

DISTRICT COURT OF QUEENSLAND

CITATION: R v CTD [2022] QDC 22

PARTIES: **R**

v

CTD
(defendant)

FILE NO: 705/21

DIVISION: Crime

PROCEEDING: Trial - Judge alone

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 18 February 2022

DELIVERED AT: Brisbane

HEARING DATES: 8 February 2022; 9 February 2022; 10 February 2022

JUDGE: Loury QC DCJ

ORDER:

- 1. Count 1 – guilty of indecent dealing with a child under 16 under 12.**
- 2. Count 2 – guilty of indecent dealing with a child under 16 under 12.**
- 3. Count 3 – guilty of indecent dealing with a child under 16 under 12.**
- 4. Count 4 – guilty of indecent dealing with a child under 16 under 12.**
- 5. Count 5 – guilty of rape.**
- 6. Count 6 – guilty of indecent dealing with a child under 16 under 12.**
- 7. Count 7 – not guilty.**
- 8. Count 8 – guilty of rape.**

CASES: *Hofer v The Queen* [2021] HCA 36

R v Barlow (1997) 188 CLR 1

R v Markuleski [2001] 52 NSWLR 82

COUNSEL: S Harrison for the Crown
S Lynch for the Defendant

SOLICITORS: Office of the Director of Public Prosecutions for the Crown
Files Stibbe Lawyers for the Defendant

Introduction

- [1] The defendant is charged with eight offences, two counts of rape and six counts of indecent treatment of a child under 16; under 12 who is his lineal descendant. The complainant in each of those counts is his granddaughter. He is her maternal grandfather. The offending is said to have occurred on unknown dates in 2018 for counts 1 and 2; unknown dates in 2019 for counts 4 and 5; on 25 or 26 August 2019 for count 6 and on unknown dates in the first half of 2020 for counts 7 and 8. The defendant entered pleas of not guilty at the commencement of his trial. The trial proceeded pursuant to an order made by his Honour Judge Smith on 31 January 2022 that it proceed by judge sitting without a jury.
- [2] As this is a criminal trial, the defendant is presumed to be innocent. The burden of proving the guilt of the defendant falls on the prosecution. The standard of proof is beyond a reasonable doubt. I must be satisfied that the prosecution has proved beyond reasonable doubt, each of the elements of the offences including the circumstances of aggravation.
- [3] The evidence in the trial comprised the following:
1. evidence from the complainant's mother, Mrs S;
 2. evidence from the complainant's father, Mr S;
 3. evidence of the complainant, admitted pursuant to section 93A of the *Evidence Act 1977*;
 4. evidence of the complainant, pre-recorded pursuant to section 21AK of the *Evidence Act 1977* on 14 September 2021;
 5. evidence from the complainant's brother, O; in the form of a section 93A statement and pre-recorded evidence taken on 14 September 2021;

6. evidence from the complainant's sister, B; in the form of a section 93A statement and pre-recorded evidence taken on 14 September 2021;
7. evidence from the complainant's friend, C; in the form of a section 93A statement and pre-recorded evidence taken on 14 September 2021;
8. evidence from the complainant's aunty, Mrs C given by way of audio-visual link;
9. evidence from the defendant's wife, Mrs CTD;
10. evidence from the defendant.

Particulars of the offences

[4] The particulars of the offences are as follows:

- (a) Count 1 ("First Bedroom Incident") – The defendant rubbed his penis on the complainant's stomach and/or legs, skin on skin;
- (b) Count 2 ("Second Bedroom Incident") – The defendant rubbed his penis on the complainant's vagina, skin on skin;
- (c) Count 3 ("First Pool Incident") – The defendant rubbed his penis on the complainant's vagina, skin on skin;
- (d) Count 4 ("Second Pool Incident") – The defendant rubbed his penis on the complainant's vagina, skin on skin;
- (e) Count 5 ("Second Pool Incident") – The defendant touched inside the complainant's vagina with his hand;
- (f) Count 6 ("Gold Coast Incident") – The defendant rubbed his penis on the complainant's chest and/or stomach and/or legs, skin on skin;
- (g) Count 7 ("Third Pool Incident") – The defendant touched the complainant's vagina with his penis and/or hand, skin on skin;
- (h) Count 8 ("Third Pool Incident") – The defendant touched inside the complainant's vagina with his finger/s.

Summary of complainant's evidence

- [5] The complainant was nine years of age when interviewed by police on 30 July 2020. She said “my poppy would touch my private parts” and “he’d rub his on me”.
- [6] She described the last occasion he touched her being at her cousin’s birthday. Her family, her cousin’s family, the defendant and his wife, and others were staying at a house on the Gold Coast for the event. The evidence of Mrs and Mr S confirmed that this event occurred around 26 August 2019.
- [7] The complainant said that her mother and father left to go to the beach and her “Nanny” left to have a shower. The complainant’s brother and sister were playing a card game. The complainant said that she had entered the defendant and his wife’s bedroom to say good morning. She was talking to them about a painting that was hanging above the bed. When her “Nanny” left the room to have a shower the defendant laid the complainant on his bed and rubbed his “private parts” on her. Later in her interview she was again questioned about this event. She said that when her Nanny left to have a shower the defendant laid her down on the bed and said “finally we get a moment to ourselves”. He removed his pants and rubbed his penis all over her stomach and legs. She said that his penis wasn’t soft, it was “kind of squishy”. She said that she didn’t touch it but that the defendant was “squishing it”. She said that he was holding it and “squishing it”, to move it around. It felt hard on her skin. She went on to say that he moved his bottom half around (a reference to his hips) and that action would move his penis. She described him moving his penis over her nipples. She demonstrated that he would move his penis against her chest (between what would be breasts). She said that she would have been eight years of age and she thought her cousin’s birthday was in 2019. **(Count 6)**.
- [8] The complainant described that the offending first started when she was eight years of age. The evidence of her mother established that she was born on 27 June 2011. She said that the defendant took her to his neighbour’s house where there was a pool with the intention of going for a swim. The complainant said that the defendant took off his togs and she could see his “private parts” (she was able to identify what she meant by this expression as the defendant’s penis). She was swimming around the defendant and he grabbed her legs. She was wearing a bikini and he took her “bottoms” off. While hugging her he rubbed his penis on her

