DISTRICT COURT OF QUEENSLAND

CITATION:	*The Queen v PNR* [2020] QDC 177
PARTIES:	**The Queen** v **PNR** (Defendant)
FILE NO/S:	98/20
DELIVERED ON:	30 July 2020
DELIVERED AT:	Brisbane
HEARING DATE:	13 and 14 July 2020
JUDGE:	Byrne QC DCJ
ORDER:	**1. On the charge of rape, I find the defendant not guilty.** **2. On the alternate charge of indecent treatment of a child under 12 years, who is a lineal descendant and who was under care, I find the defendant guilty.**
CATCHWORDS:	CRIMINAL LAW – JUDGE ALONE TRIAL — VERDICT – where the defendant is charged with one count of rape – where consideration should be given to the alternative charge of indecent treatment of a child under 16, under 12 under care - whether the complainant's evidence was honest and reliable *Criminal Code Act 1899,* s 349 *Evidence Act 1977*, s 21AC, s 21 AK, s 21AM, s 21AQ, s 21AV, s 21AW s 93A
COUNSEL:	Mr. E. O'Hanlon-Rose for the Prosecution Mr. C.F.C. Wilson for the Defendant
SOLICITORS:	Office of the Director of Public Prosecutions for the prosecution. Russo Lawyers for the defendant.

(1) This is a trial by judge alone. The application for it to be conducted in this manner was granted on 23 April 2020.

(2) The defendant pleaded not guilty to the single charge that:

That on or about the first day of April 2013 at Shorncliffe in the State of Queensland, (the defendant) raped (the complainant).

(3) My role is to determine whether he is guilty or not guilty. He is presumed to be innocent, and will remain so unless and until I am satisfied of his guilt beyond reasonable doubt, the burden of proof of which lies on the prosecution at all times. There is no burden on the defendant to prove anything.

(4) The offence requires proof beyond reasonable doubt that the complainant was raped by the defendant. "Rape" is relevantly defined at sections 349(2) and (3):

> *"(2) A person rapes another person if—*
>
> *(a) ...*
>
> *(b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or*
>
> *(c) ...*
>
> *(3) For this section, a child under the age of 12 years is incapable of giving consent.*"

(5) There is no issue that at the date of the charged offence the complainant was under 12 years of age, and hence was incapable of consenting to the charged conduct.

(6) The issues in the trial on that offence are whether the prosecution has proven beyond reasonable doubt that the complainant was digitally penetrated by the defendant, in the manner she described.

(7) The prosecution opened its case on the basis that if I was satisfied that some form of touching occurred by the defendant on the complainant, but that I was not satisfied that penetration occurred, I should consider the availability of a conviction of the offence of indecent treatment of a child under 12 years who was his lineal descendant and who was under his care.

(8) The elements of such an offence are that:

a. The defendant dealt with the complainant;
    i. It is not disputed that the touching described by the complainant, if it occurred, amounts to a dealing.

b. The dealing was indecent;
    i. It is not disputed that the touching described by the complainant is indecent, if it occurred.

c. The complainant was under 12 years of age at the time;
    i. This element is not in dispute.

d. The complainant was the defendant's lineal descendant;
    i. This element is not in dispute.

e. The child was in the care of the defendant.
    i. A person has a child "under care" if they assume responsibility for the control and supervision of the child".
    ii. It is accepted that at the time and place that the alleged conduct occurred the child was under the care of the defendant.[1]

(9) It is also not in dispute that issues of consent are irrelevant to proof of this charge. It is in any event not a factual issue in this trial.

(10) The matter in dispute on this alternative count is whether it has been proven to the required standard that the alleged conduct by the defendant did in fact occur.

(11) For the reasons which follow I am not satisfied beyond reasonable doubt of the guilt of the defendant on the charge of rape, but I am satisfied beyond reasonable doubt of his guilt on the alternate charge of indecent treatment of a child under 12 years who was his lineal descendant and who was in his care.

Applicable principles of law

Onus and standard of proof

(12) As noted earlier, the defendant is presumed to be innocent, and will remain so unless and until I am satisfied of his guilt beyond reasonable doubt, the burden of proof of which lies on the prosecution at all times. There is no burden on the defendant in this trial to prove anything.

Impartiality

(13) In arriving at a verdict I must act impartially and dispassionately; only on the evidence received at the trial; without prejudice or sympathy to the defendant, the complainant or anyone else; not letting emotion sway my judgment; and putting aside anything else I might have heard about the matter beforehand, which in this case is nothing.

Verdict

(14) My verdict must be based on the evidence I accept, taking into account the directions and warnings that I must follow and bear in mind.

Evidence

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[1] Transcript 1-55 line 29.

(15) The issues must be resolved on all of the evidence, but that does not mean that I have to resolve all of the questions or inconsistencies which I consider might have been raised by the evidence, or which conceivably arise about the facts.

(16) The evidence which I accept and that which I reject may be based on many things, including what a witness had to say; the manner in which the witness said it; the general impression which he or she made when giving evidence; and my assessment of the other evidence, including that given by the other witnesses and the various other documents and material in evidence.

(17) In the case of conflicts it is for me to decide whether they are important to resolve, or unnecessary, given the views which I reach about other parts of the evidence, when I assess the evidence and the cases which the parties have advanced.

(18) The honesty and accuracy or reliability of the evidence must be assessed, using common sense and experience. I however recognise that there are particular limitations on what can be concluded from a visual impression of the witness, and their demeanour in the witness box alone.

(19) There is a difference between honesty and reliability. A person might honestly believe what he or she said about what he or she heard or saw and yet not be reliable in recollection, perhaps because of errors in observation, or of recall, or because of an inability to describe what they heard or saw. This might become apparent, when other objective evidence is considered.

(20) It is a matter for me to decide whether or not I accept the evidence given by any witness. If I conclude that particular evidence is not truthful or reliable, I will not take it into account in determining whether the Crown has established guilt.

(21) The ultimate decision as to what evidence I accept and what I reject is mine. In arriving at my conclusions I may also take into account relevant parts of other evidence, including that of other witnesses and the facts which are not in dispute, in deciding whether to accept or reject a particular witness' evidence, or a particular part of their evidence, or in deciding how persuasive I find evidence I consider to be truthful and reliable.

(22) I am also not obliged to accept the whole of the evidence of any one witness. I may accept some parts of a witness' evidence and reject other parts, if I find some part of that evidence to be unreliable. Or I might not accept part of a witness' evidence, because I consider that the witness had some motive to conceal, or to embellish the evidence which he or she gave, or to distort the truth.

(23) The fact that I do not accept a portion of the evidence of a witness does not mean that I must necessarily reject the whole of the witness' evidence. I may accept the remainder of that witness' evidence if I think it is worthy of acceptance.

Inferences

(24) In drawing inferences I must be satisfied that they are reasonable ones to draw from the facts that I find established by the evidence. It is essential that I examine the evidence with care and to consider whether it is reliable, before drawing any conclusions from facts which I find established. This requires a process of reasoning undertaken with care and logic, avoiding speculation or conjecture to fill in any gaps in the evidence, but it is up to me to decide whether I accept particular evidence and if I do, what weight, or significance, it should have.

