

AUSTRALIA / JUDGMENT

R v Lynch

[2026] NSWDC 86**COURT**

District Court

DECIDED

02 April 2026

BEFORE

Abadee DCJ

CASE / FILE NUMBER

2024/00194291

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District Court**New South Wales****Medium Neutral Citation:** R v Lynch [2026] NSWDC 86**Hearing dates:** 2 April 2026**Date of orders:** 2 April 2026**Decision date:** 02 April 2026**Jurisdiction:** Criminal**Before:** Abadee DCJ**Decision:** See paragraph [115]**Catchwords:** CRIMINAL LAW – application for costs certificate – sexual offences alleged committed against 13 year old girl – whether complainant, as witness, was ‘very substantially lacking in credit’**Legislation Cited:** Costs in Criminal Cases Act 1967 (NSW), ss 2, 3, 3A
Criminal Procedure Act 1986 (NSW), s 292D
Crimes Act 1900 (NSW), ss 66C(2), 66DB(a)

Cases Cited:	Allerton v DPP (1991) 24 NSWLR 550 BCM v The Queen [2013] HCA 48; (2013) 88 ALJR 101 Beatson v R [2015] NSWCCA 17 Constantinidis v R; Lazar v R (Costs) [2022] NSWCCA 248 Cox v R (No 2) [2017] NSWCCA 129 Davis v R [2024] NSWCCA 120 DPP (NSW) v Davies [2025] NSWCCA 177 Higgins v R (No 2) [2022] NSWCCA 82 Mordaunt v Director of Public Prosecutions [2007] NSWCA 121; (2007) 171 A Crim R 510 R v Johnston [2000] NSWCCA 197 R v Manley [2000] NSWCA 106 RM v R [2024] NSWCCA 148 Rodden v R [2023] NSWCCA 202 Sita v R [2022] NSWCCA 90 Zhao v R [2024] NSWCCA 229
Category:	Costs
Parties:	David Lynch (Applicant) Rex (Crown)
Representation:	
Counsel:	Mr R Hussey (Applicant) Ms E Winborne (Crown)
Solicitors:	Fine Legal (Applicant) Solicitor for Public Prosecutions (NSW) (Crown)
File Number(s):	2024/00194291
Publication restriction:	Pursuant to s 15A of the Children (Criminal Proceedings) Act 1987 (NSW) the name of the victim has not been identified.

REASONS FOR JUDGMENT

Background

On 11 February 2026, a jury found the defendant, Mr David Lynch, not guilty on four counts (charges 1-3 and 5) on indictment of sexual offences involving a child in a trial I presided over, at Newcastle. Prior to the commencement of that trial, the prosecution had also discontinued charge 4 on the indictment. That was a consequence of the complainant not coming up to proof when she gave her pre-recorded evidence.

The alleged offending was said to have occurred against a 13 year old girl, who I will henceforth refer to as the complainant, at Morisset Park in May 2024.

Charges 1 and 5 alleged sexual intercourse with a child above the age of 10 and below the age of 14, contrary to s 66C(2) of the Crimes Act 1900 (NSW). In both cases, the alleged form of sexual intercourse was digital penetration. Charges 2 and 3 alleged intentional sexual touching of a child above 10 but below the age of 16 years, contrary to s 66DB(a) of the Crimes Act. Charge 2 alleged that the defendant touched the complainant's vagina. Charge 3 alleged that he had touched the complainant's breasts.

In terms of chronological sequence, the Crown case was that the conduct giving rise to charges 2, 3 and 5 occurred essentially as part of a single episode on the evening of 24 May 2024 (what I described in my summing up as the 'last time incident'); and the conduct constituting charge 1 occurred separately, a week or so earlier (described as the 'first time incident'). However, in addition to the charges, there were other uncharged acts complained of between the conduct constituting charge 1 and 24 May 2024 (the 'in between incidents').

The accused was arrested on 25 May 2024. He was arraigned for trial on 6 February 2025. He was arraigned again just prior to the complainant giving her pre-recorded evidence over 23 and 24 June 2025 when the trial commenced. One of the Crown's (child) complaint witnesses gave evidence on 17 September 2025.

On 2 February 2026, the Crown applied to amend the indictment to excise reference to count 4. That application was refused. A jury was empanelled the next day, when the Crown informed the jury that the Director had directed that there be no further proceeding on that count. The trial resumed. The jury retired to consider their verdicts late on 10 February 2026. They returned their not guilty verdicts the next morning.

Mr Lynch, who I will henceforth refer to as the applicant, now applies for a certificate for costs arising from criminal proceedings pursuant to s 2 of the Costs in Criminal Cases Act 1967 (NSW) (hereafter the 'Act'). The Crown opposes that application.

Section 2 is the source of power where, as here, the applicant was acquitted of the offence(s) after a trial had commenced.

Section 3 provides:

- (1) A certificate granted under this Act shall specify that, in the opinion of the Court or Judge or Magistrate granting the certificate—
 - (a) if the prosecution had, before the proceedings were instituted, been in possession of evidence of all the relevant facts, it would not have been reasonable to institute the proceedings, and
 - (b) that any act or omission of the defendant that contributed, or might have contributed, to the institution or continuation of the proceedings was reasonable in the circumstances.

The applicant submitted that it should be found that he did not conduct himself in any way that might be said to have contributed to the institution or continuation of the proceeding at all. He had exercised his right to decline to participate in an ERISP interview upon his arrest. He later elected to give evidence at the trial.

If the matters in s 3 are established, it was not suggested by the Crown in this instance that any residual discretion remained in the Court to decline a certificate: *Rodden v R* [2023] NSWCCA 202 at [117].

The sole issue was whether it would not have been reasonable for the prosecution to institute the proceeding against the applicant had it been in possession of all the facts. This is a question upon which the applicant bears the onus of proof (*R v Manley* [2000] NSWCA 106). The relevant time to assess whether the institution of the proceeding was unreasonable was the time of the arrest or charge.

The Crown takes no point about the timing of the application.

