

# CHILDRENS COURT OF QUEENSLAND

CITATION: *R v JL* [2019] QChC 34

PARTIES: **THE QUEEN**  
(Plaintiff)

v

**JL**  
(Defendant)

FILE NO/S: 10/19

DIVISION: Criminal

PROCEEDING: Trial – Judge - Alone

ORIGINATING COURT: Childrens Court of Queensland

DELIVERED ON: 13 November 2019

HEARING DATE: 11 November 2019

JUDGE: Sheridan DCJ

ORDER: **The defendant is discharged in respect of the count on Indictment 10 of 2019.**

CATCHWORDS: CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – INDECENT ASSAULT AND RELATED OFFENCES – GENERALLY – trial by judge sitting without a jury – where the defendant child was charged with one count of indecent treatment of a child under 16, under 12, under care

*Criminal Law (Sexual Offences) Act 1978 (Qld) s 4A*  
*Youth Justice Act 1992 (Qld) s 98, s 103*

*R v AW* [2005] QCA 152, cited  
*R v NM* [2013] 1 Qd R 374, cited  
*R v RH* [2005] 1 Qd R 180, cited

COUNSEL: G Meoli for the Crown  
S McLennan for the Defendant

SOLICITORS: Director of Public Prosecutions (Queensland)  
Legal Aid Queensland

- [1] The defendant child is charged with, and has pleaded not guilty to, the offence of having on 3 September 2018 unlawfully and indecently dealt with the complainant, a child under 16, under 12 and under his care at the time.
- [2] The particulars of the charge were that the defendant took the complainant's pants and underwear off while the complainant's mother was at Kmart.
- [3] The trial proceeded before me in accordance with the defendant's election to a trial before a judge without a jury.<sup>1</sup> In the trial, the defendant did not give or call evidence, as is his right.

### **General approach**

- [4] The burden of proof rests on the prosecution to prove the guilt of the defendant. There is no burden on a defendant to establish any fact, let alone his innocence. The defendant is presumed to be innocent. For the prosecution to discharge its burden of proving the guilt of the defendant, the prosecution is required to prove beyond reasonable doubt every element that goes to make up the offence charged.

### **Offence charged**

- [5] The elements of the offence charged are:
1. The defendant dealt with the complainant, which includes a touching of the child;
  2. The dealing was indecent;
  3. The dealing was unlawful in that it was not justified, authorised or excused by law;
  4. The complainant was under 16 years;
  5. The complainant was under 12 years; and
  6. The complainant was in care of the defendant at the relevant time.
- [6] In terms of the elements of the offence, the defendant has admitted the complainant was born on 13 June 2012. It is further not disputed that the complainant was in the care of the defendant at the time of the alleged offending.
- [7] The crown case will otherwise rise or fall on whether I accept the evidence of the complainant beyond reasonable doubt as being both truthful and reliable.

### **Form of Complainant's evidence**

- [8] The complainant's testimony included her police record of interview taken on 4 September 2018. The interview was played during the course of the trial. I was provided with a copy of the transcript as an aid only.
- [9] In addition, pre-recorded evidence was taken from the complainant on 8 October 2019. Her evidence was taken by an audio/visual link between a separate room and the court room. There was an independent support person sitting in the room with no other person present. The court was closed during the pre-recorded evidence and when the complainant's evidence was replayed during the trial.

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<sup>1</sup> The defendant child was committed for trial before a judge sitting without a jury pursuant to ss 98(2)(a) & (4) of the *Youth Justice Act 1992* and that election was not withdrawn pursuant to s 103(3). The child was at all times legally represented.

- [10] All of the measures used for the taking and the showing of the complainant's evidence were in accordance with the standard routine procedure of the court. I assess this evidence in the same way as the other probative evidence in this case.