private parts (she was able to identify what she meant by this expression as “vagina”). She said that his “thing” was quite big and he rubbed it all over hers. He said to her “do you like this?”. She nodded her head. She said that she received the bikinis for Christmas in the year 2018. This event occurred “a month or two” after she received the bikinis. **(Count 3).**

[9] The complainant described another occasion in the pool where she was playing a game with the defendant. He took his pants off to his knees; pulled her one-piece togs down so she was “basically naked” and used his hand to touch around her genitalia. She described that he “touch it and like, kind of go inside of it. Like, um, touch all around it”. She further said “there’s kind of like a lip kind of part and that’s protects your, like, my actual area where my pee comes out and then he like kind of opened that up. It kind of would hurt if he went too far. He would like have his hands, like so he’d be touching where the pee comes out.” The complainant said that she tried to move his hand by lifting it up. The defendant said “what are you doing?” to which the complainant replied “I don’t know”.

[10] The complainant clarified that the defendant used his fingers and that he would “kind of” tickle around her private parts as he was holding onto her. **(Counts 7 and 8).**

[11] The complainant described a third occasion in between these two incidents in the pool where she said that she was wearing her bikini; the defendant pulled his own pants down to his knees and rubbed his “private parts” on hers and touched his hand to her “private parts”. She described that he was touching around her “private parts” and then touched inside it, between the “lips”. She said that the defendant rubbed his penis directly on her vagina. He held onto his penis and moved it around. She described him as “directing it on mine”. The complainant said that she was wearing her bikinis and that the defendant took the bottom half off. **(Counts 4 and 5).**

[12] The complainant said, of these incidents in the pool, that the neighbour (who was the owner of the pool) was not present on two of the occasions. On the third occasion she was present although she remained inside the house and did not come out.

- [13] The complainant further described that the defendant would “take off his pants and um, rub his penis on my tummy and legs”. She said that the defendant took off his pants so that he was wearing only a singlet. He took off her shorts. She still had a t-shirt on. He rubbed his penis on her stomach and on her legs down to her knees as he was leaning over her. She was lying down on the bed and the defendant was leaning over her with his hands on the bed. She demonstrated his position using a stuffed toy. She said that he would “kind of wiggle” his penis by moving his hips, again which she demonstrated.
- [14] The complainant said that this incident occurred in the “middle-ish” of the year. She said that her cousins were at her grandparent’s house at the time. Her aunty, mother and grandmother were looking at the garden. Her sister was with them and her brother was playing with a ball outside. She said that she had been reading a book on the couch when the defendant said, “I have to show you something” and took her to his room. She said that this event probably occurred in 2018 when she was seven years of age. **(Count 1)**.
- [15] The complainant described a further occasion at the defendant’s house. She said that her father was not present as he had a work commitment. Her mother, brother and sister were getting changed to go to the beach. The complainant was in the kitchen getting the sunscreen. The defendant pulled her into his bedroom; took down his pants and rubbed his penis on her vagina. He asked her if she wanted to shower with him that night. She said no. She then said that she had to get sunscreen so she could go to the beach and she walked out. She described wearing a pair of skorts which the defendant pulled down, with her underpants. He told her to pull down his pants and underpants which she did. She described seeing his penis. She said “it looked big. It kinda looked like a sausage”. He told her to lay down and he used his penis to rub all around her vagina. He repeated “I like this, you like this too”. **(Count 2)**.
- [16] The complainant said that every time these incidents would happen the defendant would say, “you like this, you like this” and “I like this, I like this.” She also said that the defendant told her not to tell her parents. He said, “this is our little secret”.
- [17] The complainant said that she spoke to her mother about what had occurred sometime near her birthday. Her paternal grandmother who she called “Grammy”

had asked her over for lunch. She told her mother “no” and her mother asked why she did not want to go. The complainant said to police that her “Grandpa” (her paternal grandfather) doesn’t do it to her (a reference to the sexual offending) but they were still her grandparents and she didn’t feel safe. She said she told her mother that she was scared and then said “Poppy’s been doing stuff to me that I don’t find okay. He was putting his hands down my pants and touching my privates and he was rubbing his on me”.

[18] The complainant said that she also told her friend, C. Her account of what she said to C was that she was going to the police station that afternoon. She said that “he was doing stuff that wasn’t appropriate to me and he was using his hands and putting down my pants”.

[19] The defendant’s case as put to the complainant in cross-examination was that nothing of a sexual nature occurred between them. The complainant said to that proposition “that’s not true”.

[20] The complainant agreed that on most occasions she went to the defendant’s house that her parents would be present; her siblings would be present and that on some occasions her aunt and uncle would be present; as were her two cousins. She agreed that the lounge room and kitchen were “pretty close” to each other and that the lounge room was beside the defendant’s bedroom. It was put to the complainant that the only time the bedroom door would be closed would be when the defendant and her grandmother were in the room. The complainant disagreed. When asked when it would be closed, she said, “I guess if they were doing something private, I guess, or if I was in there”. She said that she didn’t know if the door would be closed of a day. When pressed about that she said she could not be 100 percent sure whether the door was ever closed of a day. She agreed that you could see a person walk into the bedroom from the lounge room.