In *Cox v R (No 2)* [2017] NSWCCA 129 (“Cox”), the Court of Criminal Appeal (at [4]-[5]) identified the following propositions relevant to this inquiry as far as they concern verdicts of not guilty after trial (omitting citations):

“(1) The Act represents a ‘middle course’ between two extremes...One extreme is the common law and English position where costs were granted in criminal cases only in exceptional circumstances. The other extreme is where costs follow the event as a matter of course.

- (2) The provision is intended ‘to create an environment in which earlier rigid resistance to the reimbursement of costs incurred by an acquitted defendant was diminished’.
- (3) The provisions allow the Court to relieve a person who has been acquitted (or discharged following the withdrawal of proceedings by the DPP) of the financial burden of defending themselves in criminal proceedings without casting any criticism on police or prosecutors. Because of what might be called the retrospective wisdom implicit in s 3(1)(a), the provisions ‘when applied judicially permit courts to make orders in appropriate cases without any innuendo arising from the making, or the refusal to make such orders that would be critical either of the Prosecutor or the accused’.
- (4) The prosecution cannot resist a certificate on the basis of some ‘ill-defined community interest in bringing a particular accused, or kind of matter, before the courts’.
- (5)

- (6) ‘It is not sufficient to establish the issue of unreasonableness in favour of an applicant for a certificate that, in the end, the question for the jury depended upon word against word; in a majority of such cases, it would be quite reasonable for the prosecution to allow those matters to be decided by the jury; it would be different where the word upon which the Crown case depended had been demonstrated to be one which was very substantially lacking in credit’.
- (7) A decision to prosecute is not ‘reasonable’ simply because there was a prima facie case, or because there were reasonable prospects of a conviction, or because a magistrate committed the matter for trial.
- (8) The applicant’s silence is not a disentitling factor under s 3 (1)(b). In other words, the failure of an applicant to participate in a recorded interview is not a matter that ‘contributed, or might have contributed, to the institution or continuation of the proceedings.’” (emphasis supplied)

Cox featured a review of the cases, including a decision by McColl JA in *Mordaunt v Director of Public Prosecutions* [2007] NSWCA 121; (2007) 171 A Crim R 510 (“Mordaunt”). Two points made by her Honour, with respect, bear emphasis:

“The fact a prosecution may be launched where there is evidence to establish a prima facie case does not mean it is reasonable to launch a prosecution; there may be cases where there is contradictory evidence and where it is reasonable to expect a prosecutor to make some evaluation of that evidence” [36(i)] and

“Section 3 calls for an objective analysis of the whole of the relevant evidence, and particularly the extent to which there is any contradiction of expert evidence concerning central facts necessary to establish guilt, or inherent weakness in the prosecution case; matters of judgment concerning credibility, demeanour and the like are likely to fall on the other side of the line of unreasonableness, being matters quintessentially within the realm of the ultimate fact finder, whether it be Judge or Jury” [36(m)].

The proposition that a decision to institute proceedings will not generally be unreasonable where questions of witness credibility or reliability are in issue is solidly entrenched: *Mordaunt* at [36(m)], *Beatson v R* [2015] NSWCCA 17 (“Beatson”) at [14]; *Higgins v R (No 2)* [2022] NSWCCA 82 at [22]-[23]; *DPP (NSW) v Davies* [2025] NSWCCA 177 at [114]. In the last of these decisions, one of the grounds for the application were that there were differences in the complainant’s account of what she reported to complaint witnesses and what the complaint witnesses said about the complaints.

However, the second highlighted part of the passage from Cox might, with respect, be regarded as a qualification to the principle that issues of witness credibility or reliability are best left to the trier of fact. The Court of Criminal Appeal emphasised (at [9]-[10]) that a witness may be “substantially lacking in credit” even though the witness is not being deliberately dishonest. It is unnecessary for the Court to form a view as to whether the complainant was being deliberately untruthful. Rather, it is a matter for the Court of assessing objectively whether the deficiencies in

the evidence are such that it would have been unreasonable to institute the prosecution had those deficiencies been known to the hypothetical prosecutor when the proceedings were commenced.

Both parties relied upon expert evidence at the trial. In *Beatson*, Hoeben CJ at CL (Johnson J and Davies J agreeing) said at [14], that if there was expert or highly technical evidence from which it was apparent that the Crown was incapable of making out all of the elements of an offence, it might be more likely that an affirmative opinion would be formed that it was unreasonable for the prosecution to be instituted.

The applicant's Counsel instanced a range of published decisions of Judges of this Court [1] (including one of my own) in which a costs certificate had been granted following a characterisation of the case as featuring an essential witness found to be 'very substantially lacking in credit'.

The Crown, for its part, drew attention to some of the facts in *R v Johnston* [2000] NSWCCA 197, including the applicant/accused's reliance at trial upon witnesses whose evidence, individually or in combination, could have cast doubt upon the complainant's credibility or reliability. (There was also delay in the making of the complaint). Yet in refusing the costs application, the Court determined that it would have been for the jury to evaluate the evidence of all of the witnesses (having been appropriately directed on the aspect of delay).

The Crown also drew my attention to two other decisions of this Court, in which costs applications had been declined. [2] In one of those, the accused did not give evidence at trial, but there was evidence of other Crown witnesses contradicting the complainant's evidence in significant respects, even if the complainant's evidence was not inherently unbelievable.

However, whilst I have considered the authorities brought to the Court's attention, as the Court of Criminal Appeal observed in *Constantinidis v R; Lazar v R (Costs)* [2022] NSWCCA 248 ("*Constantinidis*") at [6]:

"The precedential value of past decisions of this Court either granting or refusing a costs certificate following a successful appeal is limited by the Court's disinclination to formulate general rules or criteria concerning when 'it would not have been reasonable to institute the proceedings'."

In *Constantinidis*, the Court of Criminal Appeal cited approvingly observations of Wood CJ at CL in *R v Manley* [2000] NSWCA 196 (at [14]) concerning the manner in which the Court should approach such applications:

"...the section calls for an objective analysis of the whole of the relevant evidence, and particularly the extent to which there is any contradiction of expert evidence concerning central facts necessary to establish guilt, or inherent weakness in the prosecution case..."

The applicant contended that the Crown case relied wholly upon the complainant's evidence as to whether the alleged sexual misconduct occurred.

