

# SUPREME COURT OF QUEENSLAND

CITATION: *R v TAE* [2016] QCA 133

PARTIES: **R**  
**v**  
**TAE**  
(appellant)

FILE NO/S: CA No 158 of 2015  
DC No 377 of 2015

DIVISION: Court of Appeal

PROCEEDING: Appeal against Conviction

ORIGINATING COURT: District Court at Brisbane – Date of Conviction: 3 July 2015

DELIVERED ON: 24 May 2016

DELIVERED AT: Brisbane

HEARING DATE: 15 April 2016

JUDGES: Morrison and Philippides JJA and Mullins J  
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **The appeal is dismissed.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO ALL THE EVIDENCE – where the appellant was convicted on a number of sexual offences, including indecent treatment of a child under 16, under 12 and in care; indecent treatment of a child under 16, and in care; rape; and attempted rape – where the appellant was in a relationship with the complainant’s mother between 2008 and January 2013 – where the complainant told the police in April 2013 that she had been sexually assaulted by the appellant a number of times between 2011 and 2013 – where a child witness, a friend of the complainant’s, gave evidence that the complainant told him about the sexual assaults – where the evidence of the complainant’s friend was significantly different to that of the complainant – where the appellant alleges that these are irreconcilable differences, and thus the complainant’s evidence cannot be believed beyond reasonable doubt – where the complainant’s evidence contained internal inconsistencies – where the appellant alleges that these inconsistencies create a doubt such as is referred to in *M v The Queen* – whether the verdict is unreasonable or insupportable having regard to all the evidence

*M v The Queen* (1994) 181 CLR 487; [1994] HCA 63, cited  
*MFA v The Queen* (2002) 213 CLR 606; [2002] HCA 53, cited  
*Morris v The Queen* (1987) 163 CLR 454; [1987] HCA 50, cited  
*R v PAH* [2008] QCA 265, cited  
*R v Thaiday* [2009] QCA 27, considered  
*SKA v The Queen* (2011) 243 CLR 400; [2011] HCA 13, cited

COUNSEL: S C Holt QC, with B Dighton, for the appellant  
M Cowen QC for the respondent

SOLICITORS: Legal Aid Queensland for the appellant  
Director of Public Prosecutions (Queensland) for the respondent

- [1] **MORRISON JA:** The appellant, TAE, commenced a relationship with D in 2008, and moved in to live with D's family. D's daughter, K, was then eight years old. In April 2013 K complained to police that she had been sexually assaulted by TAE over a period of time.
- [2] On 3 July 2015 TAE was convicted of a number of sexual offences against K. The counts were:<sup>1</sup>
- (a) Count 1: indecent treatment of a child under 16, under 12 and in care;
  - (b) Count 2: rape;
  - (c) Count 4: indecent treatment of a child under 16, and in care;
  - (d) Count 5: rape; and
  - (e) Count 6: attempted rape.
- [3] TAE seeks to challenge the convictions on the sole ground that the verdicts were unreasonable and cannot be supported having regard to the evidence. The basis for that contention is:
- (a) there were totally irreconcilable differences between the evidence of K and another child witness (G); and
  - (b) there was no rational basis on which the jury could have excluded, beyond reasonable doubt, the evidence of G;<sup>2</sup> and
  - (c) that, combined with inconsistencies in K's own evidence, must create a doubt such as is referred to in *M v The Queen*.<sup>3</sup>
- [4] The issue is whether the Court is of the opinion that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that TAE was guilty of the offences.<sup>4</sup> The task of this Court is to make an independent assessment of the whole of the evidence to determine whether the verdict could be supported.<sup>5</sup> That assessment is both as to the sufficiency and quality of the evidence.<sup>6</sup>

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<sup>1</sup> The offences were alleged to be committed between the following dates: counts 1 and 2, 28 February 2011 and 1 July 2012; and counts 4, 5 and 6, 31 May 2012 and 1 March 2013.

<sup>2</sup> Relying in particular on *R v Thaiday* [2009] QCA 27 at [29] and [31].

<sup>3</sup> (1994) 181 CLR 487, at 494; *R v PAH* [2008] QCA 265 at [29].

<sup>4</sup> *M v The Queen* (1994) 181 CLR 487, at 493; *SKA v The Queen* (2011) 243 CLR 400 at 405, [11] and [13].

<sup>5</sup> *SKA v The Queen*, at 409 [22].

<sup>6</sup> *Morris v The Queen* (1987) 163 CLR 454, at 473; *MFA v The Queen* (2002) 213 CLR 606 at 623-624 [58].

- [5] Senior counsel for TAE put the disparity between the evidence of K and that of G at the forefront of the contention that this Court should conclude that there was no rational basis for the jury to reject G's evidence.
- [6] Discussion of this ground must commence with a summary of the evidence at the trial.

### **Evidence as to the offences**

- [7] Because of the delay between when the offences occurred and when the complaint was made there was no forensic evidence except for a relatively inconclusive physical examination of K. The findings were contained in formal admissions made at the trial:

“Genital examination was unremarkable including a normal appearance of the hymen. There was however one section of the hymen that was unable to be clearly defined. Due to [K's] discomfort and anxiety, it was not appropriate to use manipulation to further define this area. These findings do not support or negate the allegations of sexual abuse. Given the pubertal changes in the hymen, penetration by an adult male penis or similar sized object would be possible without causing injury.”

- [8] Leaving aside the formal evidence of the officer who first interviewed K and G, the other evidence is summarised below.

### ***K's evidence***

- [9] K was born in November 2000, and was nearly 12 and a half when first interviewed by police. Her account referred to a number of distinct occasions of sexual assault which subsequently formed the basis of the charges, and as well as other more general occasions. The essential parts of her evidence can be understood in relation to the separate distinct incidents that form the basis of the charges.
- [10] The defence case as put to K was that none of the alleged acts had occurred and that TAE had never done anything to her of a sexual nature at any time.<sup>7</sup>

### ***K- Wynnum incidents – hands on the penis – count 1***

- [11] This count related to what happened at the Wynnum house. In her second police interview K said:
- (a) the first time it happened was one night when she was sitting out on the deck; TAE came out wearing a dark blue towel, which he pulled off, saying “have a look at this”; he “grabbed my hand and put it there”;<sup>8</sup> K did not look at TAE's penis but described it as “hard”;<sup>9</sup>
  - (b) K pulled her hand back and “went inside screaming and I started crying and then he asked me like why I was crying and I said because you made me do that and then he said I'll never make you do it again”;<sup>10</sup> however he did do it again;<sup>11</sup> and

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<sup>7</sup> AB 227.

<sup>8</sup> AB 194-195.

<sup>9</sup> AB 195, 196.

<sup>10</sup> AB 194, 195.

<sup>11</sup> AB 196.

