DISTRICT COURT OF QUEENSLAND

CITATION:	*R v TCJ* [2020] QDC 120
PARTIES:	THE QUEEN
	v
	TCJ
FILE NO/S:	D 341/20
DIVISION:	Criminal
PROCEEDING:	Trial
ORIGINATING COURT:	District Court of Queensland at Brisbane
DELIVERED ON:	11 June 2020
DELIVERED AT:	Brisbane
HEARING DATES:	1, 2, 3 and 10 June 2020.
JUDGE:	Muir DCJ
VERDICT:	**Count 1: Guilty**
	Count 2: Guilty
	Count 3: Guilty
CATCHWORDS:	CRIMINAL LAW – TRIAL HAD BEFORE JUDGE WITHOUT JURY – VERDICT – where defendant is charged with 2 counts of indecent treatment of a child under 16, under care and 1 count of indecent treatment of a child under 16, under 12, under care– whether the defendant is guilty or not guilty of the charges
	CRIMINAL LAW – TRIAL HAD BEFORE JUDGE WITHOUT JURY – INDECENT DEALING OF A CHILD UNDER 16, UNDER CARE – meaning of 'under care'
	CRIMINAL LAW – TRIAL HAD BEFORE JUDGE WITHOUT JURY – where similar fact evidence led – separate consideration of charges – where there is a need to scrutinise complainant's evidence with care due to delay, inconsistencies and other reasons – whether complainants

evidence credible and reliable beyond reasonable doubt – where defendant gave evidence – where defence case referred to a motive to lie

LEGISLATION: *Criminal Code* 1899 (Qld) ss 210, 615, 615B, 644.
Evidence Act 1977 (Qld) ss 21A, 21AW.

CASES CITED: *Longman v The Queen* (1989) 168 CLR 79.
Nguyen v R [2012] ACTCA 24.
Pell v R [2020] HCA 12.
R v FAK [2016] QCA 306.
R v LSS [2000] 1 Qd R 546; [1998] QCA 303.
R v RH [2005] 1 Qd R 180.
R v Markuleski (2001) 52 NSWLR 82.
R v McCallum [2013] QCA 254.
R v McNeish [2019] QCA 191.
R v MMH [2020] QDC 70.
R v Mulcahy [2010] ACTSC 98.

COUNSEL: Ms C Whelan for the Prosecution
Ms K Bryson for the Accused

SOLICITORS: Director of Public Prosecutions for the Crown
Howden Saggers Lawyers for the Accused

Overview

[1] This case concerns historical sexual offending said to have been committed by the defendant on the complainant, his biological sister, TQM, over 20 years ago.

[2] The defendant is charged on indictment before the District Court at Brisbane with: one count of indecent treatment of a child under 16, under 12, under care (on a date unknown between the 20th day of February 1990 and the 24th day of November 1991 at a suburb in Brisbane's North side); and two counts of indecent treatment of a child under 16, under care (on dates unknown between the 6th day of May 1994 and the 24th day of November 1997 at a suburb in Brisbane's North side).

[3] On 17 April 2020, the Chief Judge ordered that the defendant's trial for these charges proceed as a Judge only trial.[1]

[4] On 1 June 2020, the defendant was arraigned before me and pleaded not guilty to all of the charges. Over the ensuing two days I heard and received evidence. On the third day, after I received written submissions[2] and heard final addresses, I reserved my judgment.

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1 Pursuant to s 615 (1) *Criminal Code* (Qld) 1899; see extempore reasons of the Chief Judge delivered on 17 April 2020.

2 Marked for identification B and C.

[5] My role is to determine on this evidence whether the defendant is guilty or not guilty of each of the charges.

[6] In undertaking this task, I must apply the same principles of law and procedure as would be applied in a trial before a jury.[3] The Crown and Defence agree as to the appropriate directions that apply in this case.[4] As a judge of the facts, as well as a judge of the law, I must bring an open and unbiased mind to the evidence. I must view the evidence dispassionately without emotion. I must take into account all of the necessary warnings or instructions that arise on the facts of the case.

[7] The critical issue that emerges for my determination in relation to each of the charges in this case is whether accept beyond reasonable doubt the evidence of the complainant as credible and reliable.

[8] In the context outlined above and upon the analysis below, I do not have a reasonable doubt as to the defendant's guilt in relation to each of the charges as preferred and I find the defendant guilty of all three counts on the indictment.

Directions

[9] By way of summary, I have directed myself with reference to the following directions (detailed consideration of which is set out below):

(a) The elements of indecent dealing (Benchbook direction 146);

(b) Preliminary complainant (Benchbook direction 68);

(c) Motive to lie (Benchbook direction 44);

(d) Separate consideration of the charges (Benchbook direction 34);

(e) Special witnesses, (Benchbook direction 11);

(f) The defendant giving evidence, (Benchbook direction 26);

(g) Delay, (Benchbook direction 69); and

(h) Draft directions as agreed between the parties to address the directions on similar fact evidence, motive to lie and *R v Robinson*[5]. These draft directions were Marked for Identification in the proceedings.

The Crown case

[10] The complainant and the defendant are from a family of nine children. The defendant was born on 17 April 1963 and the complainant on 23 November 1981.

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3 s 615B(1) of the *Criminal Code* 1899.

4 Marked for Identification 'D' and 'E', although as explained in footnote [136], MFI D was subsequently amended following a mention on 10 June 2020.

5 (1999) 197 CLR 162

The offending occurred over a period between 20 February 1990 and 24 November 1997 during which time the complainant was aged somewhere between eight to 15 and the defendant was aged between 27 and 34.[6]

[11] The first offence (**Count 1**) occurred sometime between 20 February 1990 and 24 November 1991 at a property located in Brisbane's North side ('the First Property') which the defendant owned with his then-wife, FLS, and where he resided with FLS and their three children.[7] The Crown case is that the complainant was at the First Property and the defendant called her into his bedroom where he was lying on the bed and he subsequently inserted his finger or fingers into the complainant's vagina.[8]

[12] The second and third offences (**Count 2**) and (**Count 3**) are both said to have occurred on separate occasions sometime between 6 May 1994 and 24 November 1997, at a property owned by the defendant and his former wife ('the Second Property'), and where they then resided with their children.

[13] The Crown case in respect of Count 2 is that the complainant was having a shower at the Second Property when the defendant came into the shower and grabbed the complainant on the breast with his hand.

[14] The Crown case in respect of Count 3 is that the complainant was in the swimming pool at the Second Property when the defendant who was also in the pool touched the outside of the complainant's vagina with his hand.

[15] The prosecution called the following witnesses:

(i) The complainant;

(j) The complainant's sister ('RKW);

(k) The complainant's mother ('MJK');

(l) The defendant's former wife ('FLS'); and

(m) The complainants' long-term school friend ('KHF').

Defence case

[16] The Defence case is that the defendant did not do any of the acts alleged by the complainant and that the complainant (and her sister RKW) were motivated to make up the allegations for the reasons set out at paragraph [85] below.

[17] The only witness called in the Defence case was the defendant himself.

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6 Exhibit 1: the complainant was born on 23 November 1981.

7 Exhibit 1: it is admitted that the defendant and his former wife had title over this property from 21 February 1990.

8 The Crown particulars for all counts are marked for identification 'A' and contain the particulars of the indecent act as opposed to the location.

[18] At this juncture is necessary to observe the contents of Benchbook direction 26. Firstly, by giving evidence, the defendant did not assume any onus of proving his innocence. The evidence called in the Defence case is simply added to the evidence called for the prosecution. The prosecution has the burden of proving the guilty of the defendant beyond reasonable doubt, and it is upon the whole of the evidence that I must be satisfied beyond reasonable doubt that the prosecution has proved its case before the defendant can be convicted.

