

DISTRICT COURT OF QUEENSLAND

CITATION: *R v MJC* [2020] QDC 143

PARTIES: **THE QUEEN**

v

MJC

FILE NO: Ind 780/19

DIVISION: Crime

PROCEEDING: Trial

ORIGINATING COURT: District Court, Beenleigh

DELIVERED ON: 26 June 2020

DELIVERED AT: Beenleigh

HEARING DATES: 15, 16 and 17 June 2020

JUDGE: Chowdhury DCJ

ORDER: **Guilty on count 3 of rape.**

Not Guilty on count 4 of rape.

Not Guilty on the alternative charge on count 4 of attempted rape.

Guilty on count 4 of the alternative charge of indecent treatment of a child under 16, under 12, under care.

Guilty on count 5 of rape.

CATCHWORDS: CRIMINAL LAW – SEXUAL OFFENCES – WHERE DEFENDANT PLEADED NOT GUILTY TO 3 COUNTS OF RAPE – WHETHER CROWN HAS PROVEN THEIR CASE BEYOND REASONABLE DOUBT

COUNSEL: C Birkett for the Crown

T Ryan for the defendant

SOLICITORS: Office of the Director of Public Prosecutions for the Crown

Ide Lawyers for the defendant

Introduction

- [1] The defendant is charged on indictment with two counts of maintaining a sexual relationship with a child, three counts of rape, five counts of indecent treatment of children under 16, under care, six counts of indecent treatment of a child under 16, under 12, under care.¹ The defendant pleaded guilty to counts 1, 2, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16 and 17, and pleaded not guilty to each count of rape, counts 3, 4 and 5.
- [2] Consequently the trial of counts 3, 4 and 5 commenced on 15 June 2020, and concluded on Wednesday 17 June 2020.

Essential background facts

- [3] At the relevant time, the defendant was in a long term *de facto* relationship with the complainant AH's mother, Ms H. According to Ms H, she and the defendant had been in a relationship for "about 11 to 14 years", ending in about February 2018.²
- [4] Ms H had three children, KH, the complainant AH, and AC, who is the biological daughter of the defendant. AH was born on 14 January 2004. She was born before Ms H entered into the relationship with the defendant.
- [5] Ms H recalled that the first home that she, the defendant and the children lived together was at 17 Copernicus Street, Inala. It was a housing commission home, and she thought they lived there for about three or four years.³ Ms H recalled that they then moved to Holland Park, and the complainant went to the Seville Road State School. They then moved to Wellington Point, and the family then moved to an address at Thanbarran Place, Inala. They then moved to Ms H's aunt's house at Kenny Street, Woodridge. She could not remember how long they lived in Kenny Street but thought it was a couple of years.⁴ The last house they moved to was 2 Lynch Street, Woodridge.

¹ Count 15, a charge of attempted indecent treatment of a child under 16, under care, was discontinued by the prosecution at the commencement of the trial.

² R1-21, 138.

³ R1-22, 140.

⁴ R1-24, 130.

- [6] Ms H said that the first school that AH went to was Richlands State School, while they were living in Copernicus Street, Inala. Other than Seville Road Primary School, she could not remember other schools that AH attended.

Particulars

- [7] At the conclusion of the evidence the prosecution was given leave to amend the dates of counts 3, 4 and 5. Count 3 reads as follows:

“That on a date unknown between the 13th day of January 2009 and the 15th day of January 2014 at Woodridge or elsewhere in the State of Queensland, [the defendant] raped [AH].

- [8] Counts 4 and 5 are in the same terms, and read as follows:

“That on a date unknown between the 14th day of January 2011 and the 15th day of January 2014 at Woodridge or elsewhere in the State of Queensland, [the defendant] raped [AH].

- [9] The crown prosecutor in her opening briefly gave particulars of each count. Count 3 related to an incident which AH says is the first time that something happened to her. She was in her bed asleep when the defendant came into her room and put his penis in her vagina. AH recalls that she was about five years old at the time that happened.

- [10] Counts 4 and 5 occur on the same occasion. AH alleges that the defendant told her to go into his room, holding her hand at the time. He told AH to take off her pants and put her on the bed. The defendant put his mouth on her “rude parts”, which AH clarifies to be her vagina, and alleges that the defendant’s mouth went inside her vagina. The defendant then told her to move into different positions and he inserted his penis into her vagina.⁵

Evidence of the complainant

- [11] AH was interviewed by officers of the Logan Child Protection Unit on 9 February 2018. The interview was video recorded. It became Exhibit 1, the Transcript became “MFI A”.

⁵ R1-12, ll 35-45.

[12] AH said that she was at the police station to talk about her stepfather molesting her. In respect of the first time she could remember, she said that she was “really little”, she was in bed and she didn’t know what he was doing. The defendant said “it was ok, because um, he said that um, everyone does it so that, ok.” AH went on to say that she thought it was a “good thing” when she was little, and she let him do it. However when she started to get older, she understood what was happening, so she told him to stop. The defendant said that he would “call his friends, to do it to me. So then I was like ok. So then when I got older he stopped.”

[13] In respect of the first time, AH said that “I was sleeping and then he came in my room. He took my blanket off, but then he was like, sorta like inside me, um, I, I was, what are you doing? And, like, it’s ok, um, it’s not a bad thing. And he was like just go to sleep. And I was like ok.”

[14] The following exchange took place during the interview:

“Q: So, [AH], I think we do know what you mean but we can’t we wanna make sure that we’re not misunderstood and we understand exactly what happened to you. So when you said that he came into your room and took your blanket off and he was inside you.

A: Mmm.

Q: What do you mean he was inside you?

A: Like, I don’t know how to explain it.

Q: What part of his body was inside what part of your body?

A: In the rude parts.

