

DISTRICT COURT OF QUEENSLAND

CITATION: *R v QRZ* [2020] QDC 166

PARTIES: **R**
v
QRZ
(Defendant)

FILE NO/S: 384/19

DIVISION: Criminal

PROCEEDING: Trial

ORIGINATING COURT: District Court at Ipswich

DELIVERED ON: 20 July 2020

DELIVERED AT: Ipswich

HEARING DATE: 14 and 15 July 2020

JUDGE: Lynch QC DCJ

VERDICT: **Count 1: Not guilty**
Count 2: Not guilty
Count 3: Not guilty
Count 4: Not guilty

ORDER: **1. QRZ is formally discharged in respect of indictment number 384 of 2019.**

CATCHWORDS: CRIMINAL LAW – TRIAL HAD BEFORE JUDGE WITHOUT JURY – where the defendant is charged with three counts of indecent treatment of a child under 16, under care and one count of common assault – where a no jury order was made – where the trial proceeded before a judge alone – whether the Crown has proved beyond reasonable doubt that the defendant has unlawfully and indecently dealt with the complainant – whether the Crown has proved beyond reasonable doubt that the defendant unlawfully assaulted the complainant

Legislation

Criminal Code 1899 (Qld) ss 187, 210, 245, 246, 335, 564, 615B, 615C

Evidence Act 1977 (Qld), s 21AK

COUNSEL: C Wilkins for the Crown

D Jones for the Defendant

SOLICITORS: Office of the Director of Public Prosecutions for the Crown

Legal Aid Queensland for the Defendant

Proceedings

- [1] QRZ is charged before the District Court of Queensland at Ipswich on indictment number 384 of 2019, with the following offences:

Count 1: That on a date unknown between the first day of January, 2016 and the first day of January 2018 at Fernvale in the State of Queensland, QRZ unlawfully and indecently dealt with PCB a child under 16 years.
And QRZ had PCB under his care, for the time being.
And the offence was a domestic violence offence.

Count 2: That on a date unknown between the first day of January, 2018 and the twenty-second day of July, 2018 at Fernvale in the State of Queensland, QRZ unlawfully and indecently dealt with PCB a child under 16 years.
And QRZ had PCB under his care, for the time being.
And the offence was a domestic violence offence.

Count 3: That on a date unknown between the first day of January, 2018 and the twenty-second day of July, 2018 at Fernvale in the State of Queensland, QRZ unlawfully and indecently dealt with PCB a child under 16 years.
And QRZ had PCB under his care, for the time being.
And the offence was a domestic violence offence.

Count 4: That on the twenty-second day of July, 2018 at Fernvale in the State of Queensland, QRZ unlawfully assaulted PCB.
And the offence was a domestic violence offence.

- [2] On 26 June 2020, a no jury order was made. When arraigned before me on 14 July 2020, the defendant entered a plea of not guilty to all counts. The trial therefore proceeded before me sitting without a jury.

- [3] Pursuant to s 615B of the *Code*, in conducting the trial I am required to apply, so far as is practicable, the same principles of law and procedure as would apply in a trial before a jury. This includes my taking account of any warning or instruction that

would be required to be given to a jury. Pursuant to s 615C of the *Code*, I am required to identify in my judgement the principles of law I have applied, and the findings of fact upon which I have relied, in coming to my decision.

- [4] For the reasons that follow, I have reached the conclusion that the defendant should be found not guilty of each count.

Evidence

- [5] In all, 7 witnesses gave oral evidence and the following were admitted as exhibits:

1. Particulars document
2. 93A recording for PCB dated 15 August 2018
3. Transcript for 93A recording of PCB dated 15 August 2018
4. 21AK recording for PCB from 13 December 2019
5. Transcript for 21AK recording for PCB from 13 December 2019
6. 93A recording of VNB
7. Transcript of 93A recording of VNB
8. Diagram drawn by PCB
9. Video recording of the fight
10. 21AK recording for VNB from 13 December 2019
11. Transcript of 21AK recording for VNB from 13 December 2019
12. 93A of XAB from 30 August 2018
13. Transcript of 93A of XAB from 30 August 2018
14. 93A recording of LGM from 19 September 2018
15. Transcript of 93A recording of LGM from 19 September 2018
16. Birth certificate of PCB
17. Written submissions of the Prosecution
18. Written submissions of the Defendant

- [6] The oral evidence included the following.

1. PCB

- [7] PCB is the complainant. She was born on 23/10/2002. She was interviewed by police on 15/8/2018 and gave evidence that was pre-recorded on 13/12/2019. PCB said she had lived with her foster parents SJK and the defendant and her siblings and foster siblings. She said there were eleven children in total. PCB described an incident she said happened a while ago. She said her foster carer kept touching her and threatened that if she told anyone he would hurt her siblings and her. She said he kept doing it when her foster mum was working night shifts and it kept getting worse and involved him kissing her and trying to take her clothes off. PCB said the person responsible was QRZ.
- [8] PCB described the last time something happened. PCB said this happened about 10.00pm when all the other children were asleep with the doors closed. She said her foster mother was at work on night shift. She said she had a shower and went to the defendant's room to get clothes. She said the defendant pushed her onto the bed and kept kissing her and threatened that bad things would happen to her. She said she was

pushing the defendant away and he said “I thought we had a connection. This is bullshit” and then told her to piss off. She said she then walked away and had another shower and sat on her bed. She said this happened a few weeks before but also said it was probably one or two months ago.