The Crown did not dispute this, although it pointed out that its case also relied upon other evidence as well. On the application, the Crown relied upon evidence given by HA when police briefly interviewed her on 25 May 2024 in the course of executing the crime scene warrant – the day after the last incident. A theme of that evidence was her reluctance to care for the complainant. But there was also narrative about the circumstances of her admonishing the complainant on the afternoon of 24 May 2024, which was substantially comparable to the evidence she gave at trial.

The Crown relied upon the evidence of Professor Hayes, which, I noted, was relied upon in the trial. Professor Hayes opined on common or recurring behavioural characteristics of child complainants of sexual abuse, particularly in the familial setting. It also relied upon a police statement of Felicity Fairfax. Ms Fairfax was the Crime Scene Officer.

But on the main point raised by the applicant, the Crown contended, in essence, that the complainant gave credible evidence; and in particular, such inconsistencies as emerged (which is not an unusual phenomenon in such cases) did not undermine her credibility to any real degree, if at all.

As was customary, part of the complainant's evidence comprised the content of the police interview she gave to police on 25 May 2024. This was after the last of the alleged incidents giving rise to four of the charges (originally). Her pre-recorded evidence was given on 23 June 2024, well in advance of the trial, which resumed on 3 February 2026. By 3 February 2026, four of the charges attributable to conduct on 24 May 2024 had reduced.

Background evidence

The complainant had been living at her aunt's place since March 2024 after having stayed earlier with her father on the Gold Coast. Her aunt (HA) had been asked by the Department of Communities and Justice if the complainant could live with her. This was not the first time that the complainant was in the foster care of HA. The complainant had been placed with her when the complainant was 12 years of age. As far as HA was concerned, the complainant had made no complaint of mistreatment by the applicant in that earlier placement.

HA had been in a long-standing domestic relationship with the applicant, out of which they produced two daughters. That relationship ended in 2023, but the applicant (who had his own place) still went around to HA's place occasionally to help with the running of the household. Both HA and the applicant had busy jobs. HA had in fact two jobs most days, starting very early. The applicant also worked in Sydney, necessitating travel very early in the morning and commuting back and forth, returning in the late afternoon.

The complainant had become enrolled to start school at Morisset High School from early May 2024. Over the next few weeks, she befriended a small group of friends and indeed, developed a 'relationship' with one boy (SB). There was evidence that these friends tended to congregate, including for overnight stays, at the home of one of the friends' mothers, Monique, who lived at Morisset; not far away (as in walking distance) from where the complainant had resided at her grandmother's place.

The complainant's account

The first incident (charge 1)

The complainant identified this as occurring in the week commencing 13 May 2024. She said that the applicant had come into her bedroom whilst she was asleep. He was wearing long pants and a jumper. He laid on top of her and had 'fingered' her as well as trying to kiss her. She said he stuck his fingers in and out of her vagina for 15 minutes. She said she had tried to scream, but he held her mouth. At one point, he told her not to tell anyone.

The in between incidents

The complainant's evidence of this was admitted as context evidence.

She said that prior to 24 May 2024 there were other occasions when the applicant came into her bedroom and touched her inappropriately whilst she was asleep. She estimated that they occurred between 13 and 17 May 2024. She said that whilst wearing underpants or boxer shorts, the applicant had gotten into her bed, took off the blanket, lay on top of her and she said that she felt his penis rubbing against her vagina and also that he touched her breasts.

The final incident (charges 2, 3 & 5)

There was a good deal of further background in the lead up to this particular incident.

The complainant said that about 6:00am on 24 May 2024, whilst she was sleeping, the applicant had tried to enter into her bedroom. By 6:00am, HA had already left the home for one of her two jobs. HA confirmed that the applicant had stayed at the place overnight. The complainant's door was locked. She said he tried again. This particular day was a school day. She said that between these two asserted attempts, she got into the bathroom to take a shower.

At 8:00am, she said that she was off to school, but not before giving the applicant a hug. Ostensibly, she appeared as if she were on her way. However, she in fact 'wagged' school. From about the middle of the day she was in a skate park near the school with her group of friends. The complainant's absence did not go unnoticed. In accordance with standard procedures, the school texted the parent(s) nominated as the contact points in the event of a child's absence. In this case, the applicant had been so nominated.

But this was a day when, according to the applicant (and supported in this respect by HA), the applicant had a day off from work, and after dropping of equipment at a ResMed, he went off to enjoy a game of golf at Belmont. He said he received the message and rang HA to inform her about it.

After school had ended, HA attended the school. She said she noticed the complainant in the bus line, but did not engage with her at that point. Eventually, HA and the complainant fronted the Principal in his office. This meeting had not been scheduled. They were later joined by one of the school's two Deputy Principals. There was likely a discussion about the complainant's recent truancy and tendency to hang out or around with her boyfriend and her other friends at a skate park that was notorious for being visited by students wagging school and who wanted to smoke pot. Indeed, it became an agreed fact in the trial that the complainant had been absent from school on a number of occasions that she was in the care of HA (and the applicant), and also after she had left their care.

HA was displeased with the complainant, to put it mildly. She remonstrated with her in the meeting and told her that she proposed to contact the DCJ; thereby signalling that there was a question mark whether she could continue to care for the complainant. There was an unpleasant drive home.

At about 4:00pm they arrived back home, HA engaged in a conversation with the neighbour and that neighbour's mother. After having originally gone inside the home, the complainant joined them for a time, dressed in pyjamas. HA told the neighbour that the complainant was not allowed to play with the neighbour's daughter.

The applicant had returned to HA's home after his golf game between 5:30 and 6:00pm. Later in the afternoon, HA rang a DCJ caseworker. Subsequently she cooked dinner for the complainant before going out to visit a friend who was seriously ill in hospital. But before she did, she had two pertinent conversations. First, she told the complainant that she needed to reflect on her behaviour. She was not allowed to watch television. Secondly, she spoke to the applicant in the kitchen. The complainant was, at that point, in the lounge room, probably within earshot. HA told the applicant about the meeting with the school principal and her decision that she could no longer continue to care for the complainant.

Ten minutes after her arrival at the hospital, HA received a telephone call from the applicant. He reported that the complainant was not at home. She had gone missing. HA and the applicant made arrangements to separately try to locate her in suspected places.

