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PERSON WAS OR IS ATTENDING.**

**IN THE YOUTH COURT
AT WELLINGTON**

**CRI 2016-235-000025
[2017] NZYC 66**

THE QUEEN
Prosecutor

v

[M H]
Young Person

Hearing	24 -26 January 2017
Appearances:	Ms Light for the Crown Mr Elliott for the Young Person
Judgment:	2 February 2017

RESERVED JUDGMENT OF JUDGE I G MILL

INDEX

The Charges	Para 1 - 4
Timing and Place	Para 5 - 10
The Law	Para 11 - 30
The Defence	Para 31 - 34
My Assessment of [LS] and [CW] as they gave Evidence	Para 35 - 54
Evidence of [NY]	Para 55 - 68
Addressing Defence Criticisms of the Evidence	Para 69 - 100
Propensity	Para 101 - 109
[MH's] Statement	Para 110
My Assessment of the Evidence on each Charge and My Findings	Para 111 - 127
Result	

The Charges

[1] [MH] has been tried on 13 charges of alleged sexual offending against his [sibling] ([LS]) and her [relative] ([CW]).

[2] During the course of the trial I discharged [MH] under the provisions of s 147 of the Criminal Procedure Act in relation to charge 9 in the charge list alleging sexual violation by unlawful sexual connection between [MH's] mouth and [LS's] genitalia. On this charge there was little evidence and I was satisfied there was no case to answer.

[3] The remaining charges in relation to [LS] are:

- (i) Sexual violation by unlawful sexual connection on or about [date deleted] by introduction of his penis into her anus (charge 1).
- (ii) Indecent act on a child under 12 years on [date deleted] by rubbing his penis on her buttocks (charge 2).
- (iii) Sexual violation by unlawful sexual connection by the introduction of his fingers into her genitalia (charge 3)
- (iv) Attempted sexual violation by attempting to put his penis into her mouth (charge 4).
- (v) A further charge of attempted sexual violation by him attempting to put his penis into her mouth (charge 5).
- (vi) A further but representative charge of attempted sexual violation by him attempting to put his penis into her mouth (charge 6).
- (vii) Sexual violation by unlawful sexual connection by the introduction of his fingers into her genitalia (a representative charge - charge 7).
- (viii) Sexual violation by unlawful sexual connection occasioned by the introduction of his fingers into her genitalia (charge 8).

- (ix) Indecent act on a child under 12 years by rubbing her genitalia (a representative count – charge 13).

[4] In respect of [CW] the charges were:

- (i) An indecent act on a child under the age of 12 by rubbing her stomach area (charge 10).
- (ii) An indecent act on a child under 12 by rubbing her legs and upper thigh area when [CW] was in bed (charge 11)
- (iii) An indecent act on a child under 12 by rubbing her legs and upper thigh (charge 12) under a blanket in the lounge.

Timing and Place

[5] From the evidence including the school records, I find that the offending if proved occurred after [MH's] 14th birthday on [date deleted].

[6] Both [LS] and [CW] were under the age of 12 years at the time the alleged offending started ([LS] was 7 in [date of offending deleted] and [CW] 9) and before 6 April 2016, when the Police were told.

[7] All the offending is said to have occurred at [address and location deleted] where [LS] lived with [family details deleted]. While the place of offending is not specified in the charges there is no prejudice to the defence as that was the evidence from the evidential interviews already disclosed to the defence.

[8] [MH] whose father is also [D] lived in the house between [18 month time span beginning at the time the offending started] . Subsequently he was a visitor to the property until the complaint by [LS] to the Police on 6 April 2016. After moving out of the house he [details deleted].

[9] The date of the alleged offences in charges 1 and 2 is on or around [date deleted] , the date I accept as [details of event deleted].

[10] [CW] lived [nearby] to [LS] and visited often. She alleges [MH] touched her indecently several times not long after he had started living [nearby]. [CW] alleges that this was at [LS's] house, in the bedroom and in the lounge.

The Law

[11] [MH] denies all the allegations and has made a written statement to the Police denying the charges brought on behalf of [LS].

[12] I remind myself that the onus of proving the charges against [MH] and each essential element of the charge is on the Crown and remained on the Crown throughout the trial. A starting point is of course that [MH] is presumed innocent until the Crown have proved he is guilty and while he needed to say nothing to the Police the fact that he did so did not mean he had an onus on him to prove anything. No onus was on him during the trial either to give evidence or prove any matter. The statement to the Police is a piece of evidence that I must take into account when deciding whether the Crown have proved the various charges against him. The standard to which the Crown must prove each charge and each essential element of the charge is beyond reasonable doubt. A reasonable doubt is an honest and reasonable uncertainty left in my mind about the guilt of [MH] after I have given impartial and careful consideration to all of the evidence.

[13] A crucial issue in this case is the credibility of the two complainants [LS] and [CW] and I had to find their evidence both truthful and reliable before I could find [MH] guilty of any particular charge.