- (c) other occasions occurred in the bedroom; TAE would take her into the bedroom and make her touch his penis.<sup>12</sup>

[12] In cross-examination she recounted the incident in much the same terms.<sup>13</sup>

*K- the clothesline incident – count 2*

[13] In her first police interview K said:

- (a) one Thursday night TAE asked K if she wanted a drink; she said no, and he forced her to have it, then took her outside and tied her to the clothes line; and “he did things”, and when she said she did not want to do it anymore he took her back inside;<sup>14</sup> the phrase “he did things” was clarified as that TAE “stuck his penis in my vagina”;<sup>15</sup>
- (b) when asked to describe how TAE put his penis into her vagina, K said “... we were both standing up [he] couldn’t really do it properly he like did it really slowly and as he put it in I guess I kicked him away because I didn’t want it to happen”;<sup>16</sup>
- (c) she told him to stop, and that she did not want to ever do it again; then “he started touching me ... only a little bit then I ... told him I was tired then he untied me...”;<sup>17</sup>
- (d) he then took her into the bedroom and “did more things”;
- (e) TAE took her clothes off outside near the clothesline before he tied her to the clothesline;<sup>18</sup>
- (f) he used rope and cable ties to tie her hands to the cross bars of the clothesline; he cut the rope and cable ties to release her;<sup>19</sup>
- (g) at the time K’s grandmother was asleep;<sup>20</sup> and
- (h) she described in some detail what each of them was wearing,<sup>21</sup> and the house and yard.<sup>22</sup>

[14] K was asked about this incident again in her second police interview, and in particular to describe what TAE was doing when he tied her to the clothesline. She said TAE’s penis was “trying for my vagina”, and touched her vagina, but she “didn’t let it go in ... he tried to but then every time he would almost get in then I’d push him away”. K was pressed to explain what she meant by “almost got in” and how it felt, but she said she found it really hard to explain and she did not want to.<sup>23</sup>

[15] However, she said there was one occasion when TAE put his fingers in her vagina, and that felt different to his penis, and she agreed that “his penis was there”.<sup>24</sup>

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<sup>12</sup> AB 196.

<sup>13</sup> AB 237.

<sup>14</sup> AB 166.

<sup>15</sup> AB 172-173.

<sup>16</sup> AB 174.

<sup>17</sup> AB 173, 175.

<sup>18</sup> AB 173, 175.

<sup>19</sup> AB 173.

<sup>20</sup> AB 174, 175.

<sup>21</sup> AB 174.

<sup>22</sup> AB 175.

<sup>23</sup> AB 190.

<sup>24</sup> AB 190-191.

- [16] In her pre-recorded evidence K gave further details about this incident:
- (a) she was tied to the clothesline with her arms above her head; in that position she was just able to stand on the ground;<sup>25</sup>
  - (b) TAE was holding one of her legs up, holding it under the thigh; the other hand was on her waist; he then removed his hand from her waist and lifted her other leg up; his penis entered her vagina, “he put it in and then took it out because I squirmed”;<sup>26</sup> and
  - (c) K felt pain at the time, and the day after noticed she was bleeding; she bled for a couple of days.<sup>27</sup>
- [17] In cross-examination K was challenged about this incident, and was asked to recount it again. Her account was very similar to her previous accounts. She said that TAE’s penis went into her vagina briefly, and caused pain and bleeding.<sup>28</sup> Some detail was added that varied from her previous accounts: she said that she was tied to the clothesline and then TAE pulled her pants down.<sup>29</sup> It was put to K that she told the chaplain a different version, namely that the clothesline rape had occurred at Redcliffe after she had been forced to consume alcohol. K denied that.<sup>30</sup>

*K – the 4WD incident – count 4*

- [18] In her first interview K said:
- (a) in the week following the clothesline incident TAE took her downstairs and tied her to the car, and “then he would do things”;<sup>31</sup>
  - (b) TAE had a 4WD vehicle; she was able to accurately recall the numberplate,<sup>32</sup> and the model;<sup>33</sup>
  - (c) he opened the back doors of the 4WD;<sup>34</sup> the doors were such that one half opened upwards, and the other half opened to a horizontal position;<sup>35</sup>
  - (d) he tied her hands to a handle on the upper part of the rear door;<sup>36</sup> he looped a tag on her shirt to the upper door so that when the door went up, it pulled her shirt off;<sup>37</sup>
  - (e) TAE pulled her pyjamas down, around her knees;<sup>38</sup>
  - (f) then “he started touching me”, on her breasts and vagina;<sup>39</sup> when he touched her breasts K tried to bite him to stop him;<sup>40</sup>

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25 AB 218.  
 26 AB 219.  
 27 AB 219.  
 28 AB 235-236.  
 29 AB 236.  
 30 AB 241.  
 31 AB 166.  
 32 AB 176.  
 33 AB 177.  
 34 AB 176.  
 35 AB 177.  
 36 AB 177.  
 37 AB 176, 177, 178.  
 38 AB 179.  
 39 AB 176, 179.  
 40 AB 180.

- (g) she told him she did not want to do it, moved her body away, and started crying;<sup>41</sup> and
- (h) she recalled, and related, the detail of what she was wearing, namely two piece flannelette pyjamas.<sup>42</sup>

- [19] In cross-examination K was asked to recount this incident. Her account was in similar terms to what she had said in the interview, with extra detail about the lead up and how she was made to undress. There were some additions, however, that were different to K's first version. K referred to wearing a dressing gown rather than a pyjama shirt, and made no mention of the top (whether shirt or dressing gown) being pulled off.<sup>43</sup> She also gave a detailed account of how she was made to undress inside and put on the dressing gown.<sup>44</sup> She repeated that TAE touched her breasts and vagina, but added that he rubbed his penis on the outside of her vagina, though he did not insert it.<sup>45</sup>
- [20] Later still K identified the 4WD from photographs, and added detail to her account by reference to the photographs.<sup>46</sup>

*K – incidents at TAE's Redcliffe house – counts 5 and 6*

- [21] In her first interview K said that when TAE moved out of the house, into his own house at Redcliffe, she and her brother would be sent there every second weekend. On those occasions TAE "started... doing it again but it was a lot more full on".<sup>47</sup> She said that at Redcliffe "it all got a lot worse".<sup>48</sup>
- [22] On the second last time she went there, TAE and K were in the yard. This was at night.<sup>49</sup> He insisted that she go inside and get undressed, then he took her outside again and said "he wanted to do more stuff to me". K said she did not want to, but TAE dragged her inside "and took me into his room and he did stuff". She was pressed to give details of the "stuff", and she said "he stuck his thing into me", and "then [he] would make me touch his parts and then touch my parts".<sup>50</sup>
- [23] She gave more detail of that occasion:<sup>51</sup>

"... he lied me down on the bed and tied my hands behind my back so I couldn't do anything he did it with like a loose cable tie but because both my hands were in there I couldn't move my hands and then he did what he stuck his thing into me and then... I started crying and then I told him to stop and he said no he'd never stop and... I kind of kicked a lot and he told me to stop then he grabbed the scissors and cut the cable tie made me sit up and he put a blind fold around me and then he made me touch his parts and he touched my parts".

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41 AB 179.  
 42 AB 179.  
 43 AB 236-237.  
 44 AB 236.  
 45 AB 237.  
 46 AB 257-260.  
 47 AB 166.  
 48 AB 167.  
 49 AB 172.  
 50 AB 168-169.  
 51 AB 169.

