

CHILDRENS COURT OF QUEENSLAND

CITATION: *R v KOD* [2022] QChC 25

PARTIES: **THE KING**
v
KOD
(Defendant)

FILE NO/S: 65/21

DIVISION: Criminal

PROCEEDING: Trial – Judge Alone

ORIGINATING COURT: Childrens Court at Maroochydore

DELIVERED ON: 9 December 2022

DELIVERED AT: Maroochydore

HEARING DATE: 5 December 2022

JUDGE: Devereaux SC CJDC

ORDER: **Count 1: Not Guilty**
Count 2: Not Guilty

CATCHWORDS: CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – SEXUAL OFFENCES – trial by judge alone – where the accused was charged with one count of choking and one count of rape – whether Prosecution has proved the elements of the charges beyond reasonable doubt - whether the Prosecution has proved the defendant child had capacity to know he ought not to do the acts constituting the charges

LEGISLATION: *Criminal Code 1899* (Qld) ss 29(2), 348(3)

CASES: *RP v The Queen* [2016] HCA 53
R v F [1999] Qd R 157

COUNSEL: S O'Rourke for the Crown
M Dixon for the Defendant

SOLICITORS: Office of Director of Public Prosecutions (Qld)
Legal Aid Queensland for the defendant.

- [1] The defendant pleaded not guilty to counts 4 and 6 on an indictment before the court, that on 17 November 2019 he choked, without her consent, his younger half-sister and that he raped her.
- [2] The prosecution informed the Court it would not proceed further with counts 1, 2, 3 and 5.
- [3] The trial proceeded on 5 December 2022. On 9 December 2022, I returned verdicts of not guilty on each count. These are my reasons for those verdicts.

The charges

- [4] The elements of Count 4, the choking charge, are:

1. The defendant unlawfully choked the complainant.

The act of choking requires that the defendant hinders or restricts the breathing of the complainant. The act of choking does not require proof that breathing was completely stopped. The act of choking requires some detrimental effect on the breathing of the complainant.

2. The choking was unlawful.

Unlawful means not justified authorised or excused by law.

3. The complainant did not consent.

4. The defendant and the complainant were in a domestic relationship with each other.

Section 1 of the Criminal Code 1899 provides that “domestic relationship” means a relevant relationship under section 13 of the Domestic and Family Violence Protection Act 2012. Section 13 of the Domestic and Family Violence Protection Act 2012 defines “A relevant relationship” to include a family relationship.

- [5] Relevantly, the elements of Count 6, rape, are:

1. Penetration of the mouth of the other person to any extent.
2. With the defendant’s penis.
3. Without the consent of the other person.

- [6] In November 2019, the complainant was under the age of 12 years and so was incapable of giving consent to the act of penetration.¹

¹ Criminal Code s 348(3).

- [7] The onus is on the prosecution to prove guilt beyond reasonable doubt. That requires the Prosecution to prove the elements of the charges and to rebut the presumption, set out in Criminal Code s. 29(2), that, as a child under the age of 14 years, the defendant is not criminally responsible for the acts constituting the offences.

The particulars

- [8] The prosecution tendered written particulars.

Count 4: The accused placed his hands around the complainant's neck and choked her. This restricted the complainant's ability to breathe. This was one of the last occasions anything occurred, when the complainant's mother had gone to the shops.

Count 6: The accused inserted his penis into the complainant's mouth. This was one of the last occasions anything occurred, when the complainant's mother had gone to the shops. The complainant was under 12 years of age at the time and was incapable of consenting.

The issues

- [9] The issues in the trial were whether the prosecution had proven that the defendant committed the unlawful acts and that he had the capacity to know he ought not to do them.

Witnesses

- [10] The following persons gave evidence in the prosecution case:

1. The complainant, by way of a police interview tendered under s. 93A of the *Evidence Act 1977* and pre-recorded evidence.
2. The complainant's mother, who was also the defendant's mother. As to the family situation, she gave evidence that the defendant was born on 4 February 2006. He was about 3 years old when the mother and the complainant's father commenced their relationship. They had two children together, the complainant, born 9 March 2010 and her younger sister, born on 11 October 2011.
3. The complainant's younger sister, by way of a police interview tendered under s. 93A of the *Evidence Act 1977* and pre-recorded evidence.
4. The complainant's father. The father lived with his fiancée and her two sons.
5. The father's fiancée.