[14] My assessment of them therefore has been an important aspect of the case. In assessing them I was able to observe them during the playing of their evidential interviews and while they gave oral evidence by way of CCTV.

[15] I remind myself that there are risks in relying too much on the demeanour of a witness, that is how the witness appears to be when they gave evidence. However I have made my assessment of them relying on these observations of them in part while taking into account the criticisms of the evidence raised by the defence and looking as

to whether there was any inherent implausibility about the evidence, whether it was consistent with the other evidence in the case and consistent in itself.

[16] I note of course that there is no requirement for there to be corroborative evidence as I may rely on the uncorroborated evidence of a witness.¹

[17] As the defence was a challenge to the veracity of the complainants I received evidence of prior statements they made to each other and others. These statements were admissible to respond to the challenge to their veracity on the grounds of recent invention. The evidence I received in my view was a proportionate and necessary response to the challenge in this case.

[18] The purpose of this evidence was to assist me in assessing whether it is a reasonable possibility that either or both of the complainants have made up the events complained of. These statements may assist in showing consistency or inconsistency in their allegations and that evidence can also be evidence that the events in fact happened.

[19] I remind myself of course that repetition does not necessarily make something true. An untruthful person might continuously repeat the same lie. A mistaken person believing herself to be correct may continuously repeat the error. And of course a truthful person may repeat her complaints.

[20] The defence have also highlighted the delay between the alleged offending and the complaints to their mothers.

[21] In this respect I have not received expert evidence about the behaviour of children who have been abused and the relevance of when and how they make complaints.

[22] I note of course that the law provides that in trial by jury a Judge may tell the jury that there may be good reasons for a victim in these cases delaying or failing to make a complaint.

¹ Section 121 Evidence Act 2006

[23] The delay in the complaints as highlighted by the defence was something I needed to take into account as was the submission by the defence that the complainants are unreliable and [LS] at least may have had a motive to lie given her father's relationship with [MH] (also his son) and the [people] that [MH] associated with following his departure from the house.

[24] The Crown case also relies upon evidence of each complainant in part supporting the allegations of the other. The Crown say I can use some of the evidence as propensity evidence.

[25] In this way the Crown submit their evidence is mutually supportive of the truth of some allegations for each of the complainants.

[26] In this respect the Crown say [MH] has the propensity to act in a particular way being evidence of acts with which he is alleged to have been involved namely an indecent act on a child.² If I were to accept that and find that the evidence had probative value in relation to an issue in dispute in the proceedings (i.e. whether the acts occurred at all) and assuming its probative value outweighed the risk that the evidence may have an unfairly prejudicial effect on the defendant,³ I could consider that when determining whether he in fact acted in the way alleged.

[27] In assessing the probative value I would need to take into account the matters in ss 43(3) and (4)⁴. Accordingly if I consider that the combined evidence establishes a pattern of conduct that is a propensity to act in a certain way I can use that to assist in deciding whether a particular charge is proved. In this case when I assess the probative value I will need to consider the issue of collusion or suggestibility as raised by the defence.⁵

[28] In an overall sense and with one reservation if I accept the evidence of the complainants as truthful and reliable on any particular charge it is likely there would be sufficient evidence to prove that charge. In doing so of course I would have to be

² See s 40 Evidence Act 2006

³ Section 43(1) Evidence Act 2006

⁴ Evidence Act 2006

⁵ See s 43(3)(e) Evidence Act 2006

aware they are separate charges and separate considerations are needed and separate decisions to be made.

[29] If however I accept [LS's] evidence on charge 1 of sexual violation by the introduction of his penis into her anus, as I have already discussed with counsel, I would have to consider carefully whether "introduction of his penis into her anus" is proved beyond reasonable doubt.

[30] As noted in the memorandum I prepared after discussing this with counsel if I accepted [LS's] evidence but was unsure of actual penetration the evidence could be sufficient to prove an attempted sexual violation and it would be open to me to find [MH] guilty of attempted sexual violation.⁶

The Defence

[31] I will take time to concentrate on the defence case but I emphasise that the defence did not have to prove anything. If however I find that the defence have raised a matter which raises a reasonable possibility in respect of any of the elements I must find [MH] not guilty of the charge or charges I am considering.

[32] The defence case requires some explanation.

[33] At the very least the defence say I cannot be sure that any of the things alleged happened.

[34] There are a number of submissions made as follows:

- (a) The allegations are incredible or implausible as they are unlikely to have occurred in the circumstances of:
 - (i) A busy household where many visiting children congregated and/or stayed overnight.