- [24] K added further detail:<sup>52</sup>
- “... he like pushed me on the bed and I was like trying to get up but he every time he’d make me lie back down and then he would like I tried to get up and grabbed my face and pushed my head back down on the pillow he like jumped [on top] of me he grabbed my hands and tied them behind my back...”
- [25] She identified that when she said that “he stuck his thing into me”, she meant that TAE inserted his penis into her vagina.<sup>53</sup> She was scared.<sup>54</sup>
- [26] She said that TAE made her touch his parts by grabbing her hand and placing it on his penis.<sup>55</sup> He touched her on her breasts and her vagina.<sup>56</sup> He touched her lightly on her breasts, then he started touching harder and squeezing them.<sup>57</sup> He inserted his finger into her vagina, which “felt yuck”.<sup>58</sup>
- [27] K said that TAE had “heaps of cable ties ... all over the house”.<sup>59</sup>
- [28] In her pre-recorded evidence K referred to this incident, when she was blindfolded. She said TAE blindfolded her with his t-shirt, but contrary to what she said in her first interview, TAE did not insert his penis into her vagina. However, he did insert his finger into her vagina, which was painful.<sup>60</sup>
- [29] In cross-examination K was challenged as to the change in her account. K explained that she changed the detail, that TAE’s penis was inserted in her vagina, “Because he only tried to but he didn’t”. She said she had only remembered that recently.<sup>61</sup>
- [30] There were other times of touching at the Redcliffe house when “he wasn’t quite as full on but he was like touching me and stuff and then he made me touch him”.<sup>62</sup>
- [31] K said she would lock herself in her room to prevent TAE coming in,<sup>63</sup> and wore long sleeves and jeans, even when it was really hot, so that TAE would not want to do anything.<sup>64</sup>
- [32] K said the touching regularly happened at the Redcliffe house. One such occasion was in the lounge room when K was watching TV. K was on a recliner chair, and TAE came in, pulled down his pants and made her touch his penis by grabbing her hand and putting it there.<sup>65</sup>
- [33] Eventually she persuaded her mother not to send her.<sup>66</sup>

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52 AB 170.  
 53 AB 169.  
 54 AB 170.  
 55 AB 170-171.  
 56 AB 171.  
 57 AB 171.  
 58 AB 171-172.  
 59 AB 170.  
 60 AB 225.  
 61 AB 229.  
 62 AB 172.  
 63 AB 191.  
 64 AB 192.  
 65 AB 197-198.  
 66 AB 166.

*Discreditable conduct - the vibrator incident*

[34] This matter was raised for the first time in K's third police interview. It followed a police search of the house where K and her mother lived.

[35] On the particular occasion K was sitting on a couch when TAE said he was going to have some fun. He disappeared and when he returned he was wearing "a lingerie outfit", which she also described as a "schoolgirl outfit".<sup>67</sup> K gave more detailed descriptions:

"It was like a see through, looked like a school uniform but it was like a see through and ... the skirt, it was ... frilly and it was ... that short and it was ... chequered and the shirt went up to ... there and it had ... lacy things ... you wear them with socks or something like that and they go ... down your legs ... it looked like a uniform..."<sup>68</sup>

and

"it was ... kind of a dress like but then there was a space in between ... the skirt and the shirt where ... your stomach is and then it had ... a lace part ... down there and ... clips onto your socks or something like that... it was lacy and it had ... a clip at the end of the skirt and ... he was wearing long socks and ... it clipped onto the sock ..." <sup>69</sup>

[36] TAE made a comment to the effect that "this was what made me have fun".<sup>70</sup> He was also holding a vibrator. K described the vibrator as red and purple, it "looked like a penis" and was "gross".<sup>71</sup> She described what TAE did:

"It was simply just him going, coming back out with it all ... and then he [said] Oh yeah I use it quite often ... I just remember him like waving it around and then he put ... it on the bench and just left it there for a bit then he went back into ... their room and got ... changed back into his clothes and he ... left it there for a bit and then he came back out and he's just like I'll take it back in now..."<sup>72</sup>

and

"He's [said] it's something that usually girls use instead of ... having sex ... but some guys use it and I [said], like gay guys, and he [said] yeah but I'm not gay but I still use it ... He said that they stick it up their arse because they don't have a vagina so ... He asked me if I wanted to use it and I [said] no and then he realised I was freaked out so he ... put it away and then stayed in his room ..." <sup>73</sup>

[37] In cross-examination it was put to K that TAE never showed her a vibrator, nor any occasion when he wore a schoolgirl outfit. K denied both suggestions, as well as suggestions that she had told TAE that her brother had found the vibrator.<sup>74</sup> The fact that there was a schoolgirl outfit was not challenged, only that it was a medium size that would not fit TAE. K denied that, saying it was large.<sup>75</sup>

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<sup>67</sup> AB 203-204, 206.

<sup>68</sup> AB 205.

<sup>69</sup> AB 207.

<sup>70</sup> AB 203-204.

<sup>71</sup> AB 204, 206-207.

<sup>72</sup> AB 204.

<sup>73</sup> AB 208.

<sup>74</sup> AB 231-232.

<sup>75</sup> AB 232.

***K's evidence – threats and avoidance***

- [38] K said she would sometimes spend time downstairs with her grandmother, because she “didn’t want it to happen and when I was down there my nan and him didn’t get along so I knew he wouldn’t go down there at all”.<sup>76</sup>
- [39] At the Redcliffe house, K said she would lock herself in her room to prevent TAE coming in.<sup>77</sup> Further, she wore long sleeves and jeans, even when it was really hot, so that TAE would not want to do anything.<sup>78</sup>
- [40] K said that when TAE did things to her, he would tell her not to tell anyone,<sup>79</sup> and that TAE told her that if she told her mother she would regret it:<sup>80</sup>

“ ... I wanted to tell mum but he told me that if I told her I would regret it like I didn’t know what he would do or anything but he said that I would regret it and I like really wanted to tell her but I couldn’t cause I didn’t know what would happen ...”.

***K's evidence – who she told***

- [41] K said that she told a friend at school, and “it went around and then I decided that I need to tell someone like a chaplain at school”.<sup>81</sup> When K told the friend “she told like most of my grade and now I regret telling her”.<sup>82</sup>
- [42] In her second police interview, K was asked about who she had told, and what she had told them. She said:
- (a) the first person she told was another schoolgirl, D; then she told a male friend, G, and after that, the school chaplain;<sup>83</sup>
  - (b) all she told D was that she had been sexually assaulted by TAE;<sup>84</sup>
  - (c) then D’s sister told K that she had also heard about it “from several people”; the sister asked “is it true you got raped”; K said that she (K) told her that “I didn’t exactly get raped, [TAE] ... did stuff to me”; she told the sister the same as she told D;<sup>85</sup>
  - (d) another girl, H, was there when K spoke to the chaplain, so she knew what K told the chaplain; however, until that time H did not know of the incidents;<sup>86</sup>
  - (e) K described her relationship with G in this way: “we were in a relationship from October last year till last month and now we’re like best of friends”; she only told him that she had been sexually assaulted;<sup>87</sup>

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<sup>76</sup> AB 167.

<sup>77</sup> AB 191.

<sup>78</sup> AB 192.

<sup>79</sup> AB 180.

<sup>80</sup> AB 166.

<sup>81</sup> AB 166-167.

<sup>82</sup> AB 176.

<sup>83</sup> AB 184.

<sup>84</sup> AB 185.

<sup>85</sup> AB 185.

<sup>86</sup> AB 199.

<sup>87</sup> AB 199.

- (f) K said that the first time she told G anything was when they were at ice-skating, and she was crying; all she said to G was that a particular song that was playing made her cry because TAE used to play it;<sup>88</sup> and
- (g) K was pressed with some aspects from G's account of what K told him, such as the use of needles and multiple people having sex with her; K denied each of them;<sup>89</sup> when asked where G would get the idea that needles were used, K said that one night at her house she and G were talking "about really weird stuff", and "being stupid and just asking each other like would we ever smoke or would we ever do that", and G asked if K would ever do needles or drugs, to which she responded that she would not as it was disgusting.<sup>90</sup>
- [43] In her pre-recorded evidence, K said that she told D, and D spread rumours about her. She told G that she was sexually assaulted by TAE, but she told him not much, just little details, such as whereabouts and briefly what happened.<sup>91</sup> She also told L, a family friend, who saw K talking to the chaplain and wanted to know what was wrong. K told L that she was sexually assaulted by TAE.<sup>92</sup>
- [44] K told the chaplain at the school. The chaplain gave evidence, the essential aspects of which was as follows:
- (a) K said she had been molested by TAE; it happened when she was 10 or 11 and in Grade 6; it happened at TAE's house; he insisted she have some alcohol, after which he took her outside, cable tied her to the clothesline and raped her; then he untied her, took her back to her bedroom and raped her again;<sup>93</sup>
- (b) the conversation with K was "scattery and jumpy", which was clarified as "sometimes we went over the same part lots of times and sometimes, yeah it was a bit scattery in that sense"; they would go onto a topic then come back to it later;<sup>94</sup>
- (c) "she said that it happened every second weekend until five weeks before [TAE] and her mum broke up, and ... that she'd been raped in the car and tied to the garage door"; no specifics were given about the car and the garage door incidents, nor was there any other detail about other incidents;<sup>95</sup>
- (d) K was told "not to tell anyone or she would regret it".<sup>96</sup>
- [45] The school counsellor was present for part of the conversation between the chaplain and K. The counsellor gave evidence as follows:<sup>97</sup>
- (a) she did not ask K any specifics, but K named TAE, referred to the Wynnum and Redcliffe houses, and said that she and her brother would go to Redcliffe every two weeks;

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88 AB 200.