- [9] PCB said she was wearing a shirt and shorts and went to the defendant’s room to get clean underwear because all their clothes were in his room. She said the defendant came out of his bathroom wearing footy shorts and pushed her onto the bed and removed all of her clothes. She said she resisted and was saying loudly “no”, and “stop, I don’t want this. Leave me alone”. She said the defendant then kept trying to “force himself into me”. She said it was dark and by this time the defendant was not wearing clothes. She said she was on the bed on her back with her knees up and she was pushing him away. She said the defendant was trying to open her legs with his hands on her knees and eventually he stopped. She said he touched her everywhere with his hands – her stomach, boobs, bum, face, neck, legs and vagina. She said he also kept “trying to finger me”. Asked to explain what she meant, PCB said he was trying to “put his hands in me ... he didn’t. He tried though.” She also said the defendant was saying it wouldn’t hurt when trying to finger her, and repeated that “he kept trying to force his hands insides of me” and “he kept trying to push them inside”.
- [10] PCB said the defendant was trying to push her legs apart and come closer to her and she could feel his penis against her legs. She demonstrated she felt the defendant’s penis against her shin area. When asked to explain the sequence of events, PCB said the defendant removed her clothes and then was trying to force his penis inside her by holding his penis and also trying to get on top of her. She said this was before he was trying to open her legs. When asked to describe when the defendant had also tried to push his fingers into her, PCB said “That was the time before. It’s happened multiple times.” She then said the defendant trying to finger her was the time before.
- [11] PCB then described that on this occasion the defendant’s penis touched her leg but did not touch anywhere else because she was pushing him away. She also said the defendant did not touch her vagina with his hand on this occasion. She said he kissed her boobs while holding her hands and squeezed her bum and was pulling her closer to him. She said on this occasion the defendant threatened if she told anyone he would hurt her and her siblings, and would stab her, and bad things were going to happen if she said anything, and that no one would believe her.
- [12] PCB next described the first time the defendant touched her. She said it happened about a year and a half before. She said it occurred at about 5.00 or 6.00pm but she could not remember where everyone else was. She said she was in the defendant’s room folding the washing so that her foster mother would not have to do it when she got home the next morning. She said the defendant came in, pulled the clothes from her hands, pinned her against the wall, and was rubbing himself against her and kissing her neck. She said he had hold of her hands above her head. She said the defendant was trying to rub his penis against her vagina. She could not recall what either of them was wearing. She said this was interrupted by her foster mother calling to check on the children and the defendant then told her to “fuck off” and said if she told anyone bad things would happen and she would get hurt. She said her foster mother would ring and say when she was finishing work and would then be “two

seconds like to get home”. PCB also said this ended when she pushed the defendant away and told him she had to go for a shower and the defendant just walked out. She then said it was probably after she said she had to go for a shower that her foster mother called. She claimed she had a shower and her foster mother got home about 10.00 or 11.00pm.

- [13] PCB was then asked to describe her best memory of another event. She said that would be the last one because she did not really remember others. She was then asked to describe the occasion the defendant tried to finger her. She said that would be the second last time. PCB said this occurred about a month before the last incident and happened at 8.00 or 9.00pm and that all the kids went to bed at 7.30pm. She said her foster mother was working night shift. She said this was much the same, the defendant pushed her onto the bed and was trying to put his hands in her pants. She said he was kissing her, then rubbing his hands on her vagina, then tried to put them in her pants, and she was pushing him away. She said the defendant was grabbing her vagina with his hands. She said the defendant was trying to put his hands down the top of her pants or up the bottom and she was pushing him away. She said she usually wore pyjamas and was wearing a bra and underwear.
- [14] PCB said this incident ended when she pushed the defendant off, rolled off the bed, and ran out and went for a shower. She said the defendant then got really mad and was “playing Fortnite and yelling at everyone on there”. She also said the defendant was lying on the bed next to her and she “knead him in the nuts so he would stop” and she rolled off the bed. She later said when she knead the defendant he half fell off the bed. Initially, PCB said the defendant said nothing during this incident. However, she then said she was yelling loudly “just leave me alone, just stop” and the defendant said if she kept talking he would stab her, hurt her siblings, and take it out on her foster mother.
- [15] PCB said the defendant did the same kind of stuff to her but that she would avoid the defendant and going to his room. She said she would usually do the washing outside, had hour long showers to avoid him, sometimes did her homework in the closet, and went to her friends a lot on weekends. PCB said she told her foster mother, RWD, and her friend LGM what had happened. She said she stayed with RWD after the fight incident where the defendant punched her. PCB also said she told her sister VNB the defendant was touching her and she didn’t believe her, but that VNB lied to their foster mother by saying she did not know anything about it.
- [16] PCB also described an occasion the defendant punched her. She said she had a fight with VNB over the length of PCB’s shower sand the defendant recorded the fight on his phone. She said VNB tried to take the defendant’s phone and the defendant punched VNB in the face. She said she then defended her sister and was pushing the defendant and punching him. She said the defendant then kept punching her in the jaw, she pushed him away, and he locked her outside. She said she then got her brother to pass her school bag out to her and she went and stayed at her friend’s place. She said she had a black eye as a result and her friend and the friend’s mother saw her injuries.

