

STATE OF TASMANIA v RDA
COMMENTS ON PASSING SENTENCE

WOOD J
15 MAY 2020

RDA has pleaded guilty to four counts of indecent assault and two counts of penetrative sexual abuse of a child contrary to s 127 and s 124(1) of the *Criminal Code*. The charges concern two children, referred to as M and S.

These crimes were committed between about 1977 and 1982, when the defendant was aged between 17 or 18, and 22.

When the defendant was 16 and a half, he committed a crime involving sexual intercourse with a child, aged 7 years. He was charged with rape and a jury found him not guilty of rape, but guilty of defilement. On 19 September 1976, three months after the crime was committed, he was sentenced by Nettlefold J. After lamenting the fact that the only institution available was prison and there was a lack of suitable institutions to provide detention for a youth, the learned sentencing judge sentenced the defendant to 15 days of work orders and a probation order for three years.

After he was sentenced, the defendant's mother asked her eldest daughter Ms H to allow the defendant to live with her. Ms H was 13 years older than the defendant. She had a daughter from a previous relationship and she had two children with her husband including S, born in July 1972. Later, a third child was born. Her husband had three children from a previous marriage, one of whom was M, born in February 1970. M usually lived with her mother and siblings in Melbourne but spent her school holidays with her father and Ms H and their family unit.

From approximately early 1977, the defendant began to live with Mr and Mrs H and the three children in the house including S.

Count one, indecent assault, concerns the child M and occurred first in time. The details are as follows. It occurred during the school holidays in 1977/1978, when the defendant was likely 18 years of age, or possibly just shy of his 18th birthday. M came to stay with the family. She was then aged 7 and a half. All seven children and the defendant were at the house. Mr and Mrs H were out and the younger children were being supervised by the older children and their uncle, the defendant. The children were playing in the lounge room at the front of the house. M was wearing a summer dress and the defendant offered to give her a piggy back. He took her for a piggy back ride through the house away from the lounge room. With one hand he held her up on his back and with the other hand he moved her underpants to one side and inserted his fingers into her vagina and moved his fingers. He digitally penetrated her vagina for about 5 seconds. The complainant felt scared, dirty and uncomfortable and squirmed her way down off his back. She went to another bedroom and stayed away from him. She knew something bad had happened but felt frightened of causing trouble if she told anyone. She was aware that there was a court order that she and her brothers spend the holidays with their father and she was concerned about making a disclosure of what had happened. She was frightened of the defendant and avoided him. When she was 12 or 13 she disclosed to a friend that her uncle had molested her, but did not discuss the detail of what he had done.

The remaining five counts relate to two incidents and involve the complainant, S. She was aged approximately 6 and a half when the family moved to Sandfly in late 1978. By then, the defendant was aged approximately 19 years of age. When she was aged between 6 and a half and 9 and a half, and the defendant was aged between approximately 19 and 22, he sexually assaulted her by sucking and licking her breasts and vagina and by penetrating her mouth with his penis. S recalls two particular occasions when she was sexually assaulted by the defendant against a background of other occasions that she is unable to particularise. The defendant is to be sentenced only for those two specific occasions. But because of the other incidents, he cannot claim in mitigation that those two specific occasions were isolated incidents.

One of the two specific occasions was during summer when he told her to go with him and he wanted to show her something "really cool". She followed him into a bedroom. He had tied a piece of cotton to a blowfly and it was flying around the room in circles. He told her to lie on the end of his bed. She did so and he penetrated her vagina with his fingers. This hurt the complainant. He asked her if it felt good and she told him no, and that it hurt. He removed his fingers, and I note that he did not ever repeat that conduct. He sucked and licked her breasts, committing a second indecent assault. He asked her if that felt nice and she replied that it did. The defendant asked her to sit up on the bed. He held her head and penetrated her mouth with his penis and moved it in and out, until he ejaculated inside her mouth. He held her head hard involving coercion and restraint. She recalls choking while he penetrated her mouth. She was confused and hated what he was doing to her. After he ejaculated, he told her to swallow the semen and she did what she was told. She found it disgusting and repulsive.