[21] In respect of the bedroom, the complainant agreed that the entrance to the ensuite was close to the bed. She agreed it was about one metre away. She also agreed that if a person was in the ensuite they could hear everything in the bedroom. She said that her “Nanny” was in the toilet when the defendant had his shorts pulled halfway down and when her shorts were pulled halfway down. His naked backside was facing the door.

- [22] The complainant denied telling her teacher, Mr AR, what had happened. The evidence from the complainant's friend, C, was to the effect that the complainant did tell Mr AR what had occurred.
- [23] With respect to the cousin's eighteenth birthday the complainant agreed that there were a lot of people staying at the house. It was a six-bedroom house. The five members of her family stayed at the house; her uncle and aunt and two cousins were staying at the house; and her grandparents (the defendant and his wife) stayed at the house (other evidence established that Mrs C's father and his partner were also staying at the house). The complainant agreed that when the defendant touched her in the bedroom that she didn't shout out "don't". She agreed that she would sit on the defendant's lap.
- [24] As to the incidents in the pool it was put to the complainant and she agreed, there was one occasion where she went to the neighbour's pool alone with the defendant and that her brother arrived around 10 minutes later. She disagreed that every time she went to the pool with the defendant that others came along as well. She agreed that there would be times when the owner of the house (the neighbour), would be inside the house when the defendant touched her. She agreed that if the neighbour was standing in the back living area she could see out into the pool area. She said that the defendant didn't take his togs off all the way but rather halfway. She further said that he pulled her one-piece togs down to her knees and her bikini bottoms down to her knees. She agreed that her siblings would sometimes join her and the defendant in the pool and that all they had to do was walk through the gate and they would be able to see what the defendant was doing to her.
- [25] The complainant agreed that she told her mother about the defendant because she didn't want to go to her paternal grandparent's house. That was effectively the motive suggested to the complainant for her allegations.
- [26] The complainant agreed she told her friend, C about what had occurred. She said that conversation occurred in a classroom.

The evidence of Mrs S

- [27] On 24 June 2020 Mrs S had a conversation with the complainant about her paternal grandparents wanting to take her out for lunch because they couldn't make it on the

day of her birthday. The complainant responded that she wasn't going for a sleepover and said they could come see her after her birthday. She asked if her siblings would be coming and was told "no, they [the paternal grandparents] just want to take you and show you they love you". Mrs S said to the complainant that she needed to give her some context as to why she didn't feel safe or why she didn't want to go. The complainant responded "Poppy has touched me down there."

[28] In cross-examination, Mrs S agreed that her children often went over to Mrs M's house together for a swim. The gate would be left open for the children to follow if any were left behind. She said that there was more than one occasion when the defendant and the complainant went to the pool together, alone. She agreed that her son would usually follow.

[29] She said that there was a boat moored at the neighbour's house (it was on a canal) and the owner of that boat would often check on the boat by entering the residence through the same gate, walking past the pool.

[30] Mrs S agreed that the complainant and defendant had a close relationship.

[31] Mrs S recalled her father having a knee operation prior to the Covid 19 pandemic.

[32] She also agreed that she discussed the complainant's allegations with her between 24 June 2020 and the date she took the complainant to the police which was on 30 July 2020. She gained the impression from what the complainant had told her that the offending only happened on one occasion.

The evidence of Mr S

[33] Mr S gave evidence surrounding the events at the Gold Coast. He said that his family stayed at the house for one night. He and Mrs S got up early to go for a bike ride; to have a swim and to go to a coffee shop. He agreed that when he and his wife returned to the house after breakfast that everyone was packing up to leave.

[34] In cross-examination Mr S said that the defendant's home was a modest one. He didn't recall the bedroom door ever being closed.

The evidence of O, the complainant's brother

[35] O was 11 when interviewed by police. He confirmed that usually, the complainant, himself and the defendant would go swimming at the neighbour's house. He recalled one occasion when the complainant and the defendant went swimming without him however he said that he arrived around 10 minutes later.

[36] In cross-examination O confirmed that he could remember no other occasion where the defendant and the complainant went to the pool alone. He also said there were times that the complainant would sit on the defendant's lap and that the complainant and defendant played a game where they try and tickle each other in the belly button.

The evidence of B, the complainant's sister

[37] It was apparent to me that the section 93A statement of B had been edited. B was 15 years of age at the time of the interview and became particularly distressed during the course of it. Her distress did not seem to be referable to the particular questions that were asked. I infer that her distress arose during that part of the interview which was edited. I draw no inference from the fact that the recording was edited. I have ignored B's distress as it has no bearing on any of her evidence or any issue in the trial.

[38] B said that there were multiple times that the complainant went to the neighbour's pool with the defendant and no-one else. B said that because the complainant was younger than herself, brother and cousins, that she was not able to play the boardgames with them. She said that she was always left out. They (the children) encouraged the complainant to go with the defendant to the pool.

[39] In cross-examination B agreed that the bedroom door in the defendant's house was left open the "majority of the time".

The evidence of C, the complainant's friend

[40] C was 11 years of age when she was interviewed by police on 18 June 2021. She said that the complainant told her that "her grandpa's tried to do some sex with her". She said that she and the complainant were participating in a cross-country race when the complainant told her that she had to go to the police station that day to make a speech about something that happened to her. She said "my grandpa tried to

touch some of my stuff and just please don't tell anyone else.”. A little later in the interview when pressed for more information C said that the complainant also said “my grandpa kind of wanted to have sex with me and touch my stuff”. C also said that the complainant spoke to Mr AR, a teacher about it on the same day.

[41] In cross-examination C confirmed that the complainant told Mr AR first and then told her. She said that the complainant said that she told Mr AR.