- [17] PCB claimed the defendant was always angry at everyone and always yells. She also said that at times when she needed to calm down she would go outside so that she did not hurt any of the kids. PCB agreed that all of the children had their underwear, socks and pyjamas in a cupboard situated in the hallway of the house. She also acknowledged that they had their school clothes in their bedrooms. PCB said that the boys and VNB kept their bedroom doors closed.
- [18] In cross-examination PCB said she told her sister VNB about the first incident after it happened but did not tell SJK because she was too scared. She agreed that her description of that event included that it was interrupted by SJK phone call that allowed her to get away. She also said that during the second last incident she was yelling pretty loudly when it happened. Regarding the last incident, PCB acknowledged she was worried about being attacked when she walked down to the defendant's room. She also claimed the light was on during this event but accepted she told police it was dark. She explained the defendant turned the light off before he attacked her and also slightly closed the door.
- [19] PCB claimed she was "interrogated and abused" by her sister VNB. She claimed also to have been "interrogated" by SJK and RWD for "weeks and months". She acknowledged she told her friend LGM the defendant had tried to grab her boobs or butt, and she told SJK the defendant touches her. She also admitted she told her sister VNB she had been "raped". She then said what she told her sister was that she'd been sexually assaulted and abused. It was suggested to her she told VNB "It's not my fault I was raped in care" and she conceded that may be what she said.
- [20] PCB also claimed she was "tormented" by every child in the household. She denied she was the aggressor or attacked the other children but said she was "pushed and pushed until I snapped". She denied ever threatening any of the children with a knife. PCB acknowledged the household wasn't very pleasant for her and that she wanted to get out. She also acknowledged that just prior to speaking to police she had re-established contact with her biological mother. She said she was happy about that because she was not tortured or tormented. PCB denied the suggestion that her allegations of sexual abuse by the defendant and her claim he punched her were untrue.

2. VNB

- [21] VNB is the older sister of PCB. She was born on 19/9/2001. She was interviewed by police on 30/8/2018. VNB said she lived in a house with SJK, who she called "mum", and five other children. She said the defendant had previously also been living with them, as had PCB before she self placed. VNB had lived with SJK for almost eight years. VNB said there was nothing that occurred in the house over the time she lived there that made her worried or concerned. She said the defendant had lived in the house for about six years and she had no worries or concerns with the defendant.
- [22] VNB said she had not spoken to PCB since she returned to their biological mother, although she had seen her at school. VNB said they got into a fight at school since because PCB wouldn't leave VNB's friends alone. VNB said she didn't want to talk with PCB because she didn't want her biological mother knowing her business and

she didn't want anything to do with her biological mother. VNB said the morning after PCB left, PCB and their biological mother were waiting for VNB at the school gate. VNB said she then complained about her biological mother's presence to the school counsellor. VNB said she did not know why PCB returned to their biological mother although PCB had previously always refused to speak to their mother.

- [23] VNB said that on the morning PCB left, SJK told her to take her necklace off because they were not allowed to wear jewellery at school; PCB did not like being told that, threw the necklace in her room, and walked out. VNB said PCB was very aggressive towards the other children and threatened and hit them. She said PCB would push them against the wall, punch them, throw things at them, threatened them with knives, and threatened and chased VNB with a saucepan. VNB said SJK and the defendant would try to get her to calm down but when PCB was upset she wouldn't listen.
- [24] VNB described an occasion she and PCB fought. She said PCB wouldn't dry the dishes, instead stayed in the shower for 45 minutes, and two of the children knocked on the door to use the bathroom. When PCB came out she hit them and they started crying and VNB pushed her away from them. VNB and PCB then got into a fight and PCB went outside and without telling anyone went to her friend LGM's place, and stayed there the night. VNB said PCB had already packed a bag beforehand. VNB said PCB had been talking to her biological mother before she left. She believed LGM's mother and her biological mother were friends and that her biological mother had recently moved to the area.
- [25] VNB said the younger children were disciplined by having to sit on a tile but she and PCB would have devices taken off them or be sent to their room. VNB identified a video recording (Ex 9), which she said was taken by the defendant, and which recorded the fight between her and PCB. This was the fight she described where PCB hit the other children and left to go to LGM's place. In this fight she and PCB were punching each other to the body and face. VNB denied the defendant punched her after this fight or that he punched PCB. She confirmed that PCB left with a bag she had packed earlier.
- [26] VNB said that prior to PCB leaving, she made it plain to everyone that she didn't want to be in the household. She became aware that leading up to PCB leaving she had started talking to her biological mother and seemed excited about that. VNB also said that on an occasion at school, PCB yelled out to her "It's not my fault I was raped in care."

3. XAB

- [27] XAB is a foster child of SJK. He was in grade 6 at the time of his police interview on 30/8/2018. He was living in the house with SJK, the other children and the defendant. XAB described the defendant as "fun" and "cool". XAB said he got on well with the other children except for PCB. He said PCB "does hit us a lot", and threatens to stab them with knives, and says she will kill them and bury them in a hole. XAB said PCB doesn't really like anybody, threw a dictionary at his head, hit him in the head, and threw him into the shower. He also said PCB swears a lot, and is really angry and mean. XAB said PCB swears at everyone and pushes everyone around, and starts fights with everyone.