The second of the two specific occasions happened in the defendant's bedroom. The complainant recalls being in the bedroom but cannot remember how she came to be in there. She was sitting on the end of the bed and laid back on the bed with her legs over the edge. The defendant was squatting or kneeling. He licked her vagina and moved up her body and licked and sucked her undeveloped breasts. He asked her to sit up. He penetrated her mouth with his penis until he ejaculated. Throughout the occasion he asked her if it felt nice, to the complainant it seemed that he was trying to convince her. On this occasion, he told her that she could spit out the semen. She ran to the bathroom where she rinsed out her mouth. She recalls feeling anxious that someone would see her or find out what the defendant had been doing to her.

The number of uncharged acts involving oral intercourse were a total of 3-5 occasions. On one of these occasions the defendant told the complainant not to tell anyone. She did not tell anyone for a number of years.

The complainant recalls a conversation she had with her older sister, R and she spoke to her sometime before they moved from Sandfly in 1983. Her sister asked her what she had been doing with R. The complainant did not say anything and her sister told her not to let him do anything to her and that she had to say no. Subsequently, the defendant tried to grab her and she rebuked him and walked off. The conversation she had with her older sister had empowered her to say no to the defendant. This is revealing about the lack of protective strategies that the complainant had, as a young child, to deal with the defendant's conduct.

The complainant felt very confused by what the defendant was doing to her. She knew it was wrong and that she did not like it but she felt complicit, conscious that he had asked her if it felt nice and at times she had said it did. It is common for child victims who have been sexually abused to wrongly feel complicity or guilt, having been inveigled into compliance or some level of co-operation by their abuser.

An aggravating factor with respect to each of the acts of sexual assault and oral intercourse is that the complainants did not consent. Lack of consent is not an element of the crimes, but it may be taken into account as an aggravating factor.¹

The charges involve two very young victims. The individual acts amount to serious crimes and carry a high level of moral culpability. The crime involving oral penetration is a most demeaning and degrading form of sexual abuse, and it was repeated. The defendant was an older relative, there was an age difference of approximately a decade. He was trusted to be part of the family. He abused that trust and carried out his assaults in what should have been for these two children, their safe, family environment. He took advantage of the complainants' young age, their innocence and the power imbalance resulting from his adult authority. His conduct was purposive, entitled and dominant.

The defendant knew full well his conduct was a serious wrong. His conduct was surreptitious and he told S not to tell anyone.

He committed these crimes with the knowledge that sexual interference with a child was a serious crime. He had sat through his own criminal trial which had brought that home to him, he knew such conduct warranted imprisonment, and that he had only escaped gaol because of his age. Also relevant, is that he was described by the sentencing judge as intelligent, and thus had the capacity to understand these matters. He was also described as remorseful, and as "guilt-ridden about the effects of his actions on this child." The supervised probation order for three years was still current for at least one of his crimes before the Court.

These kind of crimes cause enormous harm to child victims. So often the Court will be informed that the emotional and psychological toll was lasting and profound. This case is no exception. Indeed, these effects are now so well recognised that even in cases where the Court

¹ This may be taken into account without offending *Di Simoni* because for the conduct committed there was not a more serious crime available which involved an element of lack of consent. Oral penetration by the penis did not constitute "sexual intercourse" as then defined for the purpose of the charge of rape. If charged at the time, the appropriate charge for penetration of the mouth by the penis would then have been indecent assault. The Crown's position is that amendments to the definition of "sexual intercourse" are not retrospective except in the context of the crime of unlawful sexual intercourse with a young person, contrary to s 124 of the Criminal Code. Thus, the defendant could not have been charged with rape. By contrast, the crime of unlawful sexual intercourse with a young person, contrary to s 124 of the Code, including amendments to the definition of sexual intercourse, has retrospective effect from 1924, given the terms of s 124(4) resulting from an amendment in 1997: see *Perriman* [2000] TASSC 108; 114 A Crim R 486. It is noted that as a result of a very recent amendment, the crime of unlawful sexual intercourse with a young person, contrary to s 124 of the Criminal Code is now known as penetrative sexual abuse of a child.

is not provided with a victim impact statement, the Court will presume that significant, emotional and psychological harm is almost inevitable. Both victims have made a statement of the impact upon them. M still suffers with feelings of guilt and anxiety, and family relationships are fraught and damaged. As I commented when S read her victim impact statement, victims should not feel any guilt, it is only the perpetrators who bear guilt for their crimes. Throughout her life, S's relationships have been affected. The trauma she endured has had a devastating impact upon her childhood and her adult life, undermining her sense of self-worth, and her relationships with her husband, and her children. She has struggled with depression and anxiety and has needed psychological counselling. For these two complainants, the trauma associated with these crimes has endured for 40 years and their suffering may be life-long.

