

CHILDRENS COURT OF QUEENSLAND

CITATION: *R v POG* [2020] QChC 46

PARTIES: **THE QUEEN**

v

POG
(defendant)

FILE NO: 285 of 2020

DIVISION: Criminal

PROCEEDING: Trial

DELIVERED ON: 22 October 2020 (delivered *ex tempore*)

DELIVERED AT: Brisbane

HEARING DATE: 21 and 22 October 2020

JUDGE: Dearden DCJ

ORDER: **I find the defendant guilty in respect of each of counts 1 and 2.**

CATCHWORDS: CRIMINAL LAW – SEXUAL OFFENCE – INDECENT TREATMENT OF A CHILD – JUDGE ALONE TRIAL – whether the defendant is guilty or not guilty of indecent treatment of a child under 16, under 12 – whether the offences charged are proved beyond reasonable doubt

LEGISLATION: *Criminal Code 1899* (Qld) ss 210, 644
Evidence Act 1977 (Qld) s 21AK

CASES: *R v MMH* [2020] QDC 70

COUNSEL: Ms J Malouf for the Crown
Mr Kennedy for the accused

SOLICITORS: Office of the Director of Public Prosecutions for the Crown
Aboriginal and Torres Strait Islander Legal Service for the defendant

Introduction

[1] The defendant, POG, is charged with two counts of indecent treatment of a child under 16 under 12, as follows:

Count 1 – that on or about the 24th day of August 2019, at Runcorn, in the state of Queensland, POG unlawfully and indecently dealt with KP, a child under 16 years, and KP was under 12 years.

Count 2 – that on or about the 24th day of August 2019, at Runcorn, in the state of Queensland, POG unlawfully and indecently dealt with KP, a child under 16 years, and KP was under 12 years.

[2] The defendant is a juvenile and has elected to proceed with a judge-only trial.

[3] The defendant pleaded not guilty to each of the counts on the indictment.

Particulars

[4] The prosecution particularised the charges as follows:

In two separate events, the defendant touched the complainant on the outside of her vagina, and/or grabbed her buttocks.

Elements

[5] In respect with each count of indecent treatment of a child under 16 under 12, the prosecution must prove, beyond reasonable doubt, that:

- (1) the defendant dealt with the complainant;
- (2) the dealing was indecent;
- (3) the dealing was unlawful;
- (4) the complainant was under 16 years;
- (5) the complainant was under 12 years.

[6] The complainant was born on 12 April 2011.

[7] It is not then in dispute that the complainant was under 16 and under 12, as at 24 August 2019, the date of the alleged offences.

- [8] The alleged touching by the defendant's hand and/or fingers of the complainant's vagina and bottom (or buttocks) under her underwear is clearly a "dealing"; is clearly "indecent" by ordinary community standards (a 16 year old boy touching an eight year old girl in bed on the vagina and/or buttocks); and would clearly be unlawful, i.e., not authorised, justified or excused by law.
- [9] What is in dispute is whether the events, the subject of the two charges, occurred at all.

Principles to be Applied

- [10] In respect to the principles to be applied in the judge-only trial, I refer to, and respectfully adopt, the exposition of those principles, as set out by Smith DCJA in *R v MMH* [2020] QDC 70, paragraphs [7] – [10], supported by the cases and legislation cited in his Honour's judgment.
- [11] Although the defendant in that trial was an adult, the relevant principles are equally applicable to this judge-only trial of a juvenile.

The Evidence

- [12] Evidence for the prosecution was given by the complainant, KP, by way of an s.93A *Evidence Act* statement, dated 26 August 2019 (exhibit 1; exhibit A (transcript)), and a s.21AK *Evidence Act* video, recorded on 21 September 2020 (exhibit B; exhibit D (transcript)).
- [13] Evidence was called from the complainant's mother, DS, and forensic scientist, Angela Adamson.
- [14] Pursuant to *Criminal Code* s.644, the following joint admissions were made:

Pursuant to section 644 of the *Criminal Code*, the Crown and the defendant, POG, admit the following:

Preliminary Complaint Recording

On 25 August 2019, Senior Constable Bayli, spoke with the complainant, KP, at the complainant's home. The DVD labelled "KPC footage – Bayli" is a true and accurate copy of the conversation, as recorded by Senior Constable Bayli.