- [11] I accept the mother's evidence that she and the father separated in 2017 and divorced in 2018. The father was vague on dates but thought the separation might have been

in 2015. It was common ground that each parent had care of the two girls for alternate weeks, changeover occurring on Fridays.

- [12] The defendant did not give or call evidence. That, of course, was his right. I do not draw any adverse inference against him because he did not give or call evidence, nor does the absence of defence evidence assist the Prosecution. It does not fill any gap, should I perceive it, in the Prosecution's wholly circumstantial case on the issue of capacity.

Evidence that the defendant committed the acts

- [13] The pre-recorded evidence of the complainant and her younger sister was played in the trial. The recorded evidence was taken from a remote room with a support person present. The Court was closed both when the evidence was recorded and when it was played during the trial. I observe that those measures are the routine practices for taking and showing evidence of such children and I do not draw any inference as to the defendant's guilt because these measures were used; the probative value of the evidence is not increased or decreased because these measures were used and the evidence is not given any greater or lesser weight because these routine measures were used.
- [14] The complainant spoke to police on 18 November 2019. The recorded interview was Exhibit 23. A transcript was available. She told police her brother had been abusing her. He made her do things she did not want to. This happened in his bedroom or hers.
- [15] Asked about family, the complainant said the defendant, her brother, was 13 years old, her sister was 8. She got along well with her mother's new boyfriend, who stayed with them sometimes. With her mother, she got along "great but not that great".² She got along well with her father and his fiancée. That household included two sons of the fiancée, aged 10 and 8 years.
- [16] Counts 4 and 6 referred to the last time her brother made her do something. She called his penis his dingle. She said he forced her to suck his dingle. Asked what happened then, she said, "Then I said no" and then he choked her.

COMPLAINANT: Get mad [indistinct].

SCON MARSHALL: Yep.

COMPLAINANT: And then he got really mad that he grabbed my neck and choked me 'cause I standed up and told him to stop.

SCON MARSHALL: Mmhmm.

COMPLAINANT: So, then he grabbed me on the neck and [indistinct] me going up and down just hitting my head on the bed and choking me.

² Transcript of Ex 23 at 4.56.

SCON MARSHALL: And then what happened?

COMPLAINANT: Then he said w-, we'll make the deal. If you, if, I said if you will stop um, I will stop mouthin' off at you.

SCON MARSHALL: Mmhmm.

COMPLAINANT: So, then we made a deal and then he, then he said fine I'll let you have a little bit of Coke so then I, you can, you can still feel good like you're not mad at me.

SCON MARSHALL: Mmhmm.

COMPLAINANT: [indistinct].

SCON MARSHALL: And what happened then?

COMPLAINANT: Then I did and then he told me to go brush, brush your teeth so Mum wouldn't realise.

SCON MARSHALL: Okay, 'cause you'd drunk the Coke?

COMPLAINANT: Mm [indistinct].³

[17] The complainant gave a detailed account of the day, including a visit to the home of the mother's boyfriend. The police returned her to the incident.

SCON MARSHALL: Um, how long were you in your bedroom after Mum left did Ollie come in?

COMPLAINANT: It was like one, once he heard Mum's car leave –

SCON MARSHALL: Mmhmm.

COMPLAINANT: For real since the hail –

SCON MARSHALL: Yep.

COMPLAINANT: She went, he, he waited, went out the window, waited till he could, he could not see her, then he came in –

SCON MARSHALL: Mmhmm.

COMPLAINANT: And kept forcing me to suck his dingle.

SCON MARSHALL: How long was he in your bedroom before he made you do that?

COMPLAINANT: About two minutes he was like, three.

³ Transcript of Ex 23 at 10.1-36.

SCON MARSHALL: Did he say anything to you when he came in?

COMPLAINANT: No, he just came in and said hi.