89 AB 199-200.

90 AB 200.

91 AB 225, 226.

92 AB 226.

93 AB 55.

94 AB 55.

95 AB 56.

96 AB 56.

97 AB 32-36.

- (b) K said it was happening “[e]very time I go there”;
- (c) K’s mother was called into the room and she asked K a question “about where it had happened or when it had started, and [K] said in ... grade 6, and the Redcliffe house came up again, and they had a conversation back and forth”;
- (d) in cross-examination, she was reminded of a previous statement in which she had said that the exchange between K and her mother was: the mother asked K “when did it start” and K responded “In the Redcliffe house when I was in grade 6”.

### **The mother’s evidence**

[46] K’s mother gave evidence of her relationship with TAE and that he was the natural father of K’s younger brother, but not K’s father. They commenced living together in 2008 but by February 2010 she and TAE had separated. They resumed the relationship when she and the children moved into the Wynnum house in June 2011. She obtained a job working several nights a week. In June 2012 they separated again. However they tried to maintain contact for the family. For that purpose, the children went to stay at his house on occasions and TAE came to their house on occasions. Eventually they ended the relationship in January 2013.

[47] The mother said:

- (a) K would wear long jeans and jumpers to TAE’s house, even in the hottest weather;<sup>98</sup>
- (b) the mother and her friends went on a girls’ weekend to Tweed Heads in March 2012, and on a cruise in September 2012; during the March trip K and her brother went to stay with TAE, and she was sent a photo of TAE and K camping in a tent on an island; only TAE and K were camping as the brother had been taken to TAE’s mother’s house;<sup>99</sup>
- (c) TAE had many cable ties of all sizes in his truck and tool bag;<sup>100</sup>
- (d) at the meeting with K, the chaplain and counsellor, K did not tell her much by way of detail, she just spoke about the “night fishing and about the tent”;<sup>101</sup>
- (e) she confirmed that she had a vibrator and an outfit consisting of a tartan skirt and a top; the skirt was stretchy material and “one size fit most”; the outfit was in a box she gave to TAE in January 2013;<sup>102</sup>
- (f) in cross-examination she said there was no chance that K overheard a conversation about the vibrator, and the outfit was purchased for the mutual benefit of herself and TAE;<sup>103</sup>
- (g) she also agreed that it was possible that she had asked K when it started and K replied that it was in the Redcliffe house when she was in Grade 6.<sup>104</sup>

### **G’s evidence – what K told him**

[48] G was nearly 13 years old when interviewed by police. He was asked to recall what K had told him about what TAE had done to her.

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<sup>98</sup> AB 44.

<sup>99</sup> AB 45, 46.

<sup>100</sup> AB 46.

<sup>101</sup> AB 47.

<sup>102</sup> AB 48, 49.

<sup>103</sup> AB 52.

<sup>104</sup> AB 53.

[49] First was: “she said that [TAE] molested her and did all this stuff like, he molested her since she was 8 all the way up until now um I don’t know when the most recent one was but oh yeah she told me she had been molested by him for a long time”. G said this was told to him at a park. He said: “I asked when and she said ‘oh well since I was eight’ and I said ‘that’s a long time’ and she said ‘yes it’s a long time’ and she just said since she was eight though”.<sup>105</sup>

[50] Secondly, “she said that he tied her to the bed and um like put his penis in her mouth and come in her mouth and make her swallow and stuff and um then she did tell me that he did like have sex with her when he tied her to the bed and um she also told me that he used to like tie her to the clothes line and leave her there for like a day or two naked”. He added: “when she was tied to the clothes line he’d touch her in weird ways and do stuff to her, um, he um, yeah, yeah that’s what he’d do”.<sup>106</sup>

[51] When asked what else she said: “Ah that’s about it, he just molested her he’d do all that dirty stuff to her and tie her to the clothes line and that’s all I really know”.<sup>107</sup>

[52] G was pressed to give more detail about what K said about the incident when she was tied to the bed. He said:<sup>108</sup>

“Well he tied her to the bed and he had sex with her and like obviously she tried to stop it and she wouldn’t like it but he’d do it anyway and he, yeah like I said before he put his penis in her mouth and come in her mouth and make her swallow it”.

[53] Similarly he was pressed for more detail about what K said as to the clothesline incident. G said:<sup>109</sup>

“Yeah tied her to the clothes line in the back yard and left her there for a day or two, naked. Oh yeah and she also said that at night when she was tied to the clothes line he’d come out and he’d like scare her, I don’t know if he’d come up behind her and just go ‘Rah’ or something but she said he’d come out at night and scare her. She didn’t tell me much about that.”

...

“Well she just said that he’d strip her naked on the clothes line and he’d touch her inappropriately anywhere and everywhere and that he’d like, and yeah he wouldn’t feed her or give her water and she’d just be left there naked, that’s all I really know about it.”

[54] G was asked if K told him how she had been tied to the clothesline. G said: “... I can’t remember if it was with ropes or those little zip tie things, I’m not sure”.<sup>110</sup>

[55] Thirdly, G referred to a time when K stayed over at his house, which G estimated was about a month before his interview. As to that, G said:<sup>111</sup>

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<sup>105</sup> AB 265-266

<sup>106</sup> AB 266.

<sup>107</sup> AB 266.

<sup>108</sup> AB 266.

<sup>109</sup> AB 267.

<sup>110</sup> AB 268.

<sup>111</sup> AB 267.

“... she said, yeah a month ago she said that the most recent one was three weeks or something before that and that was when she got raped by [TAE] and two other people, she said that one of them was like 60’s in his 60’s and the other one was a bit older than me and then there was [TAE] and they, they did what they like what [TAE] did to her they had sex with her put their penis[es] in her mouth and that’s all she told me about that, oh and when, when she got molested by [TAE] like the times that he did it he’d drug her, she said that he’d give her needles.

...

And then he’d molest her so she’d be drugged and I think at one point he got her pregnant and gave, yeah, I remember her telling me he got her pregnant and he got like illegally gave her an abortion with a needle or something.”

- [56] G was pressed for more detail about that occasion. He started by saying “she didn’t tell me that much at all”, but then added:<sup>112</sup>

“... she just said that they did what [TAE] did to her when, like when she had been molested by [TAE] she just said that they’d do the same to her, like have sex with her, you know put their penis’ in her mouth, um, just like they raped her.

...

He um, she told me that before he’d molest her he’d give her needles anywhere like in her arm, in her thigh and he’d like, she said in her arm or in her thigh, I don’t know why she said like in her neck I don’t know, but, he’d drug and then he’d molest her and she could remember some parts but not all of it.