Q: The rude parts.

A: Mmm.

Q: Do you know the proper names for your rude parts?

A: Um, the vagina, penis.

Q: So can you use those proper terms to tell me exactly what, what was happening?

A: Mmm.

Q: Yeah. Can you tell me?

A: Um, he was doing that, and then yeah he done that few times.

Q: So you said he, you, his rude parts.

A: Mmm.

Q: Um, and you said his penis, what was he doing with his penis?

A: Um, put in my vagina.

Q: So, he put it in your - -

A: Mmm.

Q: Yeah.

A: Mmm

Q: Then what happened?

A: And then I just let him do it.

Q: So he put his penis in your vagina. What was he doing when he put his penis in your vagina?

A: He told me to um, go back to sleep, and I was wondering what he was doing. And he said it was the right thing, and I was like ok. And then so I believed him, because um, he was my father. And yes.

Q: Ok. Ah. What, what could you feel [AH]?

A: Pardon?

Q: What could you feel?

A: Like emotions or something?

Q: Yeah.

A: I felt, I didn't, like, feel anything cos he – I didn't feel anything because he said it was the right thing to do, and I didn't know why he was doing it.⁶

Q: Do you remember what house this happened at?

A: Ah, house, um, I don't remember sorry.

Q: Ok. I - , have you, the house you're living in now, did it happen in that house?

A: Pardon?

Q: The house, where you live now?

A: Now? Oh.

Q: Is it the same house?

A: No.

Q: No?

A: Was a different house.

Q: Ok, do you know what suburb that was in?

A: I, cos we moved a lot, so he'd a done it like a few times, but, and we kept moving houses, like, um a unit, we used to live in a unit, he done that there too. And then, um, the time when we lived in Inala, we moved houses. And then, I think it's Rochedale, we moved like [indistinct] houses."

[15] The police officer asked AH whether she remembered that the offending started when she was five. AH said: "*um, well, I don't know, if it was exactly five years old, but like I know I was young.*"

[16] AH was content to call the incident she described as the "first time".

[17] The complainant was asked if she could recall another time. She said the following:

⁶ The recording in Exhibit 1 is clearer as I heard it, than what the transcriber heard. I have relied solely on my hearing and watching of Exhibit 1.

“I was living in another house than that. And um, my brother and sister was, um, what’s it called again? Um sleeping um right next to me, cos we were living in, like another house. So then he told me to um come in his room. And I was like ok. And then he was like, can you take off your pants? And I was like, why? This was like when I was around, I think, eight years old. Like I thought it was like, just still a good thing to do, cos he was telling me that um, that telling lies about how, my mum, my mum, my mum’s father done it to done it to her so it’s a good thing to do to your daughter. And then, and then when I started to um, grow up, like when I was 11, I knew what it was cos we were taking classes about that at school. And then he was paying me money. He was paying me like \$50 to um, like, like, what is it called again? To do it. And I was like no. And then he was, he keeps on like raising the money and I was like no. So then when I was sleeping again he done it. Like without telling me.”

- [18] The police then sought to obtain further details of the next incident. AH said that the next occasion she recalled occurred at a different house, when her brother and sister were sleeping next to her. She recalled that the defendant was holding her hand when he asked her to come with him. She recalled that the defendant told her to take off her pants, and he then put her on the bed. When asked to provide as much detail as she could about what was happening, she said: *“Um, he done the same thing that he done to my old house.”* The complainant was reluctant to say precisely what happened, but after prompting she said: *“So then um, he was putting his mouth on my rude part. And then telling me to, um, turn in these different positions. And I was ok with it.”* After she was told to get into different positions, she said that the defendant *“he was um, putting his um, rude part in my, mine.”*

- [19] The following exchange took place:

“Q: Um, you’re living in a different house. You’re sleeping next to your brother and sister.

A: Yes.

Q: Um, he’s come into your room and told you to go into his room. Um, he’s then held your hand and walked into his bedroom.

A: Mmm.

Q: Um, when you got into his bedroom he asked you to take ah, your pants off. Um, he said that his mother's father did it to her and that it was ok and you thought it was ok.

A: Mmm.

Q: Um, he then put you on the bed and he put his mouth on your rude part.

A: Mmm.

Q: Ah he told you to get into different positions - -

A: Mmm.

Q: And then he put his rude part into your rude part. Ok. And then you went to, back to bed after that. Is that, is that right? Um, I know some of these things are going to be things we asked you before, um, but we just gotta clarify it again. When you, ah, say his rude part, what, what body part, or what are you referring to?

A: His penis.

Q: Penis. When you say your rude part what are you referring to?

A: My, my um ...

Q: Remember you can use whatever words you want. If you want us to look away we can, if you don't want to look at us that's fine.

A: My, my rude parts.

Q: Yep. And what's another name for that?

A: My, my vagina and my bum.

Q: Ok, right. So did he put his penis in your vagina or in your bum?

A: Both.

Q: Both?

A: I, like, I know he told me to put it in different positions but like, I don't know the exact, like exactly what he did.

Q: So, back then like you are eight years old, and you had been with your brother and sister and then you went into his room. I'll take you back just, you said first that he put his mouth on your rude part.

A: Mmm.

Q: What, did he put his mouth on your front bum or your back bum?

A: Pardon?

Q: Did he put his mouth on your vagina or on your bum?

A: Um, vagina.

Q: On your vagina. And what did he do with his mouth in your vagina? What was he doing?

A: He was like licking it.

Q: And whereabouts on your vagina was he licking it?

A: Mmm, I don't know whereabouts. Like, just, like on it.

Q: Just on it.

A: Yeah.

Q: And then when he's told you to get into different position - -

A: Mmm.

Q: Did he continue that? Yeah. And did his behaviour change, did he do anything differently?