⁶ See s 149 Criminal Procedure Act 2011

- (ii) There was no or little opportunity for [MH] to commit these offences and he was continually shadowed by young [child]. If he had done what is alleged the chances of him being seen or detected were high and some other evidence would have been available to support the allegations.
 - (iii) The physical dimensions of some of the spaces where some acts were said to have occurred make the allegation unlikely.
 - (iv) Some allegations are said to have occurred in a crowded room and some while [LS's] mother or parents were present but allegedly not noticing.
- (b) There is a lack of immediate complaint to a parent or alarm raised to others in the household. Also the failure to retreat from the perpetrator point to the complainant's evidence being false.
- (c) The delay in making a complaint to a parent by either complainant.
- (d) That [LS's] father [D] is likely to have or it is reasonably possible that he has orchestrated the complaint by [LS] against his son [MH] who he resented in the circumstances as outlined in the evidence of the case. The defence submit this is supported by the fact that [LS] did not mention her allegations against her [relative] [RP] in her DVD interview with the Police on 11 April 2016. The defence also point to [D's] apparent attempts to thwart the Police investigation in relation to [RP].
- (e) It is reasonably possible that [CW's] complaint arose out of grief following [details deleted] and her support for her [relative] and friend [LS].

- (f) [LS's] complaint to [CW] and to her sister and also her friends including [NY] (another witness) were dismissed by them as unbelievable. As was [CW's] complaint to [LS].
- (g) The evidence of each complainant is not admissible as propensity evidence.
- (h) [LS] is a dishonest person having stolen chocolate and money from her cousin's house and at first lying about that and further stealing [details deleted] from school.

My Assessment of [LS] and [CW] as they gave Evidence

[35] There was nothing in the way that [LS] gave her evidence either in the DVD interview or during the trial which demonstrated that she was unreliable or untruthful. She did not make allegations without explaining the circumstances. She was questioned extensively during her DVD interview about the surrounding circumstances of each allegation. She would not have anticipated all the questions that she was asked and yet she gave a clear, unhesitating and detailed account in a way that suggested she was recounting real events.

[36] Whilst there are a number of examples of this there was extensive detail when questioned about the events leading up to the alleged sexual violation by anal penetration when questioned by the interviewer.⁷ In this respect she gave a detailed account of how she was grabbed and pulled to the bottom bunk and how he positioned her whilst in her words putting his dick into her "bum". She was challenged under assertive cross examination by Mr Elliott about these matters where she was challenged in relation to for example how could she see him do this when her face was in the pillow to which she replied "I could feel it" and where he was standing when [RP] came into the room and where she was facing.⁸ These responses were given without hesitation in a fluid manner. At the same time she did not shy away from agreeing she had not called out or alerted anyone at the time.

⁷ See p 17 of the transcript onwards

⁸ See pp 25 and 26 of the transcript

[37] Matters that tended to support her not making it up as she is alleged to have done were that she said her mother for example was in the room when some of the other offending took place under the blanket on the couch and that [RP] came into the room between charges 1 and 2 and yet admitting she did not alert or complain about what had happened.

[38] She was consistent in what she said during her DVD interview and remained consistent during cross examination when challenged or asked for further detail. She was able to provide further detail. For example a description of [MH] actions on the couch during one of the alleged events, how she was positioned in the closet when another allegation arose and how she was hiding in the darkened hallway during another and who else was in the house and where. All this gave a strong impression she was recounting actual events and providing further information about them as she was examined.

[39] She did not claim they were always alone or there was no one about when the offending occurred, although there may have been such occasions when they were alone together. She described touching, rubbing, attempted oral connection, in the circumstances that showed this was done in an opportunist and covert way notwithstanding that there were others about in the house.

[40] The allegations in respect of charge 1 and 2 are different insofar as [MH] was in charge of her as the babysitter and there were no adults in the house and few other children. Considering her descriptions and consistency and the detail I found her evidence in itself believable. While at times the offending could be seen as risky and sometimes highly so, it was secretive and credibly described by her.

[41] She was emphatic in denying that she was lying or that the incidents did not take place.

[42] Near the beginning of her interview however she said once:

“He used to lick me in between the legs”.⁹

⁹ Page 10 of the transcript

[43] When asked later in the interview about it she said she did not remember saying that. She said that something had happened but she couldn't remember and couldn't give any details.¹⁰ When asked about this during the trial she said she couldn't be sure about it and didn't know whether it had happened. While it is puzzling why she mentioned it and was unable to give the details she was able to give in respect of other allegations and this may tend to support the defence submission about her reliability equally it is an example of her accepting something may not have happened or did not happen.

[44] Similarly I found the way [CW] gave evidence compelling and there was nothing in the way that she did so that indicated to me that she was other than truthful, reliable and recalling actual events.

[45] The detail that she gave was significant.

[46] She gave evidence of touching when [MH] came into the bedroom where the two girls were sleeping. This was at first an alleged touching of her stomach. When he left the room she said that she woke up [LS] and told her about what had happened but [LS] dismissed her allegation.¹¹

[47] Insofar as the second incident in the bed is concerned she gave evidence of him rubbing her up to but not on to her breasts and then down to but not on to her vagina and not under her pants.¹² She describes him as first top and tailing with her and then putting his head near her. She also describes feeling scared and being really still and afraid that he would hold her down if she moved. She describes the positions of their bodies and then him later getting into [LS's] bed and that bed moving with a little creaky sound.¹³ These descriptions and the way that she gave them was a credible account of what happened and her reactions to it.