[19] The issue for determination is not resolved by comparing the complainant's evidence and the defendant's evidence and deciding which the preferable version is. Where, as in this case, there is evidence from the defendant, usually one of three possible results will follow. First, if the Defence evidence is credible and reliable and provides a satisfying answer to the prosecution case, the verdict would of course be not guilty. Secondly, even if the Defence evidence is unconvincing, it may nevertheless create a state of reasonable doubt as to what the true position is, in which case the verdict would be not guilty. Thirdly, if the Defence evidence is not accepted, that does not lead to an automatic conclusion of guilt. If the Defence evidence is unconvincing, I must put it to one side and go back to the rest of the evidence and consider whether, on a consideration of such evidence as I do accept, I am satisfied beyond reasonable doubt that the prosecution has proved each of the elements of the offence in question.

General legal principles

Onus and standard of proof[9]

[20] The defendant is presumed to be innocent. I must be satisfied that the Crown, who bears the onus of proof, has established guilt of each of the charges beyond reasonable doubt. In order to convict I must be satisfied beyond reasonable doubt of every element that goes to make up each of the offences charged. If I am left with a reasonable doubt about guilt, my duty is to acquit, that is to find the defendant not guilty. If I am not left with any such doubt, my duty is to convict, that is to find the defendant guilty. It is incumbent upon the prosecution to prove the essential elements of the charge beyond reasonable doubt. But the Crown does not have to prove everything about which evidence has been given beyond reasonable doubt.[10]

Separate consideration of each of the charges[11]

[21] Three charges have been brought against the defendant. I must consider each charge separately, evaluating the evidence relating to that particular charge in determining whether I am satisfied beyond reasonable doubt that the Crown has

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9 Queensland Supreme and District Courts Criminal Directions Benchbook ('Benchbook') 23.
10 *Nguyen v R* [2012] ACTCA 24 at [11]; See also the Benchbook at 23.4 – 23.5
11 Benchbook direction 34.

proved the essential elements of that charge. I must return separate verdicts for each charge.

[22] The evidence in relation to these separate offences is different and I understand that it is not necessary that my verdicts be the same. I must take into account that that if I have a reasonable doubt concerning the truthfulness or reliability of the complainant's evidence in relation to one or more counts, whether by reference to their particular demeanour or for any other reason; that must be taken into account in assessing the truthfulness or reliability of her evidence generally. My assessment of the complainant as a witness is relevant to all counts, but it is necessary to consider the evidence in respect of each count when considering that count.[12]

Assessment of evidence

[23] My verdicts must be based on the evidence and only on the evidence. The evidence in this case comprised the admission document concerning the date of birth of the complainant and the period of ownership of the First Property and the Second Property where the offences were said to have occurred,[13] together with the evidence from six witnesses including the defendant.

[24] The complainant and her sister RKW are special witnesses.[14] Pursuant to an order of the court, their evidence was given remotely from another room with a support person present in that room.[15] The courtroom was closed, and all essential persons were excluded from the courtroom. The measures for the taking of both the complainant and RKW's evidence are routine practices of the court and I have not drawn any inference as to the defendant's guilt from these measures.[16]

[25] In determining whether a witness has an accurate memory of the event about which that witness has given evidence, I must determine the relevant facts according to the evidence considered logically and rationally without acting capriciously or irrationally.[17] In determining the facts I have used my common sense, individual experience and wisdom in assessing the evidence given.[18] It follows that I am not required to accept a witness wholly or reject a witness wholly. I can accept all that

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12 Consistent with Benchbook direction 34.1 and the *R v Markuleski* (2001) 52 NSWLR 82, I acknowledge that if I was not sufficiently confident of the evidence of the complainant to convict on one count, I must find the defendant not guilty in relation to that count but that does not necessarily mean I cannot convict on any other account. I must then consider whether or not I have some reasonable doubt about that part of the complainant's evidence and whether it affects the way I assess the rest of her evidence.

13 Exhibit 1 contained admission made pursuant to s 644(1) of the Criminal Code that the defendant and his former wife had title over this property from 11 May 1994.

14 As defined in s 21A(1) of the *Evidence Act* 1977 (Qld).

15 Order of Williamson QC DCJ on 26 February 2020.

16 The probative value of the evidence is not increased or decreased because these measures were used, and I've not given the evidence any greater or lesser weight because of the measures; s 21AW of the *Evidence Act* 1977 (Qld); see also Benchbook direction 11 – Special Witnesses.

17 See the observations of Nield AJ in *R v Mulcahy* [2010] ACTSC 98 at [13]-[24] applied in *Nguyen v R* [2012] ACTCA 24; see also the useful observations from *R v Mulcahy* set out by Smith DCJA in *R v MMH* [2020] QDC 70 at [10].

18 Ibid.

a witness has said, or I can reject everything that a witness has said, or I can accept that part of what a witness said.

[26] Whilst I am not to indulge in intuition or in guessing, in addition to facts directly proved by the evidence, I may also draw inferences, that is, deductions or conclusions from facts that I have found to be established by the evidence. These reasonable inferences must follow from a logical and rational connection between the facts I have found and my deductions or conclusions. Importantly, if there is an inference reasonably open which is adverse to the defendant (i.e. one pointing to his guilt) and an inference in his favour (i.e. one consistent with innocence), I may only draw an inference of guilt if it so overcomes any other possible inference as to leave no reasonable doubt in my mind.

The evidence

Defendant's evidence

[27] Before turning to the complainant's evidence, it is useful at this point to make some findings in relation to defendant's evidence bearing in mind the direction set out in paragraph [19] above.

[28] The defendant adamantly denied committing any of the offences alleged.

[29] I accept that lay witnesses are not used to giving evidence in court and may find the task daunting and nerve-wracking, but the defendant did not impress me as a witness through both his demeanour and more crucially by the content of his evidence. Indeed, I found many aspects of the defendant's evidence contrived, self-serving, unhelpfully general and most unconvincing. Some aspects of the defendant's evidence I did not find credible included his evidence that he:

(a) did not play any card games at all growing up (including strip poker) because he was dyslexic;

(b) saw his siblings play Red Aces, but didn't know how to play it;

(c) entered the shower when the complainant was naked despite the fact that his wife could have gone in;

(d) came into the shower first because the complainant had been swimming and had taking too long, then under cross examination he said he grabbed the complainant because there were others waiting and they were going somewhere;[19] and his instructions to counsel as reflected in the questioning of the complainant under cross examination was that he was angry because she was using all the hot water when others were waiting;

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19 T 2-12, ll 29-41.

(e) purchased an above-ground swimming pool but never used it, despite being a swimming coach;

(f) didn't "remember [the complainant] ever being in that pool, but I do [sic] remember her showering because she had just been swimming in the pool."[20]

(g) could not recall that the complainant being at the First Property – although he could recall her being at the Second Property;

[30] I also reject the defendant's denial of having committed these offences and much of his other evidence except where it relates to uncontroversial matters or is consistent with other evidence I accept.

[31] But I do not reject all of the defendant's evidence. In his evidence in chief he was asked whether as a much older sibling he would ever discipline the complainant and the defendant said "yes."[21] He said that he disciplined the complainant on occasions when she was younger, that he would yell at the complainant and get frustrated with her – and that he may have been "a little bit too aggressive."[22] He did not give any other detail about this. The complainant did not dispute that the defendant disciplined her when she was younger but she could only recall one particular incident where the defendant was particularly hard on her in the way he did this, and that was when she was grabbing cereal at the First Property.[23] However, she accepted that the defendant might have pulled her arm in the shower at the Second Property on another occasion (separately to the circumstances of Count 2).[24] It follows from this evidence, and I accept, that the defendant considered himself in a position of power or authority over his younger sibling, the complainant. This perhaps is not surprising given the age gap between them and that the complainant was closer in age to the defendant's own children. This evidence is also consistent with the complainant having spent time with the defendant when she was younger and is consistent with her attending the First Property and the Second Property as she said she did.

[32] The fact that I do not accept the defendant's denial or much or his evidence does not of course lead to an automatic conclusion of guilt. If the Defence evidence is unconvincing (as it is here), I must put it to one side and go back to the rest of the evidence and consider whether, on a consideration of such evidence as I do accept, I am satisfied beyond reasonable doubt that the Crown has proved each of the elements of the offence in question.