...

Um obviously he molested her and he was having sex with her and he obviously comed (sic) inside of her and she got pregnant and um obviously it took him a couple of months to realise and he gave her an abortion illegally with a needle. She said the needle was in her stomach as well if that helps.”

- [57] Fourthly, G was asked to recall the first time he was told anything by K. He said that it was when they were ice-skating. He was asked what he could recall being told on that occasion:<sup>113</sup>

“She just told me that [TAE] would molest her and like he had sex with her, put his penis in her mouth, make her swallow, I don’t know, that’s, that’s it. She didn’t tell me that he drug (sic) her though, she just told me that she molested, he, he molested her.”

- [58] G said that the first time he was told anything was at ice skating, then the next time was at a park with a mango tree, the third time was at K’s house and the fourth time was at his house. At K’s house he was told “she’d been drugged and when she got the abortion”. At his house was when K told him that “she’d been raped by those three guys”.<sup>114</sup>

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<sup>112</sup> AB 268.

<sup>113</sup> AB 269.

<sup>114</sup> AB 269.

- [59] G said that K had told him not to tell anyone but he had, in fact, told his best friend (T) about what he had been told by K:<sup>115</sup>

“I’ve told my best friend T but he hasn’t told anyone so he knows, I only said that she had [been] molested by her stepdad I didn’t tell him anything else.

...

Um K [told me not to tell anyone] but I couldn’t keep it from T like he kept asking me for a couple of weeks and I gave in but he hasn’t told anyone, he, he promised me he wouldn’t.”

- [60] G was called by the Crown at the trial, with the result that he was cross-examined by counsel for TAE. G said that what he told police in the interview was the truth. His cross-examination consisted, relevantly, of a series of questions asking if K had told him the various things he had said in the interview. Each time the question elicited a monosyllabic affirmative response. There was no testing of his evidence, nor any elaboration.

### **K’s evidence – what she told G**

- [61] K’s evidence as to this aspect started in her second police interview. She said she was in tears one night and G asked what was wrong. All she said to him was that she had been sexually assaulted by TAE. She said that the words she used were that “[TAE] sexually assaulted me”. She described the impact on G as “then he ... spun out”. G asked what actually happened but K said she did not want to go into details, and did not do so.<sup>116</sup>

- [62] K recalled the next part of the conversation:<sup>117</sup>

“... then he said like ... What if he made you pregnant and I’m like he didn’t cause I would have to have an abortion and ... then he’s just like okay and then I guess I changed the subject after that.”

- [63] K estimated that the occasion when she told G was about two months prior to the interview.<sup>118</sup>

- [64] After the first occasion, K said that every now and then G would ask if K had told anyone. When she did tell someone, K felt that she had to talk to G about it: “I had to talk to him about it cause I had to tell him what would happen and they would hear that he would have to get interviewed and stuff like that ... I told him that I told my Chaplin (sic) and then I had to talk to him about like it cause people ... would have to get interviewed”.<sup>119</sup>

- [65] In her pre-recorded evidence, K said that she told G that she was sexually assaulted by TAE, but she told him “Not much. Just little details”, such as “whereabouts and what happened ... briefly but not much that I can remember.” It was brought up occasionally because G asked “if [K] was okay every now and then and that’s all that would ... come of it”.<sup>120</sup>

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<sup>115</sup> AB 270.

<sup>116</sup> AB 183, 184.

<sup>117</sup> AB 184.

<sup>118</sup> AB 183, 184.

<sup>119</sup> AB 184.

<sup>120</sup> AB 225, 226.

- [66] In cross-examination, K was asked about what she had told G. She said that there was only the one time that she had told him about anything, the others were when G had asked why she was upset. However, she did not tell him in any detail.<sup>121</sup> The evidence of G was put to K but she denied telling G that:<sup>122</sup>
- (a) the molestation started when she was eight;
  - (b) TAE had put his penis in her mouth, ejaculated and made her swallow;
  - (c) TAE had sex with her when she tied to the bed; as to that K said that she had told G that “stuff happened on the bed”, but no details;
  - (d) she had been tied to the clothesline and left naked there for a day or two, unfed, and that TAE would come out at night to scare her;
  - (e) she had been raped by TAE and two other men, on the one occasion, and each had put their penis in her mouth;
  - (f) TAE would use needles on her to inject drugs; as to that K referred to the conversation she had with G about needles but “it had nothing to do with [TAE]”; and
  - (g) she became pregnant, or that because K realised she was pregnant TAE gave her an abortion by giving her a needle in the stomach.

***The evidence of TAE’s ex-partner, S***

- [67] After finally separating from K’s mother, TAE formed a relatively short relationship with another woman (S), from whom he also later separated. S gave evidence as to things said to her by TAE. Specifically it was said that TAE told her of his fantasy that he wanted to tie her to the clothesline with cable ties, and have sex with her. In examination-in-chief, she said:<sup>123</sup>

“You, during the course of your relationship with [TAE], had discussions about some sexual acts involving a clothesline; is that correct?---That is correct, yes.

Can you please tell the court, in as much detail as possible, what [TAE] said to you?---Okay. Would’ve been in the first week of our relationship, and it was at his address up in Clontarf while he was still living there prior to him moving into my house. And he was discussing his sexual fantasies. And he did discuss that he wanted me to go inside to his house – we were sitting out in the backyard having a few drinks – state that he wanted me to go into the house, take off my clothing and then return to the backyard, where he then fantasised about tying me to the clothesline and having sexual activities – yeah – having sex with me whilst tied to the clothesline.

Did he say how he was going to tie you to the clothesline?---He did. He said that he had cable ties. He wanted to cable tie me to the clothesline and have sex with me. Yeah. He – he did say that a couple of times.

Did you - - -?---And – yeah – in the first week of our relationship.

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<sup>121</sup> AB 242.

<sup>122</sup> AB 243-244.

<sup>123</sup> AB 62-63.

So you said he said that a couple of times. How many times?---Look, it was on a number of occasions, the first week or two and then – then another few times after that. There were a number of times that was discussed in his sexual fantasies.

With respect to this particular clothesline, how many times did he talk about that?---At least twice up at – up at Clontarf.”

- [68] In cross-examination she denied any suggestion that TAE had not said those things to her.<sup>124</sup> She agreed that: (i) in her first statement (April 2013) she had not mentioned those matters; (ii) she and TAE had ended their relationship in May 2013; (iii) she was aware of K’s clothesline allegation by the time she made her statement that included her own account as set out above.

### **Discussion - impact of G’s evidence**

- [69] Senior counsel for TAE put it that G’s evidence was at the heart of the appeal, and critical to its outcome.<sup>125</sup> The contention was that G’s evidence was such that it could not be reasonably rejected, and there were such irreconcilable differences between that and K’s evidence, that the jury should have rejected K’s evidence. It was said that it “wasn’t good enough for [the] jury to have an entitlement to prefer [K’s] evidence over [G’s] ... They, in fact had to be capable of rejecting it such that there was no reasonable possibility that [K] said the things that he said”.<sup>126</sup> In that respect, reliance was placed on the reasoning of Keane JA in *R v Thaiday*,<sup>127</sup> and two passages in particular:

“The complainant’s account at trial of the incident diverged seriously from L’s evidence of the complainant’s account to her. The evidence of L was not only inconsistent with the complainant’s evidence at trial, but actually destructive of the reliability of the complainant’s evidence about the incident in question.”<sup>128</sup>

and

“The jury could not reasonably have disregarded L’s evidence as that of a dishonest witness; and if her evidence is taken to have been honestly given, it was so radically at odds with the complainant’s evidence at trial that the two accounts cannot stand together. While the jury might have been disposed to regard the complainant as the more reliable of the two witnesses, there was no rational basis on which the jury could have excluded beyond reasonable doubt the possibility that L’s evidence of the account given by the complainant to L was accurate.”<sup>129</sup>

- [70] Senior counsel’s contention was put in a number of ways but most succinctly as: “this was an account given to [G] by her, which, if it was said by her, would make it ... utterly impossible for her evidence to be accepted beyond reasonable doubt”.<sup>130</sup>

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<sup>124</sup> AB 65.