[42] The complainant's evidence about this conversation was that it did not occur during the cross-country race but in a classroom and that she did not tell Mr AR.

[43] A formal admission was made that the complainant did not speak to Mr AR about her complaint.

The evidence of Mrs C, the complainant's aunt

[44] Mrs C confirmed that there was a birthday celebration for her son's eighteenth birthday at the Gold Coast. Her family stayed at a house referred to as “Coastal Elegance” from 23 August 2019. The complainant's family also stayed at that house on the night of 25 August 2019. A floorplan of the house was tendered and Mrs C identified in which room everyone slept including the defendant and his wife.

[45] Mrs C said that there were occasions when her family visited the defendant and his wife and the complainant's family would be present. There were two occasions that she recalls where the defendant went swimming at the neighbour's pool alone with the complainant. On one occasion the complainant's mother asked the defendant to take the complainant swimming and on the other occasion there was an open invitation to everyone to go swimming and only the complainant wanted to go.

[46] In cross-examination she said that the complainant often felt left out when the children were playing boardgames and she would become upset. Her mother would make numerous suggestions to console and redirect the complainant so that the older cousins could keep playing their game.

[47] In cross-examination she said that she never saw the defendant and complainant walk into his bedroom together. The defendant's bedroom door was only ever closed if either the defendant or his wife went in to have a sleep.

[48] Mrs C never saw the complainant upset or reluctant to be with the defendant. She did not notice any difference in her behaviour “between leaving and coming back” (I assume this to be a reference to the pool).

[49] Mrs C agreed that on 29 December 2018 the defendant and his wife travelled to Melbourne to stay with Mrs C’s family. They stayed at her home for a couple of weeks.

The evidence of Mrs CTD, the defendant’s wife

[50] Mrs CTD has been married to the defendant for more than 50 years. She confirmed that when the complainant’s family visited that their preference was to go to the beach. Occasionally they would go over to the neighbour’s place to use her pool. She confirmed that she and the defendant had free access to the pool. The neighbour would usually go away for a few months over summer.

[51] Mrs CTD said that she could not remember the defendant and complainant going to the neighbour’s pool by themselves. Her memory was that the defendant and children, particularly the complainant and her brother, would go to the pool together.

[52] In cross-examination Mr CTD confirmed that one window in her and the defendant’s bedroom opened onto the patio at the back of the house. She said that a person at the back of the house could see into the bedroom through that window. The blinds were only ever pulled down at night. The second window in the bedroom also leads to the backyard. She said that there was an ensuite to the bedroom in which there was a shower, toilet and handbasin.

[53] The neighbour’s house was on the same side of the street and there were four houses between her house and the neighbour’s. They had a code to get into the gate which would be left open whilst they were there.

[54] Mrs CTD confirmed that her husband did not shave his pubic area and did not wear underwear under his sleeping attire. Mrs CTD purchased some togs for the complainant in November 2018 which were a Christmas present. She said that in the year 2018 the extended family celebrated Christmas at her home on Christmas Day. On 29 December 2018 she and the defendant flew to Victoria to stay with their

son's family. They did not return to Queensland until 20 January 2019. School resumed on 22 January 2019.

[55] Mrs CTD said that the defendant had an operation on one of his knees on 19 June 2019. He had an operation on the second knee in October 2020. She said that after each operation the defendant took some time to recover. Prior to the first operation she said that both his knees were "pretty crook" and that he couldn't walk very far.

[56] Mrs CTD confirmed that the bedroom door would not be closed during the day.

The defendant's evidence

[57] The defendant denied any sexual interactions with the complainant and denied having any sexual interest in her.

[58] The defendant confirmed that the windows to the bedroom could be accessed from the backyard.

[59] He said that the gate at the neighbour's house would always be left open so that when the family came over and one of them wanted to go home they could get out of the gate. He said that there was a pontoon at the back of the neighbour's house where a boat was moored. The boat was owned by another person who also had access to the gate, in order to get to the boat. The boatowner would have to walk by the pool in order to get to the boat.

[60] The defendant said that his pyjama pants were boxer shorts under which he wore no underwear. He denied ever shaving his pubic hair. In respect of his knees the defendant said that walking was a problem for him and that the neighbour had to get someone else to mow her lawn as he was not able to do so. The defendant said that after the operation he would go to the neighbour's house every day to do exercises in the pool.

[61] In cross-examination the defendant agreed that he took the complainant swimming alone at the neighbour's house "a couple of times". He said one time was when the complainant's mother asked him to take her because she was in a bad mood. There was another time when the complainant's brother joined him and the complainant in the pool around 10 minutes later. He would not accept that there were any other

occasions when he went to the pool alone with the complainant. He said that when he did his exercises in the pool (after his surgery) the complainant would hug him at the side of the pool. Shortly after that evidence when the prosecutor was attempting to put the defendant's description of where she hugged him on the record he said "well, she did not hug." He said that she would wrap her arm around his neck because she could not touch the bottom. He refused to accept that was hugging but rather that she was just hanging on.

[62] He said that the patio outside the bedroom window was closed in with mesh.

[63] The defendant was categorical that he and his wife never closed the bedroom door. If the family were visiting and the "kids were there" he and his wife would go to bed earlier and close the door but as soon as they family went to bed the door would be opened. He denied that if he slept during the day that the bedroom door would be shut.

[64] In relation to the birthday event on the Gold Coast the defendant said that the complainant came into the bedroom to say hello to himself and his wife. His wife said she would go and have a shower. When his wife left the room, he said to the complainant "it's time you got up and I want to make a cup of tea and start on the breakfast". They then both walked out of the bedroom. He said that it wouldn't have been two minutes that he was alone with the complainant. He denied that the door was shut and said that those in the kitchen would have been able to see into the room.