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20 T 2-14, ll 33-35.
21 T 2-5, l 20.
22 T 2-5, l 24.
23 T 1-19, ll 27-36.
24 T 1-19, l 20.

Longman/Robinson direction: complainant's evidence to be scrutinised with care[25]

[33] Both the Crown and the prosecution submitted, and I accept, that I will need to scrutinize the evidence of the complainant with great care in this case before I could arrive at a conclusion of guilt. And that I should only act on the evidence if, after considering it with that warning in mind, and all of the other evidence, I am convinced of its truth and accuracy. The parties point to the following circumstances as justifying such careful scrutiny:[26]

(a) The delay of between 20- 27 years from the time of the alleged offences to the time in which the complainant complained to police and the lack of opportunity for the defendant to disprove the allegations;

(b) The fact that the complainant was between 8 and 15 years of age when the offences are said to have occurred; [27]

(c) The evidence of MJK and FLS about their continued presence and observation of the complainant. MJK said that after the complainant complained to her about the defendant, which she said she thinks was in 1990,[28] she made sure that the complainant was never alone with the defendant. MJK said she would go and see her daughter-in-law and the grandkids and that the defendant was rarely there;[29]

(d) FLS gave evidence that she did not remember the complainant ever visiting the First Property and that the complainant did not stay overnight. She said that, from 1989 when S was born until about 1992, she was a stay at home mother raising her three children;[30]

(e) The complainant's failure to recall the defendant's significant medical conditions and injuries in 1990 which lasted several months;[31]

(f) In relation to count 3, the complainant asserts the offending occurred in the above ground pool when she was 11, 12, or 13.[32] She says she got to a stage when she wanted to stop going over there and she would never be alone with him and so she would have been 11 or 12.[33] She specifically said she would not have been 14 or 15,[34] however the evidence of the defendant

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25 Benchbook at 69.1– 69.2.
26 These factors were identified in the agreed draft direction marked for identification "E".
27 The draft direction refers to the upper age as 13; and the complainant's evidence is that the last offence occurred when she was around 11,12 or 13 but the date range over the three counts as charged is February 1990 to November 1997 – so until the complainant was 15.
28 T 1-42, l 6.
29 T 1-43, ll 32-35.
30 T 1-54, ll 5-10.
31 Evidence of FLS T1-51, ll 15-28 and evidence of the Defendant T2-4, ll 7-40.
32 T 1-14, ll 12-13.
33 T 1-14, ll 12-20.
34 T 1-20, ll 25-32.

corroborated by FLS establishes the pool was acquired and installed in late 1996 when the complainant would have been 14 or 15 years of age.[35]

(g) Further, the defendant's evidence was that he did not swim in the pool and never swam with the complainant.[36] This evidence was corroborated by FLS when she said she did not ever see the complainant or defendant swim in the pool together and that the defendant did not use the pool at all.[37] Her common practice was to observe the kids when they were using the pool.[38]

[34] I accept that there is a need to scrutinise the complainant's evidence carefully. As the analysis below reveals, I have undertaken this task with the above circumstances in mind.

Preliminary complaint[39]

[35] In this case there was preliminary complaint evidence led from the complainant's mother MJK, her sister RKW and her long-term school friend, KHF. This evidence is not evidence of the fact that the offences took place.[40] But this evidence may support the credit of the complainant depending on whether it is consistent or inconsistent.[41]

[36] The Defence submitted that there were some inconsistencies in the different accounts given by the complainant about what occurred that would cause the Court to scrutinise the complainant's evidence with great care. I accept that the preliminary complaint evidence contains inconsistencies.[42] It follows that I have scrutinised the complainant's evidence in light of these inconsistences. But in my view the complainant's preliminary complaint evidence is an example of her giving parts of the story to different people; and as the analysis below also reveals, my overall assessment of this evidence is that it is not inconsistent with each of the complainant's allegations about what happened to her at the hand of her brother.

Analysis of the Crown witnesses

Count 1: "The bedroom incident".

[37] The complainant described the first time the defendant touched her sexually as being when she was 7, 8 or 9[43] when the defendant was residing at the First Property with his family.[44] The defendant called her name to go into his bedroom.

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35 T 1-52, l 18 and 2-6, l 5.
36 T 2-6, ll 1-14.
37 T 1-52, ll 25-28.
38 T 1-52, ll 30-35.
39 Benchbook direction 68.
40 *R v LSS* [2000] 1 Qd R 546; [1998] QCA 303 at [1] and [19].
41 *R v RH* [2005] 1 Qd R 180 at [23].
42 These inconsistences are set out in paragraphs [49] to [58] of the Outline of Submissions on behalf of the Defendant.
43 T 1-9, l 8.
44 T 1-7, ll 44-45.

He was in bed. He asked her to take off her nightie so their chests would touch. The complainant could not recall if the defendant had shorts or pants or anything on but said "I just know that he didn't have a top on."[45] The defendant said something about how nice the warmth felt, or "something positive" about their bodies touching with her nightie off.[46] He then pulled her undies to the side and put his fingers inside her vagina for maybe a minute. [47] She could not recall how many fingers but she remembered "the feeling" and "really not liking it." [48] The complainant could not recall if she had spent the night at the house[49] but she said it was light - "daytime of some sort".[50] She recalled that she was wearing a pink nightie with white lace and that she had a matching nightie for her teddy bear.[51] The complainant recalled that she was under the covers[52] and their bodies were positioned with her laying on her right side[53] and the defendant laying on his left side.[54]

[38] The complainant could not recall who else was at the First Property at the time.[55] She was also not able to give any particular detail as to the timing of this offence other than it occurred when she was 7, 8 or 9 years of age. But this lack of detail is not surprising given she is now 38 years old and was recounting an event that occurred over 20 years ago.

[39] It was uncontroversial, and I accept, that the defendant and FLS resided at the First Property from late 1989 until sometime in 1994. The defendant's evidence was that he had no recollection of the complainant ever having been at the First Property. [56] FLS also told the court she had no memory of the complainant being there either,[57] although she also said that on occasions when the complaint visited this address she was always with her mother.[58] I found this evidence unconvincing and inconsistent with the uncontroversial fact that the complainant spent time at the Second Property (without her mother).[59]

[40] The complainant said she did not really know how often she attended the First Property. Her recollection was that it was "just a causal thing"- maybe on weekends every now and that they would visit because her younger brother L was a similar

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45 T 1-10, ll 6-8.
46 T 1-8, ll 41-43.
47 T 1-8, ll 38-44; T 1-9, ll 44-47.
48 T 1-8, ll 45-46.
49 T 1-17, ll 42 to 45.
50 T 1-8, l 47.
51 T 1-9, ll 13-15.
52 T 1-9, l 16.
53 T 1-9, l 39.
54 T 1-9, ll 41-42.
55 T 1-10, ll 1-5.
56 T 2-3, l 45.
57 T 1-51, ll 30-45.
58 T 1-52, ll 1-5.
59 There was no explanation as to why the complainant would she have visited one property the defendant resided at and not the other.

age to one of the defendant's daughters.[60] I accept this evidence. It is both credible and highly plausible.

[41] Most convincingly, the complainant gave some detail about the layout of the First Property and the defendant's (and his then wife FLS's) bedroom.[61] She recalled that the defendant's bedroom was at the back of the house and she thought there were bunkbeds in the defendant's daughter's room.[62] This evidence was not challenged.

[42] Further, the complainant was also asked under cross examination about there being times when she was "younger" when the defendant was particularly hard on her in the way he disciplined her. And the complainant recalled one incident at the First Property when she was grabbing cereal and the defendant grabbed her arm.[63] She was not challenged on this incident having occurred on this address. Although subsequently the defendant gave evidence that such an incident occurred at the Second Property.[64]

[43] It was submitted on behalf of the defendant that the complainant was able to describe the layout of the First Property because she had discussed this house with her sister, RKW.[65] I reject this submission. There was no evidence that the complainant discussed the physical layout of the house with RKW. The complainant was specifically asked and accepted under cross examination, that RKW helped her work out the name of the street address of the First Property and when they lived there.[66] But it was not suggested to her that the discussions descended into the particularity as is now contended for by the Defence.

