

Brian Sheals, you plead guilty to one count of indecent assault. The crime was committed in the early hours of the morning on Sunday 28 June 2020. During the previous evening you had attended a birthday party at the home of a friend. At the time you were aged 47. The victim, then a 21 year old female, was also a guest at the party which was hosted by her sister and her partner. Although you had mutual friends you did not know the victim directly. Throughout the evening you spoke with her but, by about 11 pm, she was highly intoxicated. She was unsteady on her feet, slurring her words and having trouble maintaining a coherent conversation. During the evening you expressed a sexual interest in the victim to her sister, but you were warned not to act on it because she was too drunk and did not know what she was doing. When the party finished you helped clean up and it was agreed that you could sleep on a bed which was then set up for you in the living room. Even before then, the victim had fallen asleep, fully dressed, on the couch in that same room.

The State accepts that, after the hosts had gone to bed, the complainant moved from the couch onto the floor of the room where you were. She did not initiate sexual contact, but you removed her pants and began to lick her vagina. The victim's sister, hearing noises, got out of bed to investigate. She saw her sister on the lounge room floor naked from the waist down. You were kneeling over her with your head between her legs and with your mouth on her vagina. Her sister yelled at you to stop and asked you to leave the house. You immediately apologised, said you should have known better, and left. When the victim was informed what had occurred she said that she believed that she still had her pants on. The police were called but when they arrived she was so asleep that she could not be roused. When she woke the next morning she had no memory of the offending. An analysis of her urine taken at 10.15 that morning, hours later, disclosed the presence of alcohol still at the level of 0.111 grams per 100 millilitres.

It is obvious that the acts you performed were without the victim's consent. She was so affected by alcohol as to be unable to form a rational opinion about whether she may agree to your removing her pants and licking her vagina. You say that you believed that she was consenting, but, in the circumstances, especially because of the age difference, because her level of intoxication was so obvious and because you had earlier been warned not to act as you did for precisely that reason, that belief was entirely unreasonable. By your conduct you abused the trust extended to you by the victim's sister and her partner by permitting you to stay at their home, and in the same room as the victim. The victim, by her intoxication, was highly vulnerable and completely unable to resist your indecent acts. Her victim impact statement makes clear why what you did was so wrong. Once she became aware of what had happened it had a significant psychological impact on her. She required medication for depression, a condition for which she had not previously required treatment. Her sleep and appetite were affected. She has nightmares, now feels unsafe, insecure and distrustful. This case demonstrates the need for and purpose of the laws about consent and mistake, which is to protect persons from sexual acts committed against them when they are so affected by alcohol or drugs as to be unable to freely agree. It is to be made clear to you and others that those who perform sexual acts without any or any sufficient regard to the need to ensure that there is free agreement will be subject to criminal sanction. I am required to take into account any of the aggravating circumstances specified in the *Sentencing Act* 1997, s 11A(1). The offence was committed at least in part in the presence of the victim's sister.

You are now aged 48. You have a considerable record, mostly for driving offences, including alcohol related driving offences, for dishonesty and for anti-social behaviour. You have been sentenced to suspended terms and actual imprisonment. In 2015 a three month suspended sentence was activated to be served cumulatively with a further three months term, all for alcohol related driving offences. In 2018 you were sentenced to imprisonment for five months, again for driving offences. You have no prior convictions for sexual offences. I see no reason to conclude that this is not an isolated event. Overall however, your record does not entitle you to any leniency.

It is in your favour that you have pleaded guilty, especially in a case like this in which the victim has been spared the trauma and embarrassment of having to give evidence at trial. You were originally charged with rape and the matter was resolved when the State agreed to accept a plea to the lesser charge. You have children from previous relationships. You have an industrious background although you are not presently working for health reasons. Although you have lived almost all of your life in Australia you have status only as a permanent resident. Under the *Migration Act* 1958 (Cth), s 501A, the Minister may cancel your visa if you have been sentenced to 2 or more terms of imprisonment where the total term is 12 months or more. It is suggested that the provision means that terms of imprisonment ordered in 2018 and 2015 and even before may be taken into account. If that is correct, given that you have already served a total of 11 months or more, any further sentence of imprisonment will mean that you are liable to cancellation of your visa and deportation, subject to a discretion in the Minister to grant you a fresh visa. I was asked to make a home detention order. However, unless I conclude that home detention is the appropriate sentence, regardless of the provisions of the *Migration Act*, it is not permissible to take into account the prospect of deportation to craft a sentence designed to avoid that prospect. Beyond that, the prospect of deportation, if established in a way which is more than mere speculation, may be mitigating if it is also established that it is a hardship likely to make imprisonment more onerous, or will amount to extra-curial punishment. I think that there is some degree of speculation involved here although I will assume that deportation is likely. Even so, I have concluded that the only appropriate sentence is one of imprisonment.

Brian Sheals, you are convicted. The nature of this offence is such that I am not satisfied that you do not pose a risk of committing a reportable offence within the meaning of that term in the *Community Protection (Offender Reporting) Act* 2005 in the future. I make an order directing that the Registrar cause your name to be placed on the Register and that you comply with the reporting obligations under the Act for a period three years from your release. You are sentenced to imprisonment for 10 months from today. I order that you not be eligible for parole until you have served six months of that sentence.