Section 93A Interview

On 29 August 2020 [I interpolate, this date is incorrect and should be 26 August 2020], Senior Constable Nicholas Berrett and Senior Constable Shannon Rush interviewed the complainant, KP (DOB 12 April 2011), at Moreton District South Police Station. The DVD labelled “KP s.13A” is a true and accurate copy of the recorded interview.

DNA Evidence

On 25 August 2019, police seize the underwear and pyjamas KP wore to bed on 24 August 2019 for forensic analysis. The pyjamas [p1900355629] were not suitable for meaningful interpretation. The underpants [1900355625] were.

On 6 October 2019, POG provided a sample of DNA by way of mouth swab to police.

Forensic analysis confirmed the mixed DNA profile obtained on KP’s underwear is greater than 100 billion times more likely to have occurred if POG had contributed DNA with KP, rather than if he had not.

- [15] Exhibit 2 (exhibit E (transcript)) is a recording of a preliminary complaint conversation between DS and the complainant on 25 August 2019.
- [16] Exhibit 3 (exhibit F (transcript)) is a recording of a preliminary complaint conversation between Senior Constable Karma Bayli and the complainant on 25 August 2019.
- [17] The diagram drawn by the complainant in her s.93A police interview is exhibit 4.

Complainant’s s.93A Interview – 26 August 2019

- [18] The complainant’s version, as originally outlined to Senior Constable Shannon Rush and Senior Constable Nicholas Berrett, is set out at exhibit A, p.6L50 – p.8L21:

S Con Rush: Sounds really good. Um, all right. So Ella, tell me what you’ve come here to talk to me about today.

KP: Um, well, um, POG. He, he’s a boy and um he

S Con Rush: Mmhmm.

KP: - - - touched me in rude places.

S Con Rush: Okay, so tell me everything about POG touching you in rude places.

KP: M'kay.

S Con Rush: And start from the beginning.

KP: Okay. So, um, I was, it was late at night, and I got scared, because his brother was saying that their house is haunted.

S Con Rush: Mmhmm.

KP: And then I did, um, I did knew that it wasn't true, but I still got really scared. So I wanted to play on POG's phone.

S Con Rush: Mmhmm.

KP: And it was flat, so he went in D' bed, his brother's bedroom, and we put the phone on charge, so I, um, played it, played the movie and watched the, the movie. And then it got really, really, really late. So then I went to sleep and then lied for a couple of hours, he touched me, um, he started touching me in my vagina.

S Con Rush: Mmhmm.

KP: And then in my bum.

S Con Rush: M'kay.

KP: And then, um, I went, I pretended that I needed to go to the toilet. And then I went in the toilet for a couple of hours and thinking what to do.

S Con Rush: M'kay. And then what happened?

KP: And then I hopped back in the same bed, because I thought he would, um, realise that I wasn't there for the whole night and I thought he would get angry.

S Con Rush: Okay. So you said you hopped back into the bed, and then what happened?

KP: And then he kept doing it to me. He keep touching me in my vagina.

S Con Rush: Mm.

KP: And then, he keep touching me in my bum as well.

S Con Rush: Mm, and then what happened?

KP: And then I went out of the bedroom and I was, I was like tryna wake up D, but then he didn't wake up, so I hopped in, um, the same bed and tried to go to sleep.

S Con Rush: M'kay. And then what happened?

KP: And then he stopped doing it.

S Con Rush: Okay. So you went back to bed and he stopped doing it.

KP: Yeah.

S Con Rush: And then what happened?

KP: And then, um, I went to sleep in the morning and I told Mum.

S Con Rush: Mm, yep, so in the morning you told Mum?

KP: Yep.

S Con Rush: And then what happened?

KP: And then Mum said, um, Mum's told, um, her, Mum, when we got home, Mum told, um, his Mum, and then, um, they had a little chat and then we went, um, to the, you guys.