### **Evidence in Chief**

- [11] The complainant's evidence in chief in the pre-record consisted of her adopting her statements in the record of interview with the police.
- [12] On the night in question, the complainant, then aged 6, had been left at home in the care of the defendant child, her cousin then aged 16. Her mother had gone to Kmart with a friend. The complainant's mother had been picked up by her friend at around 7.00pm. Kmart was a one to two minute drive from the complainant's house.
- [13] The defendant had been living at the complainant's house. The precise period the defendant had been living at the house on this occasion is unclear. I accept that the defendant had lived on and off at the house for some period as the defendant had problems living with his father's new partner and his mother lived in Melbourne. The complainant accepted that the defendant was like a big brother to her.
- [14] The complainant's evidence was that while her mother was out, the defendant had put on a movie in the lounge room. The complainant said that in the movie they were doing dares. The complainant, in describing one of the dares, said: "The dad tried to make the little boy naked and be on his... skateboard". The complainant said, "I think he got it from that, trying to do it to me". The complainant said she didn't want to watch the movie but the defendant had yelled at her to get out of the bedroom.
- [15] The complainant said the defendant was lying on his back on the couch "with his legs nearly up". The complainant said she was sitting on his belly. She said she was facing him. She said, "I was just sitting there and we were like playing." She said, when asked, that she could not remember what they were playing but earlier she had referred to pretending she was on an aeroplane.
- [16] The complainant said that the defendant then laid her down and he then "took my pants and my knickers off." When asked to explain how he laid her down, she said, "Like he laid me down so my belly was on his belly." She was asked, "Is your belly touching his belly?", and she responded, "Bellies were touching each other." And she then said, "And then he took my pants and knickers off, put them on the top of the couch." When asked, "How did he take them down?", the complainant said, "Well, he just pulled my pants down and then he, he pulled my pants and knickers down together."
- [17] The complainant said she was wearing "coloured little short pants and with white and stripes and green knickers". The complainant said the defendant took them off and then he "tickled me and slapped me on the bum when they were off." The complainant then said, "He started to put his hands around my bum and I thought what is he going to do." When asked, "And did his fingers go anywhere near your...inside your bum?", the complainant said, "Yes. They were like not there, but a little bit close there". The complainant was asked, "Close to your bum hole?" and she responded, "Yep".

- [18] The complainant agreed when it was said that the defendant had tickled her when her pants and knickers were on but said, he then started to do it without her pants and knickers. She was asked, “And he tickled?”, to which the complainant responded, “Yeah. It felt really ‘appropriate’ (it is clear the complainant meant inappropriate) so I thought I would probably tell mum straight away when she got home.”
- [19] The complainant said the defendant put her pants and knickers on top of the couch. The complainant said that she then went to get a drink and she says when she went to get them from the couch, they were gone. The complainant says the defendant had quickly grabbed her pants and knickers and she says that when she looked down she noticed that his rude part was actually really big and so she thought he had put them in his jocks.
- [20] The complainant says she ran away crying. The complainant said she returned and asked for them back to which he said no but then she says she asked again and he said yes. The complainant says she then went up to her bedroom to get a JoJo book and to get a pencil and a rubber and then they started doing some work.
- [21] The complainant says her mum then got home.

#### **Evidence in Cross-examination**

- [22] The evidence of the complainant in cross-examination during the pre-record was markedly different.
- [23] In the course of the cross-examination in the pre-recorded evidence, the following exchange occurred:

“And now, [the defendant] never took your pants or underwear off you, did he?...Yes, he did.

And [the defendant] never touched you on your bottom at all, did he?...He never touched me on my bottom.

Okay. And when you told your mum when she got home and before you went to the police station the next day, you didn’t say anything to her about [the defendant] touching you on your bottom, did you? I didn’t say that because it [didn’t] exactly happen. He didn’t touch me on my bottom.”

- [24] In the above exchange, it is unclear from the recording whether the defendant said it did or didn’t happen in answering part of the question. The transcript of the recording said the word said was “did”, not “didn’t.” Counsel for the defendant submitted the word said was “didn’t”. That seems more logical. Irrespective as to what word was said at that point, it is clear that the complainant’s evidence was that the defendant did not touch her bottom.
- [25] When the complainant was asked whether she recalled telling her Nan that the defendant did not touch her at all, she said she did not remember that.
- [26] In cross-examination, the complainant confirmed that the defendant took her pants and underwear off her. The complainant accepted that the movie that the defendant had put on was Shrek and that after the movie had been put on the defendant had returned to his room to play Xbox. The complainant accepted that she later entered

into the defendant's room with her JoJo book to get help to fill out some questions. One of the questions asked in the book was for her to write her "most embarrassing moment ever".