- [28] XAB described that PCB got into a fight with VNB and VNB ran into the bathroom chased by PCB who had a saucepan. XAB said PCB doesn't really like SJK and steals her stuff, although SJK tries hard for PCB. XAB also said PCB doesn't really like the defendant. XAB described an occasion when they were about to leave for the bus and PCB told SJK to "go F off", went to the bus stop, but didn't come back home that day. He said that was the last time he'd seen PCB. XAB said he would get scared when PCB gets knives out of the cupboard and threatens to stab them. XAB demonstrated with his arm raised above his head as to how PCB would hold the knife and said this would have happened about twenty times. XAB said there was a fight where VNB had seen PCB hitting one of the children and told her to stop and PCB then hit VNB in the face. XAB said he had chores to do such as the washing up and vacuuming. He said that if they were in trouble they would have to sit on a tile and not allowed to move.

4. LGM

- [29] LGM is a friend of PCB. She was born on 1/8/2002. She was interviewed by police on 19/9/2018. LGM was at school with PCB from grade 3. LGM said during grade 9, PCB told her the defendant started to hit her. She said he would hit her or push her into things or slap her. LGM said PCB also said the defendant pushed her into his bike and the bike fell on top of her, and that PCB pushed him back into the bike.
- [30] LGM said that one Sunday she was at a friend's house to feed their dog and PCB knocked at the door, and was crying and wet from the rain. She said PCB told her she and VNB had a physical fight and the defendant had intervened and hit VNB, so PCB hit the defendant. PCB said the defendant then locked both she and VNB out of the house. PCB also said the defendant threatened to harm them so she got a bag of clothes and left. LGM said PCB was upset and said the defendant was hitting her and she didn't want to go back. LGM said her mother then picked them up and they went to LGM's house. There she said PCB told them she had had contact with her mother and wanted to return to live with her. LGM said the next day SJK came and picked PCB up from their house.
- [31] LGM said that whilst at her house, she was also told by PCB that the defendant tried to touch her inappropriately. She said PCB pulled her aside and said the defendant tried to grab her in places that shouldn't be touched. LGM said PCB complained the defendant had punched her and she saw a "really big lump" on her right jaw. She said PCB was crying and said the defendant tried to grab her and she was thinking of charging him. LGM said she could not recall whether PCB said he tried to grab her butt or boob. PCB did not tell her when that happened.
- [32] LGM described the defendant was more demanding of VNB than PCB, and would get angry at PCB for something random like the washing up. She said she had met the defendant four times and didn't like to go to the house because she didn't get along with the kids. LGM said the defendant was normally quiet when any one visited, but seemed to let VNB do a lot compared to PCB.
- [33] LGM said some time later, PCB called her biological mother to come and get her and she had been living with her biological mother since then. She said PCB now seemed

really happy. LGM said PCB told her she had twice contacted her biological mother; the first by phone and the second in person. She said PCB told her that about three months before, SJK told her biological mother PCB did not want to see her but her biological mother came to the car, and she and PCB hugged and kissed and talked. LGM also said PCB now spoke about her biological mother non-stop, “absolutely loves her”, and “absolutely loves where she is now”. LGM said before meeting with her mother, PCB always said she wanted to meet her and to find out why she was in foster care. LGM said about six months before the occasion when PCB came to her house wet and upset, PCB said she wanted to be with her mum rather than stuck in a house full of kids.

5. SJK

- [34] SJK was the foster mother of PCB. She was born on 8/11/1988. SJK was in a relationship with the defendant from 2013. SJK lived with the defendant, and children PCB, VNB, JNB and HIB, CTB, and NMB and XAB. During the period from 2016 to 2018 SJK worked as a shift worker. Both she and the defendant cared for the children. SJK said she usually worked about five days per week and about half the time worked night shifts. SJK said there were times she would call home when she finished a shift at night, to advise when she would be home or if she was delayed. However, she said it would take between 45 minutes and an hour for her to travel each way between work and home.
- [35] SJK said she recalled a night she was working when the defendant called her and said he could not find PCB and that she had run away after an argument. SJK said the next day she picked PCB up from her friend LGM’s place. SJK said that after that incident PCB came back to live at her house for a short time but because of her continuing conflict with her sister VNB, PCB then stayed at SJK’s friend RWD’s place. SJK said one afternoon she picked PCB up from school and took her to RWD’s place and was speaking with PCB about making amends with her sister. SJK said she told PCB to get her things so that they could go home and PCB said “No” and became angry, said “No I’m not coming home”, SJK replied “Come on PCB. You’ve got to come home” and PCB then said “No, because QRZ touches me.” SJK said PCB did not provide any further details.
- [36] SJK said the house they lived in had tiled floors and sound travelled from one end to the other, especially at night time. SJK also said the walls were thin so that noise also travelled through the walls. SJK said all of the bedrooms were shared. She said generally doors to rooms were kept open, including at night time; except for example, when someone was dressing. SJK said that disciplining of the children was age targeted. SJK said there was no physical discipline and the defendant did not use physical discipline against PCB or VNB. SJK said that as regards the older girls, discipline involved things such as turning off their Wi-Fi, removing devices, or removing privileges such as being able to visit a friend’s place. SJK said she did not ever see any marks upon the girls and did not see any behaviour of either of them which would show they were avoiding contact with the defendant. SJK said she did not ever see any concerning behaviour by PCB after arriving home from night shifts. SJK said she did not ever see any concerning behaviour by the defendant directed towards any of the children.

- [37] SJK said that compared to PCB, VNB was more mature; even beyond the one year by which she was the elder. SJK said that as a consequence, VNB had more privileges. SJK said the girls had chores to do and VNB was more reliable in performing them, whereas PCB was more defiant in refusing to do chores, vocalising her opposition, and requiring more encouragement. SJK said at times PCB would push her sister around when they were doing the washing up. SJK said PCB would often swear. SJK said PCB was aggressive towards the other children and would become more heightened and difficult to calm. SJK said when upset, PCB was physically violent to the other children and physically bullied them.