A: No.

Q: So when he's been licking on your vagina, and then you've turned in a different position - -

A: Yeah.

Q: Has he done anything different than licking it?

A: Don't think so.

Q: And then you said he put his penis into your vagina.

A: Mmm.

Q: Did you do anything else that night?

A: No.

Q: Ok. When he was licking your vagina, at any time did his licking go inside your vagina? Yeah, tell me about that?

A: It felt like a bit weird.

Q: How did you know that he was licking in your vagina?

A: Cos, oh, I could feel.

Q: I know it's hard for you to describe but what could you feel?

A: I feel like, I don't know what to feel.

Q: It's ok. Ok.

[20] AH later described an incident when she was waiting for the defendant to clean the shower. He told her that she could take a shower, she removed her clothes and got into the shower. He then opened the shower door. She told him not to come any closer. The defendant told her to "come here", or he would tell his friends to "do it to you instead". AH said she was really scared, she said "No" really loud and her sister came in.⁷

[21] AH said that her mother was out working at the time of this incident. AH also told police about another incident when she was in the shower, and she noticed in a towel drawer there was a camera in the top drawer. The defendant came "barging inside", saying that he had forgotten the camera and took the camera; the complainant quickly got dressed. The complainant recalled that that incident occurred sometime in 2017. Again her mother was out at work.

[22] The complainant recalled another occasion when she was asleep, and the defendant came in and she saw a flashlight. She felt his hands near her chest. She was wearing a T-shirt, pants and what she described as a "tight bra". She had blankets on her, and the defendant was trying to move her T-shirt. The complainant then went on to say that the top she was wearing was actually a "crop top" with straps over her shoulders; the defendant was moving the straps and was reaching down toward her breasts. She woke up, and the defendant said he was trying to find the cat, which slept under AH's bed.

[23] The complainant told the police that she'd told the defendant to stop on multiple occasions.

⁷ At this point on the digital recording AH is looking downcast, and sullen.

- [24] The police asked AH if she had told anyone what had happened to her. She said that she had told just one friend, MT, at school near the end of the 2017. MT had told her that she had been raped, so the complainant “felt comfortable” about telling her what the defendant had done to her.
- [25] The pre-recording of AH’s evidence took place on 9 October 2019. In her evidence in chief she said that the incidents she told the police were not the only sexual interactions she had with the defendant. When asked how often the sexual interactions occurred, she said: *“it occurred occasionally but I don’t know if there’s a – how many times he did it.”* She said that the incidents would take place at night, when her mother was at work. When asked to estimate how many times the sexual interactions occurred, she said: *“three to four times a month.”*⁸
- [26] AH said that the sexual incidents occurred, as frequently as three or four times a month, between the ages of five to 10. When she turned 10 years old the incidents became less frequent. When asked what things would happen between her and the defendant, she said: *“like sexual intercourse and how he used his male genitals inside me.”*⁹
- [27] AH confirmed that the incident involving the camera in the bathroom occurred at 2 Lynch Street, Woodridge. She identified a photograph of the bathroom which became Exhibit 4. Other photographs of the bathroom were also tendered which became Exhibits 5, 6 and 7.
- [28] In respect of what was called the “flashlight incident”, AH identified a series of photographs showing the bedroom at the time; those photographs became Exhibits 8, 9 and 10.
- [29] The complainant clarified that during the “flashlight incident” the defendant was “partially” trying to take off her crop top, and he touched her in the area near the top of her breast.¹⁰
- [30] In cross-examination, AH rejected the suggestion that it was more difficult to remember the details of incidents that occurred many years earlier. When asked if it

⁸ Pre-record R1-2, 1 15.

⁹ Pre-record R1-2, 1 35

¹⁰ Pre-record R1-7, 1 5.

was difficult for her to accurately remember how old she was when the first time something allegedly occurred, she said: *“I remember now because, as I was six years old, I moved into my new house. So five years old I remembered that I was in Rochedale, where I got sexually assaulted.”*¹¹

- [31] AH accepted that while she initially said that the first incident occurred when she was five years old, she acknowledged that she told the police that she couldn't recall exactly if she was five, but that it occurred when she was young. She rejected the suggestion that she was aged about nine years old when the first incident occurred. When pressed about the first incident, she accepted that she could remember some parts of it. She accepted the proposition that some parts that occurred on the first occasion stood out clearly and other parts not as clearly.¹²
- [32] In respect of the first incident, she maintained that she was at Rochedale State School at the time. She accepted that she had tried to block out that incident from her mind. She did that because she did not like what had happened. She rejected the suggestion that all the defendant did on that first occasion was to rub his penis between her legs; she maintained that the penis did go inside her vagina.¹³
- [33] In respect of the incident the subject of counts 3 and 4, she maintained that the defendant's tongue was licking both the outside and inside of her vagina. She rejected the suggestion that the defendant's tongue did not go inside her vagina, as she rejected the suggestion that his penis did not go inside her vagina afterwards. She rejected the suggestion that on no occasion did the defendant insert his penis inside her vagina. She also rejected the suggestions that the defendant told her that her mother's father had done it to her, and it was a good thing to do.
- [34] AH admitted in cross-examination that when she was about 10 years old she did a Google search on her cousin's computer, looking up the words “penis” and “vagina”. As a consequence of doing that search she saw pictures of men inserting penises into female vaginas. The search results also contained stories relating to men putting their penises in vaginas.¹⁴ AH agreed that she had discussed the search with her cousin, although that was done on a separate day from the search.

¹¹ Pre-record R1-7, 145.

¹² Pre-record R1-8, 145.

¹³ Pre-record R1-10, 130.

¹⁴ Pre-record R1-11, 145.