SCON MARSHALL: Mmhmm.

COMPLAINANT: And then just kept ask-, kept looking at my stuff and just went all around –

SCON MARSHALL: Mmhmm.

COMPLAINANT: And then took my teddy.

SCON MARSHALL: Yep. And then what happened?

COMPLAINANT: Then um, I said give that back, so I chased him.

SCON MARSHALL: Mmhmm.

COMPLAINANT: And then I went back into my room.

SCON MARSHALL: Mmhmm.

COMPLAINANT: And like I can just get that after.

SCON MARSHALL: Mmhmm.

COMPLAINANT: So, then I just kept watching my iPad.

SCON MARSHALL: Mm.

COMPLAINANT: Then he came up to me and then touched me, he said that I have to do this, suck my dingle, yeah.

SCON MARSHALL: Okay.

COMPLAINANT: And then I m-, then I said no.

SCON MARSHALL: Mmhmm.

COMPLAINANT: And I finally stand up for myself and told him no, I'm not doing this.

SCON MARSHALL: Mmhmm.

COMPLAINANT: And then kept telling him that um, I can't be doing things that you want me to do, um, I'm not the baby anymore.

SCON MARSHALL: Mmhmm. What did he say when you said that?

COMPLAINANT: He said I can always put your Dad in jail, and I said what for, for pushing me into my r-, like pushed me into my room.

SCON MARSHALL: Mmhmm.

COMPLAINANT: And I said that was a long time ago, that was in the past or else Dad would be jail right now.

SCON MARSHALL: Mmhmm.

COMPLAINANT: And he said don't backchat me.

SCON MARSHALL: Mmhmm.

COMPLAINANT: And then he um, said when I told him to stop, you can go away, I don't, no one wants you –

SCON MARSHALL: Mmhmm.

COMPLAINANT: Right now. And then he, then storm, he went out.

SCON MARSHALL: Mmhmm.

COMPLAINANT: I standed up seeing if was gone, he went back in.

SCON MARSHALL: Mmhmm.

COMPLAINANT: And then he grabbed me on the neck and just p-, shoved me up and down like um, made my head go up and down, hurt me on the face.

SCON MARSHALL: What was he pushing your head on?

COMPLAINANT: My bed.

SCON MARSHALL: On your bed.

COMPLAINANT: Yep.

SCON MARSHALL: So when, um, he said to you suck my dingle –

COMPLAINANT: Mmhmm.

SCON MARSHALL: Did you actually do it, or did you just talk about it?

COMPLAINANT: Um, I was talking to him and then he shoved it in my mouth and then I pushed him out of the way so just a little, but I didn't want to. Um, I accidentally didn't mean to like I was, like he kept, mm, mm, and like oh, just do it for a second so then you can stop getting on me. So then I didn't and then he sh-, said do it longer and I said no, I'm not doin' it.⁴

[18] The complainant then described the defendant's clothing and said he "pulled it out of his pants and then he said you better do this".⁵ She objected and during the ensuing

⁴ Transcript of Ex 23 at 14.18 – 16.31.

⁵ Transcript of Ex 23 at 17.35.

argument when her mouth was “wide open yelling at him ... he just shoved it in, and I told him no.”⁶

[19] The complainant explained why she did not tell her mother about the defendant’s behaviour. She did not think her mother would believe her - her mother thinks her a liar because the complainant once took something of the younger sister’s but lied that the defendant took it.

[20] The next morning, she “knew I needed to tell someone.”⁷ The complainant gave a detailed account of preparing for school, going to school, then after school, instead of meeting her mother, who she knew would be picking her up, she left school with friends and then ran to the father’s house. No-one was home. The complainant described her increasing distress and, when the father and his fiancée arrived home, she ran to him crying. First, she spoke to the fiancée and said her brother had been torturing her; that he made her suck his dingle. The father and fiancée took her to the police.

[21] In the police interview, the complainant gave a history of the defendant making her suck his dingle, describing the first time, “about 4 years ago” when the parents were together, as follows:

SCON MARSHALL: Okay. So, tell me about the first time this happened to you?