- [19] The interview establishes that the events took place at a house near Caboolture where POG, aged 16, lived with his mother, B, his brother D and B's cousin, Sam (exhibit A, pp 8-9).
- [20] At the time of the events, KP's mother, B and Sam were out, and KP was home with POG, his brother D and KP's sister, Grace, aged 4 (exhibit A, p.11).
- [21] The events occurred in D' bedroom, upstairs past the lounge (exhibit A, p.13). The plan of that room is exhibit 4.
- [22] KP was in the loungeroom watching a Barbie movie on POG's phone; it went flat, and so she and POG went to D' bedroom to put the phone on a charger (exhibit A, pp 15-16). D and Grace slept in the loungeroom (exhibit A, pp 16-17).
- [23] In D' room, KP watched Netflix for a couple of hours. She was wearing a purple and blue Elsa nightie and blue underpants with a bow (exhibit A, p.17). POG was wearing a red jacket with Champion on it, and black pants (exhibit A, p.18).
- [24] While KP was lying on her left-hand side, after the phone was turned off, POG was behind her, hugging and touching her "bum and vagina" (exhibit A, p.19).
- [25] KP describes POG as squishing her, meaning he was getting really close to her. His hand was "squishing her bum" (exhibit A, p.20).
- [26] KP describes herself as "frozen" and "really scared" (exhibit A, p.21).
- [27] After touching her bum, POG then touched her vagina – an action which she described alternately as "he squished my vagina" (exhibit A, p.21).

- [28] KP says that POG “put his hand in my undies and was squishing it” [ie, her vagina] (exhibit A, p.22 LL3-4). She says the squishing was “near when I wee” (exhibit A, p.22 L20), and that he did it for 15 minutes, a “pretty long time” (exhibit A, p.22 LL30-36). She says “it felt ticklish” (exhibit A, p.22 L24).
- [29] KP was pretending to sleep; was really scared; and put POG’s jumper on, because it was really cold (exhibit A, p.22).
- [30] KP then pretended to wake up and went to the toilet, where she says she was for a couple of hours (exhibit A, p.23). POG put his hand away when she got up (exhibit A, p.24).
- [31] KP was “scared because ... I didn’t think he was going to do that to me” (exhibit A, p.25 LL55-56).
- [32] After KP came back from the toilet, she “hopped back in the same bed” (exhibit A, p.26 L20), because she thought POG would get mad at her (exhibit A, p.26 LL24-25).
- [33] After KP got back into bed, POG “put his hand at my waist and kept doing it” (exhibit A, p.28 LL55-56). He was again touching her vagina (exhibit AA, p.29 LL11-14), and it felt “weird ... kinda like touching it, but being soft with it” (exhibit A, p.29 LL24-28). He touched her with his hand and his fingers (exhibit A, p.29 LL34-40).
- [34] POG’s movements, KP described as “moving it slowly ... near where I wee ... in the middle of my vagina” (exhibit A, p.30 LL1-10). POG’s hand was “into ... my underwear” (exhibit A, p.30 LL54-55) when he was “touching my vagina” (exhibit A, p.30 L59).
- [35] KP describes the touching, again, alternately as “15 minutes” and “it felt really, really long” and said POG was whispering when he touched her (exhibit A, p.31 LL21-29, LL52-53).
- [36] After the second touching, KP says POG went to sleep (exhibit A, p.32).
- [37] KP went to the toilet the second time, although she didn’t need to go (exhibit A, p.33).

- [38] KP tried to wake D up in the loungeroom (exhibit A, p.35), but couldn't wake him up, so went to sleep back in D' bed (exhibit A, p.35).
- [39] KP told her mother, DS, what happened, while in the car driving home (exhibit A, p.39). I note that DS taped this conversation on her mobile phone (exhibit 2, exhibit E).
- [40] On further questioning, KP identified that "his whole hand" and "his fingers" were touching her, on that part of the vagina "where I wee", and the touching "felt soft" and "felt weird" and "was really gross" (exhibit A, p.42).
- [41] KP identified that the touching was "on top of my wee" (exhibit A, p.43 L1).
- [42] KP's bum is also called a "bottom" (exhibit A, p.43 LL46-48). POG touched her bum, underneath her undies, she said (exhibit A, p.44).