With all of this background, I now turn to the complainant's account of this final incident. She said that after she and HA had returned home after the meeting in the school principal's office, HA yelled at her. She said she heard the applicant tell HA that he was going to rape the complainant and insinuated that HA had acquiesced to him doing so. She also said that she and/or the applicant had forced her to smoke a bong. She said that after dinner, she prepared to have a shower but noticed that the applicant was in the bathroom, sitting on the bathtub. She said that the applicant grabbed both of her wrists before releasing one of them before grabbing hold of her

waist. She said she was able to get out of the bathroom for a time, before going back in to have her shower. She got into her pyjamas and said she was wearing a sanitary pad, as she was having her period. After this, she went to the bedroom and noticed the applicant sitting on her bed. She said that as she entered into the bedroom, he grabbed her by the waist and chucked her onto the bed. She said he touched her inappropriately on her vagina, over her pyjamas. This was the conduct the Crown relied upon for charge 2. She then said that he touched her breasts, under her clothes, with skin to skin contact. This was the conduct relied upon for charge 3. She then said that the applicant placed his hand underneath her clothes and touched her vagina. She said that he had ‘fingered’ her for about 5 minutes whilst he lay on the bed on his side. This was the conduct relied upon to sustain charge 5.

The complainant said that this offending was interrupted when a neighbour’s car was heard in the driveway. She placed her clothing in a basket and disposed of the sanitary pad.

After the third alleged incident, the complainant got changed and sent Snapchat messages to her boyfriend, SB. She gave her approval for SB to pass on her complaint to another friend and that friend’s mother, Monique. SB passed on a report to Monique. SB and another friend resolved to visit the complainant, collect her and bring her back to Monique’s place. SB hugged the complainant and she told him that she had been raped by her uncle. After arriving at Monique’s place, the complainant confided in her (at Monique’s urging). The complainant told Monique that her uncle had touched her, which made her uncomfortable, and that he had raped her.

Complaint evidence

The Crown submitted that the complainant’s evidence was supported by the evidence of her first complaint to her boyfriend, and also to his friend and another friend’s mother, Monique.

Expert ‘counter-intuitive’ child behavioural evidence

To fortify its case, the Crown called an expert, Professor Susan Hayes. That expert gave evidence about the behavioural patterns of child sexual assault complainants on matters such as their apparent acquiescence or passivity, continuing associations with perpetrators and the circumstances in which they may make complaints; a correlation between victims of child sexual abuse and absenteeism from school; and delays in disclosures. The expert gave evidence that specifically centred upon allegations of this kind in a familial context.

The applicant derided the weight of this evidence (without any criticism of Professor Hayes). He says that the behaviours of this complainant were, in some respects, the opposite of what the research reviewed by Professor Hayes suggested. The complainant did not acquiesce or behave passively: she had only resided at the place where she said the incidents occurred for a short period and she had run away after the last of the incidents. She did not delay in bringing complaint. She complained, in general terms, to her boyfriend, whose attention, the applicant said, she tried to solicit. Although she was an absentee from school, there was no evidence that she did so because of alleged abuse and, as Professor Hayes herself acknowledged, there may be

various reasons for truancy. In her case, a more likely reason for truancy was her desire to socialise with friends.

DNA evidence

The Crown also relied upon DNA evidence suggesting that the applicant's DNA was found on part of the top sheet on the complainant's bed and on the complainant's underwear. The applicant countered this by his own DNA expert who explained how his DNA might have been transferred, in the domestic setting, either directly or indirectly.

The applicant elected to give evidence. Most significantly, he denied all the allegations. To reiterate, the prosecution could not anticipate that the accused would give evidence at trial but the retrospective nature of the exercise that a Court embarks upon when determining a costs application indicates that it is relevant to the application. By electing to give evidence as he did, he elicited a Liberato direction which, amongst other things, would have sharpened the jury's consideration of whether the Crown had established the charges beyond reasonable doubt. However, the applicant's Counsel did not refer to the applicant's evidence in his submissions in support of this application.

The applicant's critique of the Crown's case

His Counsel's written submissions principally contended that, in respect to each of the incidents giving rise to the charges (and also the uncharged acts), the complainant's evidence was not only demonstrably false but, further, indicated a witness who was untruthful.

These are the 'relevant facts' which the applicant contends were known, upon a retrospective assessment.

Relevant fact #1

This fact, or more accurately, composite set of facts, concerned "the last time incident" (charges 2, 3 and 5).

The applicant pointed to differences between the complainant's account of when she had her shower and the accounts of HA, the neighbour, and the neighbour's mother. The timing for the shower was significant since, on the complainant's version, that was the only shower she had, and it was not long after that that she said that she approached the bedroom and was sexually abused by the applicant. The complainant said that she had the shower after HA left to go to the hospital to visit her ailing friend. The evidence of all the other witnesses led to the strong inference that she had had the shower earlier in the afternoon, by the time she joined her aunt's conversation with the neighbour and the neighbour's mother and, significantly, also at a time when the applicant had not yet returned home from his golf game.

On this point, the Crown contended that the jury could have accepted the complainant's evidence as to the timing of the shower to be more reliable than other Crown witnesses (the neighbour and that neighbour's mother), given that she had particular reason to remember it. There were

differences in the accounts of the neighbour and her mother and the Crown elaborated that, in its view, what each of them had said about the conversation in the late afternoon of 24 May 2024 was generally unreliable and/or, on the specific point about the timing of the shower, should be rejected in favour of acceptance of the complainant's evidence of when the shower occurred. I understood the Crown to suggest that HA had 'washed her hands' of the complainant and, moreover, her evidence was contradicted in significant respects by the Deputy Principal.

In any event, the Crown acknowledged that the evidence of the neighbour, her mother and HA was capable of undermining the complainant's reliability, but this could have been left for the jury's scrutiny.

In reply to this submission, the applicant argued that it was hard to see how the jury could have preferred the complainant's account of the timing of the shower over that of three witnesses.