[48] The fact that [LS's] bed creaked was also attested to by [LS] and [F].

¹⁰ See pp 48 and 49 of the transcript

¹¹ See pp 7, 8 and 9 of the interview transcript

¹² See pp 12 and 13 of transcript

¹³ Page 17 of transcript

[49] [CW's] description of waking up when the door opened and the hall light shone into the room is also credible as was the way she described later that she and [LS] talked about the alleged touching with them both eventually accepting it had happened to the other.¹⁴ [CW] thought that she had been touched around the [dates deleted] which is inconsistent with her estimate of it being not long after [MH] had come to the house. Her description of the allegation in the lounge is also detailed. She describing fast and slow rubbing up to but not on to her vagina.¹⁵ She also said he did it to [LS] too and that [LS] saw what he was doing to her.¹⁶ She said that [LS] told her that he went into her pants but [CW] did not believe her.

[50] [CW], as [LS] did, described the couch which is now outside and shown in the photographs. She also explained that she did not tell her mother because she wanted it to be out of her mind.¹⁷

[51] In a challenging cross examination she maintained her allegations and was able to give further details about what happened. For example, whereabouts [B], [LS's] [relative], slept that night as [CW] was in [B's] bed. Also the positioning of the beds, the bed covering on her bed, how the light came from the hallway, and her facing the wall and turning. She also gave reasons why she did not run home.¹⁸ She also described him getting into bed on the first occasion and not touching her and how she thought it must have been a mistake. She also said that her bed did not creak but [LS's] did and also the door creaked.

[52] She could recall the details of the touching in the lounge but not the programme on TV that they were watching. She accepted that she stayed the night again and continued to come around because they were her [relatives] and she did not think he would do it again. Her evidence was that it did not happen to her again. Her evidence was that she did not want to tell her mother that she did not want to go over there again as she would have to say why and she wanted to put that out of her mind.

¹⁴ Page 20 of transcript

¹⁵ Page 24 of transcript

¹⁶ Page 25 of transcript

¹⁷ Page 28 of transcript

¹⁸ See pp 49 and 50 of transcript of evidence

[53] These were some of the ways in which I was driven to the conclusion that her evidence was truthful and reliable and she was recounting actual events.

[54] There was also the evidence of [LS] and [CW] that they saw [MH] touch the other. [CW] said she was wearing shorts and [MH] lifted the bottom of these. [LS] describes this also in her interview indicating [MH's] hand going in through the bottom of [CW's] shorts.¹⁹

Evidence of [NY]

[55] I heard evidence from [NY] in relation to what she saw during one incident in the lounge while she and a number of the other children including [LS] and [MH] watched a scary movie called "Momma".

[56] I am satisfied from [NY's] evidence, she being several years older than [LS], that she felt she was in a protective (she described it as bodyguarding) role with [LS]. Her evidence of what happened in the lounge was that she and [LS] and [MH] were on the same couch under a blanket but that [MH] was hogging the blanket, pushing [LS's] head under the blanket from time to time.

[57] This was in contrast with [LS's] evidence who said that they were all (approximately 7 people) on the couch or tugging at the blanket.

[58] [NY] described what was occurring saying in her interview:

*"And I think he was touching her; like he was touching her because she told me that he was touching her when we walked out."*²⁰

[59] However considering the remainder of her interview and also her cross examination in my view I need to treat that evidence carefully because the impression I have is that she thought that [LS] had been touched, more because of what [LS] said later than anything she saw.

¹⁹ Page 54 [LS's] transcript

²⁰ Page 10 of transcript

[60] This is mainly as a result of the cross examination of [NY] as it seems that [MH] was pushing [LS] under the blanket but [NY] did not see any touching. Accordingly I have dismissed that evidence as not being an eye witness account of what happened on that occasion.

[61] The relevance of [NY's] evidence is in the complaints [LS] made to her afterwards and at [NY's] home and also at the end of the driveway of [CW's] home next door.

[62] In the latter case [LS] told those present that she had been touched by [MH]. She was not believed and she then said that she was joking.

[63] Although [NY] tried to insist on [LS] telling an adult she accepted [LS] decision not to do so.

[64] [NY's] description of how the complaint was made to the group at the driveway²¹ is that of a reluctant complaint where [LS] was not sure she should really say something and when they all reacted by saying she was lying she responded by saying it was a joke. A few days later however she repeated the complaint to [NY] in private.

[65] [NY's] evidence was that she, her [sibling] and [LS's] [sibling] were present at the time. Although in cross examination she appeared to accept that as it was in [CW's] driveway and she would not go to [CW's] house unless [CW] was there, I do not attach any significance to the possibility that [CW] may have been present. [CW] and [NY] do not recall that.

[66] [NY] gave evidence that she and [LS] were asked by [F] and [D] about the offending. Her evidence²² was that "*last year*" she and [LS] were in the same room as [LS] mother and father and [F], [LS's] mother said:

"Did this really happen to you [LS]?"