- [35] AH rejected the suggestion that the defendant did not grab her hand and tried to pull her closer while she was having a shower in the bathroom. She also rejected the suggestion that the defendant did not threaten her with bringing his friends around to “do it to you”.
- [36] In respect of the camera in the bathroom, she rejected the suggestion that she in fact obtained the camera from the cabinet drawer in the bathroom and showed it to the defendant, with the defendant saying “I know. I put it in there to hide it from your brother”. She accepted that the camera would ordinarily be attached to a computer by cable, but then said that the camera could be connected to a computer by Bluetooth.
- [37] In respect of the conversation with her school friend MT, AH agreed that she only told MT about one occasion involving the defendant. She said that the conversation took place after school. She accepted that before she disclosed what the defendant had been doing to her, MT had confided in her that she had been raped; “*she confessed first, then I confessed second.*”¹⁵ AH agreed that MT asked her some questions of her to “make it easier for you to be able to tell her what happened”. AH conceded that MT asked her if her stepfather had put his penis into her vagina, to which she responded: “*Yes*”. She did not tell MT any other details of anything else that happened.¹⁶

Preliminary complaint evidence

- [38] MT was interviewed by police on 10 March 2018. She recalled that AH told her that she had always hated the defendant, and never felt comfortable around him. She said on one time she asked why, and AH told her that “her dad like molests her, like since she was like a little kid, I think five or something”. MT went on to say that AH told her that she had been afraid to sleep. AH also told her that she had seen “cameras in the bathroom”.
- [39] Upon further questioning, MT said that AH was the first person she told about what happened to her, “*and I think she felt comfortable telling me, like cos she could relate kind of. Cos it was kinda similar story.*” MT told police that she had told AH that one of her brother’s friends had raped her, and AH tried to comfort her.

¹⁵ Pre-record R1-17, l 18.

¹⁶ Pre-record R1-18, l 10.

AH then said that *“the same thing happened to her, or happens to her, with her stepdad.”*

[40] MT told the police the following:

“She just said that at night, oh since she was little, that her dad would like come in and like, molest her. And that. And that’s when I said, does anyone else know? And she said no. She doesn’t wanna tell anyone, and then like, ever since then I been like tryna get her to tell someone. Like to tell her mum or something. Cos she’s always been like really uncomfortable around him and everything. But she thought that it would like affect her family if she told someone.”

MT said that that conversation with AH occurred in July the previous year (in 2017) at school. MT then went on to say there was another conversation with AH after volleyball. AH told her about an incident when she found a camera in the shower. AH told her that the defendant was a “kind of a pervert and he, was perverting on her boobs with a torch, tryna find a cat.” MT told police that she recalled that AH told her that the defendant had actually put his penis inside her, and told her not to tell anyone, and she was too afraid to do anything, so she just let it happen. MT asked her if the defendant actually the penis inside of her, and AH said that he did.

[41] MT told the police that she was present when AH told her mother about the offending. They had been to a MacDonald’s restaurant near Runcorn, and Ms H came to pick them up. In the car AH told her mother that she wanted to tell her something and asked her to pull over. Ms H kept asking AH questions after AH said it was about her Dad. MT told the police:

“...then her Mum asked if he had touched her or anything. And [AH] said yeah. And then her Mum started crying and so was [AH] and then her Mum like, was kept asking her questions ‘cause she drove off to come here, to the police station. And like, she just kept asking her, she said [AH] needs to be specific ‘cause she just kept asking her questions like exactly what happened.”

[42] Ms H gave evidence before me. She said that she also knew the defendant by another surname, Carlile. She said that during the relationship with the defendant she was primarily the one that went to work. Quite often she was out working in the evenings. The defendant would be at home, looking after the children. She said

that after the children had gone to bed, the defendant would often walk around the house checking on everybody. When he did that, he would carry a torch.¹⁷

[43] She recalled an occasion when AH complained about the defendant barging in on her when she was in the shower. AH showed her a camera, and she then confronted the defendant. The defendant said that the camera was there for the mother, and they must have accidentally forgotten that he had put it there.¹⁸

[44] Ms H recalled Friday, 9 February 2018. Around 2.00pm she was telephoned by AH and asked to collect her and MT from a McDonald's restaurant. Ms H noticed that the two girls were quiet, and AH started to cry. She asked MT what was going on, and MT told Ms H about her own incident. Ms H gave the following evidence:

“And then I – and then I asked [AH] what's going on. And then she had told me what had happened. And I ask her if he had hurt her or just hurt her in any way. And she said, ‘No. I'm OK now. I'm OK.’ And then so I took her straight to the police station.”

[45] I asked Ms H if she could recall as best she could the precise words that AH used. She said the following:

“OK. She didn't say much. I just ask her did his penis went inside of her, and she said yes. I go, ‘Did he do anything else?’ And she goes, ‘Yes.’ And I just said, ‘OK. Just’ – because I couldn't sit there and just listen to everything. So I said, ‘Explain everything to the police’.”

[46] Ms H said that she became upset and then took AH to the police station.¹⁹ In cross-examination, Ms H said that when she asked AH if the defendant's penis had gone inside her vagina, AH did not say anything but nodded her head as if to say yes.

[47] Ms H agreed with the suggestion that when AH was five years old she started Grade One at the Richlands East State School. Ms H agreed that at the time she went to the police station on 9 February 2018, she and the defendant and the children were living at 2 Lynch Street, Woodridge. She agreed that her police statement recorded that before that address, she, the defendant and the children lived at 11 Kenny Street, Woodridge for about three or four years. She agreed that before that address, they lived at a house at Tanbarran Place, Inala. Ms H accepted that the family had

¹⁷ R1-25, 144.

¹⁸ R1-26, 115.