The applicant next pointed to what he contended were the implausible statements the complainant made in the afternoon of 24 May, before HA went to the hospital, these being: (a) that HA and the applicant forced her to smoke a bong; and (b) the applicant told HA that he was 'going to rape' the complainant as she was leaving the house. Putting to one side the denials by HA and the applicant of these comments, crime scene examination the next day at the home provided no support for the existence of marijuana or a bong in the home. As to the latter, the likely sequence was that HA had no further conversation with the complainant after she had indicated to the applicant her intention to terminate the care arrangements for the complainant.

On this point, the Crown acknowledged that it was unsurprising that HA and the applicant would deny that they had forced the complainant to smoke a bong. But the Crown pointed out that DSC Roseby had given evidence about the limited scope of the CS warrant, in terms of the number of rooms where it was carried out, so it was equally unsurprising if the police did not stumble upon it. The Crown contended that the complainant's evidence was not demonstrably falsified.

As to the complainant's evidence that HA had called her a "slut", the Crown indicated that this was not implausible in view of evidence, apparent on the face of what HA told police in the body cam, that she believed that the complainant was promiscuous. The Crown pointed out that there was evidence from the Deputy Principal that HA was very upset with the complainant on the afternoon of 24 May, whilst in the Principal's office.

As to the complainant's evidence that HA effectively acquiesced when hearing the applicant say he intended to rape the complainant, the Crown acknowledged that this evidence from the complainant was less plausible, but nonetheless pointed out she had said that she was not confident that HA heard the remark she attributed to the applicant.

The Crown contended that it was open for the jury to consider that HA was a partisan and had an agenda; largely stemming from her long association with the applicant, but also an apparent jaundiced view she took of the complainant, manifested by expressions of disbelief when police executed the CS warrant and explained why they were at her property. It was for the jury to scrutinize her credibility and reliability.

In reply to the Crown's submissions as to how the jury might have assessed aspects of HA's evidence and evaluated HA's conduct more generally, the applicant submitted that it was inherently improbable that the jury would have accepted the complainant's assertions about her as being credible. Indeed, the circumstances that she gave a contrary account to three witnesses about the timing of the shower and made the implausible assertions that she did about HA, probably caused irreparable damage to her credibility.

Relevant Fact #2

As a further point in connection with the charges associated with the last in time incident, the applicant contends that whilst she was under cross-examination, the complainant was unable to explain what actually occurred. She could not explain how, when she was in the bathroom, she was able to get away from the applicant's grip. She could not describe how he touched her breasts beneath her clothing. She could not remember whether she was on her side or on her back when he was alleged to have put his fingers in her vagina in the circumstance that he was said to have held her with both hands. The applicant emphasised that this was not a case of a significant period of delay between an event and the stated recollection. The complainant gave a record of interview to police the day after this alleged incident.

As to the alleged offending itself, the original charge 4 (touching of the bottom) had to be abandoned after she did not come up to proof and could only say that he attempted to touch her bottom. Once one charge was dropped and once the jury harboured doubt about another because of her credibility or reliability, the jury would be expected to have followed the Markuleski direction. In doing so, a jury might have reasoned that if she did not, in effect, come up to proof in giving an account on an abandoned charge, such absence of recollection might also affect the reliability of the account she gave about other charges alleged to have arisen from the same incident.

The Crown submitted that the applicant's criticisms of the complainant's recollections of the mechanism of the abuse was contrary to the science of memory and statements made by Judges in child sexual assault cases. As to the latter, reference was made to observations of the Court of Criminal Appeal in *Zhao v R* [2024] NSWCCA 229 at [212] and *RM v R* [2024] NSWCCA 148 at [231] about 'tangential detail'.

Relevant Fact #3

The applicant referred to the paucity of the DNA evidence. Although not submitted in these terms, it struck me that this was also most germane to consideration of the charges arising from the last of the alleged incidents.

Although the applicant's DNA was located in some places, it was not located on the interior elastic area of the complainant's underwear, or the interior and exterior of the two pink satin pyjama tops seized from the complainant's bedroom, as might have been expected given the way that she described the circumstances of the offending.

As to the DNA profile of the applicant that was located, it had no real probative value. It was of a low level; detected only through Y-STR testing after the standard DNA testing did not pick it up. It was mixed in also with two other contributors. Neither expert could say how it was deposited, including what kind of DNA transference occurred (direct or indirect). There was at least a reasonable possibility that his DNA got there in the process of the applicant collecting or folding washing (direct transfer) or was indirectly transferred as a result of common interactions associated with two people living (or often living) together under the same roof. I understand the applicant to contend, in effect, that if what the complainant said the applicant did was right, the DNA evidence would have been inculpatory. It was not.

On the DNA evidence, the Crown submitted that an absence of DNA proof is not proof of its absence. The circumstance that the applicant's DNA was located in the areas that it was, was not inconsistent with the complainant's description of what occurred. To the extent that his DNA was not located on the two pink satin pyjama tops tested that was not probative, given that the complainant did not say that she had worn either of those tops; although HA and the neighbour had recalled the complainant wearing them. But even if the jury determined that she wore those tops, Dr Collins did not rule out the possibility that the applicant's DNA was there. Nor did she say that she expected to see the applicant's DNA on the bedsheet. The highest she went (from the applicant's perspective) was that it was possible there may have been DNA transfer. Further, Helen Roebuck's evidence, viewed as a whole, did not say that the absence of DNA from the bedsheet was inconsistent with the complainant's account. The Crown contended that there were at least reasonable grounds to find that the DNA deposited on the underwear and sheet had been more probably deposited directly, rather than indirectly.

In reply to the Crown's submissions on the DNA evidence, the applicant says that if what the complainant had said about the last incident was right, it was inherently improbable that he would have shed as little DNA as he did. The DNA evidence was far from corroborative. The low amounts of DNA tended to support the applicant's argument about the innocent transfer of DNA (directly or indirectly).

Relevant Fact #4

The 'first incident' and the 'in between incidents'

The applicant grouped these incidents, even though it was only the first incident that generated a charge. The applicant referred to the complainant's inconsistent accounts as to the timing of this first incident. Various possibilities were mentioned: a month before the last incident (i.e. around ANZAC Day), a work day in a week leading up to the last incident (even if that would clash with her evidence of the timing of the 'in between incidents'). These inconsistencies, he says, go beyond what might be thought to be reasonable lapses of memory.

