40 I have summarised her evidence on this occasion at [21] above.

[100] The ***sixth*** issue is that, in her evidence, the complainant agreed that she had told police, in an interview on 7 June 2019, that her father's penis had been soft at the time.[41] Ms Goldie submits that that is inconsistent with her evidence that the penis penetrated her vagina and that the defendant ejaculated, rendering those aspects of her evidence implausible.

[101] It is not implausible that a man's soft penis, when rubbed against a girl's vagina, may penetrate the vagina a little way. Nor is it implausible that a man with some form of erectile dysfunction might nevertheless ejaculate. I do not consider that this evidence reflects adversely on the complainant's credit.

[102] The ***seventh*** issue raised by Ms Goldie is the complainant's poor relationship with her stepmother. I have dealt with this in considering whether the complainant may have had a motive to lie and I keep in mind the matters I have discussed there.

[103] The ***eighth*** issue is the evidence of sexualised behaviour when the complainant first moved back to live with the defendant and HW after living with her mother and Luke.[42] Related to this is the complainant's evidence that she once saw her mother and Luke apparently engaging in sexual intercourse. Ms Goldie submits that it is learned behaviour that explains the complainant's knowledge of sexual behaviour, which she has transposed to her father.

[104] It was clearly behaviour that the complainant had learned, presumably from living with her mother and Luke. She had seen that adult males may put their "D" in a female's "T". But that does not explain the detail she was able to give about the defendant's activity with his penis – that he was moving it with his hands (demonstrating apparent masturbation) and that the defendant had ejaculated. Her latter descriptions in particular appeared to be spontaneous and surprised, referring to "wee saliva" and "white clear stuff" (she did not know what it was) coming out of the end of his penis. That evidence does not support the proposition that she has simply transposed to her father sexual activities that she has seen before.

[105] The ***penultimate*** factor relied on by Ms Goldie is that the complainant's description of the defendant's position and hers during the alleged incident is not credible. The complainant consistently said she was on her back. In cross-examination she agreed with propositions that the defendant was kneeling over her with his legs on either side of her. Ms Goldie submits that, if he was in that position, the complainant's legs would have had to be closed and therefore penetration, even partial penetration, would be physically impossible.

[106] I accept that it would have been difficult, in that position, for the defendant's penis to penetrate the complainant's vagina. It is a factor that affects particularly whether the complainant was reliable in asserting, latterly, that there was penetration. However, it would not have been impossible for his penis to rub on the outside of her genitalia and I doubt that the complainant would distinguish between her vagina (or her "T") and her external genitalia. Also, in her initial interview she did not describe the defendant as having his knees on either side of her, but rather that he was kneeling on the bed in front of her, not on her, and then he went closer to her and started putting it onto her and started "the humping thing".[43] In the

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41 Exhibit 3, MFI-C T1-9:6-7. The interview of 7 June is not in evidence.
42 Described in [31] and [57] above.
43 Exhibit 1, MFI-A, pp11-12, lines 491-492, 516-521.

circumstances, while the "mechanics" (as Ms Goldie refers to the evidence of the defendant's position) appear to be inconsistent with penetration, they are not inconsistent with external contact and do not substantially contribute to doubts about the credibility of the complainant's evidence about the event.

[107] The ***final*** point made by Ms Goldie is that there is no evidence that the defendant groomed the complainant. This was a one off occasion.

[108] This event does seem to be out of character for the defendant, particularly given his prior conduct in removing the complainant and her brother from her mother's household where the complainant was being mistreated and where she had been exposed to sexual conduct between her mother and Luke; and his conduct in telling the complainant not to touch herself in her genital region. That it is out of character and a one off event are factors that I must weigh seriously in the balance in assessing the credibility of the complainant's evidence, as they tend to make it less likely than if there had been evidence of other behaviour of a grooming or sexual nature between them.

Other factors and findings on credit and reliability

[109] Despite being tested, the complainant insisted that, at the time, she was in her pyjamas. She thought it was because she had come out of her bedroom after a nap, but she said that the incident occurred when the sun was half down and I consider it likely that, having been sent to her room earlier in the day, she had a shower and changed into her pyjamas before dinner, in the late afternoon or early evening. She was then told by HW to go and see her father, no doubt because, earlier that day, she had had a fight with HW about not eating pumpkin soup and HW sent her to the defendant to be disciplined by him. This fits with HW's evidence that the late afternoon or early evening routine was for the children to have a shower and change into their pyjamas before tea, which was at about 6.00pm.[44]

[110] I consider that the complainant confused having been sent to her room earlier, having a nap and dressing in her pyjamas before dinner. Such confusion is not unusual for a child of her age, especially when trying to remember events some months or years later. But that confusion does not affect the reliability of her evidence of the actual event in question. Overall her memory of details such as that she was in her pyjamas, she had had an argument with HW and had been sent to her room and that she was sent to her father when the sun was half down add cogency and credibility to her evidence of the circumstances in which the alleged offence occurred.