[44] It was also suggested to the complainant under cross examination that she may have looked at You Tube video's the defendant has downloaded of "family gatherings" that had taken place at the First Property.[67] It was unclear from the question whether these videos were of immediate or extended family gatherings and the defendant did not give any evidence of having taken such videos. But in any event, nothing turns on this as the complainant denied having watched such videos.

[45] It follows that I am satisfied beyond a reasonable doubt that the complainant had attended at the First Property on more than one occasion whilst the defendant and FLS resided there.

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60 T 1-8, ll 1-4.
61 T 1-8, ll 25-35.
62 T 1-10, l 4.
63 T 1-19, ll 27- 35.
64 T 2-5, ll 28-31.
65 Paragraph 22 of the outline of submissions on behalf of the defendant; with reference to T 1-21, ll 30-36.
66 T 1-21, ll 30-36.
67 This suggestion which was denied was put to the complainant under cross examination at T 1-16 , ll 42 - 45.

[46] The Defence submitted that there were a number of other factors that made the complainant's version about what she alleged happened as described unreliable or compromised.

[47] First, that if the complainant had visited, she did not do so with any degree of frequency and when she did the inference was that both FLS and MJK would have been present with her.

[48] FLS's evidence was that she had three children and that she would normally put the children into day care at around 18 months. She recalled their daughter Z was born in 1986 and that she went back to full time work sometime in 1988. Then, their daughter S was born in 1989 but she did not go back to work because her son B was born in 1990. She recalled being at home with the children on most days in this time. She then went back to fulltime work sometime in 1992.[68] It follows that I accept that FLS was at home most days at the First Property during the dates that Count 1 is said to have occurred.

[49] But I reject the evidence of MJK that if the complainant had been at the First Property, the complainant would have been with her.[69] MJK was 79 at the time she gave evidence before me. She presented as a vague, confused and exhausted woman. The latter description is unsurprisingly given that she lost her husband in 1990, that she raised 9 children and, on the evidence, has experienced considerable tragedy with the death of a number of her children and the loss of a grandchild (the defendant's son B). Overall, I did not find MJK's evidence credible or reliable. For example, she recalled a conversation between her and the complainant about the shower incident – count 2 having occurred in 1990. Leaving aside the fact that the defendant did not move to the Second Property until 1994, her recollection of this conversation was different to what she told the police earlier. She also said that on the one hand that the complainant would not have been at the First Property without her but later she said the complainant could have stayed over at that property but she could not remember.[70] The proposition that MJK was always with the complainant is also inconsistent with the uncontroversial evidence that the complainant was at the Second Property without her on a number of occasions. I also reject FLS's evidence that MJK would have been with the complainant at the First Property. It was clear that this was pure speculation as FLS had no memory of either the complainant or of MJK being at the First Property.

[50] Secondly, the Defence submitted that none of the relevant witnesses could recall a specific time when the complainant stayed overnight at the First Property.[71] That is true, but it does not necessarily follow that I must have a reasonable doubt about what the complainant said happened at the First Property. The complainant said she was "not saying" she spent the night there – she could not recall if she did. There

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68 T 1-53, ll 30-45.
69 T 1-46, l1-10.
70 T 1-46, ll 10-12.
71 T 1-46, ll 25-30.

may be many reasons why the complaint recalled wearing a nightie. I do not need to speculate over these reasons. What she was wearing or the time of the day the offence occurred is not an element of the offence. Any uncertainty about these matters does not cause me to have any reasonable doubt about the incident having occurred at the First Property as described by the complainant.

[51] The Defence also pointed to the evidence of the evidence of the defendant,[72] corroborated by FLS,[73] established that during 1990, the defendant suffered significant injuries and was hospitalized. I accept this evidence and that following his discharge from hospital, the defendant was in extreme pain and was unable to lift and bend and was required to wear a torso brace for a period of 8 months.[74] I also accept that the complainant did not notice anything significant about the health of the defendant at the time the she said the offence happened.[75] It follows that I could not be satisfied beyond reasonable doubt that the offence occurred during one of the months in 1990 when the defendant was in a brace. But this does not cause me to have any reasonable doubt about the offence having occurred during one of the other months in 1990 or in 1991. There was no evidence that the defendant had any ongoing issues after his injuries.

[52] The complainant's evidence which I accept is that she had a conversation with RKW and another sister D after she finished high school – in about 1998 and she told RKW that she had been "abused" by the defendant. When RKW stated to tell her about what the defendant had done to her, she remembered going "I can't do this. I'm going to be sick." She could not recall the specifics of what she divulged to RKW.[76]

[53] RKW gave evidence that she had a conversation with the complainant in her lounge room in Victoria after she moved to Melbourne in 1999. RKW recalled that the complainant disclosed to her that the defendant put his fingers inside her when she was in his bed. She said they were both upset during this discussion. [77] This evidence is consistent with the complainant's evidence about what happened to her at the First Property.

[54] KHF's evidence was that she had a conversation with the complainant in December 2006 when they were at the Melbourne Museum. During this conversation the complainant did not go into graphic detail, but she told KHF that there had been some touching by the defendant. KHF could not recall the exact age that the complainant had said it started but she recalled it was while they were at primary school; and as they met in grade four, she thought it might have been from when the complainant was around 8.[78] This conversation only went for about 5 to 10 minutes

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72 T 2-4, ll 5-40.
73 T 1-51, ll 12-30.
74 T 2-4, l 10.
75 T 1-16, ll 37-40.
76 T 1-14, ll 45-50; T 1-15, ll 1-6.
77 T 1-32, l 8 to 1-33, l 45.
78 T 1-55, l 24 to 1-57, l 5.

as KHF and the complainant were in public and the complainant was getting upset and was leaving to get on a plane.

[55] This evidence is general but nevertheless, I am satisfied that it is not inconsistent with the complainant's evidence about what happened to her at the First Property.

[56] It follows from that I am satisfied beyond reasonable doubt that the complainant gave credible and reliable evidence that the defendant inserted his finger or fingers into the complainant's vagina at the First Property on a date unknown between 20 February 1990 and 24 November 1991.

Count 2 "The shower incident"

[57] The complainant recalled being at the Second Property,[79] when she was about 11, 12 or 13,[80] and when she was coming to the end of her shower, the door to the shower room or the bathroom opened, and the defendant walked in. The defendant came into the shower – his clothes were off and he "sort of did this embrace thing, and he grabbed my boob."[81] The complainant described wiggling her way out of it and getting out of the shower and then carrying on like nothing happened[82]. She later described the touching as to her right breast and that it was sort of cupping her breast or groping it.[83] The touching lasted for a matter of seconds before she got out.[84] The complainant recollection was that after the incident she was angry but did not say anything. She recalled that after she got out, the defendant just had his normal shower. It was put to the complainant that the defendant's wife and three children were present on this occasion. The complainant said there would have been others at the house, but she could not recall who was there. [85]

[58] The defendant denied the complainant's version. He did not challenge the timing (that it occurred when the complainant was about 11,12 or 13) but he described the incident occurring in a different way – that he was angry with the complainant for taking too long to have a shower (after swimming) when others were waiting. He denied touching the complainant on the breast, but he agreed that he entered the bathroom when the complainant was naked in the shower, even though his wife could have gone in.[86] This evidence was not corroborated by FLS. She was not questioned at all about this incident. The defendant said that he grabbed the complainant by the arm lodging his finger in her elbow joint. He said his actions caused the complainant to start crying and he could see she was scared.[87] The complainant did not agree with this version, however (as discussed in paragraph [31] above) she accepted that the defendant might have pulled her arm in the shower

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79 T 1-11, l 21.
80 T 1-11, l 10.
81 T 1-11, ll 19-21.
82 T 1-11, ll 19-21.
83 T 1-11, l 40.
84 T 1-11, l 45.
85 T 1-12, ll 21-31.
86 T 2-13, l 1.
87 T 2-5, ll 3-12.

on another occasion. It was not suggested to the complainant that on her version she was taking a shower after having gone swimming.