¹⁹ R1-27.

lived at other locations around Brisbane, including some emergency housing accommodation on Milton Road. Ms H accepted that when she said they lived at Wellington Point for a period in fact it could have been Capalaba. Ms H rejected the suggestion that there was no conversation with the defendant concerning the finding of a camera in the bathroom.

Police interview with the defendant

[48] On 12 February 2018 at 11.30am, investigating police commenced an interview which was tape recorded in the Beenleigh Watchhouse. It was obvious that the defendant was suffering injuries from a recent assault as a result of the complaint of AH. The defendant had been recently discharged from hospital. The defendant described to police his injuries as a fracture to the leg below the knee, a smaller bone on the inside of a leg had to be in plaster, there were a number of lacerations to his head, a stab wound to his left hip and he had been struck in the back left shoulder blade with a hammer.

[49] The defendant was specifically asked what he could tell police about indecent dealings involving AH. The defendant said:

“Um, oh at, at the time, I was on ice, um that suboxone patches and marijuana and yeah wasn’t sleeping. Um, normally I’d go through the house, check on the kids, you know, windows and everything, and yeah the oldest daughter was laying the bed.”²⁰

With a few exceptions, the transcript was accurate in relation to the sounds and the recording. I have had regard only to the sounds on the recording as the evidence of this interview.

[50] The defendant told police he could recall an incident when AH was lying in bed asleep, and he lifted up a blanket and started pulling her pants down. He noticed she wasn’t wearing underwear beneath her pants. AH started moving around, so he pulled the blanket over herself and left the room. He said he was carrying a torch at that time. He could not say for sure how old AH was at the time of that incident, maybe 10 or 11 years old.

²⁰ Transcript of interview, marked “MFIE”. With a few exceptions, the transcript was accurate in relation to the sounds and the recording. I have had regard only to the sounds on the recording as the evidence of this interview.

- [51] The defendant admitted on another occasion, when AH was either 10 or 11, he checked on AH asleep, lifted the blanket, moved her pants and underpants to one side and “just started touching her private parts”. He said that he had touched her private parts “just on the outside, top”.
- [52] The defendant denied that at any stage he had inserted a finger into AH’s vagina. He said that the “worst thing I did do” was what he called a “dry hump”. He described that he had his penis between her legs when she was still 10 or 11 years old, “dry humped her”. He admitted that his penis was erect, but said that he did not ejaculate on her.
- [53] The defendant was specifically asked if he had ever put his mouth on AH’s vagina. He said he did not recall that. The police officer told the defendant that AH had told police that incident occurred when she was about five years old.²¹ The defendant denied ever touching AH at that young age. He said that the first time he touched AH was when she was around 10 or 11 years old.
- [54] Significantly, the defendant said the following in the interview at the Watchhouse:

“Ah if she said I, put my mouth I probably did, but I woulda been intoxicated with something at the time as well I don’t recall it very well. She wouldn’t lie about it....”

- [55] The police asked the defendant about AH’s recollection of the first incident, when a blanket was taken off her, and the defendant put his penis in her vagina. The defendant denied doing that, saying:

“Never, no. As I said, the dry hump thing, that’s the only time I put it anywhere near her. If she was five years old and I’d done that there woulda been bleeding at least.”

The police clarified with the defendant that when he referred to the “dry hump time” he was referring to his penis being put near her.

- [56] The defendant said that he did not recall ever taking AH into his bedroom at all. He denied ever putting his penis into AH’s vagina. He denied the incident described by AH in the shower, where she alleged that the defendant had grabbed her hand and asked her to come closer.

²¹ The police officer’s memory was faulty on this point. AH in her police interview said that the incident involving the licking of her vagina occurred when she thought she was eight years old.

- [57] The defendant denied ever placing a camera in the shower to watch AH in the bathroom, but he did recall an incident that he thought AH was talking about, that he would put the camera in the drawer where the girls kept their hair ties, as a way of hiding it from his son who kept using it.
- [58] The defendant denied moving her crop top to try and touch her breasts. He did say that there had been occasions when he had been in the children's rooms looking for the cat, and looking under the beds. He said that checking on the children in their rooms was a regular thing that he did.
- [59] The defendant said that during the "dry humping" incident, AH's shorts were still on, and he simply inserted his penis between the skin of her thighs. He could not recall if she was awake, or if she was pretending to be asleep.

Evidence of the arresting officer

- [60] Plain-clothes Senior Constable Cameron Lacey was called to give evidence in the prosecution case. He gave evidence that after he completed interviewing AH, he was made aware by other police officers that the defendant had been assaulted and taken to hospital. He was also made aware during his investigations that the defendant had made a call to the emergency number to hand himself in about molesting a child.²²
- [61] In cross-examination, Plain-clothes Senior Constable Lacey said that he had made enquiries with the Residential Tenancies Authority to determine when AH lived at certain addresses during the relevant period. No records were found. He did not consider contacting the Housing Commission for their records, nor did he attempt to obtain records from the Department of Education to ascertain which school AH attended in 2009.
- [62] In respect of a police search that was done at 2 Lynch Street, Woodridge, a laptop computer and a Logica webcam camera was found. He determined that the camera could not be operated unless it was connected by a cable to a computer. From his observations the camera would not operate by Bluetooth connection.²³

²² R2-5, l 25.

²³ R2-9, l 25.

[63] He confirmed that no evidence of any images of AH were found on the defendant's laptop computer. No medical examination was done of AH. He said that he did liaise with a forensic medical officer, or maybe a paediatrician at Logan Hospital in respect of an examination. However he did not obtain a statement from a paediatrician or other specialist about the utility of a medical examination at the time of AH's complaint to police.

[64] In respect of the interview with the defendant, he could not say why a video was not taken of that interview. He said that there is a facility within the Beenleigh Watchhouse for video-recording of interviews to be done.