Complainant's s.21AK evidence

- [43] KP was nine when she gave her s.21AK evidence, being born on 12 April 2011 (exhibit B, 1-7). KP confirmed the truth of her s.93A interview (exhibit D, 1-8), and confirmed that POG touched her two times, on her vagina, with his fingers, on her skin (exhibit D, 1-8).
- [44] In cross-examination, KP gave evidence that she'd known POG for two years, but agreed that their families had been friends for some time (exhibit D, 1-10).
- [45] KP agreed that POG was baby-sitting her on the night in question (exhibit D, 1-11). She agreed she was going to sleep over, and said she took a nightie and underwear in a bag, together with Grace's clothes (exhibit D, 1-11).
- [46] KP gave evidence of going to bed at 7 pm, when her mother left, and that she had had a shower at 6 pm (exhibit D, 1-12).
- [47] KP was asked these questions and gave these answers, at exhibit D, 1-14 LL13-15:

MR KENNEDY: Did POG take the clothes out of your bag and give them to you? No. I brang the bag into the bathroom and when I hopped out of the shower, I dried myself and then I put them on. Privately.

- [48] [I note here that the transcript omits the words “dried myself and then I”, but as I have identified later, I listened carefully to all recordings and where necessary, made appropriate amendments to transcripts, to reflect what I heard in the recordings.]
- [49] KP gave evidence that D told her the house was haunted, which scared her (exhibit D, 1-15 LL32-35).
- [50] KP gave evidence that she started watching a movie in the loungeroom, the phone went flat, and she went to D’ room to charge POG’s phone because she couldn’t sleep (exhibit D, 1-16).
- [51] KP called her mum from D’ room, but didn’t tell her anything, because POG was right next to her and she thought he was going to get mad and do something worse (exhibit D, 1-17).
- [52] KP gave evidence that POG touched her in the loungeroom and the bedroom (exhibit D, 1-18 LL1-4).
- [53] KP gave evidence that POG was whispering, but it was an “sss” sound (exhibit D, 1-21).
- [54] KP gave evidence that she asked her mother if they could leave when she woke up at 7 or 8 am, and she then spoke to her mother in the car (exhibit D, 1-21).
- [55] KP gave evidence that POG was “mean”, swears at everyone, kicks holes in walls, and is sometimes disrespectful (exhibit D, 1-24); and further, that she didn’t like him, and that she hated him (exhibit D, 1-24).
- [56] In cross-examination, this exchange then took place at the conclusion (exhibit D, 1-28 L15-1-29 L8):

MR KENNEDY: KP, did you - - -?---Yes.

- - - make up that POG had touched you to get attention from your mother and father?---Definitely not.

Okay?---No.

And did you make this up to get POG in trouble because you don’t like him?---No. Definitely not, no. He was like by (sic) brother to me.

Okay?---Until he did that to me.

Did somebody else tell you to make this up?---No. No. No way. I swear, no one – knows.

But KP in fairness I'm putting it to you that POG never touched you on the vagina?---Well, then, you're wrong.

Okay?---You're wrong, you're very wrong, you're not - - -

Okay. Because – sorry, KP?---You're wrong.

[57] I then said “all right”. Witness said “you're not right”:

MR KENNEDY: Okay?---And I would never lie, because I knew I would get in very big trouble. And I knew I would get in, like, extremely big trouble, so I would never lie like this as – this has happened to me. But obviously, you're on POG's side, so, obviously you're going to not believe me.

[58] In re-examination, KP stated that she was first touched in the loungeroom, then touched a second time in the bedroom (exhibit B, 1-29).

[59] Ms DS, KP's mother, gave oral evidence. In particular, she testified that when KP started talking in the car when leaving the defendant's residence, she realised it was serious and recorded the conversation on her phone (exhibit 2).

[60] During the course of that conversation, the complainant told Ms DS (among other things):

- (a) the defendant touched her under her underwear;
- (b) it had occurred “last night”, “in bed” (exhibit E, p.3).
- (c) It was “like he's raping me” (exhibit E, p.5).
- (d) Inferentially, that she had been touched on the vagina (exhibit E, pp 2-3).
- (e) That it occurred in D' room, because the defendant's phone needed charging (exhibit E, p.6).
- (f) That she fell asleep for a couple of hours and the defendant “kept touching me in bum and my vagina” (exhibit E, p.6).
- (g) That she was “frozen” and “scared” (exhibit E, p.6).
- (h) That she didn't say anything to the defendant, because she was frozen (exhibit E, p.7).