<sup>125</sup> Appeal transcript T1-4.

<sup>126</sup> Appeal transcript T1-5.

<sup>127</sup> [2009] QCA 27. (*Thaiday*)

<sup>128</sup> *Thaiday* at [29].

<sup>129</sup> *Thaiday* at [31].

<sup>130</sup> Appeal transcript T1-6.

- [71] Each of the senior counsel who appeared on the appeal urged that the Court should view the DVD of G’s evidence. The Court has done so.
- [72] I do not accept the contention that it was not possible for the jury to reject G’s evidence, and consequently not possible to accept K’s evidence beyond reasonable doubt. For a number of reasons, there were features of G’s evidence that would have given the jury a reason to reject it and accept the evidence of K.
- [73] First, there were instances of expression by G where his evidence seemed to be a reconstructed or editorialised version. Thus he said that K told him:
- (a) that TAE “used to like tie her to the clothes line”, and “when she was tied to the clothes line he’d touch her in weird ways”;<sup>131</sup> these suggested it had happened more than once;
  - (b) “he tied her to the bed and he had sex with her and like **obviously** she tried to stop it and **she wouldn’t like it**”;<sup>132</sup> the use of the word “obviously” and the phrase “she wouldn’t like it” were clearly editorial comment, or reconstruction;
  - (c) referring to the clothesline incident and that TAE would scare her, G said: “I don’t know if he’d come up behind her and just go ‘Rah’ or something”;<sup>133</sup> that was plain editorialising;
  - (d) “he’d touch her inappropriately anywhere and everywhere”;<sup>134</sup> the use of the phrase “anywhere and everywhere” is redolent of editorialising;
  - (e) “he’d give her needles anywhere like in her arm, in her thigh and he’d like, she said in her arm or in her thigh, **I don’t know why she said like in her neck I don’t know**”;<sup>135</sup> the highlighted part of that excerpt was redolent of reconstruction;
  - (f) when relating the pregnancy and abortion allegation, “Um **obviously** he molested her and he was having sex with her and he **obviously** comed (sic) inside of her and she got pregnant and um **obviously** it took him a couple of months to realise and he gave her an abortion illegally with a needle”;<sup>136</sup> the use of the word “obviously” and the phrase “it took him a couple of months to realise” were clearly editorial comment, or reconstruction; and
  - (g) still on the abortion issue, “She said the needle was in her stomach as well **if that helps**”;<sup>137</sup> the phrase “if that helps” was editorial and suggestive of reconstruction.
- [74] Further, there was a degree of almost precise repetition in the description G gave of every occasion where sex was involved, that it appeared to be a reconstruction:
- (a) TAE “did have sex with her” and “put his penis in her mouth, and come in her mouth and make her swallow”;
  - (b) TAE “had sex with her and ... put his penis in her mouth and come in her mouth and make her swallow it”;

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<sup>131</sup> AB 266.

<sup>132</sup> AB 266; emphasis added.

<sup>133</sup> AB 267.

<sup>134</sup> AB 267.

<sup>135</sup> AB 268; emphasis added.

<sup>136</sup> AB 268.

<sup>137</sup> AB 268; emphasis added.

- (c) the two men “did what [TAE] did to her”, namely “they had sex with her put their penis’ in her mouth.”; “they’d do the same to her ... have sex with her, you know put their penis’ in her mouth...””; and
- (d) TAE “had sex with her, put his penis in her mouth, make her swallow”.
- [75] Secondly, the jury may have taken the view that if a 12 year old boy was really told what K said, then he may well have “spun out” and thereafter embellished the story, or overlaid it with the stories circulating at the school.
- [76] Thirdly, the jury may have thought that there was a degree of sensationalising in G’s account, perhaps the product of a misguided view that by doing so he was helping K. That may have been signified, for example, by the “if that helps” comment when referring to the needles. It may also have been signified by G’s answer in oral evidence, that he agreed that when he was speaking to the police he was “trying to help because [he] understood they were investigating serious allegations that [K had] made”.<sup>138</sup>
- [77] Further, on K’s account she and G did discuss topics that were then reflected in G’s account, such as: (i) G asking what if TAE got K pregnant, and her response that if that happened (which it did not) then she would have to get an abortion; and (ii) K’s account of the “stupid” conversation they had about whether they would ever do drugs or needles.
- [78] Fourthly, the jury may have taken the view that G wanted to distance himself from responsibility for the story getting out and breaking his promise to K, not to tell what she had told him. G had broken his promise to K, not to tell anyone, by telling his friend T. Whether it was T or not, nonetheless the story had made the rounds of students at the school.
- [79] Fifthly, the jury may have come to the view that G’s evidence could not be accepted in circumstances where the cross-examination was conducted by a party with no interest in challenging or testing anything G said, and his evidence was not challenged or tested in any respect.
- [80] Sixthly, the jury may have concluded that, taking those matters and others into account, G was an unreliable historian. For example, G said, in relation to the pregnancy allegation, “obviously it took [TAE] a couple of months to realise”. In cross-examination what was put to K was that **she** had realised she was pregnant and that was why TAE gave her an abortion.<sup>139</sup>
- [81] Seventhly, K first said that she told G very little in terms of detail; however, she did say that she told him “little details”, such as “**whereabouts and what happened** ... briefly but not much that I can remember”. That may well have been accepted by the jury as signifying that G had been told more than bare details. Then there was some degree of consistency between what K said and what G said he was told, albeit that at times he gave what senior counsel for TAE described as a “fantastical” account. Thus:
- (a) K’s evidence was that she had been tied, naked, to a clothesline with cable ties and sexually assaulted, which included being touched on her breasts and vagina; G said he had been told that, albeit he went further with the allegations of being left, tied to the clothesline, naked and unfed, for one or two days; and

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<sup>138</sup> AB 274.

<sup>139</sup> AB 244.

- (b) K's evidence was that she had been tied on a bed and sexually assaulted, which included TAE's penis being inserted in her vagina,<sup>140</sup> and being touched on her breasts and vagina; G said he was told that, albeit with the added parts to do with TAE inserting his penis in her mouth, ejaculating and making her swallow.

[82] Further, in assessing whether to accept K's evidence, and whether it had to be rejected because of what G said, the jury had to weigh the evidence of TAE's ex-partner, S. She said that TAE spoke of his fantasy or desire to have her go out into the yard naked, where he would tie her to the clothesline with cable ties, and have sex with her in that position. The jury were given a direction about their use of that evidence, namely it could only be used if: (i) they were satisfied beyond reasonable doubt that it was said; and (ii) then they were satisfied that it was so strikingly similar to the acts described by K that they could exclude coincidence beyond reasonable doubt.<sup>141</sup>

[83] There was no reason to doubt the evidence of S. True it was that her first statement did not mention the clothesline fantasy, whereas her second one did. However, as she explained, the first one was made before she knew the specific allegation against TAE relating to K being tied to the clothesline, and it was only that specific allegation that made the fantasy relevant to mention. True it was that she and TAE separated before she made her second statement, but there was nothing to suggest that the separation was other than amicable.