On the aspect of a complainant's recollection of timing for when abuse occurred, reference was made to what the High Court said on that subject in *BCM v The Queen* [2013] HCA 48; (2013) 88 ALJR 101 ("BCM") at [45]-[47], which were later applied in *Davis v R* [2024] NSWCCA 120 ("Davis") at [46].

Relevant Fact #5

This also concerned the first incident. The applicant says that there was a vagueness in her evidence as to how he digitally penetrated her. Although she said he put his hand under her vagina, she could not recall which hand or how the applicant's body was positioned when he inserted his fingers.

The applicant said that the complainant had given evidence of having screamed during the course of the first incident and also the in between incidents. That derived no support from others who were (apart from the applicant) in the home, being HA and the applicant's daughter; as might have been expected.

On this point, the Crown says that it is more accurate to say that the complainant said that she had started or attempted to scream and also that the complainant said that the applicant's daughter was rarely home. Further, to the extent that the applicant's submission insinuated that it would be unlikely that he would have engaged in conduct that was inherently likely to be detected, the Crown cited observations of Beech-Jones CJ at CL (Price J agreeing) in *Sita v R* [2022] NSWCCA 90 at [49]-[50] to the effect that a person with a sexual interest in a particular child may be prepared (or unable to resist the temptation) to take the risk of detection.

Relevant Fact #6

Demeanour

The applicant criticised the complainant's demeanour, citing instances of her yawning and stretching and tapping on the table, her hunching down with her head held up by her hand and, conveying the impression that the experience of giving evidence in the pre-recording was an inconvenience to her. She was not doing her best to tell the truth and assist the jury.

The Crown submitted that allowances had to be given to the complainant, a 13 year old child, who became tired in the second day of her evidence. It was not an indication of a complainant treating the process as a mere inconvenience. The Crown also emphasised one of the consent directions (Criminal Procedure Act 1986 (NSW), s 292D) would indicate to the trier of fact, in effect, that an absence of emotion in a witness does not necessarily mean that the person was not telling the truth. Ms Crown acknowledged that the terms of this particular legislative provision dealt with cases where absence of consent was an element. Nevertheless, the substance of the direction was also apposite in cases missing that particular element.

As to this matter, the applicant says that at the time that her disinterest in giving evidence was manifest, during the pre-recorded evidence, the applicant was actually 14 years and 10 months of age. As to the suggested application of s 292D, if only by analogy, there would not be any basis for such a direction.

Motive to lie

A motive to lie direction was given to the jury. Part of that informs the jury that they should not speculate why the complainant would lie. Nevertheless, the circumstances did indicate one possibility: her appreciation that her DCJ placement was coming to an end and the prospect that she might secure other accommodation with Monique, being in close(r) proximity to her boyfriend and other friends. She was not close to, or on good terms with her aunt and any complaint she made against the applicant would affect the aunt.

The Crown submitted that the evidence was not such that the trier of fact could conclude that the complainant knew that her DCJ placement would change. Also, the evidence did not establish that she had any basis for thinking that the friend's mother would be prepared to provide accommodation that night or even longer. But if she thought she might be able to stay the night, there was nothing to indicate any expectation that it might be longer. There were indications that if she was to go anywhere, it might be back to her father on the Gold Coast. Further, such motive did not gel with the timing of her complaint to her boyfriend, which partly occurred on 23 May, even before her arguments with HA and act of truancy on 24 May.

Summary

The applicant submitted that with the knowledge of facts now known, especially the facts or evidence as it unfolded in the trial, it would not have been reasonable to institute the proceeding. Any of the points raised could individually support such conclusion, but in combination, the conclusion was compelling. Simply put, the complainant was very substantially lacking in credit. The Crown could not discharge its onus of proving the applicant's guilt.

The Crown submitted that it had in its possession an apparently credible complainant and had supporting evidence in the form of complaint evidence and DNA evidence. The Crown acknowledged that as events unfolded, inconsistencies between her evidence and other evidence emerged, but fundamentally this was a 'word on word' case, as commonly occurs in sexual assault matters. That she may have appeared inarticulate and that there were indications that she had come from an extremely insecure childhood provided part of the forensic context with which the Crown was, in a sense, burdened, but that did not suggest that it was unreasonable for the Crown to institute the proceeding. The applicant has not discharged its onus of proving that it was.

Consideration

I recognise that it is the nature of the analytical process that I am addressing these facts separately, however, what is ultimately significant is their cumulative effect.

Relevant facts #1-3

As indicated, these especially bear upon the last of the alleged incidents, giving rise to charges 2, 3 and 5.

I consider that the timing of the complainant's shower on 24 May 2024 was an important fact. It was an event that the complainant consistently (in her JIRT interview - undertaken the day after 24 May 2024 - and pre-recorded evidence) tied to being in close temporal proximity to the last incident. On the complainant's account the incident had also occurred after she had had dinner. Further, the complainant's account did not accommodate the reasonable possibility that she may have had more than one shower after returning from the school that afternoon or evening (at least prior to the incident she alleged).

Yet the effect of the evidence of three Crown witnesses was that the complainant had been observed to have worn pyjamas after representing that she had had a shower at some time much earlier than dinner time, and particularly at a time when the applicant was not at the premises.

Contrary to the Crown's submission, the evidence of the neighbour and that neighbour's mother was evidence from 'independent' witnesses. They indicated something which, even with the passage of time, was to them a distinctive memory because of its apparently unusual nature: the sight of a thirteen year old girl wearing pyjamas outside the front of her house in the mid to late afternoon. Moreover, they had additional reason for recalling that aspect of the event as it related to HA informing them, in effect, that the complainant had behaved badly earlier during the school day.

It was open for the trier of fact to consider the Crown's submission that HA was a partisan (even if the submission was not actually put in those terms by Ms Crown at the trial) towards the applicant's interests, but her evidence was, on this point, essentially aligned with two witnesses who had no barrow to push.

Nevertheless, the jury would likely have considered the possibility that these two independent witnesses, and HA, were mistaken when they said they recalled seeing her in her pyjamas at that time of the day and that the complainant, who arguably had greater reason to recall a surrounding detail of this character, may have been correct.