COMPLAINANT: He said, oh, let’s just do this and I said okay.

SCON MARSHALL: Mmhmm.

COMPLAINANT: I didn’t know what was going on. I did and then he said do you want to do it again and I’m like um, dunno.

SCON MARSHALL: Mmhmm.

COMPLAINANT: And then next he did it he said, let’s do it again, let’s do it again.

SCON MARSHALL: Mmhmm.

COMPLAINANT: And I had no choice because he usually gets mad when you don’t give him his own way.

SCON MARSHALL: Mmhmm.

COMPLAINANT: So, that’s when he was like, he had angry issues.

SCON MARSHALL: Yep.

⁶ Transcript of Ex 23 at 17.50.

⁷ Transcript of Ex 23 at 21.10.

COMPLAINANT: So, then I said okay and then I did it over and over.

SCON MARSHALL: Mmhmm.

COMPLAINANT: And then, yeah, and now it's come so, to here.⁸

[22] It first happened in his bedroom. Asked how old she was, after some delay, she said she was 6 years old. Asked in what month the first occasion happened, the complainant thought in the month of May. She said both parents had their birthday in May. She described him taking his penis out of his pants and "he kept wiggling and then he kept going up and down like that to his dingle."⁹ She was sitting on his bed. He told her to open her mouth wide and offered her money. She said, "I did it cause um, the first time I didn't know what that meant or ...".¹⁰ She did not feel comfortable. It tasted like pee and other stuff. She told him she did not like it and pushed him away. He said to keep going, that it was okay. She thought she would trust him. So she did it again.

[23] She did not tell anyone because he told her not to.

[24] The second time he made her do it was in the bathroom at the same house, "And then it's just been happening after that."¹¹ The complainant, when asked what she meant, said, "Like he's well, making me suck his dingle and then he's making me like, shoving it up my bum."¹² The police, and all questioners since, ignored the last part of this statement, although the police later asked the complainant:

SCON MARSHALL: No. Has he ever put his dingle in, in your private or—

COMPLAINANT: No.

SCON MARSHALL: In your bottom? No. Has he asked you to do that before?

COMPLAINANT: He has and I said no, I'm not doing it.

SCON MARSHALL: Okay. What did he do when you said no?

COMPLAINANT: He's like, oh, like all grumpy face and I [indistinct].¹³

[25] The complainant said it would occur 5 times a month, or 3. Since the first time, she thought it had happened "about a hundreda hundred and fifty".¹⁴

[26] The complainant's court evidence was recorded on 25 October 2021. She was then in year 6 at a State College. In chief, the complainant was asked to describe what the

⁸ Transcript of Ex 23 at 27.19 – 27.53.

⁹ Transcript of Ex 23 at 30.55.

¹⁰ Transcript of Ex 23 at 31.35.

¹¹ Transcript of Ex 23 at 34.10.

¹² Transcript of Ex 23 at 34.18.

¹³ Transcript of Ex 23 at 38.29-38.41.

¹⁴ Transcript of Ex 23 at 34.50.

defendant did when he choked her. She said he was wrapping his hands around her neck. Could she breathe? “No. Not really.” Could she talk? “No.”¹⁵

[27] She did not give permission to be choked.

[28] Through the witness, the Prosecution tendered 22 photographs of the house where the incident occurred, where the children lived with their mother.

[29] The complainant gave evidence of the family’s previous residences.

[30] Under cross examination, asked why she did not tell her parents when the defendant first put his penis in her mouth, the complainant said she was scared and nervous. It was put that she did not tell her parents because the event did not happen. She replied: “He did do that.”¹⁶ Again, with respect to the first time, it was put that the event did not happen, that the defendant did not ask her to suck his penis: “Yes, he did.”¹⁷

“And he didn’t offer you money to do that, he didn’t?” --- He did.¹⁸

And I suggest that you simply didn’t suck his penis in any way? --- No. I did.”¹⁹

[31] As to the occasion of counts 4 and 6, it was put that her mother asked the complainant to go shopping with her but the child refused. She answered that she did not really remember being asked. But in the next answer, accepted that her mother would usually ask, “Hey, do you want to come, or do you want to stay home?” The complainant was firm the mother did not ask this on the relevant day.