[111] I find HW's evidence that she never told the complainant to go and see her father unbelievable. It is inconsistent with evidence that she would discipline the children, particularly the complainant, by sending her to her room and then would ask the defendant to discipline or speak to the complainant about her behaviour when he got home. I am sure that sometimes she would tell the complainant to go and see her father for that purpose.

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[44] This was inconsistent with the proposition put to the complainant in cross-examination, which was that they would have dinner, followed by having a bath and getting into their pyjamas, with which the complainant agreed. However, it is consistent with the complainant being in her pyjamas – a persistent feature of her recollections – and with her evidence that the sun was half down – that is, it was late afternoon or early evening.

[112] Similarly, I consider her evidence, that she never saw the complainant and the defendant alone together in any room in the house, over the entire 3½ years that they lived with her, unbelievable. If for no other reason than to have a disciplinary talk, or even to say goodnight to the complainant in her bedroom, it is not credible that a father and daughter would not have been alone together, to HW's knowledge.

[113] HW clearly had a difficult time with the complainant and did not like her. She had a natural affection for her husband and I expect resents the complainant for making these allegations. I treat her evidence in these respects with scepticism and certainly do not consider that it casts doubt on the complainant's credit.

[114] I have carefully considered all of these issues, particularly the first, fourth, fifth and tenth of the matters raised by Ms Goldie – where there are inconsistencies – and the confusion described in paragraph [110] above. I have not only considered them individually, but also the cumulative effect of the inconsistencies on the complainant's credit and the reliability of her evidence. I have also reviewed the complainant's demeanour and her manner of giving evidence, both in the police interviews and in court.

[115] Notwithstanding the delay in the complainant first making the allegation and the effect that has had on the defendant's ability to test her evidence, having considered her evidence with particular care I have formed the view that she was being truthful and was generally reliable in her early evidence of what the defendant did to her in the spare bedroom. She presented as carefully trying to remember and relate the details of what had happened, while not understanding everything that happened (for example, she did not know what the white stuff was). The complainant shook her head when asked if the defendant's penis went inside her vagina. She nodded when asked if it was just on the outside. That is consistent with her preliminary statement to Ms Schmitt, in which she said that the defendant had not put his penis in her tinkle, but just on top.

[116] The complainant's second statement to the police was unreliable in a number of respects. First, in saying that HW had knocked at the door and gone into the room. That evidence (which the complainant retracted even during that interview) was the product of the lapse of time and consequently weaker memories of the circumstances surrounding what had happened to her in the room. I also consider that her statement, during that interview, that the defendant's penis went into her vagina, was not reliable. Again, it appears to be the product of thinking things through more as she got older and perhaps changing memories of the event. Her evidence in her first interview was more reliable. I therefore set aside her statements in the latter interview (and in her evidence in court) where they are inconsistent with those in the former. Nevertheless, I do not consider that those inconsistencies affect the reliability of the complainant's statements at the first interview, which are generally consistent with her preliminary complaints.

[117] I do not consider that the inconsistencies in the complainant's statements about the provenance of the tissue used by the defendant and about believing she had just woken from an afternoon nap have such an effect on the reliability of her evidence that it is dangerous to accept her evidence of what occurred. Indeed, her consistent evidence about the defendant ejaculating and using a tissue has a strength and plausibility that vastly outweigh those inconsistencies. While the absence of grooming or other sexual conduct by the defendant weighs against the event having

occurred, as being out of character, it is not unusual for such conduct to occur on only one occasion. The lower likelihood of it having happened in this circumstance is outweighed by the cogency of the complainant's evidence about the event. Her credit and reliability in this respect are supported by her preliminary statements, much closer to the events, which were overall consistent with her evidence.

Findings of fact

[118] I find that, on the day in question, late in the afternoon after the complainant had changed into her pyjamas for the evening, HW sent her to talk with the defendant in the spare bedroom of the house. The defendant closed the door, told the complainant to remove her pyjama pants and underwear and to lie on the bed, which she did. The defendant then took his penis out of his trousers and underpants, knelt over the complainant, masturbated over her and rubbed his penis in the area of her vagina. His penis did not penetrate her vagina. He continued rubbing his penis on her and masturbating until he ejaculated into a tissue, which he then disposed of in a bin in the room. He then told the complainant to get dressed and to go upstairs, which she did.

[119] At that time, the complainant was 5 or 6 years old. The event likely occurred in 2013, when she was 6, as the complainant told Ms Hagan in June 2014 that it had happened a long time ago, in April or May. Although it may have been April or May 2014, I consider it more likely to have been the previous year.

[120] Therefore, I find that the defendant indecently with a child under 16, under 12.

[121] The complainant is the defendant's natural daughter and therefore his lineal descendant. While the complainant was living with the defendant and HW, she was under their care.[45] The defendant knew these facts.

Verdict

[122] I find the defendant guilty of indecent treatment of a child under 16, under 12, who is his lineal descendant, under his care. In the circumstances, it was a domestic violence offence.

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45 The defendant did not contend otherwise.