- (i) That the defendant was “squishing me a lot” which she clarified meant he was very close (exhibit E, p.9).

[61] In cross examination, Ms DS gave evidence that she’d known the defendant since he was six months old; that she was friends with his mother; and that the families had been together both in New South Wales and Queensland; and that KP had known the defendant her whole life (T1-11 LL1-20).

[62] Ms DS gave evidence that she arrived at the defendant’s house on 24 August 2019 at about 3.30 pm (T1-11 LL20-21); that B (the defendant’s mum) and Sam weren’t home then (T1-12 L2); and that she asked the defendant to mind the kids for 20 dollars (T1-12 LL3-4).

[63] Ms DS did not recall saying the kids had to have a shower before bed, nor did she recall the defendant laying out clothes for the kids (T1-12 LL10-13).

[64] Ms DS accepts she went for a drive with B and Sam about 9.30 or 10 pm and KP was then in the loungeroom with Grace (T1-12 LL20-30).

[65] Ms DS accepts speaking to KP on the phone at half past ten, and says that KP asked her to come home. Ms DS is “pretty sure” they spoke twice (T1-12 LL32-46). Ms DS accepts she got home at 11.30pm, but doesn’t recall going back upstairs, where the complainant and Grace were (T1-13 LL6-18). Ms DS spoke with POG but doesn’t recall checking “the girls” [i.e., her daughters] when she arrived home (T1-13 LL23-27).

[66] Ms DS gave evidence that at 6 am, Grace was awake and KP was asleep, both in the loungeroom; she did not remember seeing the defendant or D that morning (T1-13 LL37-46).

[67] Ms DS recalls going home before lunch, and accepts she’d been at the defendant’s residence a number of hours that morning (T1-14 LL1-3).

[68] By consent, the bodycam footage of Senior Constable Karma Bayli talking with the complainant was played as evidence (exhibit 3). This conversation took place prior to the s.93A interview between police and KP, and is consequently evidence of preliminary complaint.

- [69] During the conversation the complainant told Senior Constable Bayli:
- (a) She was in the lounge room sleeping on a mattress;
 - (b) She got scared;
 - (c) POG's phone got flat;
 - (d) She went into the other room to put the phone on charge to watch the movie;
 - (e) She fell asleep;
 - (f) POG touched her vagina and bum for a long time;
 - (g) She then went to the bathroom for a couple of hours;
 - (h) POG was babysitting;
 - (i) Mum was out with her friends;
 - (j) POG was putting his fingers "in there" [her vagina] and squeezing her bum and was very close to her (exhibit F p.2).
- [70] KP said he did it [i.e., touching her vagina] for 15 minutes (exhibit F p.3).
- [71] When questioned about whether POG put his penis on her, KP was equivocal, but said he was squeezing her "really really really tight" (exhibit F p.3L22).
- [72] KP describes getting back into the same bed with the defendant after coming out of the bathroom with the defendant sleeping next to her (exhibit F p.3).

Directions

- [73] I set out further directions with which I must conduct these proceedings at a judge-only trial.
- (1) I must reach my verdict only on the evidence which I have already detailed.
 - (2) In addition to facts proved by evidence, I may draw inferences, but only reasonable inferences and if there is more than one inference reasonably open, I must draw the inference that most favours the defendant.

- (3) The burden rests on the prosecution to prove the guilt of the defendant beyond reasonable doubt. There is no burden on the defendant who is presumed to be innocent. I dismiss all feelings of sympathy or prejudice regardless of who is involved and regardless of the nature of the allegations and charges.
- (4) I am required to assess the credibility and reliability of witnesses and I may accept or reject such parts of the evidence as I see fit in fulfilling that fact-finding function.
- (5) The defendant has not given evidence. That is his right. He is not bound to give or to call evidence. The defendant is entitled to insist that the prosecution prove the case against him if it can. The prosecution bears the onus of proving the guilt of the defendant beyond a reasonable doubt and the fact the defendant did not give evidence is not evidence against him. It does not constitute an admission of guilt by conduct and it may not be used to fill gaps in the evidence led by the prosecution. It proves nothing at all and I do not assume that because he did not give evidence that adds in some way to the case against him. It cannot be considered at all when deciding whether the prosecution has proved its case beyond a reasonable doubt and most certainly does not make the task confronting the prosecution any easier. It cannot change the fact that the prosecution retains the responsibility to prove guilt of the defendant beyond reasonable double.