[84] There was a striking similarity between the fantasy and what K described, such that the jury could accept that it excluded coincidence beyond reasonable doubt.

[85] Acceptance of that evidence would give the jury a strong basis to accept what K said about the clothesline incident and thus not reject her evidence on that count.

[86] The learned trial judge gave a warning to the jury about their acceptance of K's evidence:<sup>142</sup>

“You cannot find the accused guilty of any offence unless you are satisfied of the complainant's truthfulness and reliability. In the circumstances, I give this warning. You will need to scrutinise [K's] evidence with great care before you could arrive at a conclusion of guilt in relation to any charge.

That warning is given, particularly for these reasons: (1) the many internal inconsistencies and changes of story in the evidence which [K] herself has given; secondly, the many inconsistencies between her evidence to you and what other witnesses say they were told by [K], and in relation to this, it includes her denials that she told [G] certain grossly inconsistent things; and (3) the curious feature that she destroyed the diary which she said she relied upon to assist in her evidence to police in circumstances in which the police had sought its production. It would seem on the evidence that she simply defied the police and burnt the diary after they asked for it.

So, ladies and gentlemen, you must only act upon [K's] evidence if, after considering it with this warning in mind, you are convinced that [K] is a truthful and accurate witness.”

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<sup>140</sup> This was said in her first interview; this aspect was only varied at trial, but even then included penetration by a finger.

<sup>141</sup> AB 96.

<sup>142</sup> AB 99.

[87] I do not consider that the reasoning in *Thaiday* is persuasive in the particular circumstances of this case. There the complainant said she had been raped about 25 years previously, when she was about 10 years old. She said it happened one afternoon, and was a violent, digital and penile, rape. She said that the first person she told, several years after the incident, was her cousin (L). The complainant said she told L that it was Thaiday who assaulted her, telling L “what happened, who did it to me and when it happened, and where”, although she did not tell L all the details. L gave evidence that what she was told by the complainant was that “someone had entered her room ... as she was sleeping, they approached her and sat on the bed and just touched her underneath the sheets in her private parts”.

[88] The dichotomy between the evidence of the complainant and that of L was thus as to two fundamental facts, namely (i) when and where the assault happened; and (ii) whether the complainant identified who had assaulted her. That is not the case here.

[89] Keane JA said in *Thaiday*:<sup>143</sup>

“[30] L was called to give evidence by the Crown; no doubt was cast upon her honesty by any party at trial. L’s account of the complainant’s version of the incident cannot rationally be dismissed as a faulty or fragmentary recollection of the version given by the complainant in evidence. L’s evidence was not of a faded or partial memory of a version of events which was consistent with the thrust of the complainant’s evidence. To the contrary, L’s evidence contained a clear and unequivocal description by the complainant of an event radically different from that of which the complainant gave evidence.

[31] The jury could not reasonably have disregarded L’s evidence as that of a dishonest witness; and if her evidence is taken to have been honestly given, it was so radically at odds with the complainant’s evidence at trial that the two accounts cannot stand together. While the jury might have been disposed to regard the complainant as the more reliable of the two witnesses, there was no rational basis on which the jury could have excluded beyond reasonable doubt the possibility that L’s evidence of the account given by the complainant to L was accurate. If L’s evidence was accurate the complainant’s evidence against the appellant could not be accurate. However credible the complainant may have appeared as a witness, and however favourably the jury may have been impressed by her demeanour, these considerations cannot afford a reasonable basis for the wholesale rejection of L’s evidence which is necessary if the verdict is to be sustained.”

[90] In my view, G’s account suffered from the defects identified above, and could be seen as an editorialised, sensationalised and reconstructed version of events. I consider there was a rational basis upon which the jury could have excluded beyond reasonable doubt the possibility that G’s evidence of the account given by K to him was accurate.

#### **Other inconsistencies**

[91] Senior counsel for TAE conceded during oral address that, absent a finding that G’s evidence was destructive of the credibility of K, the other matters raised in support of

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<sup>143</sup> *Thaiday* at [30]-[31].

the appeal would not be sufficient to succeed. The submission was that the other matters were significant only “in the way in which they surround and support [G’s] point”. Therefore they can be dealt with in shorter form than otherwise might be the case.

***Internal inconsistencies***

- [92] Senior counsel for TAE pointed to the inconsistencies referred to by the learned trial judge in his summing up: see paragraph [86] above. These were identified as being in relation to the clothesline incident (count 2) and the 4WD incident (count 4).
- [93] As to the clothesline incident, reliance was placed on: (i) K’s first interview where she said that penetration had occurred;<sup>144</sup> (ii) the second interview where she said that the penis touched her vagina but there was no penetration;<sup>145</sup> and (iii) her evidence where she said that there was penetration, and she bled for two days.<sup>146</sup>
- [94] As to the 4WD incident, reliance was placed on: (i) the description of her pyjama shirt tag being looped over a latch and her shirt being pulled up;<sup>147</sup> and (ii) her later account that she was wearing a dressing gown, and her hands being tied above her head.<sup>148</sup>
- [95] The DVD of K’s interviews and evidence, which the Court was asked to view, reveals K was evidently uncomfortable talking about the details of penetration. She tended to speak first about TAE doing “things” or doing “stuff”, and then when asked to describe what she meant by saying “he stuck his thing into me”, said “I don’t want to”. Thereafter she did say clearly that TAE “stuck his penis into my vagina”. That was the description she used for what occurred in the clothesline incident.
- [96] In the second interview the relevant questions were preceded by the interviewer saying that K had said that TAE “had sex with you”. Then followed statements to the effect that TAE “tried to anyway” but K “would always push him away before he ...”, and that TAE “tried to go back in again” and sometimes she could not push him away.<sup>149</sup> Then the questions turned to the clothesline incident, when she said that TAE’s penis touched her vagina and she “didn’t let it go in”, and “he tried to but then every time he would almost get in then I’d push him away”. When pressed for greater explanation as to “almost got it in”, K was evidently reluctant to speak and uncomfortable with the topic of penetration.
- [97] However, in K’s evidence at trial she was very clear that penetration had occurred. As with other events about which K testified, she gave a considerable amount of detail in her account. Further, K was asked how many times TAE’s penis went in, and replied “once”. There was no evident embellishment.
- [98] There was no reason why the jury could not accept her explanation that she was uncomfortable about the topic, and prefer her trial evidence. In any event the explanation at the second interview still referred to the penis touching the vagina and he “would almost get in”. That could be seen as a child’s way of explaining that penetration occurred but not all the way in. K did say that it felt different when TAE inserted his finger from when his penis was inserted, and in the context of knowing whether the finger “went in”, she agreed that TAE’s “penis was there”.<sup>150</sup>

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<sup>144</sup> AB 173; paragraph [13](a) and (b) above.

<sup>145</sup> AB 190; paragraph [14] above.

<sup>146</sup> AB 219; paragraph [16] above.

<sup>147</sup> AB 176-178; paragraph [18](d) above.

<sup>148</sup> AB 236-237; paragraph [19] above.

<sup>149</sup> AB 189.

<sup>150</sup> AB 191.