Special Measures

(25) Given the age of the complainant and the fact that the defendant is charged with a sexual offence, the complainant is a "*special witness*" as defined.[2] As a consequence of that, certain special measures were taken to receive her evidence, namely;

a. The evidence in chief of the child was largely comprised of the admission of two recordings of conversations between the child and police;[3] and
b. A brief aspect of further evidence-in-chief, and the whole of the cross-examination of the child was conducted via a video link whilst she was in a room separate to that in which the defendant was seated at the time. A recording of that testimony was tendered at the trial and relied upon as her evidence;[4] and
c. There was present with the child at that time a "support person".[5]

(26) In respect of those measures, I direct myself that:[6]

a. each of those measures is a routine practice of the court and I should not draw any inference as to the defendant's guilt from any of them; and
b. the probative value of the evidence is not increased or decreased because of any of the measures; and
c. the evidence is not to be given any greater or lesser weight because of any of the measures.

(27) In this trial it is obvious from the transcripts that passages of each of the complainant's recorded interviews with police, and which were each tendered as the child's evidence-in-chief, have been edited. The parties informed me that passages had been excised by agreement. I do not speculate as to what may have been in those passages, and I do not draw an inference adverse to the defendant from the fact that those excisions have occurred.

(28) Further, in the second interview with police, there is a passage wherein the complainant tells police what she said about the matter to another person, who appears to be a

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2 Section 21AC of the *Evidence Act 1977.*
3 Section 93A of the *Evidence Act 1977.*
4 Sections 21AK, 21AM and 21AQ of the *Evidence Act 1977.*
5 Section 21AV of the *Evidence Act 1977.*
6 Section 21AW(2) of the *Evidence Act 1977.*

counsellor or similar. After the passage was played the prosecution contended that parts of that passage fell within sexual assault counselling privilege,[7] and should not have been admitted. The defendant's Counsel agreed and the joint position of the parties was that I should ignore those passages.[8] At the time I directed myself to have no regard to those passages,[9] and I remind myself of that direction.

Right to silence and the defendant's testimony

(29) The defendant has a right to silence. There is no evidence that the defendant was ever spoken to by police about the present allegations, and I draw no adverse inference from the fact that there is no evidence that he provided an account to police.

(30) He did however elect to testify before me. Central to his testimony was a denial of wrongdoing. The defendant does not assume any onus of proof in testifying. His evidence is added to the evidence called for the prosecution, and the prosecution retains the onus of proving guilt on the whole of the evidence.

(31) There are generally three ways in which to approach the use to be made of the evidence of a defendant in a trial, and this is the manner in which I consider this evidence:

a. If I consider his account to be credible and reliable, and that it provides a satisfactory answer to the prosecution's case, the result will be the entry of a verdict of not guilty.
b. If I consider that, although the defendant's account was not convincing, it leaves me in a state of reasonable doubt as to what the true position was, the verdict will be not guilty.
c. I may conclude that his account should not be accepted. However, if that is my view, I must be careful not to jump from that view to an automatic conclusion of guilt. In that event, I must set it to one side, go back to the rest of the evidence, and ask myself whether, on a consideration of that evidence that I do accept, I am satisfied beyond reasonable doubt that the prosecution has proved each of the elements of the offence in question.

Special scrutiny required

(32) In this trial I must scrutinize the evidence of the complainant with great care before I can arrive at a conclusion of guilt of any offence. This is because there are a number of features of the evidence which individually and collectively mean there is a risk that the complainant's evidence, or aspects of her evidence, may not be reliable. They are:

a. The young age of the complainant child at the time of the alleged offending means that there is a risk of imagination replacing or supplementing a real memory.

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[7] *Evidence Act 1977, Part 2, Div 2A*.
[8] They are evidenced in MFI-C at page 24 line 50 from the words "where she said …" to page 25 line 1 and page 25 line 22 to line 44 inclusive.
[9] Transcript 1-15 lines 14 to 20.

b. The young age of the complainant child, especially when she was first interviewed by police, means that she necessarily has a limited vocabulary which may result in an inability to accurately express that which she is describing.
c. On the complainant's own account, she was woken to find herself being touched as she alleged. There may be a risk that as she was waking she has not properly appreciated what was occurring.
d. It was her mother who in effect suggested that she had been touched by someone. There may be a risk that the child has agreed to the proposition in an effort to please her mother.
e. She did not herself initially speak of the complained of conduct in the first 93A statement. It was only after police prompted her that they had been told she said something to her mother that she spoke of that conduct. There may be a risk that the child has told her mother a false account and felt as though she was subsequently bound by it.
f. The difference between accounts given by the child at different times.
g. The passage of time between the second 93A statement and her pre-recorded evidence on the one hand and the time of the alleged incident on the other.

(33) In light of those matters, I should only act on the evidence of the complainant if, after considering it with this and all other warnings and directions in mind, and all the other evidence, I am convinced of its truth and accuracy.

Prior good character

(34) In the trial, the defendant testified that he was a retired police officer and that, although he had three surviving children, three grandchildren and a number of great-grandchildren, he had never been the subject of a sexual allegation before. There was no other evidence of good character adduced at trial. Counsel for the defendant expressly disavowed the need for a direction as to good character, given that the only source of the evidence is the testimony of the defendant himself.

(35) I accept that a formal direction as to good character is not required in this trial. However, the evidence is still something that I must consider in determining if I accept that the charged conduct occurred.

Motive

(36) The evidence referred to above is more directly relevant to the issue of a lack of motive to offend in the manner alleged.

(37) The motive by which a person is induced to do an act is immaterial to the question of criminal responsibility. However the existence of a motive can be an important factual issue. It can, if accepted, tend to explain something that is otherwise odd or unlikely. Equally, positive evidence that the defendant lacks a motive to offend as alleged is a matter to be taken into account by the tribunal of fact.

Preliminary complaint evidence

(38) The prosecution have adduced preliminary complaint evidence in this case. I am mindful that the evidence can only be used to assess the credibility of the complainant's account in the sense that consistency between her account of events and that which she told each of her mother and father may enhance the likelihood that her account is true. I cannot, and do not, regard those out of court statements as evidence proving what occurred.

(39) Of course, any inconsistency between the preliminary complaints as I find them to have been made and the complainant's evidence as to what occurred may cause me to have a doubt about her credibility or reliability, although I must consider whether any inconsistencies are of such a nature as to affect her credibility or reliability or whether they are matters that are explicable in all the circumstances. That is, whether consistencies or inconsistencies impact on the complainant's credibility or reliability is a matter for me to determine.

Expert evidence

(40) One expert testified in this trial, Dr Skellern. Experts have specialised knowledge and so are able to give evidence about their opinions on relevant matters, which are within their particular area of expertise. While other witnesses may speak usually only as to facts, that is, what they saw or heard or otherwise experienced directly, and are generally not permitted to express their opinions, experts may give opinion evidence because their training and experience enables them to give opinions about matters outside the range of experience of ordinary members of the community, including judges such as me.

