

STATE OF TASMANIA v DARREL GEORGE HARINGTON
COMMENTS ON PASSING SENTENCE

4 MARCH 2020
BRETT J

Mr Harington, the jury has found you guilty of two counts of indecent assault and one count of maintaining a sexual relationship with a young person under the age of 17 years.

The charges relate to two complainants. Having regard to the conduct of the trial, and the basis upon which the matter was left to the jury, there can be little doubt that the jury accepted each complainant as a credible and reliable witness. For the purposes of sentencing, I also accept each as such. I am satisfied that each gave a substantially accurate account of your conduct and will formulate the sentence on that basis.

The two counts of indecent assault occurred during the Christmas school vacation between 1977 and 1978. The complainant in respect of those charges was, at that time, 12 or 13 years of age, and in between grade 8 and 9. You were a teacher at his school. During the school holidays, while the complainant was staying with his mother and brother at a caravan park on the East Coast, you collected him and took him to your farm at Little Swanport. Because of the passage of time and his age then, the complainant was not able to give much detail about how this was arranged, but it is clear enough that you must have suggested this to his mother. His mother was bringing up the complainant and his brother by herself after their father had left when the complainant was an infant. I infer that she agreed to your proposal because it would have seemed beneficial to her for her son to spend time with an adult male teacher. She would have trusted you implicitly because of your position.

The complainant stayed for two nights. Another unidentified male student was also present. During the day, you provided alcohol, the complainant thinks sherry, to him, and, at some point, you took both boys shooting. The only accommodation was a caravan. After the boys had gone to bed in the caravan for the evening, you suggested a masturbation game. When the complainant did not show interest, you then masturbated yourself. The complainant heard you doing this before he fell asleep. He woke later to find you holding him down, masturbating his penis as well as your own. You were naked. The complainant's evidence was that when you had finished, you pushed your penis into his face. You are not charged with this act as a separate crime but it is relevant to the context in which the indecent assault was committed. The act of masturbation of the complainant's penis constitutes count 1.

Count 2 involved the same conduct, perpetrated on the second night. Again, you provided the complainant with alcohol during the day. He again woke to find you masturbating him and yourself as you had done on the first night. On this occasion, he yelled out and you desisted from your conduct. You took him back to his mother at the caravan park on the following day.

These were serious crimes. They involved a shocking breach of trust. The complainant was vulnerable because of the disparity in age, his mother's trust of you, and the isolated nature of the farm. He had no means of escape nor even of contacting his mother. Your use of alcohol and the presence of the other boy are also aggravating factors, although there is no evidence that the other boy was aware of your criminal conduct. Although the acts did not involve sexual penetration, they were degrading and personally invasive. Some force was involved, in particular, holding down the complainant. Although your counsel suggested to the jury that this would have been almost impossible, I have no difficulty accepting that you had the capacity to place pressure on the small boy with your arm, thereby holding him down, while touching his penis. This aspect of your conduct is significant to his traumatic recollection of these events.

In his impact statement, the complainant speaks of his ongoing traumatic memory of your abuse of him and the consequences it has had on his life. His partner's evidence was that the traumatic memory of being forcibly held down has surfaced in repetitive nightmares. I have read the impact statement and will not go into the detail of his description of the consequences, but that ongoing harm is consistent with the Court's understanding and experience of the long term and often permanent harm which results from childhood sexual abuse. He has started counselling but still feels that he is only at the start of the healing process.

With respect to count 3, the crime of maintaining a sexual relationship with a young person. This crime was committed between June 1998 and February 2000. The complainant was 14 at the commencement of that period and 15 years of age at the end. You were 46 to 48 years of age at that time. You met the complainant by chance when he was with friends. He and his friends visited your house a couple of times and then he returned there alone. It is not clear from his evidence whether he was invited by you to do so. The complainant's evidence was equivocal on this point. I will give you the benefit of the doubt, and will proceed on the basis that he did so of his own volition without invitation.