[65] The defendant again denied that the door to his bedroom at his home was ever shut. He said that it "is never closed". Even when visitors were staying, he said that the bedroom door was never shut.

Considerations – general

[66] The issue in the trial with respect to each of the offences is whether I am or can be satisfied beyond reasonable doubt of the essential features of the complainant's evidence. That requires me to assess her credibility and the reliability of her evidence. Her evidence (as with all children in this trial) was given by way of section 93A statement and pre-recorded evidence pursuant to section 21AK of the *Evidence Act 1977*. For each of those witnesses their evidence was given by audio-

visual link from a remote room when the witness, with the presence of a support person. The witness could not see the defendant. I direct myself, pursuant to section 21AW(2) of the *Evidence Act 1977* that these measures used are the routine practices of the court for taking the evidence of children. I draw no inference as to the defendant's guilt from these measures; the probative value of the evidence is not increased or decreased because of these measures and I give the evidence no greater or lesser weight because of these measures.

[67] As the defendant gave evidence in his defence, I acknowledge that he has not assumed the responsibility of proving anything. I caution myself against making a choice between his evidence and that, in particular, of the complainant. The prosecution, in carrying the burden of proof must persuade me that the complainant's evidence is true and accurate beyond a reasonable doubt, despite the defendant's sworn testimony.

[68] Whilst a motive was suggested as to why the complainant might have made the allegations up, I bear in mind that it is nonetheless for the prosecution to satisfy me that the complainant is telling the truth and not for the defendant to establish why she might be lying. I do not consider that it is at all likely that the complainant would have concocted these allegations in order to avoid visiting her paternal grandparents. It is not her paternal grandfather against whom she made the allegations but rather her maternal grandfather. Despite my rejecting that suggested motive to lie, I must not jump to a conclusion that the complainant is telling the truth. Rather, after a consideration of the evidence that I do accept, I must be satisfied beyond reasonable doubt of the essential features of her evidence, if I am to be satisfied of the guilt of the defendant on any of the offences.

[69] In considering the complainant's evidence I have considered each charge separately, evaluating the evidence relating to that particular charge in deciding whether I am satisfied beyond reasonable doubt that the prosecution has proved its essential elements. I am also cognisant of the fact that my general assessment of the complainant as a witness is relevant to each of the charges. If I have a doubt about one or more aspects of her evidence whether by reference to her demeanour or for

some other reason, I must take that into account in assessing the truthfulness and reliability of her evidence generally.¹

Consideration – complainant’s evidence

[70] The strong impression that the complainant left on me was that she was a young child giving an honest account of a lived experience. She was nine years of age when interviewed by police. She impressed me as an intelligent, young girl who was quite articulate for her age. There were features to her account which were very compelling because they involved unique, childlike descriptions of adult concepts. In particular I refer to these descriptors:

“his thing was quite big”

“he’d rub his thing on mine whilst hugging me” (in the pool)

The defendant’s comment “do you like this?” in reference to rubbing his penis against her genitalia in the pool.

The complainant’s description that the defendant “kind of opened up” the “lip kind of part that protects your, like, um, my actual area where my pee comes out”.

The complainant’s statement “it kind of would hurt if he went too far. Um, he, he would like, have his hands, like so, he’d be touching where the pee comes out.”

“He’d rub it directly on my vagina, um, and, well, he holds onto his penis, ‘cause it moves around.”

“..he was like, directing it on mine. Like, he was making sure that it was on mine.”

“So, he was kind of, um, using his penis, well, sausage penis to rub all around mine and on mine.”

¹ *R v Markuleski* [2001] 52 NSWLR 82.

“And, and it, it didn’t feel comfortable. Like, his penis isn’t soft. His penis is kind of squishy, but like, that’s only if you touched it, but I didn’t touch it. Like, he was squishing it. Um, it was kind of hard. Um, yeah”

“...he was acting like it was squishy, because he was like holding it and squishing it, and then, like, like, to move it around, he was holding onto it. And it kind of looked like he was squishing it. And then it, on my skin, it felt hard”.

“he did it a bit around my chest...over my nipples...And, um, in the middle” demonstrating an action of rubbing his penis between what will become, her breasts.

[71] The complainant’s descriptions and demonstrations of where the defendant touched her, how he touched her and his comments to her all left me with the strong impression that she was giving an honest account of lived experiences. The complainant’s account was internally consistent and consistent with the evidence she gave in court on 14 September 2021 when she was 10 years of age in respect of the essential features of it. I considered her evidence in court to be thoughtful. She was expressive and again impressed me as an honest witness.

[72] The defendant’s counsel points to a number of features of her evidence to argue that she was either not credible or that her evidence is unreliable. In particular, he argues that there were on many occasions, a large number of people nearby so that if these events occurred it might be expected that someone would have seen at least something they considered suspicious. With respect to count 6 there were a large number of people staying in the house; the complainant did not say that the door to the bedroom was closed and Mrs CTD was in the shower across the hallway, a very short distance from the bedroom. The complainant’s evidence however included that her parents were at the beach; her siblings were playing cards; her aunty had also gone to the beach and her cousins were still asleep. Whilst the complainant’s evidence did leave open the possibility that there were others in the house, including her uncle and her aunt’s parents; that does not give rise, in my view, to a concern that the offence could not have occurred as she described without someone either seeing something or becoming suspicious. Whilst I accept there was a significant risk of discovery, that the defendant acted in disregard of that risk is not a feature

that is unusual in these sorts of offences committed against children and does not lead me to conclude that the complainant's account is not honest or reliable.