However, although there was evidence of three Crown witnesses contradicting the complainant's evidence on a material fact, and whilst it may have generated doubt about the complainant's reliability, it was not indispensable for proof of the Crown case that the offending occurred when the complainant said it did, in the evening, after HA had left the premises, and after the complainant had had dinner. The jury might have reasoned that although the complainant had given reliable evidence that the incident had occurred in the evening, she may have been

inaccurate in her recollection of when she had got into her pyjamas, and that when she had given her account she was only surmising that she had had a shower in the evening, rather than in the afternoon. In this way, the jury may have regarded her evidence as inaccurate, but not necessarily as implausible, or worse, dishonest.

I will now address the two aspects of the complainant's evidence about the presence of the bong and the applicant's asserted declaration of intent about raping the complainant in HA's vicinity with the latter's apparent acquiescence. These asserted statements were made in the Snapchat messages to the complainant's boyfriend (Exhibit A in the trial). In my view, both statements would have appeared to the jury as being inherently implausible. Moreover, they bore the hallmark of a complainant who gratuitously was intending to smear HA and/or the applicant. However, this has to be seen in a context where there was animosity between the complainant and HA because of events that had occurred earlier in the day and the jury could well have concluded that the complainant was in a resentful mood.

A related point was the motive to lie. This was closely linked to the complaint evidence, since the complaints were not directed to her mother or father, or DCJ caseworker, but to friends including a boyfriend (and another friend's mother) whom she apparently met for the first time only weeks before. The complainant's boyfriend could only recall the complaint being made via Snapchat. This was the same medium in which the complainant asserted that the applicant (and/or HA) made her smoke a bong and the applicant indicated to HA his intention to rape the complainant. Given what I have already said about those statements, this would have been additional reason for the jury to treat somewhat sceptically other statements the complainant made to him through the use of this medium.

But even if, as HA clearly thought, the jury may have believed that the complainant was seeking her boyfriend's attention, it would be another thing for the jury to conclude that she would also have necessarily lied to her other friends and one of those friend's mother. It was for a jury to determine these matters.

The jury might treat the complaint evidence as additional evidence to support the complainant's account, and the jury could use it as evidence of the truth of what she asserted but also as relevant to her credit. It was also conventionally directed that just because something was said on more than one occasion it did not mean that what was said was necessarily true or reliable; and that a false or inaccurate statement did not become more reliable just because it was repeated. The stream cannot rise above the source. If the jury harboured doubts about the complainant's credit and reliability in making the accusations against the accused, the circumstance that she did so more than once, even at a point of contemporaneity with the last incident was unlikely to aid the prosecution. This, however, was a matter for the jury to determine.

The jury might also have treated the presence of the DNA evidence as additional evidence of the complainant. However, there were apparently reasonable hypotheses consistent with the accused's innocence that could prove difficult for the Crown to disprove in the familial context where direct and indirect transference of DNA, even to the complainant's clothes or bedsheet,

can arise. With the benefit of hindsight, after two experts had given evidence about the subject, the DNA evidence, viewed in its totality, was unlikely to materially move the dial in favour of the jury's acceptance of the Crown case. Again, though, this was a matter for the jury to decide. Unlike the position identified in some of the authorities I referred to earlier in these reasons, it is not the case that expert evidence might, on balance, have been regarded as being decisively against the Crown in a way that indicated the unreasonableness of the commencement of the proceeding.

The evidence of Professor Hayes was educative and aided the jury in impeding a process whereby the adoption of, or resort to, stereotype might quickly overwhelm rational decision-making. What that expert said about the difficulties that a complainant in a familial setting may face and an indication that a child complainant has been absent at school may have resonated with the jury. On the other hand, the jury would have to consider how this particular complainant behaved. If they disbelieved her for want of credibility or reliability, Professor Hayes' evidence could not save the prosecution case. This is another instance where, in my view, when considering an application of this kind, this expert evidence called by the Crown was neutral.

As the jury was directed, the applicant did not need to demonstrate any motive for the complainant to lie to her boyfriend, her other friends and, after the intermediation of the friend's mother, eventually to police, but they were in issue in the trial. To the extent that the complainant's motives were in issue, the question was not what a hypothetical reasonable 13 year old girl in her circumstances would likely have thought, but rather what this particular complainant likely thought. I am inclined to think that the reasoning process that the Crown submitted was directed to the former rather than the latter. The issue is not whether the complainant could reasonably (or even rationally) have thought, with the prospect of imminent termination of placement with HA in mind, that the home of the complainant's friend's mother would likely have provided an alternative source of accommodation for any length of time. Conceivably, the jury might have reasoned that the complainant might have actually viewed that home as a potential port in the emotion-laden storm that she was in and that her focus was on the immediate term. However, there was no evidence to indicate that the complainant had discussed with her friends any plan that she might have conceived that she might stay with Monique for any substantial period of time. There was very scant evidence to sustain such motive. It relied very substantially upon inference where there were a range of potential competing inferences. In any event, again, these were all matters appropriately left for a jury.

It was also possible for the jury to reason along the lines that the Crown later did, that HA had washed her hands of the complainant, did not care (or no longer cared) for her and thought that the complainant was an attention-seeker towards young men, such that her accusations against the complainant fell to be considered in that light, as HA indicated in her Body Cam interview with police. But it was also in my view part of the prosecutor's function to consider the possibility that HA might be believed and, if so, what effect that prospect might have upon the jury's consideration of the reliability and credibility of the complainant. HA might well have impressed the jury as a hard-working aunt, pressed, for the second time, into caring for her niece and who,

on 24 May, had to deal not only with the absenteeism of the complainant but a painful injury that required medical attention; in conjunction with an ailing friend she wanted to see. In my view, to think that the jury might reason in the way the Crown suggests would have been forensically risky. Although it can be accepted that it was for the jury to compare the accounts of the complainant and HA, there was, in my view, always an inherent risk that a decisive preference for HA's account would very substantially weaken the prosecution case. Therein lies the rub for the applicant, however. Which witnesses' narratives are preferred is generally in the domain of the jury.