(41) It must be borne in mind, however, that the value of any expert opinion is dependent on the reliability and accuracy of the material which the expert uses to reach her opinions and that my conclusions must be based on all of the evidence, including that which was not available to her.

(42) Where there is no challenge to the expert evidence, I would be slow not to accept those opinions. But if, having given the matter careful consideration, I do not accept the evidence of the expert, or any part of her evidence, I do not have to act upon it, even if unchallenged.

(43) If the facts upon which the expert's opinion was based do not accord with the facts as I find them to be, I would not accept the opinion. I am also, to a degree, entitled to take into account common sense and my own experiences, if they are relevant to the issue upon which the expert evidence relates.

The parties' cases

(44) In arriving at my conclusions I must give careful attention to all of the evidence, not only that which the parties have particularly addressed and the cases which they have each advanced by the submissions, especially about the matters which are in issue but to the evidence as a whole. If I consider that there is a view of the evidence which neither party advanced, I am entitled to act on that view of the evidence.

Factual Allegations

Overview

(45) On 1 April 2013 the complainant, then aged just over 5 years and 8 months old, stayed with the defendant and his wife for the night, as prearranged. The defendant is her great-grandfather, the child's father's grandfather. She had stayed overnight on a few occasions previously. She referred to the defendant as Pop or Poppy. They returned her home the next day, 2 April 2013.

(46) The defendant and his wife stayed only a few minutes before leaving. Shortly after they left the complainant told her parents certain things, the details of which will be outlined below, and as a result she was taken to the Royal Children's Hospital where she was examined. She then attended the police station and spoke with police in a recorded interview.

(47) There is then no evidence of anything occurring in the investigation, apart from some photos being taken at the defendant's house on 3 April 2013, until almost five years later when, on 15 March 2018 the complainant again took part in a recorded interview with police.

The complainant's evidence

(48) During the recorded interview of 2 April 2013 ("the first 93A statement") the complainant initially told police that she was there to talk to them about her Grandma, that she had a shower at her house, had a sleep in her bed and when she got up in the morning they had a walk and she saw some turtles and fish.[10]

(49) After then being prompted by an officer saying she had heard that the child had told her mother that she was sore, the complainant said that she had been asleep at Grandma's house and Pop touched her "*on the mini*"[11], that he rubbed her mini, that she didn't like it, that Grandma didn't see it as she was asleep and that she told her mother the truth.[12] She said that she saw Pop touch her mini[13] and that he opened up her pants and he touched it. She said that it "*stings when Pop touched it*".[14] She had never felt the stinging before and she gestured to indicate that it was stinging in the genital region.[15] She was not wearing any underwear under the pyjamas, because "*those undies hurt me*".[16]

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[10] MFI-B page 4.
[11] There is no dispute that "mini" was the term used by the child to describe her vulval/vaginal area.
[12] MFI-B page 5.
[13] MFI-B page 15 line 53 to page 16 line 15.
[14] MFI-B page 16 line 20 to 40; page 18 lines 33 to 45.
[15] MFI-B page 17 lines 31 to 45.
[16] MFI-B page 19 line 50 to page 20 line 12.

(50) She spoke of cream being applied to the stinging, and corrected police when they asked a question suggesting that Pop may have applied the cream.[17]

(51) At different times of the interview the complainant referred to being touched "*on*" the mini and "*in*" the mini, and on occasions gestured towards her vaginal area. Although at one point the complainant referred to the defendant using his hands and then shortly afterwards to using his hand,[18] she did not otherwise nominate whether he used one or two hands.

(52) Other details of what the child did that day were elicited, including that he defendant got a stone in his foot that day and went to the hospital, the details of what she ate for dinner and after dinner, that she watched a movie on the TV after dinner, that she cuddled up to Grandma in bed and was wearing "smurfette" pyjamas.[19] She could not recall the name of the movie she watched.[20] A photo of pyjamas bearing the word "smurfette" and with images of what is apparently a smurfette was tendered as showing the pyjamas she took to the defendant's house.[21] None of these details were in any way challenged in the trial.

(53) Describing the sleeping arrangements, the complainant referred to "*Pop changed*", and described sleeping in the big bed with Grandma and the defendant sleeping on the "*little bed*".[22] (This "little bed" is usually described by the complainant as a bunk bed, and by the defendant as a stretcher. There is no dispute that they are the one and the same.)

(54) She told police she had told her mother and father what had happened to her. She said that, apparently at an earlier time, her mother had told her *"... if somebody touch you on the mini, just tell your parents ... then I did ... then I tell the truth.*"[23]

(55) During the recorded interview of 15 March 2018 ("the second 93A statement") the complainant told police she was there to tell them about being "*sexually abused*".[24] She said that she came to know that term because you see it used on the news, and because her mother told her about the term when she was eight or nine years old.[25]

(56) She said she recalled going to the defendant's house, feeding magpies, having lunch, playing and feeding magpies, having dinner and then watching "Snow White. When she went to bed she didn't want to sleep in the bunkbed, so she slept on the bed with her Grandma and the defendant slept on the bunkbed. She fell asleep and woke up being touched, and she saw the defendant touching her on her "*private*". She tried to get away from him, moving away, but he kept touching her. The next morning she had a shower

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17 MFI-B page 17 line 55 to page 18 line 34; page 19 lines 33 to 36.
18 MFI-B page 18 lines 35 and 38.
19 MFI-B pages 6-11.
20 MFI-B page 22 lines 46 to 54.
21 Exhibit 5.
22 MFI-B page 14 lines 10 to 48.
23 MFI-B page 30 line 50 to page 31 line 5.
24 MFI-C page 2 line 52.
25 MFI-C page 11 lines 13 to 33.

and after being dropped off at home, she told her mother that "*my privates were all sore*".[26] The term private referred to her "*mini*" which in turn referred to her vagina.[27]

(57) She later described that the defendant put his "*hands in, near my private*" and started touching it and although she was moving away he kept doing it. She said that she told her mother while she was doing the garden.[28] She demonstrated that the defendant was touching her by flexing her fingers with one hand[29] and said that she was lying on her back on the bed at the time. She said that the defendant was on the bunkbed, lying facing the roof until he reached over and touched her and he was half on his side.[30] She later confirmed that he was on his side in the bunkbed when he touched her.[31]

(58) She saw that it was the defendant touching her because she saw his face, which she could see because moonlight was coming in through a window.[32] She was wearing a Smurf outfit to bed that she had gotten for Easter a short time before.[33]

(59) She said, gesturing with her fingers, that the bunkbed the defendant was on was a few centimetres from her on the big bed, and was a few centimetres lower in height than her bed.[34]

(60) At one point she was asked to describe the touching in as much detail as she could. She then described the defendant touching her with two hands. Her gestures were firstly of flexing the fingers on both hands when describing how he was touching her, although this was she said before she woke up and saw him doing it. She however continued to describe, and gesture, that the defendant used two hands, including parting her labia majora and touching her "*in there*" (whilst gesturing with one hand).[35] She again later described the defendant moving his hands "*on*" her private "*and then he started opening it and touching inside it*". The gestures on this occasion were with one hand only. [36] Comparatively late in the interview, the complainant mentioned for the first time that the defendant stopped touching her after she verbally told him to stop.[37]