- [27] The complainant accepted that she had written, "Pulling my dad's pants down". The complainant was referring to an incident in a supermarket with her dad when she accidentally pulled his pants down. The complainant accepted that the defendant had said to her "That's not nice" and that he had said to her, about her answer to that question, "That's not okay. That's a rude thing to do".
- [28] The complainant remembered that the defendant had explained to her what embarrassed meant. The complainant accepted that the defendant had rubbed the answer out.
- [29] It was put to her that she then wrote, "Pulling my mum's pants down". The complainant denied that allegation. The complainant said that the defendant had written that answer. Nevertheless, the complainant accepted that the defendant rubbed out that answer and told the complainant that that was rude. The complainant accepted that the defendant had written the answer, "Killing a crab".
- [30] The complainant also accepted that she had "a bit of a tantrum". The complainant accepted that she started jumping on furniture, though said she was jumping on her bed and not the couch in the lounge room. The complainant did not accept that she had run into the lounge room but said that she had gone to her bedroom.
- [31] The complainant accepted that she ended up in the lounge room hugging a cushion, crying and accepted that she continued to have a tantrum.
- [32] The complainant accepted that the defendant came to check on her and accepted that the defendant had leant down near the couch to talk to her. The complainant accepted that they started to fill out more questions in the book.
- [33] It was put to the complainant that she made the complaint up about the defendant pulling her pants down because she didn't want to get into trouble for what she had done. When first asked about that, the complainant said, "Yeah, because he told the lie, but I was telling the truth." The question was then rephrased to, "You thought – before your Mum got home, you thought that [the defendant] was going to get you into big trouble?" and she said, "Yes". She was then asked, "And you thought you were going to get into big trouble for writing about - the first thing was writing about when your dad's pants were pulled down?" and she said, "Yes". It was put that this was because [the defendant] told you that was rude and it wasn't a nice thing to write and she agreed.
- [34] She was then asked again about having written in the book that she had pulled her mum's pants down. On this occasion, contrary to her previous denials, the complainant accepted she had written that in the book. And she agreed that she had never pulled her mum's pants down. She agreed that she thought the defendant was going to get her into trouble for making things up about her mum. When asked whether she thought she might get into trouble because she had a bit of a tantrum and was either jumping on the couch or jumping on the bed when she shouldn't be doing that, she said, "No, I don't remember that." Finally, it was put to the complainant that she had made up the story about [the defendant] pulling her pants

down because you didn't want to get into trouble for what you had done, and she responded, "[The defendant] did pull my pants down."

- [35] It is noteworthy, having regard to the evidence given by the complainant in this exchange, that the complainant's mother in her evidence had said that she recognised the imprint of the words "mum", "pants", "get", "pulling", "down" which had been left in the notebook, as being in the handwriting of the complainant. This fits with the complainant's final admission that she made in cross-examination, towards the end of her evidence. It seemed that the complainant was trying to distance herself from what was written in the book.

#### **Defendant's record of interview**

- [36] In his record of interview with police, which was played during the trial, the defendant admitted to being at the house and to having agreed, when asked by the complainant's mother, to babysit the complainant while she went to Kmart to hang out for a bit with one of her friends. The defendant denied that he had ever touched the complainant inappropriately. The defendant denied that he had tickled or slapped her bottom or that he had ever removed her pants or underwear and hidden them from her. The defendant said that any suggestion of having done any of those things was not a good thing. When asked to explain why it was not a good thing, the defendant said, "The age difference and the fact that she's family and she's young and it shouldn't happen".

#### **Preliminary complaint**

- [37] In assessing the credibility of the complainant, I have considered the evidence of the preliminary complaints.<sup>2</sup> That evidence has no probative value or capacity to independently prove anything.<sup>3</sup> It can only be used by me for limited purposes of assessing consistency or inconsistency of the complainant's statement or conduct to buttress or otherwise the complainant's credibility about the commission of the offence.<sup>4</sup>
- [38] For that limited purpose, the other witnesses' accounts were to the following effect:

- (a) The complainant's mother testified that the complainant told her that the defendant had taken her pants down. The complainant's mother said that in the shower, after she had returned home, the complainant had told her that you really need to listen to me because [the defendant] took my pants off. She said that the complainant had said that the defendant had taken her pants off, he had put them on top of the couch, she had asked for them back, he said no, she went around to the fridge, she asked again, she thought they were inside his jocks because it was big and bulgy there, he gave them back and she went upstairs and put them on. In cross-examination, her mother agreed that the complainant had told her before they went to the police that [the defendant] had "tickled her bum". When asked whether the complainant had ever said, "Mum actually, [the defendant] never touched me?", the mother said, "No, she's never changed her story."