[73] With respect to count 3, the defendant's counsel argued that the bikini that the complainant was wearing was given to her on Christmas Day 2018 by virtue of the evidence of Mrs CDT. There was a Christmas celebration with the complainant's family on Christmas Day with the defendant and his wife travelling to Victoria on 29 December 2018. They were away until school returned. That still allows for the offending to have occurred in the period between the complainant receiving the bikini and the defendant leaving for Victoria. In any event the complainant described this event occurring "probably a month or two" after she received the bikini. There is nothing inherently unlikely in the complainant's evidence. The evidence of Mrs CDT does not preclude the offending having occurred.

[74] Again, the defendant's counsel points to the brazenness of the offending given the risk of discovery. The gate to the house was left open; the boat-owner could attend his boat at any time; other members of the family might arrive to go swimming. That there was a risk of discovery does not, as indicated, make it so unlikely that the offending could have occurred without someone seeing something, as to warrant a finding that the complainant's evidence is either not truthful or not reliable.

[75] The defendant's counsel also argues that the complainant's description of crossing the road to get to the neighbours house is incorrect. The houses were on the same side of the road according to the evidence of Mrs CTM. There was no evidence led as to the shape of the road or whether it was a cul-de-sac. There were no photographs admitted depicting the houses or the street. This discrepancy, if it even is one, does not cause me any concern.

[76] A further argument made was that there is an inconsistency in the complainant's evidence in that she initially described the defendant being naked and later that he pulled his pants down only halfway. I do not consider this inconsistency to be of great moment. It does not undermine the credibility of her evidence.

[77] The complainant described the defendant as having a bad knee at the time of this offending and so he was "always next to the side" of the pool. The evidence established the defendant's first knee operation was in mid-2019. The

complainant's evidence is not inconsistent with the timing of that operation. The defendant himself indicated he had bad knees; thus why he required surgery. His bad knees prevented him from walking distances and mowing the neighbour's lawn but there is no suggestion that his bad knee/s prevented his having offended in the way described.

[78] With respect to counts 7 and 8 the defendant's counsel argues that the complainant agreed, although she was not sure, that her togs were cross-back thus creating some complexity in getting the togs back on if they were partially removed as she describes. Again, I do not consider that even if the togs were cross-back that this means that commission of the offence is implausible. There was no evidence that the complainant required assistance in getting her togs on. There was also no evidence as to how tight the togs were on her body. I do not consider that the nature of the togs, even if they were cross-back, means that the offence being committed in the way she described is not plausible.

[79] The defendant's counsel also argued that the description given by the complainant of counts 7 and 8 involves only one act and not two separate and distinct acts as particularised. Upon hearing the evidence, I did not gain the impression that the complainant was speaking of two separate acts. She described what occurred this way "he went, um, would like touch it and like, kind of go inside of it. Like, um touch all around it". The prosecutor argues that by some later questions the complainant was making clear that there was a second distinct action. She was asked:

Q: "And, this might sound a little bit funny, but when you say hands, we've go, this is a full hand. Do you know what part of his hand?"

A: Ah, his fingers.

Q: Okay. Okay. You said as well that he would touch around it".

A: Yeah

Q: Yep. Tell me –

A: Well, he'd –

Q: About that.

A: Kind of like, tickle around it.

[80] In *R v Barlow*² it was said:

“Section 2 of the Code makes it clear that “offence” is used in the Code to denote the element of conduct (an act or omission) which, if accompanied by the prescribed circumstances, or if causing a prescribed result or if engaged in with a prescribed state of mind, renders a person engaging in the conduct liable to punishment.”

[81] The act here is the touching of the genitalia. If that act is accompanied by the prescribed circumstance that penetration of the labia major occurs, that act renders the person engaging in it liable to punishment for the offence of rape. If that act of touching the genitalia does not involve penetration of the labia majora, it would nonetheless be accompanied by the prescribed circumstance that it was indecent therefore rendering the person engaging in that conduct liable to punishment for the offence of indecent dealing.

[82] The questioning of the complainant by the police officers does not make clear whether they are asking about one act of touching the genitalia or two acts of touching the genitalia. A consideration of the complainant’s evidence in context, in my view establishes that there was a singular act of touching of her genitalia including “around it” and “where the pee comes out”.

[83] Irrespective of my findings as to the complainant’s credibility and reliability, I would find the defendant not guilty of count 7 on the basis that it is duplicitous with count 8.

[84] Counsel for the defendant also argues that the complainant’s description of the offences occurring in the pool are implausible because the complainant describes that she was facing down and that they were facing each other. In context, the complainant was saying that she was playing a game where she would try to swim away from the defendant and he would pull her back towards him by the leg. That is when she was face down. It was during that game, that the defendant eventually removed his pants and the complainant’s bikini bottoms. She said that he was hugging her as he rubbed his penis on her vagina. She said that initially she had her

² (1997) 188 CLR 1, 7 (Brennan CJ, Dawson and Toohey JJ).

back to him, but he turned her around so that she was facing him. That is consistent with her description that this event started as a game in which the defendant was pulling her towards him by the leg. Consistently with that description when she was questioned about the similar event which occurred in her togs, she confirmed that she was initially face down in the water when playing the game and then facing the defendant when he touched her. I do not consider that her description of these events is implausible.

[85] Again, the complainant describes that the neighbour was present inside the house during one of these events in the pool. That does not cause me to doubt the reliability or credibility of her evidence. That the defendant offended against her in circumstances where there was a risk of discovery is not so an unusual feature to this kind of offending, that it would create any doubt in my mind. Consistently across all of the offending, the complainant has described a variety of different circumstances where there was always a risk of discovery suggesting in my view, a brazenness on the part of the defendant.

