

STATE OF TASMANIA v MJP
COMMENTS ON PASSING SENTENCE

7 FEBRUARY 2022
ESTCOURT J

The defendant MJP, now aged 40, has pleaded guilty to one count of persistent abuse of a child. The abuse occurred in a two year period between December 2012 and December 2014 and consisted of the defendant masturbating with his penis in the complainant's view. He did not pull his pants down but rather his penis was out of his pants through his fly. He was never seen by the complainant to ejaculate. Such conduct constitutes the crime of an indecent act directed at a young person, contrary to s 125B(1) of the *Criminal Code*.

At the time of the offending, the complainant was between 14 and 15 years of age and the defendant was between 31 and 33 years of age. The offending occurred in the complainant's home between 24 December 2012 and 23 December 2014.

In September 2019 the complainant told her aunt that when the defendant had lived with them, he had "wanked off" in front of her from when she was about fifteen. It had happened at the bathroom door when she was in the shower, it had happened at the fridge door and at her bedroom door. She said it had happened so many times she has lost count.

The complainant specifically recalls a number of occasions

Occasion 1

The defendant exposed his penis and masturbated at the sliding door to the bathroom. The complainant would shower at night and within five minutes of undressing and turning the water on, the defendant was standing at the door. The complainant could see him and the area of the sliding door from the shower. This was not the first time the defendant had masturbated in the bathroom doorway while the complainant was in the shower.

Occasion 2

This was at the bathroom door again. The complainant saw the defendant masturbating at the door. He would look at her and then put his face out of sight but his penis in sight. The complainant called out to her friend who was staying the night to get her a towel. The defendant left when she called out to her friend.

Occasion 3

The defendant came into the complainant's bedroom. The room was completely dark, except for the light coming from the complainant's lap top and some light coming from the door. The defendant came in and stood next to her asked her what she was doing. The complainant's elbow brushed something and when she looked to the side it was the defendant's penis and he was masturbating. The complainant tried to stare at the lap top while he continued to talk to her. The complainant gave very short answers and then the defendant left after about a minute.

Occasion 4

The complainant was sitting on the couch near the sliding door in to the lounge room. Her mother was also sitting on the couch. The defendant would open the fridge door and masturbate. The complainant could see his penis and his hand moving, as there was a gap between the fridge and the fridge door when the door was open. The defendant would look at

her over the top of the fridge door. The complainant had a clear view of the fridge but her mother did not.

Occasion 5

The complainant was sitting on the couch near the sliding door in to the lounge room. The sliding door was the access point to the lounge room from the rear area outside of the house. The defendant would masturbate at the sliding door, where there was a gap in the curtains. The defendant would check to see if the complainant was looking and then look away. The complainant would glance out of the corner of her eye but try to look at the television so he would stop. On this particular occasion, the complainant was sitting on the couch near the sliding door in to the lounge room watching television when the defendant masturbated his penis at the sliding door. He was there long enough for a few advertisement breaks to pass.

Detective Wilby of Glenorchy Criminal Investigation Branch was assigned to investigate this matter. He invited the defendant to participate in a record of interview, however he declined.

I have read a Victim Impact Statement provided by the complainant. The impact of this crime on her life has been huge and it is ongoing – it has irrevocably damaged her relationship with her mother and caused strain in other relationships within her family, it has caused her to distrust others, making it difficult to form and maintain friendships and romantic relationships, it forced her out of home when she was 17, and left her with ongoing feelings of anxiety.

The defendant has no relevant prior convictions.

I have had the benefit of a pre-sentence report which I ordered to assess the defendant's suitability for home detention. The defendant is unrepresented.

I am informed that the defendant was born to the union of his parents and is one of four siblings. He reported an unremarkable upbringing, describing his parents as loving and having made sacrifices to establish a good life for their children.

The defendant reported a close relationship with his parents. He advised his father died in 2017, however he remains very close to his mother. He described his mother as a significant support and noted that he has caused her pain in regards to his offending and the subsequent deterioration of his and his brother's relationship. He reported no longer maintaining any contact with his brother, who is the step-father of the complainant. Nonetheless, he stated his relationship with his other siblings remains close.