[32] As to the choking, it was put:

“He wasn’t stopping you breathing on what you’re saying, was he? --- A little bit.”²⁰

[33] It was put that the defendant never choked her, on that day or at all. Her reply, “No. He did.”²¹

[34] Asked whether she had marks on her neck, she said, “No, I don’t think so.”²²

[35] The complainant agreed she did not tell her mother that the defendant made her suck his penis. She accepted she could have.

[36] It was put and the complainant accepted that there was an argument that day about their dads.

¹⁵ Transcript of complainant’s pre-recorded evidence at 1-3.18-25.

¹⁶ Transcript of complainant’s pre-recorded evidence at 1-13.5.

¹⁷ Transcript of complainant’s pre-recorded evidence at 1-14.38.

¹⁸ Transcript of complainant’s pre-recorded evidence at 1-14.40.

¹⁹ Transcript of complainant’s pre-recorded evidence at 1-14.42.

²⁰ Transcript of complainant’s pre-recorded evidence at 1-16.18.

²¹ Transcript of complainant’s pre-recorded evidence at 1-16.32.

²² Transcript of complainant’s pre-recorded evidence at 1-17.13.

- [37] It was put that the defendant did not put his penis in her mouth. She replied: “No, he did.”²³ It was put that he did not hit her on the bed. She said: “He was banging my head on the bed.”²⁴
- [38] The complainant agreed she had been wanting to go and live at her father’s home for a while; that she got along really well with her father’s new partner; the children would fight for her attention; that the day after the argument with the defendant, she decided to run away to her father’s house even though she was supposed to be collected by her mother; she knew she would be in trouble for that; she had told her friends her mother had tortured her and that was not true. That is, she agreed she told a lie about that. She also agreed that in March 2019, when asked by a person from Child Safety whether anything about her mother’s house made her scared or upset, she said she did not really worry about anything.
- [39] The father’s fiancée confirmed, under cross examination, that she had a good relationship with the complainant; that the two girls wanted to sit with her and the complainant had made a comment about wanting to live with the father and her.
- [40] The complainant’s sister was interviewed by police on 18 November 2019. She told them she saw the complainant crying on the day before she ran away. She was in their brother’s room. In her court-recorded evidence on 25 October 2021, the sister said she heard the complainant and her brother fighting and then the complainant ran from his bedroom to their mother. Given the mother’s general evidence about the children fighting, the sister’s evidence is relevant only as to the complainant’s actions when the mother arrived home from shopping.

Preliminary complaint evidence

- [41] There is evidence of the complainant’s disclosures to her father and his fiancée.
- [42] That evidence may only be used as it relates to the complainant’s credibility, depending on whether consistency or inconsistency of account affects my assessment of the complainant’s credibility.
- [43] The father’s fiancée gave evidence that she and the father arrived home from a weekend at Brisbane at about 3.30 pm. The mother rang the father, apparently looking for the child, and he was involved in the call when the complainant came running out to the front driveway. She told the fiancée she had to get away from her brother because he was strangling her - she was showing the actions with her hands. Asked why he was strangling her, the child told the fiancée, “because I wouldn’t suck his dick.”²⁵

²³ Transcript of complainant’s pre-recorded evidence at 1-18.41.

²⁴ Transcript of complainant’s pre-recorded evidence at 1-19.24.

²⁵ Trial transcript 1-12.24

[44] The other detail given was retold this way: “she said she didn’t want to do it, so he was grabbing her head and forcing her to do it. And then she said she was going to tell her dad, so he started strangling her.”²⁶

[45] The evidence continued:

All right. And did she talk about how long this had been happening for?--- Yeah, I asked her, “Has he done it before?” And she said he’s done it heaps of times to her since her parents were still together, which was three years earlier.