6. XYM

- [38] XYM is the mother of LGM. XYM was born on 31/10/1973. XYM knew PCB through her friendship with XYM's daughter. XYM said on the night of 22 July 2018, PCB was at her house. XYM said that night she noticed both sides of PCB's face were red, she had a really big lump on one side of her head, and her rib cage was also red. XYM said that night she spoke with SJK concerning PCB and made arrangements that SJK would collect PCB from XYM's house the next day. XYM said PCB did stay overnight at her house and SJK collected her the next day which was a Monday.
- [39] XYM said she spoke with PCB whilst she was at her house and endeavoured to make her comfortable so that PCB would tell her what had occurred. XYM said PCB told her she was having a fight with VNB, the defendant struck VNB, she went to VNB's defence, and the defendant struck her quite a few times. XYM said PCB later again complained of being assaulted but made no other complaint.

7. Christine Frances Ward

- [40] Christine Ward is a Plain Clothes Constable of Police, stationed at Ipswich. Constable Ward was one of the officers who interviewed PCB. Constable Ward said in that interview PCB claimed to have complained to a female named RWD about the defendant sexually abusing her. Constable Ward said she attempted to obtain a witness statement from RWD but was unsuccessful.

Legal principles

- [41] The prosecution bears the onus of proving each element of each charge beyond reasonable doubt. The elements of the offences are as set out below. The defendant has no onus of proof and is presumed by me to be innocent. I must determine whether the prosecution has proved the elements of the charges only upon the evidence properly admitted during the trial. All external considerations are irrelevant to my assessment of the evidence in this regard, and I cannot be influenced by any feelings of sympathy for, or prejudice against, any person.
- [42] QRZ did not give or call evidence, as is his right; I draw no inference against him because he did not give evidence. That QRZ did not give evidence remains irrelevant to whether the prosecution have proved the charges, or any of them, beyond reasonable doubt. Because separate charges are preferred, it is necessary that I give

separate consideration as to whether the elements of each offence are proved. Any doubt I have as to the credibility and/or reliability of the evidence of PCB, relevant to any count, must be considered by me in my assessment of her evidence regarding all other counts.

- [43] The evidence of each of PCB, VNB, XAB, and LGM, consisted of their accounts as recorded in police interviews and pre-recorded evidence. PCB (DOB 23/10/2002), was interviewed by police on 15/8/2018 in a caravan where she was living; two police officers were present during that video recorded interview. That recording was admitted as Exhibit 1. PCB gave evidence which was video recorded on 13/12/2019. That recording was admitted as Exhibit 3. VNB (DOB 19/9/2001) was interviewed by police on 30/8/2018 at a police station with a single police officer present. The video recording of that interview was admitted as Exhibit 6. VNB gave evidence which was video recorded on 13/12/2018. That recording was admitted as Exhibit 10. XAB was interviewed by police on 30/8/2018 at a police station with a single police officer present. That recording was admitted as Exhibit 12. LGM (DOB 1/8/2002) was interviewed by police on 19/9/2018 at a police station with a single police officer present. That recording was admitted as Exhibit 14. Both PCB and VNB gave evidence from a room remote from the court room, and each had a support person present with them in the remote room. When each gave evidence all non-essential persons were excluded from the court room. The defendant was present in the court room when each gave evidence but was not visible to either witness on the monitor or at all. The interviews and evidence of each of these witnesses was recorded as it was given and those recordings were played in evidence. All non-essential persons were excluded from the court room when the recordings were played in evidence.
- [44] The use of recordings for taking and presenting the evidence of PCB, VNB, XAB, and LGM is the routine practice of the court for taking and showing evidence of such witnesses. I do not draw any inference as to the defendant's guilt because those measures were used. The probative value of the evidence of these witnesses is not increased or decreased because those measures were used; meaning it is not better evidence, or worse evidence, than if the evidence had been given before me from the witness box. I do not give the evidence any greater or lesser weight because those routine measures were used.
- [45] In this case there is evidence of preliminary complaint by PCB to SJK and LGM. The relevance of this evidence is as regards the credit and reliability of the evidence of PCB. This evidence cannot be regarded by me as evidence of the truth of the out of court statements. Depending upon the view I take of this evidence, the evidence may bolster the credibility of PCB due to consistency, or alternatively detract from her credibility or reliability due to inconsistency.
- [46] In the course of cross-examination, it was suggested to PCB the defendant had never touched her sexually at any time and did not punch or otherwise assault her at all on the 22nd July 2018. PCB denied those suggestions. The evidence showed PCB was deeply unhappy living in the household with her foster parents, siblings and foster siblings, and had resumed communication with her biological mother prior to her making complaints against the defendant. The evidence showed also that PCB initially complained only of being assaulted by the defendant on 22 July 2018 and her

complaint of sexual abuse was made at a later date when she was being asked to return to live with her foster family. It follows the defence case is that PCB's allegations are untrue and that a possible motive for her to have falsely complained is that she wished to live with her biological mother rather than return to live with her foster family. In those circumstances it is necessary that I recognise, if I reject this as a possible motive for PCB to have made a false complaint, it does not follow automatically that PCB is truthful. Any failure to prove a motive for PCB to have lied does not mean that no motive exists. Importantly, any failure to demonstrate a motive to lie is irrelevant to my assessment to PCB's credibility. In the event I reject the possible motive for PCB to have lied, it remains a matter for my assessment whether PCB's account is truthful and reliable.