(61) When she got home she told her mother straightaway that her mini was stinging, but she couldn't remember if she told her why it was stinging.[38]

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26 MFI-C page 3 lines 1 to 16.
27 MFI-C page 7 lines 23 to 30.
28 MFI-C page 5 lines 40 to 44.
29 MFI-C page 6 line 5. This demonstration is at about 10.00 minutes into the recording Exhibit 2.
30 MFI-C page 6 line 41 to page 7 line 16.
31 MFI-C page 32 line 28 to page 33 line 12.
32 MFI-C page 7 line 38 to page 8 line 18.
33 MFI-C page 23 line 13 to 55.
34 MFI-C page 5 lines 20 to 28. This demonstration is at about 8.40 minutes into the recording Exhibit 2.
35 MFI-C page 13 line 5 to page 14 line 10. The relevant demonstrations are on the recording Exhibit 2 between about 26.30 minutes and 28.10 minutes.
36 MFI-C page 15 lines 9 to 36. The relevant demonstrations are on the recording Exhibit 2 between about 30.00 minutes and 31.00 minutes.
37 MFI-C page 31 lines 5 to 10; page 35 line 22
38 MFI-C page 18 lines 21 to 55.

(62) This was the first and only time that the defendant had done anything like that to her.[39]

(63) She recalled that her mother told her mother's sister what happened and that she, the complainant was present when she did that.[40] She was asked why she was back with police today. As the answer was the subject of competing submissions, and given that I have listened to it a number of times, I will set out the complete answer as I hear it:

> "*Because Mum told me that you're old enough to come here and speak to the police officer because dad didn't want to go through all that stuff when I was five or six. So we came here today because I wanted to tell you guys what happened and for him to go to jail if it happens*."[41]

She said that although they had discussed her options, no one had reminded her of what happened.[42] This passage contains the only evidence explaining why there was a delay of several years in the investigation.

(64) She was also asked how far apart the beds were. She initially gestured a distance of a few centimetres, and confirmed that you "*couldn't stand between the two beds*".[43] She later estimated, using a thong on her foot, that the defendant's body was a little over a half a thong length from her body.[44]

(65) There were a number of occasions in the interview when the complainant could not answer questions asked, as she said she could not remember, or words to that effect.[45]

(66) The pre-recording of the complainant's evidence was brief. The evidence in chief was limited to globally confirming the truth of the two accounts to police. The cross-examination relevantly elicited the complainant's confirmation of the following propositions:

a. The original plan was for her to sleep in the bunkbed, but she did not want to and the defendant did instead.[46]
b. The bunkbed "*was about two feet away from the bed so that you could walk between the stretcher and the bed*", which was agreed to in terms that it was "*about that, yeah*".[47]

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39 MFI-C page 20 lines 29 to 42.
40 MFI-C page 26 lines 20 to 54.
41 MFI-C page 29 lines 33 to 38. The passage is recorded at about 55.25 minutes on Exhibit 2.
42 MFI-C page 30 lines 20 to 25.
43 MFI-C page 33 line 46 to page 34 line 19. The relevant demonstration is on the recording Exhibit 2 at about 61.20 minutes.
44 MFI-C page 40 line 31 to page 41 line 28. The relevant gestures are shown commencing at about 71.45 minutes on the recording Exhibit 2.
45 See for example MFI-C page 14 line 50; page 19 lines 8 to 50; page 31 line 17.
46 MFI-D page 1-8 lines 7 to 14.
47 MFI-D page 1-8 lines 23 to 26. This concession is recorded at about 4.30 minutes into the recording Exhibit 3.

c. On her account the defendant was lying on the bunkbed, he did not sit up at any time, he touched her with both his hands and stopped when she said "stop".[48]
d. That it was her mother who first suggested someone had touched her.[49]
e. That although her mother told her the term "sexually abused", she knew what had happened to her.[50]

The mother's evidence

(67) In evidence-in-chief, the mother recalled that when the complaint was dropped home she was scratching at her vagina. After the defendant and his wife left she let out a "*wail*", that when asked she said something was wrong, that the mother took the complainant inside and as her "*Has someone touched you?*" to which the child replied affirmatively, and when asked "*Who?*" the child replied "*Poppy?*".[51]

(68) She called her husband inside and asked the child to show what had happened to her. The complainant laid down on the lounge and showed them by motioning her hand across her stomach, then towards her vagina and said that the defendant had put his finger "*up there*" whilst motioning into the vagina. The child said the contact happened in the bed.[52] They took the complainant to the hospital and then the police station that night.

(69) In cross-examination, the mother accepted (after being shown her written statement) that after the defendant left she took the child inside to apply some cream in an effort to relive the stinging. They then went back outside and it was then that the child wailed. They then went back inside and the mother asked "*Did someone touch you there?*" and after receiving an affirmative answer, she asked "*Who?*" and was told "*Poppy*". The mother then summonsed the father and the demonstration occurred.[53]

(70) The mother accepted that the child had returned from the defendant's house on 27 March 2013 with a rash on her vagina.[54] She also accepted that the child developed a rash every two months or so, which the mother attributed to the child "*wiping herself too hard*".[55] The child was taken back to the hospital two days later on 4 April 2013 because she either would not urinate because of pain, or because of the pain on urination.[56]

(71) The mother denied ever telling the child that she had been "*sexually abused*" or telling her the term "*sexual abuse*".[57] She accepted that she had spoken to a number of people

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48 MFI-D page 1-9 lines 28 to 43.
49 MFI-D page 1-10 line 35.
50 MFI-D page 1-11 line 4.
51 Transcript 1-26 lines 32 to 44.
52 Transcript 1-27 lines 1 to 50; page 1-27 line 40.
53 Transcript 1-31 line 46 to 1-32 line 43.
54 Transcript 1-33 lines 16 to 18.
55 Transcript 1-34 lines 1 to 2.
56 Transcript 1-34 lines 4 to 22.
57 Transcript 1-34 line 43 to 1-35 line 8.

about the incident[58] and she, the father and the child decided that it would be left up to the child if she wanted to go back to police.[59]

The father's evidence

(72) In evidence-in-chief, the father recalled that the complainant was moving her pants around and was itchy when she returned home. Once the defendant and his wife left, the child became upset. The mother took her inside, and then called out to him to come inside. When there, he asked the child what she was saying and was told "*Poppy touched me on the mini*", and when asked to demonstrate the child rubbed the top of her "*mini*".[60]

(73) In cross-examination he accepted that before going to the hospital he had gone to the defendant's house and confronted him about the allegation.

The medical evidence

(74) The child was examined by Dr Skellern when she presented on 2 April 2013. Dr Skellern is highly credentialed in the field of paediatrics. On examination the child showed no signs of injury or trauma, and the hymen was intact. Penetration of a five year old's vulva or vagina may, or may not, leave any visible injury.