All right?---Used to do it at the old house.²⁷

[46] Under cross examination, the father’s fiancée was referred to her police statement and said the complainant “didn’t want to be at her mum’s anymore, and she’d planned to run away, to get away from Ollie, and that’s why she ran to our house that day.”²⁸

[47] The complainant’s father, once off the phone from the mother, spoke to the child, who said, “That [the defendant] has sexually abused her and threatened that if ... she told me, then he would have me thrown in jail.”²⁹ Asked whether the child explained what she meant by sexual abuse, the father reported, “That ... he made her put his dingle in his mouth – in her mouth.”³⁰ Under cross examination, he said the child said, “That [the defendant] was making her put his dingle in his mouth – in her mouth or else I’m going to have you – if you tell your dad, I’m going to have you locked up or thrown in jail.”³¹

The evidence of previous sexual conduct

[48] The prosecution relies on the evidence of previous sexual conduct in two ways:

1. As supporting the inference that the defendant had a long-standing sexual interest in the complainant which he was prepared to act upon, which circumstantial fact made it more likely that the defendant did the act constituting the charge;
2. As context to the offences charged and the complainant’s reaction.

Submissions

[49] The defendant’s counsel relies on the accumulation of several matters as undermining the complainant’s credibility generally. Counsel also points to particular matters to undermine the case on each charge.

[50] As to the first proposition, Counsel points to the following:

²⁶ Trial transcript 1-12.27.

²⁷ Trial transcript 1-12.30.

²⁸ Trial transcript 1-14.20.

²⁹ Trial transcript 1-20.15.

³⁰ Trial transcript 1-20.24.

³¹ Trial transcript 1-25.40.

[51] The complainant chose to stay home with the brother she said sexually abused her 100-150 times; although she was in an environment away from the defendant every 7 days, the complainant did not disclose any of that behaviour to her parents or a Child Safety Officer; no other house member witnessed the alleged conduct; not only did the complainant not disclose to the Child Safety, she gave her only worry as “when [the defendant] was away”; the unrepeated assertion that her mother was torturing her shows the ability to tell a serious lie; the statement to police that the defendant made her shove [his dingle] up her bum must be a lie - she later denied it; the expressed desire to live with her father and his fiancée was a motive for a false complaint; the first statement to the fiancée was that the complainant did not want to live with her mother anymore; when the mother arrived home, rather than complain of being choked or made to suck the defendant’s penis, the complainant told her mother of a fight with him; the complainant accepted she would be in trouble for running away; the disclosures to the fiancée escalated until the complainant got the reaction she wanted.

[52] Counsel also drew attention to the lack of detail as to the earlier incidents of sexual offending; the apparent difference in disclosure to the fiancée as to how the defendant moved her head. It was submitted that the mother’s evidence about the disclosure of a fight but not choking and a threat about her father undermined the complainant’s disclosures to police; and undermined the complainant’s evidence that she did not tell her mother because she thought she would not be believed.

Conclusions

[53] The complainant was a credible and reliable witness. Her account was detailed and consistent, making some allowance for her age and the process of questioning from which her account emerged. She spoke in a clear, straight-forward way and relatively maturely. Aged 9 years and 8 months at the time of interview, she expressed her relationship with her mother as “we get along well but just sometimes off track.”³² Asked what that meant, she said, “Like sometimes she, she’s um, stormed off or like she’s mean, like angry at me.”³³

[54] The details included her experience that his penis made her feel sick “and it taste like pee” ... “and like a little bit of salt and sand.....and I didn’t like it.”³⁴ When describing the first occasion the complainant said the defendant kept wiggling his penis and “kept going up and down like that to his dingle.”³⁵ It was clearly an experience of his masturbating himself in front of her. There was no concerning lack of detail in the complainant’s account.

[55] There is no substantial inconsistency between the complainant’s account of discussion about soft-drink and the mother’s evidence that there was no soft-drink in the house. The evidence that the complainant said she drank soft drink on 17

³² Transcript of Ex 23 at 6.48.

³³ Transcript of Ex 23 at 6.51.

³⁴ Transcript of Ex 23 at 18.50.

³⁵ Transcript of Ex 23 at 30.55.