[74] The defendant has a right to silence. His silence is not evidence against him.

[75] Preliminary complaint evidence is contained in the accounts given by the witness, DS, who taped her discussion with the complainant (exhibit 2) and the bodycam footage tendered by consent (exhibit 3) of a conversation between Senior Constable Karma Bayli and the complainant as to what the complainant told each of them about the alleged offending against her by the defendant.

[76] In relation to that evidence of preliminary complaint contained within the evidence given by those witnesses and contained in those exhibits, I direct myself as follows.

- [77] That evidence may only be used as it relates to the credibility of the complainant. Consistency between the account of the complainant about the alleged offence and what the complainant said as reported by the preliminary complaint witnesses is something I may take into account as possibly enhancing the likelihood that the complainant's testimony is true.
- [78] In addition, I may also take into account any inconsistency between the accounts given by the complaint witnesses and the accounts as given by the complainant in assessing the complainant's credibility. I cannot, however, regard the things said in the out of court statements by the complainant as proof of what, if anything, actually happened. In other words, evidence of what was said on those occasions to the preliminary complaint witnesses may, depending on the view I take of it, bolster the complainant's credit because of consistency, but it does not independently prove anything.
- [79] I direct myself that transcripts provided are only aids, and I have formed my own conclusions about what I saw and heard, making appropriate amendments to the supplied transcripts when necessary.
- [80] Separate charges have been preferred. I must consider each charge separately, evaluating the evidence relating to that particular charge, to decide whether I am satisfied beyond reasonable doubt that the prosecution has proved its essential elements. I will return separate verdicts for each charge.
- [81] The evidence in relation to the separate offences is different and so my verdicts need not be the same.
- [82] If I have a reasonable doubt concerning the truthfulness or reliability of the complainant's evidence in relation to one count, whether by reference to her demeanour or for any other reason, that must be taken into account by me in assessing the truthfulness or reliability of her evidence generally.
- [83] Evidence was called from expert witness Angela Adamson in respect of DNA evidence located on the complainant's underwear. This evidence was, in part, the subject of admissions at exhibit C paragraphs 3-5. Although Ms Adamson is an expert witness and is entitled to express an opinion in a particular area of expertise, her evidence does not have to be automatically accepted by me as the tribunal of

fact. I should note, however, that there appears to be no dispute about Ms Adamson's evidence. I note further that Ms Adamson gave her evidence by telephone. I must not give that evidence any more or less weight, or draw any adverse inferences against a party, simply because that evidence was by telephone.

[84] The forensic evidence in this trial is that the mixed DNA profile obtained on KP's underwear is greater than 100 billion times more likely to have occurred if POG had contributed DNA with KP rather than if he had not.

[85] This evidence does not prove that DNA from the defendant actually contributed to the crime scene sample; rather, it is evidence as to the likelihood that this occurred. It is not absolute proof.

[86] Furthermore, the reliability of this evidence depends on the accuracy and reliability of the profiling tests carried out with respect to both the sample obtained from the defendant and the crime scene sample. The results of that testing will not be reliable where there has, for example, been contamination of one or both of the samples to which I have just referred. That direction of course also applies to the sample from KP which was taken in order to exclude her in respect of that evidence. I note that the DNA sample was a mixed sample.

[87] The prosecution has submitted that the complainant does not have any motive to lie. I must bear in mind that any failure or inability on the part of the defendant to prove a motive to lie does not establish that such a motive does not exist. If such a motive existed the defendant may not know of it. There may be many reasons why a person may make a false complaint. If I am not persuaded that any motive to lie on the part of the complainant has been established, it does not necessarily mean that the complainant is truthful. It remains necessary for me to satisfy myself that the complainant is truthful.

[88] The case against the defendant is based in part on circumstantial evidence – namely the DNA evidence located on the complainant's underwear.