²¹ See pp 23 and 24 of transcript

²² Page 76 of the transcript

And she also asked [NY] and they both said “Yes” but [D] said nothing. There was only one question and they answered “Yes”.

[67] [NY’s] evidence about [LS’s] reactions and [MH’s] behaviour in a spotlight game outside when [NY] was being pushed into the hedge and [NY’s] impressions of [LS] and [MH] at the time in my view is simply opinion evidence and has not been used by me.

Addressing the Defence’s Criticisms of the Evidence

[68] In relation to these matters I note:

(Item (a))

[69] The fact that this was a busy household with children visiting and playing and staying fits with [LS’s] description of the circumstances surrounding the alleged offending. The fact that [O] was often in the company of [MH] and there were limited dimensions to the spaces where some acts are said to have occurred does not lead me to suspect the allegations themselves are implausible. [LS] gave a credible narrative of opportunistic and covert offending against her.

[70] In relation to charges 1 and 2 [MH] was in a position of responsibility and authority over [LS] and there was ample opportunity on that night to commit the offences alleged.

(Items (b) and (c))

As far as lack of complaint or raising of alarm this is something I must take into account as part of the evidence.

[71] There was no expert evidence in this case to say what one would expect of a child in these circumstances. For example to complain or cry out. So I simply have taken a commonsense approach to this.

[72] On the one hand one may have expected a complaint to be made to her parents, more likely her mother [F]. But the circumstances and her reasons for not doing so need to be considered. First these were the actions of her brother albeit only recently come into her life.

[73] [LS] said she feared if she told someone she would not be believed. It is a reasonable inference to draw that if confronted with these allegations her brother would deny them and he may be believed over her.

[74] This fear is borne out in the evidence in the case. In spite of their mutual complaints to each other about him allegedly touching them [LS] and [CW] did not believe the other at first.

[75] When [LS] told her [relative] and others about being touched she was not believed. She then told them that she was joking.

[76] That she told them that she was joking I find was a reaction to her not being believed rather than her acknowledging it did not happen. So having tested the water in a way she felt safe she was not believed and withdrew.

[77] Although [NY] encouraged her to tell an adult I accept the evidence she steadfastly refused to do so. In these circumstances it is hardly surprising.

[78] The evidence from [CW] and [LS] was that they discussed whether they should tell their parents and decided not to for similar reasons.

[79] Accordingly [LS's] fear that she would not be believed is compelling evidence in this case as to why she did not say anything to anyone else at the time.

[80] [LS] said she feared there would be violence if she told her parents and that this would come from her father [D] against [MH]. Her evidence was that she did not like violence and feared that it would happen given her father's discipline of other children. These fears were well founded. Once [D] found out from [F] about the allegations he went around to see [MH] and punched him in the head. There was evidence he was threatening towards the others at the house where [MH] was.

[81] In this way her reluctance to say anything becomes more understandable.

[82] She did not complain to her mother until her [relative] threatened to disclose her “secret” to her mother while they were preparing to go to school on the morning of 6 April 2016. It was only then she spoke to her mother and in doing so gave a brief overview of the allegations that are now more fully before the Court.

[83] Given these factors it is hardly surprising that she did nothing else to alert anyone or behave in a way which suggested that she had this problem with [MH]. The same day she told her mother she was taken to the Police and told the detective of the allegations and a few days later a DVD evidential interview occurred.

[84] I do not find the evidence that [LS] only mentioned “touching” to her friends and not more serious offending detracts from the strength of the evidence of her prior statements given her reluctance to say anything and the reactions she got from them. She was prepared to tell her mother more when they spoke on 6 April 2016 and that mirrors substantially what she now asserts.

[85] As far as [CW] is concerned her evidence is that she did not want to complain and did not do so until the Police had visited her mother following [LS’s] complaint. She was reluctant to talk to her mother even then but later completed a DVD interview on 11 April 2016.

[86] Her evidence was she wanted to forget (rather than had forgotten) and this was reasonable in the circumstances. She hoped it would not happen again and on her evidence it did not. She wanted to keep her friendship with her cousins next door and continued to behave as if nothing had happened. In the end she made a complaint which she didn’t want to do because she had wanted to put it out of her mind. The delay in her complaining is understandable.

[87] In my view the delay in the complaint in the circumstances as described tends to support the credibility of [LS] and [CW] and not detract from it.

(Item (d))

[88] It is submitted that it is reasonably possible that [D] orchestrated the complaint by [LS] as he resented [MH] and also [details deleted – other individuals associated with MH].

[89] There is no doubt having seen and heard [D] that he did resent what [MH] had done by moving in with [details deleted – other individuals associated with MH]. There was a lot of bitterness on his part towards [MH] when he left home to do that and a lot of animosity between he and the other [people]. There was also the evidence from Detective O’Leary that he and in turn [LS’s] mother [F] did not originally cooperate with the Police in respect of the other complaint made by [LS] against [RP] her [relative] of sexual offending by him against her. Detective O’Leary’s view was essentially that [D] was attempting to thwart the Police investigation in relation to [RP].