[59] I reject the defendant's version. It was most unconvincing, for two main reasons. First, it does not make sense that the defendant would walk into his naked sister having a shower, in circumstances where his evidence was that his wife was at home at the time. And secondly, the defendant referred to the incident he recalled having occurred after the complainant had been swimming. And given my findings at [69] and [70] below – the pool was not installed until late 1996 when the complainant was 14 or 15.

[60] The complainant gave clear and credible evidence about this incident. She conceded she could not recall if there was a shower curtain or glass or a screen. [88] She was challenged under cross examination about the fact that she had not told the police that the defendant was naked at the time. She readily accepted she had not mentioned this but her explanation when pressed exemplified that the complainant was a witness who was trying to do her best to answer honestly:

> "I suppose if someone stepped in the shower, grabbing my breast, the presumption – that they would not have clothes on to do that while I was showering, otherwise they would be wet in clothes, but I don't know why I didn't say that. Just didn't think it – think of it." [89]

[61] The complainant could not recall telling her mother about this incident, but MJK gave evidence that she had a conversation with the complainant after they had been to the defendant's house where they had been swimming. She said that she was in the car with the kids including the complainant and the complainant started crying. MJK pulled over and asked what was wrong and the complainant said she had been in the shower and the defendant had gone into the shower with her and touched her boobs. She told the police that the defendant had looked at the complainant's boobs. She said this incident occurred in about 1990. During cross-examination MJK said that she couldn't remember exactly whether the complainant had said that the defendant had looked at or touched her boobs. MJK was clearly confused about the dates and what she was told. Her evidence about this conversation is confusing and unreliable.

[62] The complainant did not mention this specific incident to anyone else. But the preliminary complaint evidence of RKW (that the defendant had molested and abused her)[90] and the evidence of KHF, must be seen in the context of the brevity and general nature of these conversations. The lack of specific detail to these witnesses does not diminish the complainant's evidence about what happened to her in the shower.

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88 T 1-11, ll 29-31.
89 T 1-19, ll 13-16.
90 T 1-34, ll 7-10.

[63] It follows from that I am satisfied beyond reasonable doubt that the complainant gave credible and reliable evidence that the defendant came into the shower at the Second Property on a date between 6 May 1994 and 24 November 1997 and grabbed the complainant on the breast with his hand.

Count 3: The pool incident

[64] The final allegation by the complainant relates to an incident she described occurring in the above ground swimming pool at the Second Property when she was around 11, 12, or 13 years old.[91] . She said there were people around but that she did not know who they were. She recalled the defendant swam up to her moved her bathers to one side and quickly touching her vagina and then her swimming away.[92] The complainant frankly described the incident as a quick grab and a touch – she other could not describe the way in which it was done – except to say convincingly under cross examination that "I was swimming and he did that. Sorry."[93]

[65] The defendant denied touching the complainant inappropriately in the pool.[94] His evidence was that he never used the swimming pool. FLS said that the defendant did not swim in the pool and that she never witnessed the defendant swimming at the same time at the complainant.[95] FLS also said that it was her usual practice to be outside watching the kids when they were swimming in the pool.[96]

[66] I reject FLS's evidence that the defendant did not use the pool. It may be that she did not see him use the pool – but her evidence was that she worked full time from 1994 so it follows that she was not always home. I also find it incredible that the children only used the pools when FLS was watching. I accept that she may have watched them on many occasions but it is reasonable to infer as I do, that there were occasions when FLS was not present at home to observing the children in the pool and that her husband or another adult may have been present instead.

[67] Further it is not convincing in my view that the defendant was a swimming coach and he did not use the pool at all. His evidence that he would stand in the water for six or seven hours a day and that he didn't have the urge when he got home to have a swim was most unconvincing particularly given his passion for swimming.[97] And that he had three relatively young children who were using the pool at the time.[98]

[68] The evidence from the defendant and FLS was that the pool was acquired and installed in late 1996[99] – so the complainant would have been 14 or 15 years old.

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91 T 1-14, ll 12-15.
92 T 1-13, ll 21-27.
93 T 1-13, l 7.
94 T 2-6, ll 12; T 2-14, l 35 to T-15, l 20.
95 T 1-52, ll 17-30.
96 T 1-52, ll 30-32.
97 T 2-13, l 32.
98 T 2-13, ll 25-41.
99 T 2-5, ll 41-45.

There was no independent evidence provided about this. This is not surprising given it was purchased for $50.00 from a neighbour many years ago.

[69] The Crown submitted that the defendant and FLS could be mistaken. That is possible. It is also possible that whilst the complainant denied that she could have been 14 or 15 at the time,[100] she could have been mistaken about her age at this time of this incident. I am satisfied beyond reasonable doubt that the incident occurred as described by the complainant but giving the defendant the benefit of the doubt as to the timing of the purchase of the pool I find that the pool incident occurred when the complainant was 14 or 15 and not when she was younger as she contended. Even so, this still places the "pool incident" within the date range of the charge brought by the prosecution.

[70] The Defence pointed to the complainant having never mentioned this specific incident to any of the preliminary complaint witnesses. I accept this. But this submission overlooks two things in my view. The first is that none of the preliminary complaint evidence was particularly detailed or lengthy. Secondly, the complainant was asked under cross examination if she had any discussion with anyone about this incident and she recalled a specific incident of running into the backyard and crying "he did it again."[101] She recalled her mum was hanging the washing on the line and that her mother hugged her. I accept the complainant's evidence about this – it was very credible as was her other evidence that she could not remember telling her mother the first time.[102] The complainant's conversation with her mother was not recalled by MJK – but that does not mean it did not happen. As stated above, I did not find MJK to be an entirely credible or reliable witness. She was clearly disoriented and confused about the content and the timing of her conversation with the complainant about what had happened.

[71] It follows from that I am satisfied beyond reasonable doubt that the complainant gave credible and reliable evidence about the defendant having touched the outside of her vagina with his hand whilst they were in the pool at the Second Property on an unknown date between November 1996 and 24 November 1997.

Analysis of RKW's evidence

[72] The Crown submitted that the evidence of the complainant is supported by the evidence of her sister RKW. This evidence was ruled to be admissible in a pre-trial before another judge of this court.[103]

[73] The Defence submitted that upon carefully scrutinising the evidence of RKW, the court would not find it proved beyond a reasonable doubt due to concerns about her reliability and credibility.

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100 T 1-20, l 27.
101 T 1-14, ll 33-44.
102 T 1-14, l 37.
103 See the *ex tempore* ruling of Judge Williamson QC in this matter, 26 February 2020 (Unreported).

[74] In order to evaluate her evidence, it is necessary to examine how she describes the allegations. In doing so it is instructive that she is a witness who was recalling events from 40 years ago at a time when she herself was only 10 or 11 years of age.[104]

[75] RKW was 51 at the time she gave her evidence before me [so was born in around 1969].[105] She gave evidence about three incidents of a sexual nature that the defendant committed upon her when she around 10-11 years old when the defendant was around 16 or 17 years of age.

[76] On one occasion, she recalled that the defendant commenced a game of strip poker with her; he then restrained her and inserted a pencil into her vagina; the defendant showed her a pornographic magazine of a female giving a male oral sex; and forced his penis into her mouth. He did this in a bungalow at a property the family resided in at Ashburton, when no one in the room, except for the defendant and RKW.[106]

[77] On another occasion the defendant came into the bathroom of the house when she was having a shower and he made her put her hand on his penis.[107]

[78] On another occasion the defendant masturbated in front of her in the bathroom.[108]

[79] In relation to the first allegation in the bungalow at the property at Ashburton, the Defence points to RKW' evidence of initially playing cards with the defendant before being the victim of a violent attack where she kicked out at the defendant and was screaming,[109] as being unreliable for two reasons.

