

STATE OF TASMANIA v HJR
COMMENTS ON PASSING SENTENCE

WOOD J
26 JUNE 2020

The defendant has pleaded guilty to one count of persistent sexual abuse of a child contrary to s 125A of the *Criminal Code*.

The abuse occurred between 22 March 2017 and 5 February 2018, and involved a child aged 5 years, born in March 2012. At the beginning of the offending, the defendant was 16, he turned 17 in May of 2017. The complainant is the defendant's young step-sister. The defendant lived at their father's house in Wynyard and the complainant would usually stay there with the defendant and her other siblings but sometimes she would go and stay with her mother.

There are four occasions of sexual abuse that constitute the crime in this case. All occasions occurred in the defendant's bedroom when the complainant was staying at their father's house. On one occasion, the defendant inserted his finger into the complainant's vagina. This caused her pain. There was another occasion during the period, when he again inserted his finger into her vagina. It again caused her pain. Depending on the dates these crimes were committed and the law at the time, they amount to the offence of aggravated sexual assault, involving an aggravating factor of lack of consent, or the crime of rape.

On two separate occasions, the defendant inserted his penis into the complainant's vagina. She suffered physical pain. He did not ejaculate. These two unlawful sexual acts amount to the crime of rape.

On one of the four occasions, the defendant told the complainant not to say what had happened.

On 13 January 2018, the complainant stayed the night at her mother's house. She was collected from her father's house by her maternal grandmother and in the car she told her grandmother she had a sore "rudie", which was her word for her vagina. When her mother was bathing her that night, her mother observed that her vagina was red and inflamed. She stayed with her mother for several days before returning to her father. On 5 February 2018, she stayed with her mother and she complained her "rudie" was sore and it was found again to be red and inflamed.

On 15 February 2018, the complainant's prep class had a lesson on personal safety and private parts of the body. That night, she disclosed to her mother an incident involving the defendant's brother. That resulted in a sentence imposed by Porter AJ on 30 May 2019. That matter was reported to Tasmania Police and the complainant disclosed not only that incident but the serious conduct involving the defendant. She described the defendant putting his finger in her "rudie" and that he did it so hard it made tears come out of her eyes.

The defendant was first interviewed by police on 21 February 2018. He denied any sexual touching. His mobile phone was seized and analysed and found to contain pornographic material and resulted in him being interviewed a second time on 20 March 2018. He was asked about the pornographic material and he described himself as "sick". On that occasion, he denied sexually touching the complainant in any way. Then on leaving the police station, he told police officers that his partner was pregnant and that he wanted to sort out this matter before the baby was born. He said that something had happened in his bedroom and he referred to digital penetration of the complainant.

He participated in a final police interview on 29 November 2018. During this interview, he admitted he had put his finger in the complainant's vagina, and that this had happened on two occasions. After some further questioning, he admitted that he had inserted his penis into the complainant's vagina. He admitted this happened on two occasions when the complainant was 5. He expressed regret about what he had done.

Aggravating factors identified by the Crown are noted, such as the very young age of the victim, that vaginal penetration occurred without protection exposing her to a risk of disease, the presence of a trust relationship given the family context and that the defendant was the victim's older brother.

I have a victim impact statement from the complainant's mother. The offending has resulted in the complainant becoming a very troubled and disturbed little girl and she is undergoing counselling. It is well accepted and the experience of the courts that it is likely that the psychological and emotional harm she has suffered will be lasting and pervasive. It need hardly be said that the complainant's mother is also a victim and she is finding it very difficult to deal with what has happened to her daughter, and how her daughter has been affected. Inevitably, other family members are adversely affected.

The defendant is now 20 years of age. He has no other convictions or court history. He has a partner who is supportive of him and they have a child, two years of age. His partner's parents are supportive of the young family. The defendant is in receipt of a disability support pension because he has learning difficulties. I have a report from Dr Georgina O'Donnell, Forensic and Clinical Psychologist, which outlines an intellectual assessment and a full scale IQ assessment result of 56, which falls in the lower .2 percent of the population.

As a child and adolescent, the defendant's home life was chaotic. His mother was an alcoholic in those years and the children were often unsupervised. The defendant's father commenced a relationship with the complainant's mother when the defendant was in about grade four. He felt excluded and he would often leave the house with the complainant when there were arguments and difficulties. School was a very difficult environment and he was subjected to persistent bullying and taunting.

The defendant has a history of anxiety and depression. In 2016, he sought psychological assistance for those symptoms. He used cannabis as an escape mechanism. During the offending period, he was heavily abusing cannabis on a daily basis. He was more vulnerable than others to developing a habitual reliance on cannabis due to his mental health.

Until his remand in custody, the defendant was living in a stable home with his partner's parents. He completely ceased his use of cannabis in April last year. He has a personal goal of attending TAFE. He is someone who enjoys working. He worked in a takeaway shop when he was younger and undertook volunteer work at a local yacht club, helping in a rescue boat which he enjoyed, until his consumption of cannabis became problematic.