The crime is comprised of four unlawful sexual acts. However, of course, these sexual acts took place within the context of ongoing criminal conduct. The first unlawful sexual act took place on his first visit alone to your house. It consisted of indecent assault. As he was leaving, you tickled him, and while doing so, you deliberately touched his penis through his clothing. This act commenced the course of sexual conduct which persisted for the balance of the relevant period, and took place exclusively at your house. Throughout the relevant period, the complainant returned to your house on a regular basis, he estimated a couple of times a week. On each occasion, there was sexual activity between you. The nature of your sexual conduct quickly escalated and included oral and anal intercourse. The three remaining unlawful sexual acts which constitute the crime formed part of this ongoing conduct. I am satisfied that each occurred as described by the complainant. Two of the acts consisted of you penetrating the complainant's anus with your penis, thereby committing the crime of sexual intercourse with a young person. One such occasion took place when you and he were in the shower together. The other occurred with you on top of him on your bed, as he was watching pornography on the television. The pornography had been provided by you. On that occasion, he asked you to withdraw before ejaculating but you did not do so and ejaculated inside him. The final act was constituted by you permitting him to penetrate your mouth with his penis during an act of oral sex.

I will proceed on the basis that the entire course of conduct, including the specific acts which constitute the crime, occurred with the complainant's consent. Of course, the consent of a 14 or 15 year old boy, does not mitigate your behaviour for the reasons explained by Pearce J in the decision of the Court of Criminal Appeal in respect of your sentence for sexual crimes against other boys. However, I do accept that your conduct lacks some of the aggravating features sometimes seen in crimes of this nature, and in particular applicable to the other crimes which you committed. You were not in a special position of trust with respect to this complainant, as you were in respect of the other complainant. You did not initiate the contact, although you clearly encouraged and fostered it once it had started. Although you did supply alcohol to the complainant, this was not done in order to facilitate your commission of the crime, but rather was in the nature of a gift intended to contribute to the maintenance of the relationship. You did not resort to actual or threatened physical force, nor to overt manipulation or deception. Apart from the one occasion when you ejaculated despite the complainant's request for you to withdraw, there is no suggestion that you overcame resistance or distress.

On the other hand, there are some aggravating aspects of your conduct. There was a very significant disparity in age. You clearly took advantage of the complainant's youth and lack of maturity. The course of conduct took place on a repetitive basis over a significant period of time and consisted of highly intimate and penetrative acts. The maintenance of a sexual relationship of that nature over a lengthy period and at that stage of his life had a clear capacity to corrupt and interfere with the complainant's opportunity for healthy emotional, psychological and sexual development.

Understandably, the impact on this complainant has also been profound. His impact statement describes ongoing psychological and emotional consequences of considerable persistence and severity. This is consistent with what can reasonably be expected from the history of your conduct as described by him.

Your background is set out in considerable detail in the Court of Criminal Appeal decision. I take into account, in particular, the contents of paragraphs 78 to 82 of Pearce J's reasons. You, of course, had no prior convictions and have had employment in a number of capacities, including as a teacher, but this of course, has little significance in respect of sentencing, having regard to your demonstrated criminal behaviour over a very long period of time. You have been in custody since the commencement of your sentence for the other crimes. You were 63 years of age at the time that you started incarceration, and are now 68. The sentence imposed by the Court of Criminal Appeal was one of 12 years' imprisonment with a non-parole period of 7 years. You will become eligible for release on parole after serving the 7 year non-parole period, which will expire on 30 August 2022. At that time, you will be 70 years of age.

A factor of real significance in this case is the application of the totality principle. This principle requires a court which is imposing sentence for multiple offences to have regard to the aggregate sentence to ensure that it is just and appropriate, in particular that it is proportionate to the overall criminality and, further, is not unduly crushing, having regard to the record and prospects of the offender. The principle applies when a sentence is being imposed on a person already serving a sentence for other crimes. It clearly has application in your case.