[80] First, the defendant's evidence was that he did not play cards because he found the task too difficult.[110] As discussed above, the defendant did not impress me as a witness at all. I reject the defendant's evidence on this point as being very unconvincing. His evidence is not consistent with MJK's evidence which I found credible on this point that she recalled that all of the children played cards, because their Dad taught them. She specifically recalled that the defendant "did play them."[111]

[81] Secondly the Defence pointed to the unlikelihood of the incident occurring as RKW described given the number of occupants of the house at the time [Mr T senior, MJK and the children A, P, B, D and C][112] who could have potentially heard or witnessed this abuse. I reject this submission. The evidence was that the house was on a 24 perch block,[113] and that the bungalow was away from the main house down

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104 T 1-28, l 4.
105 T 1-27, l 5 – she described the defendant as being six or seven years older than her.
106 T 1-27, ll 6 to 1-30, l 19.
107 T 1-30, ll 21-38.
108 T 1-30, l 38 to 1-31, l 23.
109 T 1-30, l 1; T 1-37, ll 20-30.
110 T 2-7, ll 25-35.
111 T 1-45, l 10.
112 T 1-27, ll 25-35.
113 T 2-6, ll 25-30.

about six to eight stairs.[114] There was no suggestion that the defendant did not have the opportunity to carry out the conduct alleged. The conduct is more aptly described as 'opportunistic,' 'brazen' and 'risky.'

[82] The Defence also referred to the fact that RKW's description of the offending in the bathroom was that it occurred in the house and that there was no lock on the door – but there is no evidence anyone in that 3-bedroom house observed this alleged abuse. Again, this does mean that the defendant did not have the opportunity to carry out this act. At its highest, this evidence would suggest the offending was carried out brazenly or opportunistically.

[83] RKW presented as a credible and reliable witness. She was thoughtful and reflective in her answers. She gave clear and coherent evidence about what she recalled had happened to her.

Motive to Lie[115]

[84] It is submitted by the Defence that the complainant and RKW may have a motive to make up the allegations. In support of this submission, the Defence relied on the following evidence:

(a) The description by the defendant that his relationship with both Rachael and his sister was toxic;[116]

(b) The evidence of the defendant that he used discipline her in a manner be described as being too aggressive.[117] The defendant[118] and the complainant[119] recalled an incident involving cereal which was an example of him acting aggressively. The defendant gave evidence that another example was when he pulled her out of the shower by her arm at the Second Property;[120]

(c) The strained relationship between the complainant and the defendant as observed by FLS;[121]

(d) RKW's evidence that she had animosity towards the defendant and that she didn't like him;[122]

(e) The evidence of the defendant that he would "call out" his sister RKW's bad behaviour[123] and would tell her she was "full of crap" and "a liar;"[124]

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114 T 2-12, ll 26-30.
115 See MFI E direction, and Benchbook direction 44.
116 T 2-7, ll 37-45.
117 T 2-5, l 20.
118 T 2-5, l 23.
119 T 1-19, ll 32-35.
120 T 2-5, ll 3-10.
121 T 1-52, ll 35-37.
122 T 1-32, ll 14-16.
123 T 2-8, ll 42-44;

(f) The significant tension in the relationship between the defendant and the complainant and the defendant and RKW after the suicide of their sibling P in 2013;[125]

(g) The close relationship between RKW, the complainant and their younger sibling L, and their knowledge of the trouble between L and the defendant. RKW denied discussing the matter with the complainant,[126] while the complainant says she had a conversation with RKW about it.[127]

[85] It was not suggested to either RKW or the complainant that any of the above matters motivated them to make a false complaint against the defendant. But in any event, and for the reasons set out below, I reject the proposition that any of these grounds form a valid basis to support a finding of there being a motive to lie in this case:

(a) The defendant's said that his relationship with the complainant and RKW was "toxic" and that this started when his mother inherited a considerable amount of money in around 1995 and arose from his view that RKW and the complainant had "ripped off" their mother.[128] The suggestion seems to be that the defendant accused RKW of this and that they have colluded against him by making up these allegations. I reject this submission. For a start RKW was only 14 in 1995 but, moreover, there was no evidence from anyone else that that the complainant and RKW had ripped off MJK, or that there was any tension in the family as a consequence of the inheritance or its dissipation.[129]

(b) The suggestion that the complainant has lied as some form of payback for the defendant having bullied and disciplined her heavily in her childhood is rejected for main two reasons. First, whilst I accept the defendant disciplined the complainant on occasions when she was growing up, and that there was some evidence which I accept of this discipline being harsh (for example, the cereal incident), there was no evidence from the Defence of any particular example of aggressive bullying or discipline such that would form the basis of any motive to lie. Secondly, the complainant denies any constant or harsh discipline by the defendant.[130]

(c) I accept the relationship between the plaintiff and the defendant was strained. The complainant invited the defendant and his son B to her wedding in 2008 but her evidence, which I accept, was that she sent a

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124 T 2-9, l 2.
125 Evidence of the defendant at T 2-10, ll 22-32; Evidence of FLS at T 1-53, ll 18-21.
126 T 1-39, l 27.
127 T 1-24, l 5-6.
128 T 2-7, ll 38-47; T 2-8, ll 1-35.
129 See: the complainant's evidence at T 1-22, ll 7-8; RKW's evidence at T 1-38, ll 1-6; and MJK's evidence at T 1-47, ll 1-2.
130 T 1-19, ll 27-36.

separate letter to the defendant telling him not to come. The defendant's evidence was that it was only after he said he was not coming to the wedding that he received a letter from the complainant saying she was glad he was not going because he had been mean and a bully "and that sort of stuff" to her when she was younger.[131] The complainant denied this timing – and I accept her evidence as it is more logical and credible.[132] The evidence that I accept was that the defendant wrote to the complainant in response to her letting telling him not to come saying the he wanted to "explain but not excuse his behaviour" (the letter is not in evidence and the behaviour the defendant was apologising for was not put to the complainant but she accepted that the letter did not refer to sexual abuse).[133] Overall I am not satisfied that the relationship between the defendant and the complainant was a strained one for the reasons contended for by the Defence. I am also not satisfied that any issue about earlier discipline forms a sufficient basis for the complainant to have been motivated to lie.

(d) The defendant's evidence was that RKW would also steer clear of him because he was continually calling her out on her dishonestly and poor behaviour. And that he would literally confront her and tell her she was full of crap and she was a liar in front people. There was no evidence of what RKW had lied about or evidence of what her bad behaviour was (apart from the defendant's gripe about his mother's inheritance, which I reject, and the defendant's allegation that the complainant and RKW refused to help with the funeral costs after their brother P died in 2013, which I also reject). In any event none of these matters form a sufficient basis to support a finding that there was a motive to lie on the part of RKW or the complainant.

(e) I accept that the complainant, RKW and their brother L were close. And that the defendant had an issue with L during the course of L's employment with him and that the defendant did not press charges against L. The fact that the complainant had a conversation with RKW about this [134] that RKW did not recall[135] is not probative of anything. It does not make sense that the defendant not pressing charges against L somehow motivated the complainant and RKW to make false allegations against the defendant.

[86] Of course, if I reject the motive to lie put forward on behalf of the Defence that does not mean that the complainant is telling the truth. I accept that the onus remains on the Crown to satisfy me that the complainant is telling the truth beyond reasonable doubt before I can find the defendant guilty.

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131 T 2-9, ll 16-21.
132 T 1-22, l 22.
133 T 1-22, ll 10-34.
134 T 1-39, l 27
135 T 1-24, l 5-6

Similar fact evidence[136]

[87] As stated earlier in these Reasons, I must consider the evidence in relation to each charge separately and I must return a separate verdict for each charge.

[88] Here the prosecution submitted that the evidence of the complainant is supported by the evidence of RKW. The Crown relied upon the evidence of RKW in the following ways:

(a) Firstly, in combination with that of the complainant, to prove the defendant had a tendency to engage in sporadic sexual conduct with a younger aged female sibling in the family home.