(75) In a child of that age, the hymen is "*quite an uncomfortable structure to even be touched*" and touching it will cause pain or discomfort.[61] The skin of the genital region is different to the skin that is an external part of the body and a rubbing type pressure to the former can cause pain and discomfort because it is quite sensitive.[62] A minor tissue injury may manifest itself only as swelling and tenderness. Swelling is difficult to see when there is only a bit of it, and tenderness is a symptom that people complain of rather than seeing it, so injury to the tissue may be something that can't actually be seen.[63]

(76) A burning feeling and sensation on urination is called dysuria, and any type of inflammation or traumatic injury can cause it. Inflammation in the genital area is called vulvovaginitis, and there are a wide range of potential causes of it.[64] The previous rashes were consistent with vulvovaginitis.[65] There was no urinary symptoms when she was examined on 2 April 2013, but you would not necessarily expect that dysuria would immediately be present if the vulvovaginitis was caused by trauma, although it might.[66]

(77) Although Dr Skellern did not attend to the child on 4 April 2013, the records indicated that a urine test was taken which excluded the presence of a urinary tract infection.

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58 Transcript 1-35 lines 10 to 44.
59 Transcript 1-35 line 28 to 1-36 line 10.
60 Transcript 1-39 lines 14 to 28.
61 Transcript 1-18 lines 1 to 4.
62 Transcript 1-18 lines 10 to 18.
63 Transcript 1-18 lines 28 to 39.
64 Transcript 1-19 line 45 to 1-20 line 9; 1-22 lines 21 to 30; 1-23 lines 21 to 22.
65 Transcript 1-20 line 39 to 1-21 line 2.
66 Transcript 1-21 lines 15 to 34.

(78) Dr Skellern's opinion was that the examination results could neither confirm nor refute the allegation that had been reported to police. It must be noted that it is unclear precisely what aspects of the allegation the doctor was there referring to.

The police investigation

(79) The principal purpose of the testimony from the investigating officer, apart from acknowledging the conduct of the two 93A statements, was to facilitate the admission into evidence of a number of photographs. Some were taken close to the time of the alleged commission of the offence, namely on 3 April 2013, and broadly speaking show the bedroom at the defendant's house and the bed therein, as well as a fold out stretcher bed (referred to by the complainant as the bunkbed) packed into a carry bag in the downstairs garage area.

(80) Others, surprisingly, were not taken until 12 May 2020. By this time the defendant and his wife used of a new and differently sized bed. Some photos were taken of the stretcher bed folded out and placed in the bedroom and, by reference to other furniture that had remained since 2013 and the photos of the original bed against that furniture taken in 2013, it was established that the bunkbed was close to but a little lower than the height of the original bed. This was not in dispute between the parties.

(81) Other measurements were taken of the stretcher bed. The frame was wider at one end than the other; 0.723 metres at the narrow end and 0.803 at the wider end, including what I will refer to as an overhang of the frame measuring 0.103 m.

The defendant's testimony

(82) The defendant testified that he was 77 years of age at the time of the alleged offences, and was a retired policeman.

(83) On previous occasions when the complainant slept at their house, she slept on the stretcher and next to her great-grandmother who was in the bed.[67] On the night in question, the complainant and her great-grandmother slept in the double bed and he on the stretcher, to the right of the bed as the photos were taken.[68]

(84) He testified in chief that he set up the stretcher that he slept in on the right side of the bed and about six inches out from the side of the bed, "*which is the length of that piece*" [69] (which I am calling the overhang).

(85) He initially testified in chief as follows:

> "*On the occasion on which (the complainant) stayed, how far away was it from the bed?--- Well, it was – as I said, it was about six inches out from the bed. All*

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[67] Transcript 1-53 line 43 to 1-54 line 12.
[68] Transcript 1-52 lines 42 to 44.
[69] Transcript 1-53 line 34.

right? --- Because she was originally sleep in it (sic), but she wouldn't get into it."[70]

(86) The questions were then briefly directed to another topic before returning:

"*All right. On this occasion, on this night, who slept in the stretcher - the last time?---I did.*
All right. And where was the stretcher placed on that night when you slept on it?---Well, it was on the right-hand side of the bed. It was out about two foot, I suppose.
All right. So when you say, "Out about two feet," was there a gap of two feet between the bed and the stretcher?---Yes. Roughly.
And - - -?---Roughly two - prob - - -
All right?---Just so they could head in and out."[71]

(87) In cross-examination:

"*So you agree that when (the complainant) was going to bed in the stretcher that night it was about six inches out from the side of the bed?---She never went into the stretcher.*
I know. But I just asked you how far the stretcher was from the side of the bed when (the complainant) was initially going to sleep in the stretch - - -?---When - when she was initially supposed to get into the stretcher it was about six inches away from the back (sic).
Okay?---When she wouldn't go to bed and (the wife) was going to sleep in the stretcher and I said, "No, I'll go back into the stretcher". I shifted the stretcher away from the side of the bed so that I'd get in and out of the stretcher.
Okay. Now, the stretcher bed, when you were sleeping on it - so when (the complainant) refused to sleep in the stretcher bed and you then slept on the stretcher bed, it was still fairly close to the side of the bed, wasn't it?---No, it was out two foot. I just said I shifted it out away from the bed so as I could get in and out of the stretcher."[72]

(88) The defendant considered that he would have been unable to reach the side of the bed with his arms without falling out of the stretcher.[73] He denied that he could have gotten out of the stretcher during the night, nor that he could have leant over to check on the complainant.

(89) The defendant told the Court that there was a street light outside the house that casts enough light that things can be seen in the bedroom, but it's not bright enough to read a

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[70] Transcript 1-53 lines 38 to 41.
[71] Transcript 1-54 lines 11 to 23.
[72] Transcript 1-57 lines 4 to 23.
[73] Transcript 1-57 lines 41 to 1-58 line 2.

book. That night he read with a light on in the bedroom before turning off the light and sleeping on the stretcher.

Consideration

(90) Given the unusual course that the investigation and prosecution of this matter has taken over some 7 years, I consider it important to look closely at what the complainant said closer to the point in time the offence is alleged to have occurred, and then look at later accounts to assess the consistency or otherwise.

The first 93A statement

(91) I accept that the complainant in the first 93A statement was fidgety and tended to wander a little in her narrative, but I found her to be trying very hard to answer the questions asked as best she could. I consider her to have been honest in that interview, and indeed honest overall. I am however still required to assess her reliability and, for reasons to be developed, I consider that she was reliable in the first 93A statement but that there is some doubt about the reliability of aspects of her account at later stages of the investigation and prosecution.

(92) It is true that's she did not completely volunteer the account of the defendant's conduct to police on this occasion, but she was particularly forthcoming once her wandering attention was directed to that. I found her to be trying to tell the truth. I did not consider her to be suggestible. In that respect, in the first 93A statement, I thought it significant that on at least one occasion she corrected the interviewing officers when they seemed to suggest that the defendant had placed cream on her.