[89] Circumstantial evidence is evidence of circumstances which can be relied upon not as proving the fact directly but instead as pointing to its existence. It differs from direct evidence which tends to prove a fact directly: typically when a witness

testifies about something which that witness personally saw or heard. Both direct and circumstantial evidence are to be considered in this trial.

- [90] To bring in a verdict of guilty based entirely or substantially upon circumstantial evidence, it is necessary that guilty should not only be a rational inference but also that it should be the only rational inference that could be drawn from the circumstances. If there is a reasonable possibility consistent with innocence, it is my duty to find the defendant not guilty. This follows from the requirement that guilt must be established beyond reasonable doubt.

Discussion

- [91] The fundamental submission on behalf of the defendant is that nothing happened.
- [92] Mr Kennedy submits (correctly) that the DNA evidence is circumstantial and submits further that transfer of the defendant's DNA could have been from another surface or that the defendant laid out the complainant's clothes, or that the DNA came via the toilet, or in some other way, to either the inside or outside of the complainant's underwear. I note that the evidence is that tape-lifts were taken from both inside and outside the underwear and only one report is made in respect of the DNA found.
- [93] Mr Kennedy submits then that the DNA evidence is equivocal and should be put aside and that on an examination of the complainant's evidence, in particular, with what he submits are inconsistencies in the complainant's evidence, that would leave this court with a reasonable doubt as to the defendant's guilt in respect of each charge.
- [94] It is useful therefore, to start with an examination of the DNA evidence. Essentially, the evidence demonstrates an infinitesimally small possibility that someone else other than POG was a contributor to DNA on either the inside or outside of the complainant's underwear (as I have noted there was no evidence as to exactly where the tape-lift or tape-lifts were taken on the underwear).
- [95] That evidence, if accepted, is powerful circumstantial evidence, supporting the complainant's direct evidence that the defendant had his hand inside her underwear, touching her on her vagina and (her words) bum.

- [96] On the evidence before me, there is a clear denial by the complainant that the defendant got any clothes out of the bag in which she brought those clothes and gave them to her (exhibit D1-14). Her mother, DS, also denies that the defendant set out clothes for the kids (i.e., the complainant and Grace) (T1-12 L13).
- [97] A question put by counsel and answered in the negative by a witness is not evidence in the trial. This excludes each of those possibilities as an explanation for the presence of DNA.
- [98] With respect, given there is also no evidence by or on behalf of the defendant which raises any even vaguely credible explanation for the transfer of genetic material directly or indirectly from him to the underpants (and I hasten to note of course that there is no obligation on a defendant either to give or to call evidence), I am in a situation where I conclude that the only rational inference to be drawn from the DNA evidence is that the defendant has touched the complainant on the inside or outside of her underwear as she describes. I have no difficulty with that touching being either inside or outside the underwear on her descriptions of the defendant's actions. I note also that the presence of the defendant's DNA on the underwear is not itself disputed.
- [99] Having reached that conclusion on the DNA evidence, it clearly becomes a powerful piece of objective evidence, supporting KP's direct evidence that she was touched by the defendant's hand and/or fingers, on her vagina and/or bum.
- [100] I then need to move on to consider the preliminary complaint evidence, rather unusually in this case captured on tape by Ms DS (exhibit 2) and Senior Constable Bayli (exhibit 3). Unlike many other cases, there is extraordinary clarity as to exactly what was communicated to each of Ms DS and Senior Constable Bayli for which I express my gratitude to each of those witnesses.
- [101] That evidence does not, of course, prove the charge events occurred. However, in both cases, the conversation has occurred the day after the alleged events, and in each case, the complaint by KP as recorded by each of those witnesses in the tapes they captured of the conversations, is broadly consistent with her s.93A interview and for that matter her evidence under s.21AK. That preliminary complaint

evidence then, in my view, supports the complainant's credibility and consistency in respect of the evidence she gave in relation to each of the charges.

[102] That then brings us to an examination of KP's evidence. It is correct, as Mr Kennedy submits, that in order to convict the defendant I have to accept the complainant's narrative. As is almost always the case with offences such as this, only the complainant and the defendant were present during events relevant to each of counts 1 and 2.