(b) Secondly, that the evidence of the sexual offending against RKW makes it more likely that the defendant engaged in sexual conduct with the complainant.

(c) Thirdly, the Crown says that the evidence of RKW refutes a suggestion of an inherent unlikelihood that the defendant would be sexually interested in his younger female sibling and act upon that interest in circumstances where there is a serious risk of detection.

[89] Leaving to one side the evidence of RKW, the complainant gave independent and compelling evidence in this case. As the above analysis reveals, even without the evidence of RKW, I am satisfied beyond reasonable doubt on all of the (other) evidence, that the complainant has given credible and reliable evidence in relation to each of the counts. It follows that there is no need for me to rely on RKW's evidence in the way submitted for by the Crown.

[90] But given that this evidence was adduced it is prudent and necessary for me to address the submissions of the parties about the use of this evidence.

[91] The Crown submitted that the similarities in the defendant's alleged conduct towards the complainant and RKW means that the evidence of RKW supports that of the complainant and makes it more likely that what the complainant says about the conduct relating to her is truthful and reliable. In other words, the Crown argued that the degree of similarity between the versions makes it highly improbable that it is just by chance that the complainant and RKW have falsely complained about similar events.

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136 A draft direction was marked for identification "D" drawn, in part, from Benchbook directions 52 and 70. On 10 June 2020 I resumed court so that I could hear further from the parties as I was concerned about some inaccuracies and inconsistencies in the document that I had been provided. These inconsistencies included constant references to there being two complainants and there being a tension in the general propensity warning about how the evidence of RKW should be used. The directions I have given myself is consistent with the further submission of the parties and as is reflected in these Reasons is now Marked for Identification "F".

[92] The Crown also submitted that that the facts proved are so similar that, when judged by common sense and experience, they must be true; and in that way, I can use the evidence of the complainant and RKW in combination. They argue that, in the absence of collusion, it is objectively improbable that the complainant would complain of offending against her by the defendant in such similar circumstances as those alleged by RKW, unless the offending against the complainant actually occurred.

[93] Before I can use RKW's evidence in support of the truthfulness and reliability of the complainant's evidence, the parties submitted, and I accept, that I need to be satisfied beyond reasonable doubt about the following three things.

No collusion

[94] First, I must be satisfied that the evidence of the complainant and RKW is independent of each other. This means I must be satisfied that there is no real risk that they have together concocted similar complaints.

[95] The value of any combination, and likewise any 'strength in numbers', is completely worthless if there is any real risk that what the complaint and RKW said was falsely concocted by them. A real risk is one based on the evidence, not one that is fanciful or theoretical.

[96] The Defence submitted that there was evidence of animosity and a dislike for the defendant which makes the likelihood of collusion with the complainant more likely. The Defence also referred to the evidence that RKW was aware of the issues between the defendant and her brother L and that she had discussed these with the complainant despite her denial of any conversations as supporting a finding of there being collusion in this case.

[97] I accept that there was evidence that RKW and the complainant did not like the defendant, but I reject the Defence case of collusion for the following reasons.

[98] First, it was not suggested to either RKW or the complainant that they had colluded.

[99] Secondly, whilst the complainant said that she and RKW discussed some matters such as the address of the house the defendant was residing at; and they worked out dates around RKW's pregnancy;[137] there was no evidence that they discussed in any great detail, the specifics of the alleged acts perpetrated upon each of them by the defendant. If there had been collusion it would be reasonable to expect that there would be some reflection of that in their respective versions of the acts said to have been perpetrated upon each. That is some attempt to have them match up. No such contrivance exists in the present case. Both RKW and the complainant gave frank and credible evidence about the different acts that had been perpetrated upon them in their particular circumstance.

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137 T 1-21, l 30.

[100] Thirdly, accepting that RKW was aware of the issues between L and the defendant, it does not make any logical sense that she would collude with her sister to contrive charges against the defendant given that it was uncontroversial that the defendant had decided not to press charges against L.

Evidence reliable

[101] Secondly, if I am satisfied there is no risk of concoction (as I am in this case) then I must also be satisfied that the:

(a) evidence of the complainant is truthful and accurate as to the alleged similar conduct; and

(b) supporting evidence of RKW is also truthful and accurate as to the alleged similar conduct.

[102] As discussed above under the respective headings, I am satisfied beyond reasonable doubt of the truthfulness and accuracy of both the complainant and RKW's accounts of what happened to each of them in this case.

Strikingly Similar

[103] Thirdly, I must be satisfied that the facts proved with respect to RKW are so similar to the allegations made by the complainant, that there is no reasonable view of the evidence of the complainant, other than that the defendant committed the acts she alleged.

[104] The Crown submitted that the conduct described by the complainant and RKW has the following similarities:

(a) They are sisters who were, at the material time, offended against in a sexual way by the defendant in a family home;

(b) Both sisters were under age;

(c) The offending occurred in circumstances where they were either invited into the defendant's bedroom or he intruded on their privacy during a shower / in the bathroom;

(d) The offending occurred despite the risk of detection.

[105] The Defence submitted that I could not use the evidence of RKW to support the complainant's evidence for the following two reasons:

(a) First: because the allegations by the complainant and RKW are not so similar as to allow me to use the evidence of one in proof of the allegations made by another. To that end they point to:

(i) Conduct alleged between the defendant and RKW is alleged to have occurred when they are both juveniles as opposed to an adult and child relationship as alleged in the conduct involving the complainant;

(ii) The nature of the conduct was distinct. RKW describes in part a violent attack whereas no such violent outside the commission of the offences is alleged by the complainant;

(iii) The passage of time between the two instances of a decade.

(b) Secondly, I would not be satisfied that either the complainant or RKW are truthful and accurate as to the alleged similar conduct. And it follows I could not use the evidence of one to support the other.

[106] It is unnecessary to deal with the second matter submitted by the Defence given my earlier findings as to the credibly and reliability of both the complaint and RKW's evidence.

[107] Otherwise, I reject the Defence submission about the lack of similarities in the offending. Whilst I accept that these are aspects of the offending that are distinguishable as identified by the Defence, as Judge Williamson QC observed relevantly when he ruled RKW's evidence admissible, it is not necessary that the particular acts that constitute the charged offence be the same kind.[138]

[108] I am satisfied that the evidence of RKW supports a tendency by the defendant over a period of time, to have a sexual interest in young girls – more particularly a younger sister. A tendency that he was willing to act upon given the opportunity and despite a significant risk of being detected by another person whether that be an adult or a child. As a matter of ordinary human experience that propensity itself is unusual.

[109] It follows that overall I am satisfied beyond reasonable doubt in this case that: there was no collusion between RKW and the complainant; that RKW's evidence is credible and reliable and strikingly similar to the evidence of the complainant.

[110] It follows from the above analysis that I am satisfied that the evidence of the complainant is supported by the evidence of RKW.

Elements

[111] Count 1 is charged under s 210(1)(a)(3)(iv) of the *Criminal Code*. For this count the Crown must prove:[139]

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138 Ruling of Judge Williamson QC in this matter, 26 February 2020 (Unreported) at page 8 with reference to *R v McNeish* [2019] QCA 191 at [40].

139 Benchbook direction 146.1-146.2.

1. The defendant dealt with the complainant
2. The dealing was indecent.
3. The dealing was unlawful.
4. The complainant was under 16 years.

Count 1 also includes the additional circumstances of aggravation that:

5. The complainant was under the age of 12; and
6. The defendant for the time being had the complainant under his care.

[112] Counts 2 and 3 have been charged under s 210(1)(a)(ii)(iv) of the Criminal Code. The Crown must prove all of the elements 1-4 set out in the preceding paragraph above together with the aggravated circumstance that the complainant was for the time being under the defendant's care.