<sup>2</sup> *Criminal Law (Sexual Offences) Act 1978* (Qld), s 4A.

<sup>3</sup> *R v RH* [2005] 1 Qd R 180; *R v AW* [2005] QCA 152.

<sup>4</sup> *R v AW* [2005] QCA 152; *R v NM* [2013] 1 Qd R 374.

- (b) The complainant's grandmother said that the complainant had said the defendant took her pants off and wouldn't give them back and that he put them down the front of his. In cross-examination, the grandmother said that the complainant said she went upstairs to put another pair of pants on. The grandmother said when she asked the complainant if the defendant had touched her at all, the complainant had said no. The grandmother said that she had spoken to the complainant in the presence of her mother.
- (c) The complainant's mother took the complainant that night to her friend's house. Her friend said the complainant was very quiet and seemed shaken and just not her usual self. She said the complainant's mother was hysterical. She said that the complainant had said that the defendant had taken her underwear and shorts off, put them on the back of the couch or somewhere she couldn't reach and it was something like tickling or patting her naked bum, or something along those lines. In cross-examination, she accepted that in terms of the sequence of events, the complainant had said she was colouring in the JoJo book in the lounge room and then [the defendant] took her pants off and patted her bum.
- (d) Another friend gave evidence of speaking to the complainant. This friend said that she spoke to the complainant the following morning in the bird room of her friend's house, though she accepted she was there the night before. This friend said that when she asked the complainant what happened, the complainant said that she and the defendant were watching cartoons, he tickled her bum, he took her knickers off and he put them down his pants and she said that she knew that because it was big down there. In cross-examination, she said she could not remember the precise order of events. She accepted that the complainant made reference to doing some colouring.

[39] There is a high degree of consistency between the evidence of the mother of the complainant and the evidence of her mother's friends. This might not be unexpected given their friendship. The strength of the evidence is, however, significantly diminished by the fact that all three were present together on the night of the alleged offending and the alleged event had been discussed by at least one of the friends and the complainant in the presence of the others and was clearly discussed between them also in the presence of the complainant.

[40] It is therefore not surprising that there was a high degree of consistency in the evidence of the mother and her friends and the statement of the complainant in her interview with the police.

[41] This evidence is to be contrasted with the account of the grandmother. In the conversation with her grandmother the next day at the complainant's house, when the grandmother asked the complainant as to whether [the defendant] touched her at all, the complainant answered "No". That account is consistent with the evidence of the complainant in her answers during cross-examination in her pre-recorded evidence. In cross-examination, the complainant had accepted that she had never

been touched by [the defendant]. During cross-examination, the complainant maintained, however, that [the defendant] had taken her pants and underwear off.

### **Analysis**

- [42] Although it was the act of the taking of the pants and underwear off which formed the basis of the charge and there is a strong element of consistency in the evidence of the complainant in this respect, that story is vastly different from the version as said by the mother and two of her friends to have been given to them and as contained in the police record of interview; which was adopted by the complainant at the commencement of the pre-record. Any touching was denied to the grandmother and in cross-examination in the pre-recorded evidence.
- [43] Although it is possible to accept some parts of a witness's evidence and reject others and the mere existence of inconsistencies does not mean that I must reject the complainant's evidence, the differences here inevitably lead me to doubt whether even the taking off of the pants and underwear occurred. Her attempts to distance herself from what was written in the book impacts her credibility.
- [44] The differences in the complainant's answers in her interview with police and her answers in cross-examination in the pre-recorded evidence are so significant that it is difficult to accept her as a credible witness. To have said that she was touched on the bum and that his fingers were near her bum hole and then subsequently to say she was not touched, has the result that I could not be satisfied beyond reasonable doubt as to the truthfulness and reliability of the complainant's evidence.
- [45] Having not been satisfied as to the truth and reliability of the complainant's evidence, I find the defendant not guilty. The defendant is discharged of the count on indictment 10 of 2019.