Admission

[65] The written admission became Exhibit 14. In brief, the prosecution admitted that AH attended the Richlands East State School during the school years of 2009, 2010 and 2011.

Submissions of counsel

[66] The learned crown prosecutor submitted that on the whole of the evidence, I could be satisfied beyond reasonable doubt that the defendant is guilty of Counts 3, 4 and 5. It was submitted that the defendant's admitted sexual offending of the complainant on other occasions demonstrated an unnatural sexual interest in the complainant. She submitted that the critical issue on Count 3 as to whether it occurred as when the complainant was as young as five years, and if penetration occurred. In respect of Count 4, given that the defendant in his interview acknowledged that he may have licked her vagina on the outside, the critical issue was whether there was some slight or partial penetration of the vulva of the complainant by the defendant's tongue. In respect of Count 5, the critical issue was whether there was actual penetration of the vulva or the vagina by the defendant's penis.

[67] It was submitted that the credibility of the complainant was critical. It was submitted that the complainant was able to give both context and detail. It is to be expected that the complainant would not remember all details, given her age at the time the offending commenced, and the nature of the relationship with the defendant.

- [68] It was submitted that the delay in the complainant telling MT, and then her mother, was explicable as the complainant from a young age had been told that the sexual offending was a “normal thing to occur”. It was submitted that it was only to be expected that the complainant would first confide in her school friend MT.
- [69] It was submitted that the complainant’s evidence was supported by the preliminary complaints she made to MT and her mother.
- [70] It was submitted that the defendant was not fully frank in the police interview. Initially he only admitted one minor incident, and then as the interview progressed he changed his evidence as to other incidents. It was submitted that he did not have a good memory, having been largely affected by drugs throughout the relevant period. It was submitted that he was simply not a reliable historian.
- [71] It was submitted that if I was not satisfied beyond reasonable doubt of all the elements of rape in respect of Counts 3, 4 and 5, I should consider the alternative charge of indecent treatment of a child under 16, under 12 under care, pursuant to s 578 *Criminal Code*.
- [72] Counsel for the defendant submitted that there was no independent evidence to confirm the critical element of penetration on any of Counts 3, 4 and 5. There was no evidence as to where the alleged offence in Count 3 occurred, as no school records had been obtained. AH’s evidence that she was at Rochedale State School was inconsistent with the evidence of her mother.
- [73] It was submitted that the complainant had given so little detail about the circumstances of the commission of the alleged offence in Count 3 that the court would be unable to find the complainant reliable, and therefore could not convict. There is no connection with any other surrounding event which highlighted the complainant’s unreliability.
- [74] Counsel for the defendant submitted that there was an absence of any complaint for eight years, and the complaint to MT took place only after MT had disclosed that she had been raped by someone else.
- [75] In respect of Count 5, the complainant in her police interview was vague about how the alleged offence occurred. She initially said that the defendant had put his penis

in both her vagina and bum, but clearly showed her confusion when she told police “*like, I know he told me to put in different positions but like, I don’t know the exact, like exactly what he did.*” Later, the complainant said that he put his penis into her vagina, but did not do anything else that night.

[76] Consequently, it was submitted that the complainant may have been confused about precisely what the defendant did, and it may well be that what she was describing was what the defendant said he did, namely intercrural sex.

[77] It was submitted that the complainant embellished her evidence on a number of occasions, in particular concerning the camera in the bathroom, giving different explanations in both the police interview and then pre-recorded evidence about the position of the camera.

[78] It was submitted that there were particular problems in the court accepting that penetration occurred. There was no claim by the complainant that she experienced pain at all, nor is there any medical evidence which might support evidence of penetration. Relevantly, it was submitted that the complainant searched online for pictures of men penetrating women’s vaginas with their penis, the inference being that the complainant got the idea of penile penetration from that online search.

[79] It was submitted that the complaint to the mother only came about because the mother was asking questions. It was not a spontaneous disclosure of the offending to the mother, which cast doubt on the reliability and usefulness of the preliminary complaint evidence.

[80] It was ultimately submitted that I should acquit the defendant on Counts 3, 4 and 5.

Elements of the offences

[81] In respect of Counts 3 and 5, s 349 *Criminal Code* relevantly states that a person rapes another person if the person has carnal knowledge with or of the other person without the other person’s consent. Relevantly, s 6 of the Code states that if carnal knowledge is used in defining an offence, the offence so far as regards that element of it is complete on penetration to any extent. Carnal knowledge includes anal intercourse. In R v SAW [2006] QCA 378, the Court of Appeal made it clear that “carnal knowledge” included penetration of the vulva, not just the vagina.

[82] In respect of Count 4, s 349 also states that a person rapes another person if that person penetrates the vulva, vagina or anus of the other person to any extent with a thing or part of the person's body that is not a penis without the person's consent.

[83] The section also clearly states that a child under the age of 12 years is incapable of giving consent.

Fundamental directions

[84] I've directed myself on the following matters:

1. That the accused is presumed to be innocent of the charges, unless and until the prosecution have proved his guilt beyond reasonable doubt.
2. That the onus is at all times upon the prosecution to prove the guilt of the accused.
3. That the standard of proof that the prosecution must meet is proof beyond reasonable doubt.
4. In this case the defendant elected not to give evidence. He was not bound to do so, and he is entitled to insist that the prosecution prove the case against him, if it can. The prosecution bears the burden of proving the guilt of the defendant beyond a reasonable doubt at all times. The decision of the defendant not to give evidence or call evidence does not constitute an admission of guilt by conduct and it may not be used to fill in any gaps of the evidence led by the prosecution.