[86] With respect to count 1 the argument was made that all the cousins, the complainant's aunt and others were outside the bedroom. The defendant's counsel pointed to the windows to the bedroom making detection a very high risk. However, the complainant's description of where others were was her aunty, mother, sister and grandmother were looking at the garden and her brother was playing with a ball outside the house. There was no evidence as to which part of the yard that the complainant's family were in. The windows to the bedroom opened to the back yard. It is entirely possible that the complainant's family were looking at the garden in the front yard. This is not something that was explored in the section 93A interview or cross-examination of the complainant. In any event, from the complainant's description, the other members of her family were all focused on something else. Their attention was not on what was happening in the bedroom and nor would I expect it to be so focused. In respect of this count, without being asked, the complainant demonstrated in her police interview, using a stuffed toy, how the defendant was leaning over her and how he was "wiggling" his hips in order to move his penis. Her demonstration gave the impression that this was a lived experience. The fact that there were members of her family in the yard (whether that

be the back yard or the front yard) does not give rise to any concern in me that the offence could not have occurred without someone being aware of it.

[87] Whilst the complainant described her grandmother as being in the ensuite during one of the incidents in the bedroom, that doesn't preclude the incident occurring as described. If her grandmother was in the shower she is unlikely to hear what was occurring, particularly if the door to the ensuite was closed. She certainly couldn't see what was occurring if the door was closed.

[88] The defendant's counsel further argues that the complainant described the defendant as having a shaved pubic area when his wife (and himself) both gave evidence that he had never shaved his pubic area. I do not consider that the complainant was necessarily saying that the defendant had a shaved pubic area. She was asked if there was anything special about the defendant's penis. She replied "no" and said "I'm glad it didn't have hair on it". She was asked the following questions:

Q: Tell me about it having no hair.

A: So, some boys have hair, um like, in their, around, like, on their, only, like, only a little bit around, like, on their part where the pee comes out

Q: Mmhmm

A: He's only ever had one.

Q: One hair?

A: Yep

[89] The officers interviewing the complainant did not clarify what she meant by these statements. It seems to me that she was having trouble explaining what she meant. The reference to "where the pee comes out" does not tend to indicate that she is speaking about the pubic area. The immediately following questions and answers I do not understand. The complainant certainly did not use the word "shaved" in her descriptions of the defendant's penis. In the absence of some clarification either by police or in cross-examination I cannot understand what she is attempting to explain but I do not consider that she is attempting to describe a shaved pubic area. I have given careful thought to this evidence. Ultimately, I have come to the view that as

her evidence is unclear, I do not consider that this discrepancy (if that's what it is) undermines her credibility or the reliability of her evidence generally.

[90] With respect to the bedroom door the defendant's counsel argues that if it was open there was a significant risk of discovery and if it was closed that would have raised suspicions with other members of the family. If the door was open there was only a significant risk of discovery if there was somebody nearby the bedroom, perhaps in the lounge. The complainant's evidence was that on one occasion the others present were outside looking at the garden. On the second occasion her family were getting ready to go to the beach. It seems unlikely that getting ready to go to the beach would be occurring in the lounge. That the defendant engaged in conduct which involved a significant risk of discovery does not, in my view, undermine the complainant's credibility or reliability. With respect to the door being closed, the overall flavour of the evidence was that the complainant and defendant enjoyed a close relationship. What others noticed was the ordinary activities one would expect to see of a grandfather playing with his young granddaughter. Indeed, the entire extended family enjoyed a close and loving relationship. I would not expect that any of them, in those circumstances, would be looking out for suspicious activity. Even being in the bedroom with her grandfather with the door closed is not the sort of activity, in my view, likely to arouse the suspicions of a trusting and loving family.

[91] As indicated, the second bedroom incident occurred when the complainant said that her family were getting ready to go to the beach. That would have least involved getting changed into appropriate swimwear and gathering up towels and whatever items were necessary for a trip to the beach. That everyone was engaged in "getting ready" for the beach explains why no-one noticed anything untoward occurring. Again, whilst there was a risk of discovery I do not consider that risk makes it unlikely for the defendant to have engaged in this sort of conduct.

[92] The defendant's counsel also argued that the defendant had bad knees and that walking created difficulty for him. It is not argued that the defendant could not have offended in the way described, but rather given the risk of discovery, covering up what he was doing would have been difficult with bad knees. He would have to dress the complainant and dress himself hurriedly which may well have been

difficult for him. I do not consider that the defendant would have been faced with such difficulties in avoiding discovery as to make it unlikely that the offending occurred. There was no evidence that he had difficulties getting dressed. The complainant was old enough to pull her pants or her togs/bikinis up herself. The defendant only had to pull his pants up. There is nothing in the complainant's description of the offences which would cast doubt on the ability of the defendant, even with bad knees, to have committed the offences.

[93] The defendant's counsel also argues that there are inconsistencies in the preliminary complaint evidence and a delay in the complainant being taken to police.

[94] As to the evidence of the complainant's friend, C, she remembered the conversation happening during the cross-country and said that the complainant had told the teacher, Mr AR. An admission was made that Mr AR was not told anything about the complaint by the complainant. The complainant herself denied having told Mr AR about her complaint.

[95] The conversation the complainant had with her friend occurred on the very day that the complainant was interviewed by police and described the conversation. Her account of the conversation to police was proximate to it in fact occurring. The complainant's evidence that she did not tell Mr AR is supported by the admission made. C was not interviewed until more than 11 months later. It may well be that C believes that the complainant told Mr AR but is mistaken in that regard. These inconsistencies in the evidence are, in any event, of a minor nature and explained by the passing of time. I do not consider that they undermine the force of C's evidence which serves to buttress the credit of the complainant. The nature of the disclosures by the complainant to C, that her grandfather wanted to touch her "stuff" and have sex with her are consistent in a general sense with the nature of her allegations. I consider that the evidence of C buttresses the credit of the complainant.