November 2019 was unclear at best and came from the apparent adoption of a leading question by the police officer. That is, although her account is that the brother talked about letting her have soft drink, it is not clear she did not assert that she drank soft drink on the day of the incident before the mother arrived home. During the police interview, the complainant said:

“I will tell you to stop and I will tell mum. Then he said I’ll tell mum that you drank a lot of her Coke and I said, she won’t, she won’t care that much, it was just a little bit but that was, that was, um, three or five weeks ago.”³⁶

[56] The mother confirmed the complainant’s account that she left the defendant and complainant at the home when she went shopping some time after there had been a hailstorm. The child stayed home to “finish her arts and craft that she was doing.”³⁷

[57] The complainant’s account of her decision to tell someone was logical and reasonable, if dramatic in the execution. She told police:

SCON MARSHALL: That’s okay. And so, today you decided to tell your dad and Megan.

COMPLAINANT: Yes ‘cause I knew that Mum would do nothink about it, she wouldn’t believe me. So, then I realised that it’s, it’s enough, it’s not somethink—

SCON MARSHALL: Yep.

COMPLAINANT: That anybody wants to do so I decided to run.

SCON MARSHALL: And you said that today you were with your friend Sarah and Georgia.

COMPLAINANT: Mmhmm.

SCON MARSHALL: Did you tell them about what happened?

COMPLAINANT: No, I just told them I’m just runnin’ to Dad’s house no matter what because my brother and my mum have been torturing me.

SCON MARSHALL: Okay.

COMPLAINANT: And that I realise that Mum hasn’t been torturing me at all.³⁸

[58] To some extent it was submitted that the complainant’s desire to live with her father and his fiancée gave a motive to make a false complaint. This was not squarely put to the complainant, rather that she wanted to go and live with her father; she ran

³⁶ Transcript of Ex 23 at 17.40

³⁷ Trial transcript 1-32.25.

³⁸ Transcript of Ex 23 at 38.58-39.26.

away to his home after school; when she got there no one was home and to avoid getting into trouble for running away and not telling people where she went, she came up with the lie.

[59] In any case, I reject the submission. I do not convert that rejection into an automatic conclusion of guilt. It simply does not undermine my assessment of her credibility and reliability.

[60] The complainant's description of the position of the defendant's hands on her neck was consistent with a choking mechanism.

[61] The complaint evidence, while it is not without inconsistency, confirmed in material ways the complainant's account and, overall, bolsters her credibility.

[62] The father's fiancée's impression that the child told her the defendant pushed her head down to force her to suck his penis is not fully consistent with the child's evidence of the choking but it confirms the essence of the allegation and is open to the possibility that she did not wholly comprehend the child's statement. As in many cases, an inconsistency in the complainant's preliminary complaint may well be explained by the misapprehension or poor memory of the complaint witness. The fiancée was upset upon hearing the disclosures, on her evidence, "I was in such shock."³⁹ Any inconsistency between the complainant's account in evidence and the reported disclosures to others does not undermine her credibility.

[63] I accept the complainant's evidence of the defendant's previous sexual conduct. It is unnecessary to analyse whether it supports an inference that the defendant had an unusual sexual interest in the complainant that made more likely her allegations of the offences charged. Although I accept the evidence I do not infer only from that evidence that the defendant committed the acts charged in count 6. It is likely he opportunistically enrolled her in exploratory sexual conduct which became entrenched. It is in this sense, which sets the context for the events of 17 November 2019, that the evidence is useful. On this occasion, the complainant decided not to co-operate. That led to the defendant's reaction as she described in count 4 and the penetration in count 6.

[64] I am satisfied beyond reasonable doubt that the defendant did the acts alleged. He put his hands around the complainant's neck inhibiting her breathing and he penetrated her mouth with his penis. The choking was without lawful excuse, authority or justification and the complainant did not consent. The complainant could not, at law, consent to the penetration.

Capacity

[65] *Doli incapax*, as expressed in the Criminal Code s. 29, is not the same as the common law as expressed by the High Court in *RP v The Queen* [2016] HCA 53.

³⁹ Trial transcript 1-15.34.

[66] Section 29(2) provides:

A person under the age of 14 years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission the person had capacity to know that the person ought not to do the act or make the omission.