The complainant S first disclosed what had happened to her boyfriend when she was 14 or 15. At about the same age she told her mother that the defendant "had done stuff to me". Her mother referred to a confessional note the defendant had written when they were living at Sandfly which she had found saying that he had "messed around" with the girls. Her mother arranged for the complainant to speak to some family friends who offered support and to pray for her. The matter was not reported to police and the defendant was not confronted. Over the years, the complainant told other family members that the defendant had abused her.

In 2008, the complainant approached the defendant outside her family home, after he had been visiting. She told him she wanted him to know that she forgave him for all the things he did to her during her childhood. He looked at her blankly and said "right". She told him that it had really affected her and her marriage had suffered. She asked him if he had sought counselling or therapy, and he said he had. He left without saying anything further or expressing any remorse. The complainant was shocked and adversely affected by his reaction.

In June 2016, the complainants each became aware that the other had been abused. This was the impetus for both women to report the crimes to police. The defendant declined to participate in a police interview. He was charged in August 2017. He pleaded not guilty and first appeared in the Supreme Court on 20 November 2017. The matter was due to proceed for trial in 2019, but that was not possible and it was listed for the March sittings this year. The matter was prepared for trial, witnesses were briefed including the complainant from the 1976 incident. She found that very confronting.

A new indictment was filed in February this year. The defendant pleaded guilty in March. While this is not an early plea, I have reduced the sentence I would otherwise have imposed. The complainants have been spared the additional stress and anxiety associated with giving evidence on a trial and they have been vindicated by his pleas.

In assessing the defendant's moral culpability and the nature and gravity of his crimes, I take into account his young age at the time he committed these crimes, he was a young adult in his late teens/early 20s.

I have read the report of Consultant Clinical and Forensic Psychologist Mr Jeffrey Cummins dated 14 April 2020. Mr Cummins highlighted that the defendant was raised by his mother

and stepfather, from birth to age 9, when his mother left his stepfather. His stepfather was an alcoholic and was physically violent. His mother was a victim of his violence, and the defendant was also verbally and physically abused by his stepfather. It is Mr Cummins opinion that it is likely that at the time of offending, he was still suffering from symptoms relating to trauma reflective of being raised in a dysfunctional family. He opines that it is likely he was suffering from a Trauma-and Stressor-Related Disorder in the form of an Adjustment Disorder with Mixed Disturbance of Emotions and Conduct, reflective of his dysfunctional upbringing and low self-esteem. He considers that it is probable that suffering from this condition interfered with the defendant's normal development and may therefore have played a role in his psychosexual development, such that, during the time of offending, he was "psychosexually immature". I note this opinion draws a causal link between his childhood trauma and a level of psychological and sexual immaturity and I give this some weight. This opinion provides some context for his offending. It appears he was more immature than typically his age would suggest. It also provides an explanation for why his sexual offending involving young girls did not continue as he grew older and matured.

The level of the defendant's criminality, notwithstanding his age and immaturity, involved a high level of culpability.

I take the defendant's personal circumstances into account. He is now 60 years of age. He has committed no offences of any relevance since. This is obviously an important consideration.

He has demonstrated a strong work ethic throughout his life. As a young man he obtained qualifications in motor mechanics and as a panel beater and has a long work history in the motor insurance industry until 2019. He then worked for a stonemason as a labourer until he was recently remanded in custody. His employer is aware of his crimes but an offer of employment remains open to him.

The defendant has taken a responsible path in other aspects of his life, as a caring member of his family and of his community. He married in 1986 and he and his wife had a happy marriage and family life with their two sons. His wife died from cancer in 2018, impacting him greatly. He nursed her at home during her illness. His adult sons are aware of these criminal proceedings and remain supportive of him.