(93) I find it relatively unremarkable that she exhibited some hesitancy in speaking with police about the conduct, as opposed to telling her own parents. I do not consider that to be a feature that detracts from her credibility or reliability in the circumstances of her young age, and of having been told to tell her parents if she had been touched.

(94) Allowing for her limited vocabulary consistent with her age, I considered that she gave a broadly consistent account that the defendant had relevantly touched her. I observe that although her vocabulary was limited, she appeared to be capable of expressing herself.

(95) As she did not precisely indicate, and was not asked to precisely indicate, whether she alleged he used one or both hands, (but for one short passage, where she referred to both), it is unclear to me whether she was describing a touching with one or two hands.

(96) Further, her frequently alternating use of the terms "*in*" and "*on*" her "*mini*" in relation to that touching means that it is impossible for me to conclude that the touching involved penetration of the vulva.

(97) Further again, the investigators chose not to more precisely clarify what the complainant understood her "*mini*" to be. Her mother testified that it was a term for her vagina, but it

is not clear to me that the child understood (as opposed to her mother's understanding of what the child knew) it to be a particular and distinct biological organ capable of penetration, as opposed to an area of her body which included her vagina. If it was the latter understanding, the child could well have been describing a touching "*in*" in the "*mini*" by a hand or hands being placed between her legs. The child pointing to her genital area in the course of the interview does not clarify the issue. I do not consider this consideration to be fanciful. In my view, it is raised on the evidence given the young age of the complainant, the alternating use of the terms and the need for precision in the evidence to reach a state of satisfaction that penetration has occurred. To attempt to lead it from the child seven years later in the pre-recording would have left the answers with little, if any, weight.

(98) As was submitted by the defendant's Counsel, the clearest complaint by the child of penetration is on the account of the mother. However, that evidence is admitted as preliminary complaint evidence for the purpose of assessment of credit only, and is not admissible of the truth of the matter.

(99) It follows that I am unable to conclude that the complainant was relevantly penetrated in the course of the touching, based on the first 93A statement alone.

(100) I am however satisfied that the child was describing a skin on skin touching by the defendant in the area of her vagina. A touching of that nature, in the circumstances described, is in my view indecent.

(101) I note that there is some broadly supportive evidence for the child's account. First, she correctly described the pyjamas she was wearing. Although this is perhaps unsurprising given it was a timely complaint, it is nonetheless a point of consistency by which the complaint's reliability can be gauged.

(102) Second, she asserted that she could see the defendant touching her. It can be accepted that is possible based on the defendant's evidence of the light coming into the bedroom from the street light. In my view, nothing turns on the fact that the complainant spoke of it being moonlit. It is a reasonable assumption by a young child.

(103) Thirdly, she made a timely complaint of being touched. I acknowledge that she did not complain to her great-grandmother and that there was undoubtedly opportunity to do so, however I think that is explained by the fact that she had been told previously, as related in paragraph 54 herein, that she was to tell her parents if she was touched on her mini. That is what she did.

(104) Fourthly, I think it is of some slight support for the complainant's credit that she was not challenged at all about her testimony of other things that happened on the day, and so it might be accepted that she has been accurate in that respect. Notably, the defendant had been notified of the accusation on the day by the child's father, and so he was not

deprived of the opportunity to consider closely what he did that day. Although he was presumably not informed of those details until after the second 93A statement, it might be assumed he would recall a trip to the hospital to remove a stone from his foot, or not.

The preliminary complaint

(105) It must be acknowledged that the possibility of her being "touched" was raised by her mother before the complainant disclosed herself disclosed it. However, that leading question was followed by an open ended question which enquired who had touched her, and she replied without any prompting, "*Poppy*". Throughout the lengthy course of the investigation and prosecution, she has been consistent that she was touched indecently (although some details have changed over time, as will be discussed) and that it was the defendant who had touched her.

(106) I consider it to be a timely preliminary complaint that supports her credit, including the reliability of her complaint in the first 93A statement.

(107) While the terms of the complaint, at least on the account of the mother, included a clear and demonstrated assertion that penetration occurred, I do not consider that the later omission of that clear allegation to police detracts particularly from a favourable assessment of her honesty and reliability. As I have attempted to earlier explain, I am uncertain if she was attempting to tell police that she was penetrated but, for reasons given, I cannot be satisfied beyond reasonable doubt that she was penetrated according to that account. Whilst I have accepted that she was honest in her account, I also have no difficulty in accepting that a young child with a necessarily limited range of vocabulary may well be reluctant to give as graphic a description of events to two police officers, one male, who are strangers to her as opposed to giving an account to her own parents, if she in fact did so in that manner. As noted above, I think it unremarkable that her hesitancy to tell police of the conduct, whom she presumably had never met before, was not exhibited with her own parents.

(108) It is only on the mother's account that the preliminary complaint contained that clear assertion of penetration, and I accept that the father was also present at the time the child gave her demonstration. The father's description of the demonstration was far more benign. That difference in recollection, combined with the child's failure to repeat the graphic description to police raises an issue as to whether the complaint was in fact made in those terms.

(109) The mother testified in chief in a clear and forceful manner, but was forced to concede matters of significance in cross-examination. I have set out her evidence in some detail above to demonstrate that she was forced to concede that she had the order of events relating to the preliminary complaint wrong, but that only happened after she was taken to her written police statement. There as another occasion where she railed at the suggestion by the cross-examiner that her child had suffered regular rashes, until told that

he was sourcing this from what she was recorded as having told doctors, as which point she agreed with the proposition.

(110) There is nothing to suggest that the disclosure was not made, and that must have been terribly distressing both at the time and subsequently. Her ability to recall precise details of what was said and done, and the order in which things occurred, was no doubt affected by those factors and the considerable passage of time that has now occurred. It is clear to me that she is attempting to deal with this issue in a manner that will provide the best outcome for her daughter, both in the present time and future.[74] That desire must also potentially affect the details of a long distant memory. I do not conclude that she has deliberately altered her evidence, but I must consider her evidence carefully, and in light of all other evidence, before I accept it.

(111) Accordingly I doubt that the complaint of penetration was made in the graphic terms related by the mother, noting that it was not recalled by the father, but if it was I do not consider that it damages the complainant's credit when assessing her account in the first 93A statement for the reasons I have stated earlier.

(112) At the time of making her complaint, the child was visibly upset. The prosecution, correctly in my view, have not sought to rely on that distressed condition as corroborative evidence of the commission of the offence. The coexistence of the history of rashes and vulvovaginitis, the fact that she was by that time feeling a stinging sensation caused by some phenomenon which may or may not have been nefarious and the complaint of being touched means that it is impossible to attribute her distressed condition to the latter cause. Accordingly I do not take that into account in my consideration of the issues.

Possible contamination of the complainant's recollection after the first 93A statement.

(113) There seems little doubt that the matter had been the subject of discussion, in various ways, involving the complainant both close to the time of the complaint and subsequently. There is direct evidence that the mother spoke to her sister in the presence of the complainant close to the time, and that the mother had spoken with others. It is also clear that there had been discussions involving the complainant and her parents about the possibility of resuming the prosecution at least once, but I think more likely more than the once. It is only natural that the topic would be raised on occasions, especially once the complainant decided that she wanted to revive the prosecution.