[90] There is nothing in the evidence or the way in which [LS] gave her evidence to suggest that she was coached. While I accept that the defence do not have to prove anything let alone a motive for [D] to orchestrate the complaint the submission is contradicted by the evidence.

[91] The only evidence that I have is that [D] learnt of the complaint only after [LS] had told her mother.

[92] After he assaulted [MH] he instructed [F] to take [LS] to the Police station which she did. There is no evidence that [D] had spoken to [LS] about the allegations and [LS’s] evidence was he has not.

[93] As far as her not mentioning the allegation against her cousin [RP] during the initial interview I note the following: [LS] told her mother the day that she was taken to the Police station about those allegations. [LS] told the detective about [RP]. [F] told Detective O’Leary also. [F] had previously dismissed a comment by young [O] that [RP] had been silly with the children as being nothing more than that. Given what [LS] had said [F] asked Detective O’Leary to investigate that complaint also.

[94] When [LS] gave her evidential interview although she mentioned [RP] as being at the house at one stage she made no mention of the complaint against him.

[95] It is clear to me she believed she was there to talk about [MH]. In cases of several alleged offenders it is to be expected there would be separate interviews from a Police point of view.

[96] Although [D] may not have wanted [RP] to be prosecuted or investigated and he was uncooperative about that, I see no connection between that and [LS's] complaint about [MH] or her interview with the Police. She was interviewed about [RP] a few weeks later.

(Item (e))

[97] The defence submission is that it is reasonably possible that [CW]'s complaint is unreliable but I find no evidence to infer that it was reasonably possible or it came about in some way out of [traumatic event deleted] several years before.²³ As far as her wanting to support and therefore collude with [LS] there is no evidence to support that as a reasonable possibility given that they had decided previously not to say anything to their parents and [CW] was reluctant to say anything even to her mother²⁴ after the Police had called. There is no evidence from which I can make such an inference and I do not do so.

(Item (f))

[98] The fact that others did not believe the allegations about touching has already been dealt with in my previous remarks.

(Item (h))

²³ [details and date of traumatic event deleted] 2011

²⁴ See evidence of [CW's] mother page 126 and [CW] not wanting to talk about it

[99] As to [LS's] alleged dishonesty I cannot see this as relevant to my assessment of her when she complains of these matters given the nature and circumstances of her dishonest behaviour.

Propensity

[100] [CW] describes [MH] touching her while she and [LS] were in the lounge covered by a blanket. She described him as touching her legs but did not go on into her pants but went on top of them. She also describes him as rubbing her legs up and down, rubbing his hand up and down her legs on top of her clothes down by her vagina.²⁵

[101] She also describes the night before when she was staying at the house when [MH] came in, got into bed with her and started rubbing his hand on her stomach. He then left and when she told [LS] about it she was accused by [LS] of lying. She described subsequent rubbing as not being under her clothes but him rubbing her stomach, going up to her "boobs" or nearly so almost touching and then would go back down and touch her stomach instead going down to her thigh and up near her vagina.

[102] [LS] describes [MH] touching her whilst they were under a blanket in the lounge, putting his hands in her pants. He would then put two fingers inside her vagina. She said that he had done this "heaps of times". The first time was when he pushed really hard on her vagina.

[103] This evidence shows a propensity on [MH's] part to touch younger girls on or around their genitalia whilst in the lounge at [LS's] home whilst under a blanket. Given the issue in dispute here is whether this occurred at all it is relevant to that issue. [CW] alleges only one act in the lounge of this nature but a further similar touching in the bedroom the night before. [LS] alleges numerous occasions of such touching but says that the touching was more intimate and involved penetration with his fingers.

[104] The offending of [CW] is said to have taken place at the time when similar offending was said to be occurring against [LS]. [LS] complained of similar except

²⁵ Pages 8 and 9 of her transcript

more serious conduct than [CW]. Such behaviour is unusual and given the close connection in time, the fact that the girls were present in the same household, were of roughly similar age and the offending complained of by each is similar although not the same insofar as the seriousness is concerned it is probative. It has strong probative value in respect of some of the offending by the defendant against [LS] and the alleged offences against [CW].

[105] As I previously found there is no evidence of collusion. The evidence is that they had not colluded, and nor did they have an opportunity to discuss what they would say before they gave evidential interviews. Nor had [LS] been influenced to make this complaint, in fact she feared what would happen if she did complain.

[106] When she spoke to the interviewer on 11 April 2016 there had been no opportunity to speak to [CW] about what she should say.

[107] There is no unfair prejudicial effect on the defendant in this case given the strength of the probative value of the evidence as long as I use it conservatively in respect of the charges in relation to [CW] and only some of the charges in relation to [LS]. I intend to do this. The evidence of [LS] and [CW] is mutually supported in this way. In addition both of them say they were present when [CW] was allegedly indecently assaulted and [LS] says that she saw some of this.