- [47] In this case PCB gave evidence of events which are not the subject of any charge. In particular PCB said, when interviewed by police on 15/8/2018 that the defendant had sexually mistreated her on multiple occasions and that he at some earlier time attempted to put his penis into her vagina. When cross-examined in court on 13/12/2019, PCB said there were "many occasions" apart from those charged in which the defendant had sexually abused her. She did not detail any further instances. It remains a matter for my assessment whether I accept any of this evidence. However, I recognise the specific limits of the use of this evidence.
- [48] As is obvious, the evidence relied upon as the basis of each of counts 1, 2 and 3 is relevant to whether each of those individual allegations is proved beyond reasonable doubt. But in addition, when considering each of those counts, I can have regard to the uncharged allegations of the defendant sexually abusing PCB, if satisfied that conduct actually occurred, for the purpose of assessing the credibility of PCB's allegations that the acts the subject of counts 1, 2 and 3 actually occurred. The evidence of these other acts might make PCB's allegations that are the basis of the charges, i.e. the acts relied upon as the basis of counts 1, 2 and 3, more likely to be true, because that might show the defendant had a sexual interest in PCB. Before I may use the evidence of these uncharged acts in this way, I must be satisfied the defendant did one or more of those acts, and that he did so because he had a sexual interest in PCB. Unless I am satisfied of those things, the evidence of the other acts has no relevance to whether the allegations the subject of counts 1, 2 and 3 are proved.
- [49] However, even if I concluded the uncharged allegations are true, i.e. that the defendant sexually abused PCB on other uncharged occasions, that does not mean the defendant must be guilty of any of the charges. I cannot reason that because the defendant did any of those uncharged acts to PCB, that automatically proves any of counts 1, 2 or 3. It remains for the prosecution to prove counts 1, 2 and 3 beyond reasonable doubt. Even if I am satisfied the defendant sexually abused PCB on occasions other than those relied upon as the basis of counts 1, 2 and 3, I cannot reason that demonstrates he is a person of bad character and must for that reason be guilty of any offence. It is only if I am satisfied of the elements of an offence beyond reasonable doubt that I can return a verdict of guilty of that count. The allegations of other sexual mistreatment can only be used by me, if I am satisfied they are true, when considering the credibility of the account of PCB.

[50] In the same way, the evidence of the conduct which is relied upon as the basis of each of counts 1, 2 and 3, might be relevant when considering each of the other of those allegations. For example, when considering count 1, I can have regard to the allegations which are the basis of counts 2 and 3, if I accept them beyond reasonable doubt, for the purpose of assessing the credibility of PCB's allegations that the acts the subject of count 1 occurred. The evidence of the other sexual act or acts, i.e. the acts relied upon as the basis of counts 2 and 3, might make PCB's allegations relied upon as count 1, more likely to be true, because that might show the defendant had a sexual interest in PCB. Before I may use the evidence of the other sexual act or acts in this way, I need to be satisfied beyond reasonable doubt the other sexual act or acts occurred, and that showed the defendant had a sexual interest in PCB. Unless I am satisfied beyond reasonable doubt of those things, the evidence of the other sexual act or acts has no relevance to whether count 1 is proved. The same reasoning can apply when considering each of the other specific charges in counts 2 and 3. For count 2, I can use the allegations the basis of counts 1 and 3, if satisfied beyond reasonable doubt those act or acts occurred, in determining whether the act the subject of count 2 occurred; provided of course I am are satisfied beyond reasonable doubt the act or acts the subject of counts 1 and 3 occurred, and that showed the defendant had a sexual interest in PCB. The same can apply when considering count 3.

Particulars and elements of offences

Counts 1, 2 & 3: Indecent treatment of a child under 16 under care

[51] Section 210(1)(a) of the *Criminal Code* provides that any person who unlawfully and indecently deals with a child under 16 years commits an offence; it is more serious if the child was for the time being under the care of the person (s 210(4)). There are 5 elements of these offences the prosecution must prove beyond reasonable doubt. These are:

1. The defendant dealt with PCB. The term deals with includes touching of the child. There must be a deliberate or intentional touching. It need not be touching of the child by the hand, it can be touching with any part of the body or on any part of the body. It does not require there to be skin on skin contact, it can be touching through clothing for example, but it must be deliberate touching.
2. The dealing was indecent. "Indecent" carries its ordinary every day meaning. That is, what the community regards as indecent. It is what offends against currently accepted standards of decency. Indecency must always be judged in light of time, place and circumstance. I must have regard to the context in which the touching occurred. What might be indecent in one circumstance will not necessarily be indecent in another circumstance.
3. The dealing was unlawful. Unlawful means not authorised, justified or excused by law.
4. At the time of the dealing PCB was aged under 16 years.

5. At the time of the dealing PCB was for the time being under the care of the defendant. It must be proved the defendant was looking after PCB at the time of the alleged touching. The prosecution do not have to prove the defendant was the only person looking after her at that time or that there was any formal arrangement giving the defendant guardianship or custody of her.