[113] The term "deals with" includes a touching of the child. It does not have to be a touching of the child by the defendant's hand – it can be a touching of the child by any part of the accused's body. The word "indecent" bears its ordinary every day meaning that is, what the community regards as indecent. It is what offends against currently accepted standards of decency. Indecency is to be judged in the light of time, place and circumstances.[140]

[114] "Unlawful" means not justified, authorized or excused by law.[141]

[115] It was not contended otherwise by the Defence and it follows that if I accept the complainant's evidence about what happened in each instance, that all of the elements and circumstances of aggravation are proved beyond a reasonable doubt - bar one. That is the issue of whether or not the Crown has proved that the complainant was under the defendant's care at the relevant time.

Meaning of "under care"

[116] The Benchbook states that an assessment of whether a child was under care "should take into account such things as the age of the child, how the child came to be with the defendant and why the child was with the defendant."[142]

[117] The authorities establish that "under care" means that the "person in question is responsible for the control and supervision of the child."[143] In *R v FAK,*[144] Morrison

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140 Ibid.
141 Ibid.
142 Benchbook direction 146.2.
143 *R v FAK* [2016] QCA 306 at [71]; see also *R v McCallum* [2013] QCA 254 at [21]; Benchbook direction 146.2.
144 [2016] QCA 306.

JA provided a comprehensive outline as to the meaning of a child being "under care" and in doing so made the following relevant observations:

(a) The paramount consideration is the welfare of the child.[145]

(b) There are a broad range of relevant aspects to determining whether an accused had care of a child, including but not limited to: providing for a child's physical needs (eg, food, shelter, and medical needs), their emotional and developmental needs (including education, moral support, encouragement and fostering a sense of self),[146] and a general responsibility to protect the child from harm, including psychological harm and "moral degradation."[147]

[118] A child can be 'under the care' of multiple adults simultaneously and there is no requirement that an accused be the only person responsible for the child.[148]

[119] One adult's responsibility towards a child is not affected by the presence of another adult with responsibility towards a child. The requirement to protect a child from accidental, deliberate or careless harm "cannot be rendered meaningless by the changing combinations of persons at a time or place."[149]

[120] Responsibility need not be specifically conferred upon an individual and can arise from the nature of the relationship between adult and child, particularly where those relationships are familial. One relationship referred to by his Honour was that between an adult sibling and their child-age sibling, although the mere existence of such a relationship is not, in itself, determinative.[150]

[121] With these principle in mind, and bearing in mind my findings at paragraph [31] of these Reasons, I make the following observations:

(a) In relation to count 1, the "bedroom incident": The defendant was approximately 27 at the time of the alleged offending. The offending occurred at a property owned by the defendant and FLS at the time. The complainant was around 9 years of age. The defendant's evidence which I accept was that over the years he disciplined the complainant "as an older sibling.[151] He later apologised for his poor way of doing this. This conduct is consistent with the defendant having a relevant familial relationship with the complainant, and reflective of him some "control" of the complainant, and that he had a role in her development and upbringing which falls within the broad definition of 'care' as set out in *R v FAK*. The complainant could

145 *R v FAK* [2016] QCA 306 at [72].
146 Ibid.
147 *R v FAK* [2016] QCA 306 at [73].
148 *R v FAK* [2016] QCA 306 at [74].
149 *R v FAK* [2016] QCA 306 at [73]-[75].
150 *R v FAK* [2016] QCA 306 at [78].
151 T 2-5, ll 20-23.

not recall precisely who was in the house at the time of the alleged offending[152] but even assuming that FLS and or MJK were there, their presence did not abrogate the defendant's responsibility to the complainant and I am satisfied that he would have been one of several adults (along with his mother and wife) who had 'care' of the complainant in the relevant sense.

(b) In relation to count 2, the "shower incident": This incident occurred at the Second Property which the defendant owned and where he resided at the time. The adult-younger sibling relationship described above was still in place at the time of the shower incident: that is, the defendant was still disciplining the complainant. It follows that the defendant had "control" and "supervision" of the complainant whilst she was at this property. The complainant could not recall who was present in the house at the time of the alleged offending,[153] but I accept to the extent that other adults may have been present in the house with care of the complainant, that care was in addition to the responsibility of the defendant. I therefore find that the complainant was under the defendant's care in respect of count 2.

(c) In relation to count 3, the "pool incident": This offence occurred at the Second Property. There were others present at the time. But there is no evidence of who they were. Given the timing of the pool being built in the back yard I have found the complainant was around 14 or 15 at the time. The evidence was that the defendant was still exercising control over and disciplining the complainant around this time. For example, he described pulling the complainant forcefully out of the shower after she had been for a swim. This offence occurred in the defendant's back yard – he was an adult and the complainant was still a child. The relevant familial relationship with the complainant remained as did there being evidence reflective of the defendant exercising some "control" over the complainant. Again, even assuming that FLS and or MJK were watching in the back yard, their presence did not abrogate the defendant's responsibility to the complainant.

[122] It follows that I am satisfied beyond a reasonable doubt that the complainant was under the care of the defendant at the time of each that each of the offences were committed.

Conclusion

[123] I accept that it is essential that each charge and the evidence in relation to that charge be considered separately.

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152 T 1-16, ll 41-42.
153 T 1-18, ll 33-37.

[124] The complainant impressed me as a reliable and credible witness both by her demeanour and quality of her evidence. To that extent I accept the Crown submission that her evidence has the "ring of truth" about it. She was reflective and appeared to make every effort to be as accurate as she could be. Overall, she was a compelling witness.

[125] The Defence submitted that I would have a real doubt concerning the truthfulness and reliability of the complainant's account particularly in respect of count 3 and count 1. And that I would then have regard to her unreliability in relation to these counts when assessing her account in relation to count 2. It was also submitted that the complainant's version in relation to each count is uncorroborated. The Defence relied on a number of matters which were submitted as either contradictory or casting real doubt on the complainant's reliability in this case particularly given the sworn evidence of the defendant denying the offences. But for the reasons discussed above, none of the matters raised by the Defence cast any reasonable doubt on the reliability of the complainant's evidence about what happened in relation to each count and therefore the elements of each of the offences.

[126] In reaching this conclusion I have taken into account the forensic disadvantage the defendant has been subjected to as a result of the long delay between when the events occurred and when the complainant first made a complaint to Police in or around October/November 2017.[154]

[127] The Defence also relied on the recent decision of *Pell v R*,[155] where the High Court conducted an analysis of the improbability of a sufficient opportunity to commit the two offences described by the complainant in that case to have existed. The facts in Pell are distinguishable. The "solid obstacles" that existed in Pell do not exist here. Having considered each charge separately, I am satisfied that the evidence as a whole is capable of excluding a reasonable doubt as to the applicant's guilt.

[128] After critically evaluating all of the evidence carefully, I am in left with no reasonable doubt that the defendant:

(a) inserted his finger or fingers into the complainant's vagina at the First Property on a date unknown between 20 February 1990 and 24 November 1991 [Count 1];

(b) grabbed the complainant on the breast with his hand in the shower at the Second Property on a date between 6 May 1994 and 24 November 1997 [Count 2]; and

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154 In accordance with *Longman v The Queen* (1989) 168 CLR 79; Benchbook 69.1 – 69.2; T 1-14, ll 22-24.

155 [2020] HCA 12 at [46] and [58].

(c) touched the outside of the complainant's vagina with his hand whilst they were in the pool at the Second Property on an unknown date between 6 May 1994[156] and 24 November 1997 [Count 3].

[129] I am also satisfied beyond a reasonable doubt that:

(a) each of the acts identified in Count 1, 2 and 3 above constitute an unlawful indecent dealing by the defendant upon the complainant;

(b) each of the acts were committed by the defendant when the complainant was under his care;

(c) the act in Count 1 was committed when the complainant was under 12; and

(d) each of the acts in Count 2 and 3 were committed when the complainant was under 16.

Verdict

[130] It follows that I find the defendant guilty of counts 1, 2 and 3 on Indictment 341 of 2020.

156 I have been able to narrow the scope of the date range specified by the Crown in the Indictment to 1 November 1996 – 24 November 1997. See paragraph [69] of these Reasons.