The sentence imposed by the Court of Criminal Appeal was in respect of crimes of a similar nature committed against nine other boys, aged between 12 and 15. That conduct took place during four separate periods over 35 years and involved 12 separate crimes and 27 separate incidents of sexual abuse. The criminal conduct ranged from indecent assault to acts of anal penetration, and included one rape. The crimes included 2 counts of maintaining a sexual relationship with a young person. All the conduct involved what one of the appeal judges described as an appalling breach of trust. The indecent assaults with which I am dealing were committed one year before the first of those crimes. The crime of maintaining a sexual relationship occurred during the overall period, but at a separate time to the other offending.

Proportionality requires me to take into account that the offending with which I am dealing consisted of separate crimes committed against different complainants to those involved in the other cases, and at different times. I must take into account the harm caused to each complainant as a result of the criminal conduct. On the other hand, the fact that you are already serving a lengthy sentence for similar conduct reduces the weight to be attributed to general and specific deterrence, which, of course, are in general terms, highly pertinent sentencing considerations in a case such as this.

Although I think that your conduct, taken discretely, demands a significant sentence of imprisonment, when I have regard to totality, I am constrained to some extent by the view taken by the majority of the Court of Criminal Appeal. It may well be that had you pleaded guilty to these crimes at the same time as the other crimes, the overall effective sentence, because of the totality principle, would have been similar, if not the same, as that imposed by the Court of Criminal Appeal. However, you were not charged with and did not plead guilty then to these crimes. While you are not to be punished for exercising your right to trial in respect of these crimes, you are not entitled to the mitigation that arises from a plea of guilty. Of course, you should not receive any mitigatory benefit from the fact that these crimes were not reported until after sentence was imposed for the other matters. You could, of course, have confessed to this conduct at any time after its commission. Further, there is the question of the separate criminality, and separate complainants, which I discussed above. In my view, these various considerations are properly balanced by a modest increase in the length of the part of the overall sentence which is actually served in prison, but not to the full extent of the sentence which I would otherwise impose for these crimes. Because of the technical provisions of the *Sentencing Act* and the *Corrections Act*, the only practical option available to me is to backdate your sentence, with the effect that it will be served concurrently but will extend your release date by an appropriate length. If I were to impose a cumulative sentence, there would be a need to artificially reduce the sentence, having regard to minimum non-parole period of one half. I think the better option is to impose a sentence which I think is deserved, but to backdate that sentence, so it will be served concurrently, but will also extend the overall release date, in terms of a non-parole period, by an appropriate length. Further, there is no practical benefit in fixing a non-parole period in the sentence which I impose. If I did, any remaining period would be ineffective because it would be served concurrently with the other sentence.

A further consequence of adopting this methodology is that the balance period of the overall sentence, to which you will be subject in the event that you were granted parole and parole was revoked, will be reduced by the extent to which your release date is extended. I do not think this can be avoided. Of course, such period would only be relevant in the event of a revocation of parole. It does not necessarily affect the period during which you would be on parole. That is a matter for the discretion of the Parole Board and can exceed the full term of your sentence. I refer to s 75 of the *Corrections Act*. However, it is relevant to take this into account when assessing the impact of my sentence on the overall sentence.

In assessing the length by which your release date will be extended by this sentence, I will take into account all of the above considerations including, in particular, the overall effect of the sentence. I will also take into account your age and what your counsel has told me about your experience of prison to date, and work which you have done while in prison, with a view to seeking rehabilitation for yourself and assisting other prisoners. On the other hand, I reiterate that you are not entitled to the mitigation which arose from your plea of guilty in respect of the other crimes.

The sentence I impose is as follows. You are convicted of the crimes of which you have been found guilty. You are sentenced to a global term of five years' imprisonment, which will be backdated to commence on 28 February 2019. Pursuant to s 17(2)(a) of the *Sentencing Act*, I order that you not be eligible for parole in respect of this sentence. The practical effect of this sentence is that it will be served concurrently with the sentence to which you are already subject, but you will not become eligible for parole until its completion, which means that your effective release date will be extended for a period of 18 months.

I order that pursuant to the *Community Protection (Offender Reporting) Act* that your name be placed the register for a period of 10 years, which will commence on the day of your release from prison.