Count 4: Common assault

[52] Section 335 of the *Criminal Code* provides that anyone who unlawfully assaults another commits an offence. There are 2 elements of the offence of common assault the prosecution must prove beyond reasonable doubt. These are:

1. The defendant assaulted PCB. Section 245 of the *Code* relevantly provides that any person who strikes, touches, or moves, or otherwise applies force of any kind to the person of another, either directly or indirectly, without the other person's consent, is said to assault that other person.
2. The assault was unlawful. Unlawful means not authorised, justified or excused by law (s 246).

[53] The prosecution have particularised the alleged offences (Ex 1) as follows:

Count 1: The first occasion the defendant indecently dealt with the complainant and the dealing was constituted by the defendant rubbing his body against the complainant.

Count 2: The second last occasion the defendant indecently dealt with the complainant and the dealing was constituted by the defendant grabbing at and/or touching the complainant's vaginal area.

Count 3: The last occasion the defendant indecently dealt with the complainant and the dealing was constituted by the defendant rubbing his penis against the complainant.

Count 4: The defendant struck the complainant to the face.

[54] In proof of counts 1, 2 and 3, the prosecution relies upon the complainant's account as contained in Ex 2, wherein she detailed three occasions the defendant indecently dealt with her. Similarly, in proof of count 4, the prosecution relies upon the complainant's description of the defendant punching her in the face on 22 July 2018.

[55] Count 1 is based upon PCB's description of the first occasion the defendant indecently touched her, about a year and a half previously. She said this occurred at about 5.00 or 6.00pm when she was in the defendant's bedroom folding washing and

the defendant pushed her against the wall, held her hands above her head and was rubbing his body against her.

- [56] Count 2 is based upon the complainant's description of the second last time the defendant indecently touched her. She said this was about a month before the last occasion. She said this occurred at about 8.00 or 9.00pm in the defendant's bedroom when the other children were in bed. She said the defendant pushed her onto the bed and was trying to put his hands into her pants and was rubbing his hands on her vagina. She was wearing pyjamas and underwear.
- [57] Count 3 is based upon PCB's description of the last time the defendant indecently touched her. She said this occurred a few weeks before in the defendant's bedroom at night, whilst her foster mother was at work and the other children were asleep. PCB said in the course of this incident the defendant pushed her onto the bed, removed her clothing, removed his own clothing, was touching and kissing her, and she felt his penis against her lower leg.
- [58] Count 4 is based upon PCB's claim that after the fight between herself and her sister that was filmed by the defendant (Ex 9), the defendant punched her a number of times in the jaw. PCB claimed that the defendant hit her sister, she then hit the defendant, and the defendant then hit her.
- [59] The case put on behalf of the defendant was that he did not at any time indecently touch PCB and that he did not punch or otherwise strike PCB after the fight between her and her sister. If accepted, the description of events given by PCB is capable of proving each of the charges. No submission was made that if the touching as alleged occurred, it was not indecent or unlawful, or that PCB was not during the relevant period aged under 16 years, or that she was not then under the care of the defendant for the time being. Likewise, no submission was made that if the defendant struck PCB as she claimed, it was other than unlawful. The real issue in the case of each charge is whether the allegations have been proved beyond reasonable doubt. This means that the central issue is the credibility and reliability of PCB's account.

Consideration

- [60] As identified by both parties, the prosecution case depends upon acceptance of the credibility and reliability of PCB. It is common ground that no other evidence is capable of proving any of the charges. This requires examination of the detail of PCB's account.
- [61] Significant inconsistencies exist in the account of the sexual abuse PCB claims she was subjected to. The first event she described to police was what is charged as count 3 (defendant rubbing his penis against her leg). When first asked to say what she wanted to complain about, PCB said it involved the defendant trying to take her clothes off. When asked for a detailed version, she claimed the defendant in fact did take all of her clothes off, rather than just making an attempt. Her description of this event included that the defendant touched her everywhere with his hands, including on her boobs and vagina, that he tried to insert his fingers into her vagina, and that he also tried to insert his penis into her vagina. The description included detail of the defendant attempting to "finger" her, holding his penis, trying to get on top of her, and

trying to force his penis into her. However, she later expressly retracted these allegations and instead said only that he kissed her boobs, did not touch her vagina at all, and his penis touched her lower leg when he leaned against her. These differences in detail are not as to peripheral matters and were given as if relating a genuine memory.

- [62] Other inconsistencies regarding count 3 include that the light was on when she entered the bedroom and that the defendant partly closed the door before attacking her. These allegations were not part of her account to police.
- [63] Ultimately, PCB said the defendant's attempt to insert his penis and fingers into her vagina occurred on the "time before" the last event, however, when describing the second last occasion (count 2 – touching her vaginal area), she gave no such detail. Instead she said only that the defendant tried to put his hands into her pyjama pants. Concerning the event which is the basis of count 2, PCB at first said that incident ended when she pushed the defendant away and rolled off the bed, then she said it ended when she kneed the defendant in the "nuts", then she added that when she kneed him he half fell off the bed and she was able to get away. Her account included that the defendant as usual said nothing, but this changed to include that he threatened her. Other details had an air of invention; e.g. her clear memory that everyone else was asleep having gone to bed at 7.30pm, the defendant being angry that she managed to get away then yelling loudly when playing an online game.
- [64] PCB's description of the event which is the basis of count 1 (rubbing body against her), included that it occurred at 5.00 – 6.00pm. At first she described that it ended when her foster mother called and the defendant told her to "Fuck off" and threatened her. Later she said she pushed the defendant away, said she had to go for a shower, and the defendant then walked out. PCB claimed she told her sister VNB about this incident after it happened, however, that was not supported by the evidence of VNB.
- [65] PCB also complains she was punched by the defendant after the fight with her sister when she attempted to defend her sister against the defendant's assault. PCB claimed the defendant punched her sister in the face and then repeatedly punched her in the jaw. However, this version is fundamentally contradicted by VNB. VNB specifically denied the defendant assaulted her, and specifically denied the defendant then assaulted PCB. VNB described she and PCB punching each other in the head and face. Although the evidence of LGM and her mother XYM might show PCB had some redness on her face and perhaps a lump on her head afterwards, that might easily have occurred in the altercation that can be seen in Exhibit 9, and as described by VNB.
- [66] After staying overnight at LGM's place, PCB returned home with SJK but did not then complain to her about any sexual abuse by the defendant. Likewise, she did not complain of sexual abuse to XYM. That complaint was made sometime later, but only when SJK told PCB she had to return home.
- [67] PCB acknowledged that she was very unhappy living in the house with her foster family. She claimed to have been victimised by everyone and admitted she wanted to leave. She also admitted that prior to making her complaint she had re-established