Specific directions

[85] The evidence of AH and MT consisted of their police interviews, and their evidence in court on an earlier occasion which was pre-recorded. Giving of the evidence in this manner is part of the routine practices of the court, and no adverse inference is to be drawn against the defendant because these routine practices were used. The probative value of the witnesses' evidence is not increased nor decreased because the routine measures were used, and the evidence is not to be given any greater or lesser weight because those routine measures were used.

[86] In this case separate charges were laid against the defendant. I must consider each charge separately, evaluating the evidence relating to that particular charge to

decide whether the prosecution has proved its essential elements beyond reasonable doubt.

[87] In respect of the digital recordings that have been tendered in this case, I have had regard only to the evidence contained on those recordings. The transcripts of the recordings that were marked for identification were placed before me simply as an *aide memoire*.

[88] In respect of each count, I must consider the alternative charges, if established by the evidence, of attempted rape or indecent treatment of a child under 16, under 12, under care to find in s 210(1) of the Code, especially if I'm not satisfied beyond reasonable doubt of the element of penetration on each count. I must, of course, be satisfied beyond reasonable doubt that the prosecution had proved the elements of the alternative charge beyond reasonable doubt.

[89] The prosecution rely on statements made by the defendant in the course of his police interview at the Beenleigh Watch house. As the interview was tape recorded, I am satisfied that the defendant made the statements that were recorded. I have to consider whether the parts that the prosecution rely on has indicating guilt are true and accurate. I also must have regard to the answers given by the defendant which indicate his innocence. It is a matter for me as to what use I make of the defendants statements, and what weight I give them.

[90] In respect of both the complainants and their mother, cross-examination established arguably what are inconsistent statements. If I find that there are significant differences between the prior statement of the witness and the evidence the witness gave in this court, and I found that no acceptable explanation has been provided for the inconsistency, it should cause me to be hesitant about the witness's accuracy, honesty, reliability and credibility generally.

[91] In this case the prosecution led preliminary complaint evidence from MT and Ms H, the mother of the complainant. That evidence may only be used as it relates to the complainant's credibility. Consistency between the account of the complainant and what she told MT and her mother is something I may take into account as possibly enhancing the likelihood that the complainant's evidence is true. I cannot have regard to those things as proof of what actually happened. Likewise, any

inconsistencies between the account of the complainant, and what she told MT and her mother, are matters that may cause me to have doubts about her credibility or reliability. The extent to which they do is a matter for me. The mere existence of inconsistencies does not mean that of necessity I must reject the complainant's evidence as some inconsistency is to be expected, because it is natural enough for people who are asked on a number of different occasions to repeat what happened at an earlier time, to tell a slightly different version each time.

[92] In this case the prosecution also placed before me evidence of other conduct by the defendant which it says is relevant to my consideration of the charges. In particular, there is the evidence of the complainant in both her police interview and pre-recorded evidence of other occasions of sexual activity with the defendant separate from the occasions charged in the indictment; there are also the admissions made by the defendant of other sexual touching of the complainant, including an incident where he "dry humped" the complainant.

[93] I can only use that evidence if I am satisfied of it beyond a reasonable doubt. If I do not accept that evidence then that finding should bear on whether or not I accept the complainant's evidence relating to Counts 3, 4 and 5. If I do accept the other evidence, I can only use it to establish that the defendant had a sexual interest in the complainant. If I am satisfied that the evidence establishes that he did have a sexual interest in the complainant, then that may make it more likely that the defendant committed the offences charged on the indictment. I cannot use it as evidence simply showing that the defendant is a person of bad character, and for that reason he must be guilty of Counts 3, 4 and 5.

[94] In the course of his submissions, Mr Ryan for the defendant submitted that I should give myself a warning consistent with the High Court decision in Longman v The Queen (1989) 168 CLR 79, due to the delay in making a complaint to a responsible adult. Similarly, he submitted that there were a number of unsatisfactory features that I should have regard to, such that I should give myself a warning consistent with the High Court decision of Robinson v The Queen (1999) 197 CLR 162.

[95] The particular features highlighted were:

- Absence of any medical examination of the complainant

- Absence of a prompt complaint at the time the alleged offences occurred
- The young age of the complainant at the time she alleged the rape in Count 3 occurred
- The inability of the complainant to provide any detail of the alleged offences
- There are no records to support the complainant in her evidence where the offences occurred
- The complainant stated that she was at Rochedale State School at the time of Count 3, where her mother said that she went to a completely different school
- The complainant's evidence may have been affected by her searing for and viewing images of men penetrating the vaginas of women
- The complaint to MT only occurred after MT disclosed that she had been raped. Similarly, the complaint to the mother resulted from a series of questions asked by the mother.

[96] I accept that by the delay in making the complaint, the defendant has been denied the chance to assemble, soon after the incidents are alleged to have occurred, evidence as to what he and other potential witnesses were doing when, according to the complainant, the incidents happened. Had the complaint instead been made known to the defendant soon after the alleged events, it would have been possible to explore the pertinent circumstances in detail, and perhaps to gather, and to look to call at a trial, evidence throwing doubt on the complainant's story, opportunities lost by the delay. The fairness of the trial has necessarily impaired by the long delay.

[97] Similarly, the factors highlighted by counsel for the defendant lead me to conclude that it would be dangerous to convict upon the complainant's evidence alone, unless after scrutinizing it with great care, considering the circumstances relevant to its evaluation, I am satisfied beyond reasonable doubt of the complainant's truth and accuracy of the critical elements of each offence.

Consideration

[98] I did not find the defendant's statements in the course of the police interview on 2 February 2018 convincing. Clearly his memory was affected by his admitted use of

the drug “Ice”, suboxone patches and marijuana consumption. Relevantly, he conceded that he “probably did” put his mouth on the complainant’s genitals, adding “I would’ve been intoxicated with something at the time as well I don’t recall it very well. She wouldn’t lie about it so.” Despite that concession, he accused the complainant of lying about the incident in the shower where she said that he had come in, grabbed her hand and asked her to come close. It is difficult to accept that he would have a clear memory in respect of that incident, and not the others. The defendant simply was not impressive as a historian. I do not accept his statements that there was never any penetration, in the light of my findings set out below.