There are contextual factors that contributed to his crime. These are identified by Dr O'Donnell. These factors arise from the unstable and dysfunctional family environment in which he grew up, lack of parental supervision, lack of sexual boundaries between siblings and early sexualisation of the children in their home environment.

There is no suggestion that his intellectual disability causally contributed to his offending. He had an awareness that his conduct was wrong, and he accepts full responsibility for his crime. Dr O'Donnell notes the *Verdins* principles as to offending are not enlivened.

Still, his dysfunctional childhood and home environment as an adolescent impacts on his moral culpability, and affords some (although limited) mitigation. He did not have the advantages that most other youths have in terms of moral guidance, boundaries and emotional resources to guide his behaviour: *R v Millwood* [2012] NSWCCA 2 at [69] and *R v Fernando* (1992) 76 A Crim R 58. Also, it seems there was a lack of positive role models external to the family while he was growing up and in relation to this, I note too his disengagement from school.

The defendant has pleaded guilty at an early opportunity. This has vindicated the victim and saved her and family members the ordeal of court proceedings and the stress of that prospect. There has been some delay due to a number of factors, but not due to his fault.

He has found these court proceedings very stressful. He attempted suicide when he was charged with this crime. His mental health has been declining as the resolution of the court proceedings has drawn closer. Dr O'Donnell's clinical assessment is that he is experiencing symptoms of distress due to his fear of imprisonment and that his capacity to cope with stress is less than his peers due to his intellectual difficulties. I accept that he will find imprisonment more difficult than his peers. Dr O'Donnell also identifies that imprisonment will give rise to a risk of heightened anxiety and depressive symptoms and the potential for his suicidal ideation to escalate. Given his background, and lack of appropriate role modelling, he is more vulnerable than others to corrupting influences within a prison environment.

The defendant is deeply ashamed and sorry for what he did. His conduct has irretrievably damaged his family unit and he has not seen his sister since. He has been subjected to community retribution, he has been verbally abused and assaulted in public.

Dr O'Donnell says that his interest in female children may not be enduring. This will become apparent as he matures and develops through adulthood. Recommendations have been made to minimise his risk of reoffending such as psychological counselling to address any dysfunctional elements of sexual development; sexual boundaries counselling through Relationships Australia. He is likely to have the assistance of a worker from the National Disability Insurance Scheme.

It is important that the harm to the very young victim be reflected in the sentence. Given the gravity of the crimes committed, four episodes of penetrative abuse involving a very young and vulnerable victim, two of them rape involving vaginal sexual intercourse, a term of imprisonment must be imposed. The defendant has been expecting a term of imprisonment, he understands that he has committed serious crimes.

At the time of his offending, the defendant was an immature and youthful offender, aged 16 and 17; with a bearing on his moral culpability (*TAP* at 28 and *Boland*), rehabilitation is a prominent consideration. I give his personal circumstances substantial weight. General deterrence is still a significant objective, but muted. It will be seen that the sentence I impose will be very different to that which would be imposed if not for his youth, personal circumstances and difficulties.

Despite his disadvantages and difficulties, I consider that the defendant has good prospects of rehabilitation. I note the progress he has been making, and the improvements he has made to his lifestyle such as giving up cannabis. He has shown that he responds well to support and guidance. He is willing to attend therapy and work with counsellors to address risks of reoffending. It is in the interests of the community that he does reform and becomes a contributing member of society.

Ultimately, in fixing the sentence I have endeavoured to maximise the defendant's prospects of rehabilitation within a sentence that recognises the grave harm that he has caused and imposes the punishment that is necessary to fulfil the Court's objective to protect other children.

The sentence I impose is as follows:

I record a conviction. I impose three years and six months' imprisonment to commence from 23 June 2020. I suspend 2 years and 9 months. That part of the sentence that has been suspended is suspended on strict conditions:

- He must not commit an offence punishable by imprisonment for three years from the date of his release.
- He must submit to the supervision of a probation officer for a period of two years from the date of his release from prison as required by his probation officer.
- Additionally he must comply with the following conditions for that period of two years:
 - He must report within two working days of his release from prison to Community Corrections at 57-59 Oldaker Street in Devonport and comply with the reasonable and lawful directions of a probation officer;
 - He must not leave Tasmania without permission and he must notify his probation officer of any change of address or employment;
 - He must submit to the supervision of a probation officer as required by the probation officer;
 - He must attend educational and other programs as directed by his probation officer;
 - He must submit to medical, psychological or psychiatric assessment or treatment as directed by a probation officer;
 - He must attend counselling as directed by a probation officer;
 - He must attend vocational courses as directed by a probation officer.

I am not satisfied that there is no risk of reoffending and I direct that the defendant's name be placed on the register pursuant to the *Community Protection (Offender Reporting) Act* for a period of six years from today.