contact with her biological mother, and that she was treated better by her. The evidence of VNB suggests the possibility that PCB had planned to run away prior to the fight and had packed a bag to do so. The evidence of LGM was to the effect that PCB had long complained about the defendant mistreating her, and had expressed she wanted to live with her biological mother, rather than in a house full of children. She also described that when PCB achieved this goal she was very happy and loved her new life. The evidence of SJK was that PCB did not complain to her about any sexual mistreatment by the defendant until after being told she had to return home.

- [68] The evidence of SJK, VNB, and XAB contradicts PCB's version about how she was treated and behaved when living in the house. All of these witnesses painted PCB as aggressive and physically violent and prone to losing control of herself when upset. Although PCB denied she was the aggressor, elements of her account tend to confirm that tendency. She admitted for example she would normally go outside to calm down so as not to hurt the children. In addition, her claim the defendant a number of times threatened to stab her, should be seen in the light of the evidence that she regularly made a similar threat to the other children, including by arming herself with a knife.
- [69] Overall, PCB was an unimpressive witness. In light of all of the evidence that directly contradicts her, and her own inconsistency as detailed above, I accept the descriptions given by SJK, VNB and XAB. I conclude PCB was a troubled young girl, prone to outbursts of aggression and violence. I accept she was very unhappy living in the foster household and she well understood that making this complaint was a method by which she could achieve her stated aim of living elsewhere. I conclude PCB in fact had genuine motive to make a false complaint.
- [70] Evidence of preliminary complaint was given by witnesses SJK and LGM. The detail in the complaint to SJK was limited to alleging the defendant touched PCB. This evidence is of little value in assessing the credit of PCB. The complaint to LGM was that the defendant tried to grab PCB on the butt or boob. PCB confirmed that was what she told LGM. Although this complaint is arguably inconsistent with the evidence of PCB, it might be expected that someone in PCB's position would not necessarily provide her friend with a full account. This complaint too, seems to me of little significance in assessing credit. Of more significance was PCB's claim she complained to her sister, which her sister did not confirm. Also, PCB admitted she told her sister she'd been "raped in care", after first denying it. That claim is fundamentally inconsistent with PCB's evidence and is a feature which tends to undermine her reliability. It is also significant that PCB failed to complain of any sexual abuse to either XYM or SJK although then complaining she was punched.
- [71] In this case PCB also gave evidence of alleged sexual abuse by the defendant which is not the basis of any charges. PCB claimed the defendant attempted to put his fingers and/or penis into her vagina the "time before" the last occasion he indecently touched her. Yet, when describing the events of that occasion, PCB did not describe those things at all. Otherwise, the uncharged conduct alleged was general in nature and no detail of it was given beyond claiming that similar things occurred. I do not find the allegations of uncharged similar conduct convincing at all. I am not satisfied any uncharged acts occurred. In those circumstances, those allegations are of no relevance

to whether the charged events are proved. I therefore disregard the uncharged allegations.

[72] For the reasons canvassed above, I have real doubt concerning the reliability of the account of PCB in respect of all charges. I accept the evidence of VNB that the defendant did not punch PCB at all on 22 July 2018. I conclude that allegation was made up by PCB, likely for the purpose of her seeking to live with her biological mother. It follows the defendant should be found not guilty of that charge. My conclusions concerning this charge are clearly relevant to PCB's credibility generally.

[73] Far from being a compelling account of events, PCB's police interview left me with the impression her allegations were made up as she went along. The detail of the allegations changed significantly in the telling. Other evidence contradicts a good deal of what she said. The real issue in respect of counts 1, 2 and 3 is whether I am satisfied beyond reasonable doubt of the specific allegations relied upon. On the basis of all of the evidence, I am not satisfied beyond reasonable doubt those events occurred. It follows the defendant should also be found not guilty of those counts.

Verdicts

[74] In relation to count 1, a charge of indecent treatment of a child under 16 years under care, I find QRZ not guilty.

In relation to count 2, a charge of indecent treatment of a child under 16 years under care, I find QRZ not guilty.

In relation to count 3, a charge of indecent treatment of a child under 16 years under care, I find QRZ not guilty.

In relation to count 4, a charge of common assault, I find QRZ not guilty.

Order

[75] I make the following order:

1. QRZ is formally discharged in respect of indictment number of 348 of 2019.