[99] On the other hand, I found the complainant to be a good witness. During the course of the police interview on 9 February 2018 she is clearly apprehensive. She spoke in a natural, unforced manner, and was clearly doing her best to recall events that actually happened. At times the complainant was downcast and slightly tearful, consistent with the unpleasant subject matter she had to detail.

[100] The complainant initially used the expression “rude parts” to describe the defendant’s penis and her vagina. It is common enough for girls and adult women to use the word “vagina” as a general expression for the genitals. It is rare for a child complainant to use precise anatomical terms.

[101] In respect of count 3, she clearly said that the defendant had come into her room, removed her blanket and put his rude parts inside her. When asked what she meant by “inside you”, the complainant said she did not know how to explain it. Later she was asked what the defendant did with his penis, to which she replied “put in my vagina”. Once that happened, she “just let him do it”.

[102] The investigating police attempted to elicit more details, asking the complainant what she could feel. The complainant queried whether that meant emotions, to which the police officer said “yeah”. She then responded that she didn’t feel anything because he said it was the right thing to do. It is unfortunate that the police officers did not specifically ask what she physically felt, and to ask the complainant to describe the penis, whether it was erect, and to precisely ascertain what part of her genitals were penetrated.

- [103] The complainant when asked by the police again if the first incident occurred when she was five years old, she conceded that she wasn't sure if she was exactly five years old, but that it occurred when she was young.
- [104] The complainant in her pre-recorded evidence on 9 October 2019 re-stated that she was five years old when the sexual interactions been. She said that the sexual activity occurred about three or four times a month between when she was five years old to 10 years old, when it became less frequent. In particular she was asked the type of things that would occur, and she responded "like sexual intercourse and how he used his male genitals inside me".²⁴
- [105] Again during her pre-recorded evidence the complainant gave her evidence in a natural, unforced way and in my view, was clearly endeavouring to tell the truth.
- [106] In my view, the delay in making the complaint, together with the lack of medical evidence, does not detract from the prosecution evidence in respect of count 3. The experience of the courts in matters of this kind, together with the photographic and video evidence of child pornography, establish that an adult penis can penetrate to some extent the vulva of a five or six year old child.
- [107] In respect of count 4, the complainant in the police interview said that the defendant was putting his mouth on her rude part. When asked precisely what he did, the complainant said that "he was like licking it", and when asked whereabouts on her vagina he was licking, she said "*I don't know whereabouts. Like, just, like on it.*"
- [108] A little later she said that the licking went inside her vagina, and "it felt like a bit weird". When asked how she knew that he was licking in her vagina, she said "I could feel it". When asked to describe what she could feel, she said "I feel like, I don't know what to feel".
- [109] In cross-examination of the pre-recording, the complainant was adamant that the defendant licked her on the outside of her vagina, and inside. No precise details were sought, but in my view, there is some uncertainty on the part of the complainant, as to precisely where she was licked. While it is possible for an adult tongue to penetrate the vulva of a child, at the end of the day I am not satisfied

²⁴ Pre-record R1-2, l 35.

beyond reasonable doubt that penetration has been proved. I am however, satisfied beyond reasonable doubt that there was licking of her external genitals, and on count 4, the defendant is convicted of the alternative charge of indecent treatment of a child under 16, under 12, under care.

[110] In respect of count 5, there is some confusion initially in the police interview as to where the defendant put his penis. She described her “rude parts” as her “vagina and my bum”. She said initially that the defendant had put his penis in both her vagina and “bum”, adding that “I know he told me to put in different positions but like, I don’t know the exact, like exactly what he did”. Later she clarified that the defendant put his penis into her vagina. In her pre-recorded evidence, the complainant was adamant that the defendant’s penis went inside her vagina following the licking incident.²⁵ I considered whether this occasion was the act of intercrural sex described by the defendant, and that the complainant is mistaken about penetration. On the defendant’s version the complainant was wearing shorts so there was no possibility of penetration. I accept the complainant’s evidence of this occasion.

[111] The complainant’s evidence on counts 3 and 5 is similar to the evidence given by the complainant in R v Holzinger [2016] QCA 160. In that case the Court of Appeal held that there was sufficient evidence before the jury to allow them to be satisfied beyond reasonable doubt that penetration had been effected.

[112] I do not consider that the complainant’s reliability in respect of these two counts is diminished by her searching for images of men penetrating women. My view that is a natural and understandable thing for a complainant to do, to try and understand precisely what happened. Again I do not think the complainant’s credibility, nor reliability, is diminished by the way the complaints were made to MT and the mother. It is understandable that the complainant would not disclose the offending in the light of the defendant’s position over her, and his requests and threats to maintain her silence. It is also perfectly understandable that a complainant would only disclose sexual offending that happened to her when another friend has disclosed the same thing, allowing the complainant to be more comfortable with then disclosing her own experience. It is not surprising that complaints of a sexual

²⁵ Pre-recording R1-11, 18.

nature may need to be elicited from a child who is understandably embarrassed and hesitant by a series of questions from a concerned mother.

[113] As I am required to do by the specific warnings mentioned above, I have scrutinised the evidence of the complainant with great care. In respect both counts 3 and 5, I am satisfied beyond reasonable doubt that there was sufficient penetration of the complainant's vulva to prove the element of carnal knowledge beyond reasonable doubt. As the complainant was under the age of 12 years at the time of those offences, then clearly she was incapable of giving consent. I therefore find the defendant guilty on counts 3 and 5.