(114) Further, the complainant came to know the term "*sexually abused*" after the time of the first 93A statement. I expect that it was a phrase that the mother had introduced her to, even though the mother denies having done so, but it may also have been innocently acquired. One such example was given by the complainant herself as possibly having heard it on the news.

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[74] See for example 1-35 line 43 to 1-36 line 11.

(115) I accept the defendant's submission that there had been discussion about the matter, including discussion which involved the complainant, after the first 93A statement. It is not clear to me that these discussions necessarily involved a discussion about the details of the offending, apart from the first one with the aunt, although clearly they may well have. The complainant denied that details had been discussed when she says her mother told her about the term "*sexually abused*". There is also, I think, considerable potential for the complainant to have gained some knowledge of, and a greater understanding of the matters about which she complained in the first 93A statement in the roughly five years before the second 93A statement was recorded from other sources such as the news, education, general discussion amongst friends of matters sexual and other sources independent of the mother.

The second 93A statement

(116) I found the second 93A statement to be generally consistent with the first 93A statement, except that it tended to delve into greater detail. The impression I have of this statement, having watched and heard it, is that the complainant was doing her best to give an honest account of her recollections.

(117) The prosecutor submits that the greater detail, and any variation from her initial account, is attributable to her older age and the concurrent growth in her vocabulary and ability to express herself. That must be so to some extent, but I am unable to quantify that extent. The variations in the account may also be because of other sources of knowledge that she has acquired since the first 93A statement.

(118) It is at least the risks that the complainant's recollection has been contaminated by outside sources since the first 93A statement and that the complainant was recalling events from about five years earlier and which in turn happened when she was woken from sleep (thereby raising a risk of confusion in recollection in itself) combine to mean that I must exercise caution before relying on this statement. I accept those parts of the statement which are consistent with the account in the first 93A statement, but otherwise do not rely on those parts of the second 93A statement which expand upon the earlier account in any manner of substance or which raise matters which were not related in some form in the first 93A statement.

(119) It follows that the clearer, but still ambiguous statements as to penetration in the second 93A statement cannot be accepted as proving that element in the rape charge, and hence that reasonable doubt remains. That means that regardless of any other conclusions I reach, the rape charge cannot be proven to the required standard.

(120) A part of the second 93A statement has been reproduced in full at paragraph 63 herein, as it was the subject of competing submissions as to what the final three words were. The transcript contained an indication of inaudibility for part of it. The defendant submitted that the words spoken were "… *if it happened*", and that I should attribute to that a recognition by the complainant that she was unsure if she had been touched as she

described. Since submissions I have listened carefully to that passage, and I am satisfied that the words spoken are as they appear in paragraph 63. The child slightly hesitates and drops her voice in the course of that answer, but I believe the words to be as reproduced herein. I have undertaken the exercise without reference to any preconceptions of what she might be expected to say, but the words, as I hear them, are consistent with maintaining an account of touching, with perhaps a recognition that the defendant may not be imprisoned even if convicted. That recognition evidences in itself the likelihood that the child has spoken with one or more adults about the process of the investigation and/or prosecution and provides another layer to the reasons to be cautious about the acceptance of the second 93A statement.

The position of the stretcher

(121) A point of contention during the trial was the position of the stretcher relative to the main bed. Although the defendant doubted he could have reached the bed from where he said the stretcher was,[75] both Counsel in submissions accepted that if the stretcher was about two foot away from the bed, it would have been very difficult - although not impossible - for the touching to have occurred with the defendant laying on his side and reaching out. The concessions are appropriate. The defendant stands at 5' 11½" by his own testimony or at 183 centimetres according to Department of Transport records.[76] To the untrained eye, his limbs appear to be in proportion to his height. It would not be impossible to reach out about two foot to touch the child, although the differing heights of the bed and stretcher would make it difficult. It is of course less difficult the closer the two are, and the defendant was at some pains in testimony to not be tied down to a precise distance of two foot.

(122) I have earlier set out the relevant parts of the defendant's testimony as to the placement of the stretcher as prosecuting Counsel contended that, in effect, the defendant had initially admitted in evidence-in-chief that the stretcher was close to the side of the bed. I am satisfied that when looked at in context that he was describing the stretcher being initially set up beside the bed, but that it was moved out when, as is uncontentious, the complainant refused to sleep on the stretcher. I reach that satisfaction in part on reliance of my having observed the defendant testifying. However, it is unclear to me whether the stretcher was moved, on the defendant's account, before or after the child went to sleep.

(123) There is a curious feature of the defendant's evidence about moving the stretcher. In effect he testified that he did that so he could get in and out of the stretcher. It is obvious from a perusal of the photos of the bedroom and the placement of the stretcher that there is more than sufficient room to get off the stretcher to the right side of it (as looking from the perspective of the photographer) if it was placed close to the bed. There was no reason identified why the defendant saw the need to get off it to the left. However, whilst it raises some doubts in my mind as to the acceptability of that aspect of the evidence, I

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[75] See paragraph 88 herein.
[76] Exhibit 16.

must approach any finding adverse to the defendant cautiously based on that given that prosecuting Counsel chose not to explore the issue in cross-examination.

(124) The complainant was consistent across both 93A statements as to her assertion that the stretcher (referred to by her as a bunkbed) was on the right hand side of the main bed, and close by it. There were arguably some minor differences in her description of how far away it was from the bed, and how far it was away from her while she was in the bed, but if there are inconsistencies (and I don't consider there are) they do not, in my view, rise to the point of damaging her credibility. It is unremarkable that some variance in precise measurements occurs when asking a five year old girl to explain distances, and then asking her some five years later to recall the same measurements.

(125) The defendant however took issue with whether the complainant in the second 93A statement was in fact describing the position of the stretcher on the night in question or whether it was a description of where the stretcher usually was, that is on the previous occasions she slept over. He specifically analysed a passage of the transcript commencing at MFI-C page 2 line 1 to page 34 line 16.

(126) I accept that the child initially refers to the usual sleeping arrangements whereby she slept in the stretcher and the defendant on the bed.[77] The questioning is then specifically directed to "*this time*" when she was in the main bed and he on the stretcher[78] before she is asked about the specific positioning of the stretcher relative to the bed. She is then asked about the bed coverings and whether she slept under or on top of the blankets and sheets. She indicated that she slept under with her head poking out, and was then asked if she could explain how he got under the blanket;[79] obviously a reference to the night in question.

(127) Having considered the passage in its complete context, I am satisfied that the complainant was referring to the night in question in the impugned passage. That the passage contains direct references to the night in question, and the fact that the complainant appears to understand the questioning allows me to so conclude.