[103] The complainant was eight when she gave her s.93A interview, and nine at her s.21AK hearing, around a year later.

[104] In my view, the complainant was an intelligent, articulate witness who gave evidence that was age appropriate, that was not embellished, and again in my view much of what Mr Kennedy describes and submits as "inconsistencies" are entirely understandable differences given her age and the circumstances under which her testimony was given.

[105] In my view, KP was honest – in fact she was at pains to stress her understanding of the seriousness of the matters about which she was talking and she was emphatic that she was not lying. I believe the evidence that she gave in this trial.

[106] Most crucially, in my view, the evidence that KP gave at the s.93A interview and at the pre-record, was relaying events that really occurred. She gave evidence that in my view was indicative of a witness recalling a lived experience.

[107] She was describing events that an adult would of course recognise as sexual foreplay in an adult sexual context, and she used a child's language to explain what was occurring, where it was occurring, how it felt, and why she didn't stop the actions occurring. In short, this evidence impressed me as credible, although not always entirely consistent, but an honest recounting of actual events.

[108] When viewed in that light, the inconsistencies carefully catalogued by Mr Kennedy are, in my view, an inevitable consequence of a young child repeating her story on a number of occasions, to her mother, to two different police officers, and to a court.

[109] KP has given inconsistent versions as to where the sexual touching first occurred, whether it was in the lounge room or in D' bedroom. However, the particularised acts are not tied to a specific room. Also, the DNA evidence, as I have accepted, is powerful supporting evidence that the defendant put his hand and/or fingers on or in her underwear.

[110] What follows from this analysis is outlined as follows:-

- (a) The defendant undoubtedly had opportunity to commit the offences;
- (b) The defendant was able to touch the complainant, as she describes, either in the lounge room or in D's bedroom.
- (c) The complainant's mother was either downstairs (there is evidence that this was an upstairs-downstairs residence) or was out of the residence during the relevant events.
- (d) The time frames referred to by KP have been the subject of legitimate criticism by Mr Kennedy, but this is a child giving evidence, and there is no evidence that she was wearing a watch or had any other practical means of capturing elapsed time, and in my view she is essentially describing short or longer periods of time in a childlike and not necessarily accurate way.
- (e) The complainant did not make a complaint in what is accepted as either one or two phone calls with her mother (that is from her mother's evidence). KP's explanation (that she was either frozen or scared) is both rational and entirely explicable.
- (f) With respect, all inconsistencies identified by Mr Kennedy are more than capable of being explained by the complainant's age and the circumstances under which the events occurred. In particular, the inconsistency as to whether the events the subject of count 1 occurred in the lounge room or the bedroom do not in my view raise a reasonable doubt as to whether the offence actually occurred, as particularised.

[111] I wish to stress that in my fact-finding role, I have carefully considered all of the inconsistencies and discrepancies identified, carefully and methodically, by Mr Kennedy. I have carefully considered that evidence in the light of all the directions

that I am obliged to give of myself and which have been set out in detail in these reasons.

[112] Being cognizant of all these matters, and in the light of the preliminary complaint evidence, which in my view supports the credibility of the complainant, and in the light of the DNA evidence, which I consider to be powerful evidence that directly connects the defendant to the offending, I consider that the prosecution has persuaded me, beyond reasonable doubt that the defendant indecently dealt with the complainant, on two separate occasions, on 24 August 2019. That dealing was constituted by the defendant, on each occasion, touching the outside of the complainant's vagina, and her buttocks, under her underwear, which clearly explains the presence of the defendant's DNA either inside or outside the complainant's underwear.

[113] The touching of a nine year old child's vagina and/or buttocks in these circumstances is clearly a "dealing", that "dealing" is undoubtedly "indecent" applying ordinary community standards of decency. There can be no lawful basis for that dealing in this context. The complainant it is accepted was both under 16 and under 12 given her date of birth. She was relevantly eight years old at the time.

Orders

[114] In respect of each of counts 1 and 2, I am satisfied beyond reasonable doubt of each element, in respect of each count, having carefully considered all of the evidence, and having directed myself as I have previously outlined in these reasons. I find the defendant guilty in respect of each of counts 1 and 2.