[67] In *RP v The Queen*, Kiefel, Bell, Keane and Gordon JJ wrote:

From the age of 10 years until attaining the age of 14 years, the presumption may be rebutted by evidence that the child knew that it was morally wrong to engage in the conduct that constitutes the physical element or elements of the offence.⁴⁰

[68] Gageler J wrote:

To establish that a child under the age of 14 years has committed an offence in the jurisdiction in which the common law presumption continues to apply, the prosecution must prove more than the elements of the offence. The prosecution must prove beyond reasonable doubt that the child understood that the child's conduct which constituted the offence was seriously wrong by normal adult standards.⁴¹

[69] Capacity to know requires the ability to reason but need not be limited to intellectual ability. The assessment of capacity may include consideration of the child's education – at school and at home – on moral issues, decision making ability and emotional development. Capacity refers to what resources, under all headings, a person may hold. In theory at least, knowledge and the capacity to know are quite separate things. Practically, it is hard to imagine a situation where a person who had capacity to know did not know the moral wrongness of an action. That would mean the person simply did not apply their capacity.

[70] To prove the defendant did have the capacity to know he should neither choke the complainant, nor put his penis in her mouth, the Crown relied on three categories of circumstantial evidence: what is known of his age and ability; the circumstances of the offending itself and the moral instruction he received.

[71] In November 2019, the defendant was aged 13 years and 9 months, that is, close to the age of unequivocal criminal responsibility, although the inference cannot be drawn from age alone.⁴² He was in grade 8 at a school described as a State College. The defendant's mother accepted the suggestion that he was "behind in his schoolwork" and that his grades were poor.⁴³ She thought he took medication in 2019 but was not sure if it was "just before or after", presumably referring to the complaint.⁴⁴ This was medication prescribed by a paediatrician for anxiety.

⁴⁰ [2016] HCA 53 at [9].

⁴¹ [2016] HCA 53 at [38].

⁴² *R v F* [1999] Qd R 157

⁴³ Trial transcript 1-33.40.

⁴⁴ Trial transcript 1-32.14.

- [72] The offences involved violence upon the complainant's resistance to his demand. The defendant threatened to tell their mother that the complainant had drunk "a little bit of Coke"⁴⁵ and then, in her words, made a deal with her to let her have a little Coke. When she told him she would not be the baby anymore, the defendant in effect, threatened to put her father in jail for pushing him into his room.
- [73] The parents gave evidence of instructing the children to keep their hands and feet to themselves, with consequences for misbehaviour, for example, loss of use of his Playstation or iPad. The father said the defendant had been disciplined for "hitting the girls or fighting among themselves or behaviour towards his mother or myself."⁴⁶ The children were taught not to touch each other where their bathers covered their body. It is likely this instruction was given when the defendant was quite young.
- [74] The inference – that the defendant had capacity to know that he ought not to do the act or make the omission – is open on the evidence. The evidence on the issue being wholly circumstantial, to support a conviction it must be the only rational inference. I am not satisfied the evidence excludes beyond reasonable doubt other inferences, such as that the conduct was within the defendant's understanding of sexual exploration and sibling fighting. The evidence of bargains or threats does not suggest mature reasoning enough to lead to the requisite inference. The exchanges which included the threat to tell on his sister for drinking Coke, or to have her father put in jail for pushing him, were consistent with childish squabbling between siblings, the complainant telling the defendant the conduct happened long ago, that in effect his threat was unfounded "or else Dad would be in jail right now."⁴⁷
- [75] The parents' efforts, by the mother's evidence, were of little effect in reducing the fighting among siblings.
- [76] The evidence relied on does not support the conclusion that the defendant had capacity to know his actions were seriously wrong, not just naughty.
- [77] The prosecution, as it is entitled to, relies on the accumulation of the various pieces of evidence. Ultimately, I am not satisfied the evidence proves beyond reasonable doubt the defendant had capacity to know he ought not do the criminal acts.

⁴⁵ Transcript of Ex 23 at 9.48.

⁴⁶ Trial transcript 1-19.30

⁴⁷ Transcript of Ex 23 at 15.45.