(128) Although I conclude that she has been consistent across those two accounts as to the placement of the bed, it is again unclear to me whether she was describing the position of the stretcher when she got into bed or when the offending occurred. Her descriptions of the distance between the stretcher and where she was in the bed must mean that the stretcher was close by the bed, at least when she first got into it. I cannot discern any evidence as to where she said it was when she got out of bed in the morning, and so it may be that she has assumed that, at the time she says she was touched, the stretcher was in the same place as where she had last seen it. None of this was clarified with her.

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[77] MFI-C page 32 line 10.
[78] MFI-C page 32 line 28.
[79] MFI-C page 35 line 9.

The concession at the pre-recording

(129) Her consistency on this point across the two 93A statements changes, at face value, in the pre-recording of her evidence on 7 April 2020. This evidence was taken a few days over 7 years after the initial complaint and a little under 2 years and 2 months after the second 93A statement was recorded.

(130) In those circumstances some variation in detail might be expected, but, at face value, there is a complete concession in contrast to her earlier stated accounts. There are however some there considerations to be taken into account.

(131) First, I do not accept that a 12 year old girl will necessarily understand what a distance of two foot represents. As a general rule, imperial measurements are the language of an older generation. Nonetheless, whatever it means to her, she conceded that the distance was sufficient to walk through.

(132) Second, I have watched the pre-recorded evidence of the complainant since submissions were made. Generally her demeanour presents as less engaged than she was for each of the 93A statements. In the particular passage of cross-examination where the concession was gained, she hesitates and seems unsure, but agrees. The hesitation may be attributable to the use of the measurement being expressed in imperial terms as opposed to metric, it may be attributable to the concession being sought for a compound proposition or she may have been unsure generally. Her hesitation was not explained in the evidence.

(133) Thirdly, again there is no precision deployed in the questioning to allow me to assess what point in time she is referring to. It may be that there is no inconsistency at all.

(134) Fourthly, it is surprising that such a concession was made when she has remained generally consistent in all her allegations. The unexpected departure from her account is remarkable in all the circumstances and should on that basis be approached with some circumspection and not simply be accepted at face value.

(135) In those circumstances I am not prepared to act on the apparent concession as to the distance that the stretcher was from the bed as elicited in the pre-recording of the complainant's evidence.

(136) If I am wrong in that conclusion, nonetheless I would accept the concession only so far as it accepted that the distance between the two was sufficient to walk through, rather than being about two feet. It would however lend weight to acceptance of the defendant's evidence that the distance was roughly two feet. I therefore accept that on the evidence before me the stretcher was positioned such that it was possible for the defendant to touch the complainant as she described in the first 93A statement whilst she lay in the bed, which distance was imprecisely described in evidence as about two foot away from the bed.

The expert medical opinions

(137) The child's history of experiencing rashes/vulvovaginitis and her subsequent experience of dysuria together with the complicated cause and effect considerations relating to these aliments means that, in my view, nothing of value comes from a consideration of the cause and timing of the vulvovaginitis and dysuria. There is however, in my view, something of support for part of the child's account in the first 93A statement from an aspect of the expert medical evidence.

(138) Dr Skellern testified that touching the hymen of a child of that age will cause pain or discomfort, and a rubbing type pressure on the skin of the genital region can cause pain and discomfort because it is quite sensitive.[80] As I understood her evidence, and the context in which these answers were given, this was independent of the presence or otherwise of any vulvovaginitis, including a rash. The child in the first 93A statement directly attributed a stinging sensation in the genital region to the time of being touched on the "*mini*".[81] She indicated that she had never felt that stinging before, and so it can be accepted to be a different sensation to when she had previously suffered rashes/vulvovaginitis. It does not exclude that she was suffering from that condition at the time of being touched, but the attribution of the stinging sensation to the actual touching suggests it is occurring independently of the condition, if she was afflicted by it at the time.

(139) I consider it unlikely that a five year old girl would know to attribute a stinging sensation to the touching of her genital region, unless that is what occurred. I consider that the evidence supports the honesty and reliability of her claim of having been touched, as she recounted it in the first 93A statement.

(140) This evidence does not assist with proof of penetration as the stinging may have occurred by touching the hymen (which meant that penetration occurred) or it could have been to an external part of the genitals. He is nothing in the description given to make it site specific.

No evidence of motive and the defendant's denial of offending

(141) I acknowledge that there is no evidence to suggest that the defendant had a motive to offend as alleged, and that he has denied the offending.

(142) His own evidence establishes that he was previously a police officer. No evidence was led in rebuttal to suggest that he had anything other than meritorious service.

(143) Although I have observed earlier that his testimony as to why he moved the stretcher was curious, for the reasons stated I consider that it rises no higher than that and there is nothing to be found in the terms of his evidence to discard the whole of his testimony.

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[80] See paragraph 75 herein.
[81] See evidential references in paragraph 49 herein.

(144) It follows that the question to be answered is whether I am satisfied of the guilt of the defendant beyond reasonable doubt on an assessment of the whole of the evidence that I accept, notwithstanding the lack of evidence of motive and his sworn denial of offending.

Conclusion

(145) While cognisant of the need to scrutinize the evidence of the complainant carefully before accepting it, for the reasons outlined above I consider the complainant to be a generally honest and reliable witness, and in particular honest and reliable in so far as the evidence found within the first 93A statement is concerned. There is an unacceptable risk in my view of contamination of her recollection of events by the time of the second 93A statement and so I do not accept those parts of it which are in conflict with or otherwise not mentioned in the course of the 93A statement.

(146) Although I strongly doubt that the stretcher had been moved as recounted by the defendant in his testimony, if it had been I am satisfied that it had been moved only to a point where one could walk between it and the main bed, but from which the complainant could still be touched with the defendant lying on his side on the stretcher. That point was imprecisely described in evidence as roughly two foot.

(147) The complainant's credibility in terms of the contents of the initial 93A statement was supported in my view by the timely complaint she made to her parents, which very soon after she was no longer in the presence of the defendant. Although the possibility that someone had touched her was raised by the mother, the child nominated that it was the defendant who had done so and has not wavered in that evidence at any stage in the roughly seven years since.

(148) Her credibility is in my view not affected by her failure to complain to her great-grandmother. She was simply doing what she had been instructed to do if touched on her "*mini*"; to tell her parents.

(149) Further, some support for her account can be found in the medical evidence and the support it provides for the then very young child's account of the stinging sensation being associated with the act of touching, regardless of whether or not she was suffering vulvovaginitis or not at the time. The medical evidence is otherwise of no assistance to either party, and is best described as neutral.

(150) It is no small thing to discard the sworn denial of offending by a man of mature years who has previously served apparently meritoriously as a police officer and it might be assumed therefore had no reason or motive to offend in this manner. However after having regard to the need for caution and to the various warnings and directions that apply, I have reached the conclusion that I accept beyond reasonable doubt that the defendant has offending against the child in the manner that is outlined in these reason.

(151) It follows that I must put his sworn denial of offending to one side and assess the state of the evidence that I do accept. The state of that evidence that I accept requires that I convict on the alternative charge.

Verdict

(152) Accordingly I find the defendant not guilty of rape, but guilty of the alternative charge of indecent treatment of a child under 12 years who was his lineal descendant and who was under his care.