I have been provided with eight character references providing various perspectives of the defendant's life, from the pastor of his local church at Rokeby, family members and extended family members, and his employer. These referees are aware of these proceedings. They speak of him as a caring person who helps others. He has been a member of his Church for many years, he is described as a person of faith, kindness, and someone who is trustworthy and reliable. His good character and strong values are evident in practical support he provides to his family and his church community; for a number of years he drove the Church bus to collect elderly people to take them to Church. His care for his mother-in-law suffering from dementia has been exemplary. Family members speak of him as a devoted husband to his wife and as a loving father. They maintain that they have never had any concerns about him in the presence of their own children or grandchildren. I note, that there is no suggestion of any such concerns

since his offending. These references are useful as they provide content to the submission made by the defendant's counsel that he is a totally reformed person.

As I have mentioned, he is now caring for his mother-in-law who is 86 and suffers from dementia. He moved in with his mother-in-law to care for her after his wife died. She requires care and assistance in daily living. The arrangement has been very helpful to her family, as her son and daughter live interstate and there is no one else in Tasmania who can care for her. I accept that making alternative arrangements for her care has been difficult because of COVID-19 restrictions. The defendant's incarceration will give rise to very real difficulties for the family in terms of her care and, if her present living arrangements cannot be supported, hardship to her. It must be noted that he assumed that responsibility at a time when the charges had been laid, and when there was the prospect that the arrangement would not be long-term. I do give some weight to this factor of hardship to others but in view of the severity of these crimes, I do not accord it significant weight.

I also take into account that in serving his term of imprisonment, the defendant will be aware that as a consequence of his crimes, a vulnerable person who was in his care is adversely affected as a consequence of his crimes. In this respect, imprisonment will be felt by him more harshly than it would generally for other prisoners.

I take into account that generally for all prisoners at this time, due to the COVID-19 pandemic, imprisonment is now a more punitive experience due to the restrictions that have been imposed. As someone close to his family and who has never been to prison, the defendant will find these restrictions difficult.

I have mentioned Mr Cummins report, and I note that the defendant expressed remorse to Mr Cummins for his crimes and he acknowledged his wrongdoing and the harm he has caused to the complainants.

I accept that the defendant being sentenced today is a different person to the young man who offended some 40 years ago. The Court can see that in the time that has lapsed, he has rehabilitated. He has been assessed by Mr Cummins as low risk of reoffending. Indeed, he describes the risk of future offending as "farfetched and fanciful". This is a case where specific deterrence and a need for the community to be protected from the particular offender is not a concern.

There are though, other sentencing goals which must be reflected in the sentence. The Court has a fundamental duty to deter other offenders and thereby protect children from sexual abuse. The need for general deterrence is a prominent consideration in all cases of child sexual abuse including historical cases. Frequently, because of the nature of the crimes and the effect on child victims or the conduct of perpetrators in silencing their victims, such conduct only comes to light many years after the events. It is essential for potential offenders to see that if that is the case, they will not escape the punishment that is commensurate with the gravity of their conduct.

Time does not dull the gravity of the criminal conduct or diminish culpability. In fixing the sentence, it is important to adequately reflect the harm inflicted upon victims, and to reflect the seriousness of the crimes and the defendant's moral culpability. There are three separate incidents involving penetrative acts, all serious, and resulting in lasting harm to two victims.

As I have said, there are mitigating factors to be reflected in the penalty, the defendant's young age and immaturity at the time of offending, his complete reform, the responsible and law-abiding life he has led since then, his contribution to his family and community, his remorse, and pleas of guilty. These factors have been given significant weight. The penalty has been moderated so that it is proportionate to his total criminality. Also taken into account, as I have said, is that there is no need for personal deterrence.

I record convictions. I impose five years' imprisonment backdated to 1 May 2020. I impose the minimum non-parole period, which is half of that sentence.

I am conscious that the defendant will feel this is a harsh penalty, but a lesser sentence would not adequately reflect the seriousness of the conduct, and the harm that has been done.

In light of Mr Cummins' report there is no need for an order under the *Community Protection Offender Reporting Act*.