[108] So the propensity evidence is probative in relation to the charges in relation to [CW] and those charges in relation to [LS] where rubbing on her genitalia is concerned including where [LS] alleges he introduced his fingers.

[109] I have considered [MH's] denial in his statement to the Police that anything happened.

[MH's] Statement

[110] Although [MH] told the Police that he had not babysat for the children for longer than 10 or 20 minutes I find that he is mistaken about that and that he was the babysitter on [date deleted]. I also take into account his statement to the Police that

he did not know whether “they” were making things up because he thought his father had something to do with the allegations. While I accept that [D] is likely to want to do things his way as [MH] told the Police I have already found there is no inference I can draw or evidence to show that he orchestrated the complaint. As far as conflict with his father being a reason for generating a false complaint I note that the conflict reached its head in [date deleted] when [MH] left the house and must have continued for a little while because of his living arrangements. However [MH] visited on [date deleted] and his father’s evidence was he helped [MH] and [details deleted] shift into a flat (unchallenged) and on [date deleted] he was entrusted with the care of [LS] as his parents were to be away for the night. From this evidence I infer the relationship had mended significantly and he was able to visit when he chose and was trusted to the care for his younger sister. I take into account his denials when the allegations were briefly put to him and the fact that he was neither obliged to speak to the Police nor was there any onus on him to prove anything.

My Assessment of the Evidence on each Charge and My Findings – Charges 1 and 2

[111] I find [LS’s] account of the events of the night of [date deleted] and the morning of [date deleted – the next day] believable and reliable. Her evidence about these events was convincing and detailed and her reaction and responses to questions about that or challenges to it appeared natural, truthful and reliable. The fact that she did not complain or raise alarm notwithstanding her [sibling] was in a bedroom next door and [RP] her [relative] was in the house did not prevent [MH] from having the opportunity to commit the offences and I find that he did sexually assault her twice both before and after [RP] had come into the room. The question is whether the evidence of [LS] which is accepted by me is sufficient to prove the essential elements of the charges beyond reasonable doubt? I find things happened in the way described by [LS] where [MH] got [LS] face down in the lower bunk and having pulled down her pants that he then put his penis into her “bum”. I am satisfied beyond reasonable doubt that [LS] did not consent to this and also [MH] did not believe she was consenting nor was there any reasonable grounds for him to believe that she was.

[112] The sole issue remains whether when he put his penis into her “bum” he introduced it into her anus.

[113] Given [LS’s] description of what happened, the pain that she described and the thrusting back and forth she also described an inference could be drawn that in fact he penetrated her anus when she said that he put his penis into her bum.

[114] As against that she told her mother on [date deleted] April that she prevented him doing this by covering her bum.²⁶ She could have been describing the second incident but she did not describe actual penetration and her mother did not press her for details. Although she described the pain and the hurt and it is a strong inference that she would have experienced pain had he succeeded in introducing his penis into her anus there is a reasonable possibility that she would have shown the effects of this the next day. In spite of the fact that her mother was hung over it could be expected that she would have noticed something about the child or her movements that day.

[115] Being satisfied that he held [LS] down and put his penis into her “bum” and thrust and caused her pain I am satisfied that in doing so he intended to have sexual connection with her by penetrating her anus with his penis.

[116] While it is highly likely that he in fact penetrated her anus I cannot be sure and so in accordance with s 149 of the Crimes Act I find him guilty in respect of that incident of attempted sexual violation of [LS], the attempt being to introduce his penis into her anus. I find the remain elements of that charge proved beyond reasonable doubt.

[117] While the defence submit that there would have been insufficient room for this to have been done as described by [LS] there was no evidence to support that and the photograph of the bunk in the other room is irrelevant and I do not infer because of the configuration of those bunks in the photographs that there would have been insufficient room as clearly there was.

²⁶ See p 92 transcript of evidence

[118] In respect of charge 2 which is the allegation of him “humping” her by rubbing his penis against her buttocks this time over her clothing, again having found [LS’s] description of this and the details that she gave in interview and during the trial truthful and reliable including the detail that she found that her pants were wet afterwards and she didn’t know why I find this case is proved as I find proved beyond reasonable doubt that he did do what was described by [LS]. I also find proved beyond reasonable doubt that the act was indecent and that it would be regarded by right minded members of the community as indecent. I also find it proved beyond reasonable doubt that [MH] knew what he did would be regarded as indecent in that sense. [LS] was 10 at the time and so that charge is proved.

[119] I now deal with charge 3 of sexual violation by introduction of his fingers into [LS’s] genitalia is alleged. This is an occasion when it is alleged that it occurred on the couch under the blanket in the lounge. In this case again I accept [LS’s] evidence notwithstanding this offending took place in a busy well populated house. It was opportunistic, concealed offending and I find that he sexually violated her when he introduced his fingers with some application of force into her genitalia and the other elements are proved beyond reasonable doubt namely that she did not consent, he did not believe that she was consenting and so that charge is proved.