[96] The complainant's complaint to her mother is also consistent with her allegations and also serves to buttress her credit. Whilst there was a delay in the complainant's mother taking the complainant to the police, she explained that delay in her evidence. She said that she understood from what the complainant had said that there was only one occasion where the defendant had touched her. Her immediate reaction was to support the complainant. She didn't want to put the complainant or

her family through the process. She said it took her some time to reach the decision to go to the police. Given the closeness of this extended family, I found this explanation for the delay in going to the police, an understandable one.

- [97] The complainant's mother accepted that she spoke to the complainant about her allegations prior to going to the police. It was suggested that the complainant's mother told the complainant about something that had happened to her when she was a teenager. The complainant's mother seemed to accept that she did tell her daughter although was unclear as to when that was. The complainant, however, was not questioned about her conversations with her mother. That the complainant's mother spoke to complainant about such matters does not create any concerns in my mind that the complainant's evidence has been corrupted. The complainant's mother was clearly distressed by the allegations. She said that her immediate reaction was to support the complainant. That she might have discussed what had occurred to herself is not surprising in the context of supporting her daughter.

Consideration – defendant's evidence

- [98] I did not find the defendant's evidence convincing. It was inconsistent internally and it seemed that the defendant was trying to distance himself from any suggestion that the complainant hugged him in the pool despite having used that term himself initially. The prosecutor argues that the defendant's account evolved over time. In particular, she points to what was put to a number of witnesses, that the only time the complainant was alone with the defendant at the pool was in the 10-minute period before her brother arrived on a single occasion. The prosecutor argues that the defendant's case changed after hearing the evidence of the complainant's aunt. He gave evidence almost identical to that of Mrs C. The defendant was not cross-examined on this point. He was not given the opportunity to respond to the suggestion that his evidence was evolving or recently invented in that regard.
- [99] There are a number of possible explanations as to why what was put to the witnesses varied as to the evidence of the defendant. A plausible explanation is that, upon hearing the evidence of Mrs C, that jogged the defendant's memory as to an occasion where he was asked by the complainant's mother to take the complainant

swimming. Such an event is hardly of great moment. In the recent decision of *Hofer v The Queen*³ Kiefel CJ, Keane and Gleeson JJ said:

“Where there remains a number of possible explanations as to why a matter was not put to a witness, there is no proper basis for a line of questioning directed to impugning the credit of an accused. Except in the clearest of cases, where there are clear indications of recent invention, an accused person should not be subjected to this kind of questioning. The potential for prejudice to an accused is obvious.”

[100] So too the making of an argument that the defendant’s evidence was evolving or recently invented (and in circumstances where he has not had an opportunity to respond to such a suggestion) is unfair. The attack upon his credit on this basis is not warranted. I ignore this argument.

[101] The defendant’s categorical evidence that the bedroom door was never closed does not, to my mind, seem likely. The closing of a bedroom door, for whatever the reason is such an inconsequential event, that I do not accept that the defendant could have remembered with such firmness that the bedroom door was never closed. Further, his evidence was inconsistent with Mrs C who said that the bedroom door was closed if the defendant or his wife went into the bedroom to have a sleep. It was inconsistent with his own evidence that the door would be closed if he went to bed before other family members and then opened when they went to bed.

[102] I did not, as indicated, find the defendant’s evidence convincing. It was not credible and reliable and does not leave me in a state of doubt as to what the true position is. Accordingly I have put it to one side. I have, however, cautioned myself against jumping to an automatic conclusion of guilt.

Verdicts

[103] After having carefully considered the complainant’s evidence and the discrepancies in it and the defendant’s counsel’s arguments as to the weaknesses in her evidence, I am nonetheless satisfied beyond reasonable doubt that the events as she has described occurred.

³ [2021] HCA 36.

[104] I am therefore satisfied beyond reasonable doubt of the elements of each of the offences in counts 1, 2, 3, 4 and 6. I am satisfied that the complainant has described penetration of her labia majora, so I am satisfied of the elements of counts 5 and 8. As referred to above I do not consider that the complainant's description of count 7 is a separate act to that which gives rise to count 8. Accordingly I find the defendant not guilty of count 7. My verdict on count 7 is not based on any concerns as to the credibility or reliability of the complainant's evidence. I have set out my reasons for that finding in paragraphs [78] – [83].

[105] With respect to the offences in counts 1, 2, 3, 4 and 6 a circumstance of aggravation that the complainant was to the knowledge of the defendant his lineal descendant has been charged.

[106] The evidence led does not prove this circumstance of aggravation to the standard of beyond a reasonable doubt. The complainant's mother was not asked if the complainant was her biological child. The defendant's wife was not asked if the complainant's mother was the biological child of the defendant. Whilst no cross-examination was directed to this point, no admission was made that the complainant was the defendant's biological granddaughter. No birth certificate was tendered. The defendant was not asked in cross-examination if he was aware that the complainant was his biological granddaughter. Whilst it is probably true that the complainant is his lineal descendent the evidence led does not establish beyond reasonable doubt that the complainant was the defendant's lineal descendant or that he knew that to be the case.

[107] My verdicts are:

Count 1 – guilty of indecent dealing with a child under 16 under 12.

Count 2 – guilty of indecent dealing with a child under 16 under 12.

Count 3 – guilty of indecent dealing with a child under 16 under 12.

Count 4 – guilty of indecent dealing with a child under 16 under 12.

Count 5 – guilty of rape.

Count 6 – guilty of indecent dealing with a child under 16 under 12.

Count 7 – not guilty.

Count 8 – guilty of rape.