When considering charges 2, 3 and 5, the jury was entitled to act on the Markuleski direction. The jury heard the complainant's evidence that the accused had attempted to touch her bottom, which was substantially different to what she had complained about and resulted in the prosecution's effective abandonment of charge 4. That the conduct sustaining this charge was part of a rapid succession of other aspects of abuse sustaining charges 2, 3 and 5, and was something that the jury would doubtless have taken into account when weighing whether the prosecution had established those charges beyond reasonable doubt. However, the jury might also not have regarded quite as materially as the applicant regarded, the distinction between touching a child's bottom and attempting to touch it.

Finally, I have considered the applicant's suggested 'Relevant fact 2'. In this, there is force in the Crown's contention that in the circumstances, differences in account as to precisely how, and in what circumstances, an act of sexual intercourse or intentional sexual touching occurred are the sort of thing that should be left for a jury's determination, especially in the light of legislative provisions but also more modern understanding of how memory of a complainant of a traumatic episode can be affected: it was, to paraphrase, more likely that the complainant would remember the core aspects of an event rather than detail of it. This complainant had, in her JIRT, given a fairly sparse indication, in effectively a 'Q and A' procedure, of what she said the applicant had done the day after the last incident. But she was not probed for further detail by the interviewing officer, so should not be criticised for any perceived incompleteness in the detail. In the passage highlighted in the applicant's written submissions on this issue, plainly her recollection of the details surrounding those alleged acts had not improved.

Relevant Facts #4 and 5 (the first in sequence)

Although it is true that time was not of the essence in the matter, there is some force in the applicant's point about inconsistencies as to when the first incident occurred. This was not a case like BCM or Davis, the two authorities the Crown cited, where there was a substantial time interval, measured in years, between the incident and the first report of it. At the time she was interviewed by police on 25 May, bearing in mind that she commenced her enrolment on 8 May 2024 (and therefore likely to have met her boyfriend and other friends from the same school), the first of the alleged incidents could only have occurred a matter of weeks before. A lack of detail about that matter, in the circumstances, was apt to sap an assessment of her reliability to a degree.

What I have said about Relevant Fact #2 also applies to (the first of the) Relevant Fact #5.

However, applying Markuleski, a jury taking into account the abandonment of charge 4 and, for reasons I have explained, the deficiencies in the complainant's evidence and the prosecution case on charges 2, 3 and 5 would have had to consider how those matters would factor into their assessment of charge 1.

Relevant Fact #5 (the second in sequence)

This concerned the 'in between incidents', which did not give rise to any particular charge and the screaming.

Having considered the parties' respective submissions, the state of the evidence is too ambiguous such as to allow a finding in the terms that the applicant proposes.

Relevant fact # 6

As to the applicant's point of demeanour, juries are customarily told, and this jury was specifically told, to pay attention to the demeanour of all witnesses (not simply the complainant) and the relevance of demeanour to assessing a witness' credibility or reliability. But as I explained to this jury:

"Demeanour and impression alone do not determine the honesty, or accuracy, of the witness's evidence."

I generally agree with the Crown that it is seriously doubtful that the jury would have been disinclined to believe the complainant on this basis since at a point she may have manifested disinterest, even boredom, in the course of her being cross-examined. The jury would have been aware that she had given accounts of the incidents twice before she was cross-examined. The jury would also have been aware that she was a teenager. Certainly when viewed in isolation, this fact, even assuming it is a valid criticism of part of the complainant's evidence, would not cast doubt upon the reasonableness of the institution of the prosecution.

Evaluative assessment

It is unnecessary for me to find, and I do not find, that the complainant was deliberately untruthful or deliberately dishonest.

However, in applications of the kind that the applicant brings, predicated upon the characterisation of it being a 'word for word' case, it is insufficient for an applicant to establish that there were concerns about the complainant's reliability. It is not just that a complainant (as central Crown witness) is unreliable, it is that she is "very substantially" lacking in credit. Even in the absence of any need for the applicant to prove that the complainant was deliberately dishonest, that is a high threshold: it emphasises the general principle that it is for the jury to consider issues of witness credibility and reliability.

On the basis of all of the facts, I accept that there were some doubts about the complainant's credibility if not also her reliability. A more difficult question however is how that was likely to have played out in the jury's consideration of the charges. It may have been understood by the jury that she harboured resentment or animus towards the carers (HA, but also the applicant to some extent) and that, because of her background, she might have appeared troubled. A jury may have reasoned that this may have contributed to what the applicant rightly describes as implausible assertions she made about HA and the applicant about the encouragement or condonation of using a bong and the applicant's declaration of his intention to rape her; but despite this possibility, it might also have still believed her accusations. Although she did not come up to proof on charge 4 (a circumstance that the jury would be expected to take into account when determining the other charges), in the heat of trial, the jury may not have thought that there was a great deal of difference between an allegation that the applicant had touched her bottom and an allegation that he had only attempted to do so as part of an episode of other sexual touching. The complainant gave a consistent description of the essential features of the conduct constituting the other charges, with few inconsistencies; even if her accounts did lack a level of surrounding detail; which, as was explained to the jury, is not uncommon in these kinds of cases.

Moreover, there was additional evidence that the jury could have relied upon as supporting her evidence: she made contemporaneous complaints to strangers (which were not shown to contain glaring differences) and the applicant's DNA was located on her bedsheet and clothes. As to the latter, although the applicant raised competing innocent explanations for how it came to be there, it could not be said that it would have been unsafe for the jury to think that it assisted the Crown case.

In the circumstances, I am not persuaded that if the prosecution had, before the proceedings were instituted, been in possession of evidence of all of the relevant facts, it would not have been reasonable to institute the proceedings. It is unnecessary for me to consider the other matter in s 3(b).

The application for a costs certificate is dismissed.

Endnotes

1.

R v Nellore [2022] NSWDC 333; R v Duffy (No 2) [2022] NSWDC 388; Field v DPP [2010] NSWDC 144; R v CPR (2009) 9 DCLR (NSW) 362; [2009] NSWDC 219; R v Cardona [2002] NSWSC 823.

2.

R v DJY [2012] NSWDC 59; R v Pratt [2006] NSWDC 48.

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Decision last updated:

02 April 2026

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Prepared on 30 October 2026 · Esheria