- [99] The 4WD incident was different. The inconsistency related only to what she was wearing, and the tag being looped over something on the vehicle. However, there was no true inconsistency. The first account was that she had her pyjamas on and it was the pyjama shirt that was hooked up. At trial she said that she was taken inside where she “got undressed and put my dressing gown on and tied it up so ... avoided him untying it”. That could well be understood as meaning she took off her day clothes, put on her pyjamas and a dressing gown over the top. There is no reason to interpret that evidence as meaning that she was naked under the dressing gown. Further, on her evidence TAE was inside when she changed, so the “avoided him untying it” remark may well be understood as meaning that she avoided TAE untying the gown inside the house.
- [100] That K meant that her pyjamas were under her dressing gown received support from her evidence at trial when she identified various photographs of the car. In the course of that evidence she identified the latch over which the tag on her shirt was looped.<sup>151</sup>
- [101] In each case the counsel for TAE did not cross-examine on the inconsistencies now raised. In any event these inconsistencies were drawn to the jury’s attention,<sup>152</sup> the jury asked to be, and was, reminded of them,<sup>153</sup> and were the subject of the *Robinson* direction set out in paragraph [86] above. In addition the jury were directed, as one would expect, that they should consider inconsistencies in the evidence and the impact of those inconsistencies on K’s credit.
- [102] I do not consider that the inconsistencies relied upon were so damaging that the jury could not have accepted K’s evidence.

### *Significance of the diary*

- [103] In her second police interview K said that her mother went away for a cruise on a girls’ weekend. During that weekend K and TAE went by boat to an island where they camped in a tent. K thought the island was called Sovereign Island because that is what her mother called it. She was sexually assaulted during that trip. The incident was the subject of count 3, of which TAE was acquitted.
- [104] In her pre-recorded evidence the prosecutor’s questions raised a discrepancy in what she had previously said about when the Sovereign Island incident had occurred: “And you told police it was a time, maybe, in September? Do you know any more about when that cruise was now?”<sup>154</sup> In fact K had not said that in her interviews, though it is possible that the prosecutor was referring to something said outside the formal interview. Be that as it may, K said that she had checked her diary and from that she could remember that the Sovereign Island incident happened in March, because the diary recorded that was when her mother went on the cruise. She could not say if it was 2011 or 2012.<sup>155</sup>
- [105] In cross-examination K was asked about the Sovereign Island incident. She agreed that her evidence was that she had originally told police that it happened in September 2011.<sup>156</sup> She explained that the change was due to her checking her diary, which did

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<sup>151</sup> AB 259.

<sup>152</sup> AB 84-85, 101 and 102.

<sup>153</sup> AB 133-135, 136-147 and 148-154.

<sup>154</sup> AB 212.

<sup>155</sup> AB 212.

<sup>156</sup> AB 229, 230.

not have dates in it, but a record of events. The diary “said mum was going for a cruise in February and going from the end of February to the beginning of March”.<sup>157</sup> She still could not say if it was 2011 or 2012, though later she said she thought it was 2012.<sup>158</sup>

[106] K was subsequently told that the diary was required by the police, and notwithstanding that, she burnt it.

[107] Senior counsel for TAE contended that the burning of the diary in the face of the requirement to produce it was a factor that told heavily against K being a witness that the jury could have accepted. I do not consider that contention can be made out. K explained the nature of the diary and her reason for burning the diary:

“It wasn’t a diary to be exact ... I’m a person who writes down stories of events that happen and I wrote it down and ... there was no names or anything, but when I write I express my feelings into it but not put ... names or ... dear diary or something like that. It was just a story that made me memorise it because it was about that day.”<sup>159</sup>

and

“Because I don’t let anybody read my stories and I found out that I had to give it to the police and I didn’t want to, so I burned it.”<sup>160</sup>

[108] The jury were given a warning about reliance on K’s evidence, which included reference to the doubts that might arise because she burned the diary after being told it was required.

[109] In my view, it was open to the jury to accept her evidence that the diary contained intensely personal things, and that was why she was not prepared to allow others to read it, rather than it containing anything contrary to what she had said.

#### ***Improbability of TAE wearing the schoolgirl outfit***

[110] This point relied on the fact that TAE was 201cm tall, and about 120kg. It was contended that the improbability of his fitting into the outfit was such that K’s evidence should have been rejected. The mother’s evidence was that the skirt was made of stretchy material and the size of the outfit was “one size fit most”. The improbability was highlighted to the jury in the summing up.<sup>161</sup> It was not such an improbable thing that rejection of K’s evidence was warranted.

#### ***Timing of the rape allegation***

[111] Finally, senior counsel for TAE raised the fact that K said she was raped at the Redcliffe house when she was in Grade 6, when in fact she was living at the Wynnum house in Grade 6.

[112] The basis for this comes from the counsellor’s and chaplain’s evidence.

[113] The chaplain said that K told him about the clothesline incident as having occurred, he thought, at TAE’s house when she was in Grade 6. The conversation was jumpy and scattery, and K was nervous. After that he went to speak to the counsellor.<sup>162</sup>

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<sup>157</sup> AB 230.

<sup>158</sup> AB 251.

<sup>159</sup> AB 260.

<sup>160</sup> AB 261.

<sup>161</sup> AB 104.

<sup>162</sup> AB 55.

- [114] The counsellor said that her question to K, prior to the mother joining them at the school meeting, was: “How often is this was (sic) happening?”, to which K responded: “Every time I go there”. The counsellor said that she (the counsellor) was “referring to the alleged rape that was happening”.<sup>163</sup> However, the counsellor did not say that K used the word “rape”, nor did she say that she asked K using the word ‘rape’. Further, her source of information prior to that question was what the chaplain had told her about his conversation with K, as the counsellor had not been present when the chaplain spoke to K. In the chaplain’s meeting with K the only rape allegation was the clothesline incident.
- [115] The counsellor said that when K’s mother joined the meeting at school, the mother asked K a question “about where it had happened or when it had started, and [K] said in ... grade 6, and the Redcliffe house came up again, and they had a conversation back and forth because her mum thought that they – that he wasn’t living at the Redcliffe house at that time”. The counsellor said that she put an end to the conversation between K and her mother, “because they were arguing and I said that they could possibly be confusing details”.<sup>164</sup>
- [116] Then in cross-examination she was reminded of a previous statement in which she had said that the exchange between K and her mother was: the mother asked K “when did it start” and K responded “In the Redcliffe house when I was in grade 6”.<sup>165</sup>
- [117] In all that evidence the counsellor did not say that the word “rape” was used, nor was that put to her.
- [118] The evidence of all at the meeting was that K was upset and nervous, then distressed at the prospect that her mother would be told, rocking back and forth and wringing her hands. Clearly on that evidence the meetings were distressing and emotional for K. Given that, and the matters referred to above as to the sources of information and the questions, the jury could well conclude that K may have mistaken details.
- [119] These matters were raised for the jury’s consideration in summing up,<sup>166</sup> and almost certainly in addresses. The jury had the distinct advantage of having seen and heard the evidence of the chaplain and counsellor. I do not consider that the inconsistencies are at the level where the jury should have rejected K’s evidence.

### **Conclusion on inconsistencies**

- [120] For the reasons expressed above I do not consider that the disparity between the evidence of G and that of K, or the other inconsistencies raised by senior counsel for TAE, are such that the jury should have rejected K’s evidence. In my view, a review of the evidence reveals that it was open to the jury to be satisfied, beyond reasonable doubt, of TAE’s guilt. Put in terms from *M v The Queen*<sup>167</sup>, the evidence does not contain such discrepancies, inadequacies, taint, or otherwise lack probative force, as to lead me to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted.

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<sup>163</sup> AB 33.

<sup>164</sup> AB 34.

<sup>165</sup> AB 33, 34; see paragraphs 46(c) and (d) above.

<sup>166</sup> AB 90 and 99.

<sup>167</sup> (1994) 181 CLR 487.

**Conclusion**

[121] For the reasons expressed above I would dismiss the appeal.

[122] I propose the following order:

1. The appeal is dismissed.

[123] **PHILIPIDES JA:** I agree with the order proposed for the reasons given by Morrison JA.

[124] **MULLINS J:** I agree with Morrison JA.