[120] In respect of charge 4, attempted sexual violation, I have taken into account [LS’s] evidence about that and the cross examination after about the people in the house and the limited opportunity. The circumstances she described were of playing a game known as Spotlight where she alleged that whilst seated on the floor with her knees up against her chest [MH] attempted to put his erect penis into her mouth. I accept her evidence that the light would have been out and he had wanted to hide with her. Although opportunistic and not without risk it was done in circumstances where he could be assured of some brief privacy as [LS] was hiding from the other young people. I find proved beyond reasonable doubt that he did push his penis around her mouth but she prevented him from getting it inside and in doing so he intended to have sexual connection with her by connection between his penis and her mouth. I am satisfied that this was without her consent and that he did not believe that she consented.

[121] In respect of charge 5 the allegation of him attempting to do the same while she was in the closet looking for a photograph, while I accept that the conditions were not ideal as there was limited room I find the charge proved and find that this was when [MH] had found her alone in the bedroom and attempted to put his penis into her mouth, perhaps with some difficulty given the confined space while he pulled the door to to avoid detection. Although this may have been risky I am satisfied beyond reasonable doubt that it happened, that he intended to have sexual connection between his penis and her mouth, that she did not consent and he did not believe that she was consenting.

[122] Dealing with charge 8 next, being sexual violation by introduction of his fingers into her genitalia on the occasion when he was under the blanket with her but her parents were in the room I again find [LS's] description both convincing and reliable notwithstanding that others were in the room or the difficulty that [MH] encountered in getting his fingers into her genitalia and keeping her legs apart. This was a case of brazen but concealed offending where [LS] was fearful of saying or doing anything to attract attention. I find this charge proved beyond reasonable doubt in that he did introduce his fingers, it was without [LS's] consent and he did not believe that she was consenting.

[123] In respect of charges 6 and 7 which are representative charges of attempting to put his penis in her mouth and putting his fingers into her genitalia on other occasions, given the lack of detail of any surrounding circumstances concerning any of these and simply a bald assertion that they happened on many occasions, while I think it is probable these things did occur I am not satisfied beyond reasonable doubt that these charges have been proved and I find him not guilty on charges 6 and 7.

[124] On charge 13 being a representative charge of him rubbing [LS's] genitalia, I find on the basis of [LS's] evidence of this and that it happened on numerous occasions and given the propensity evidence that I have deemed is admissible and the consistency demonstrated in her complaints to others that touching did occur. I find it did happen at least once during the time alleged and that [MH] did rub her genitalia, that this is proved beyond reasonable doubt to be indecent and that he knew it would be regarded as such and of course [LS] was under the age of 12, charge 13 is proved.

[125] In respect of [CW] again I find her evidence convincing, reliable and truthful. It is also supported by her complaint immediately to [LS] on the night of [date deleted] and I find that [MH] did come into the bedroom twice, the first time rubbing her stomach area and the other occasion rubbing her legs and upper thigh area. As far as charge 11 is concerned and the rubbing of her legs and upper thigh area is concerned I am also driven to the conclusion that it is proved also because of the propensity evidence that I have held is admissible. I find that charge proved and what happened in the circumstances as described by [CW] was indecent and that [MH] would have known it would be considered indecent in those circumstances and [CW] was of course under the age of 12 at the time.

[126] Charge 10 in my view does not reach that standard. While not exactly a duplication I find that the rubbing of her stomach although inappropriate was part to the lead up to the further charge (11) and therefore find him not guilty on that charge.

[127] In respect of charge 12 I find that also proved on the basis of my assessment of the reliability and truthfulness of [CW] and the propensity evidence and [LS's] evidence of what she saw and find him guilty of rubbing her legs and upper thigh whilst under the blanket in the lounge the following morning. In her interview [LS] described [MH] putting his hand up [CW's] shorts and "feeling" her. She had had no opportunity to concoct this with [CW]. [CW] told the Police he pulled the bottom of her shorts open then allowed them to close while rubbing towards her vagina. This evidence assisted me in finding the charge proved. I find that to have been indecent in the circumstances as described by [CW] and [MH] would have known it was indecent.

Result

Charge 1 – Guilty of lesser charge of attempted sexual violation by unlawful sexual connection (s 129(1) Crimes Act 1961).

Charge 2 – Guilty of indecent act on a child under 12.

Charge 3 – Guilty of sexual violation by unlawful sexual connection.

Charge 4 – Guilty of attempted sexual violation.

Charge 5 – Guilty of attempted sexual violation.

Charge 6 – Not Guilty – representative charge of attempted sexual violation.

Charge 7 – Not Guilty – representative charge of attempted sexual violation.

Charge 8 – Guilty of sexual violation by unlawful sexual connection.

Charge 9 – Already discharged under s 147 Criminal Procedure Act. Sexual violation by unlawful sexual connection.

Charge 10 – Not Guilty – indecent act on child under 12.

Charge 11 – Guilty of indecent act on child under 12.

Charge 12 – Guilty of indecent act on child under 12.

Charge 13 – Guilty of indecent act on child under 12.

I G Mill
Youth Court Judge