The defendant commenced a relationship with his wife 15 years ago, advising the pair married in 2016. He described their relationship as good and stated that his wife is his primary support person. Chiefly, he attributed his rehabilitation to date to his wife's support. The defendant advised the pair have experienced fertility issues and are attempting to conceive children. He described this as a challenge that has negatively impacted on them.

The defendant reported a consistent and stable employment history. Namely, maintaining employment at Tasmanian Protective Services as a security guard for approximately 14 years. While he stated his employment is considered casual, he reported being rostered for full-time hours. Community Corrections contacted the defendant's employer, who confirmed the information above and described him as a model employee.

While the defendant stated he has never been diagnosed with any mental health conditions, he reported engaging with a psychologist immediately following the discovery of his offending. He reported experiencing suicidal ideation at that time and advised that he attempted suicide on one occasion in 2019 or 2020. He reported addressing this in sessions with his psychologist. He now states he does not feel depressed or suicidal.

Community Corrections contacted the defendant's psychologist who advised that he was referred for therapy by his medical practitioner on 23 September 2019. She confirmed that he had attended 17 sessions and had ceased therapy on 14 July 2020. She verified the defendant has been diagnosed with Major Depressive Disorder (initially with suicidal ideation). She further noted that he disclosed experiencing a significant number of anxiety symptoms. It was also her clinical opinion that he had symptoms indicative of him having an acquired brain injury. She advised that his limited finances precluded him from being able to afford an MRI to affirm this hypothesis.

The defendant attributes his offending to alcohol use at the time. He reported using an excessive amount of alcohol mostly on weekends. Despite multiple prompts the author of the pre-sentence report was unable to illicit anything other than the defendant claims that he does not recall his offending or any historical instances of similar behaviour, however he stated that he does not deny committing the crime. He stated that this was due to an accumulation of the extensive time period between the offences and interview, and his alcohol use at that time.

The defendant's psychologist affirmed at initial presentation, that the defendant was considered as abusing alcohol, with a tendency to binge drink. Although, at the third session of therapy, he reported ceasing all alcohol consumption, and maintained sobriety thereafter. She stated, "Please note that taking any mind altering drugs, including alcohol, is contra indicated, with individuals who have acquired brain injury. This is, due to its compromising brain function, particularly in the frontal lobe region, the person often experiencing loss of impulse control, and co-ordination. In addition, the individual can have significant memory voids whilst under the influence of alcohol."

The defendant stated that this offending was an isolated series of events and was out-of-character. He reported struggling to accept he behaved in this manner. He stated that he has no intention of repeating the behaviour however, was unable to articulate any specific measures by which he would reduce his likelihood other than to address his alcohol use. He stated that he feels remorseful for his actions and he demonstrated insight into the extensive impacts that his actions would have caused to the victim. I note that the defendant has, in what he has told the Court today, which has been heard by the complainant, apologised and expressed remorse and shame.

The defendant stated that he was not sexually attracted to his victim, noting that he loves his niece, although not in a sexual manner. He advised of no feelings of needing to engage in such behaviour in order to fulfil any urges, nor was he able to reflect on any potential or possible reasons as to why this may have occurred other than intoxication. He reported reducing his risk of reoffending by engaging in psychological intervention, as noted, since late 2019. He reported addressing his mental health and alcohol use throughout this intervention given he maintains alcohol to be the only contributing factor in his offending behaviour.

I note that he is considered by Community Corrections to be below average risk for being charged or convicted of another sexual offence.

He is considered suitable for a home detention order.

It is now well understood in the community that the relatively newly named crime of persistent abuse of a child is a very serious crime, and will almost always be visited with an actual and immediate sentence of imprisonment. However, as can be seen from the facts outlined by me, the circumstances of the defendant's offending lacks many of the egregious features of child sexual abuse and as a result might be considered less serious than many cases that come before judges of this Court. That is not to underestimate the effect on the complainant of this offending.

The defendant is convicted and is sentenced to 15 month's home detention.

All of the core conditions contained in s 42AD(1) of Part 5A of the *Sentencing Act* 1997 are imposed. With specific consideration to s 42AD(1)(g), (h) and (k), the following conditions are added to the order:

- you must, during all of the operational period of the order submit to electronic monitoring, including by wearing or carrying an electronic device.
- during the period that you are required to submit to electronic monitoring:
 - (a) you must not remove, tamper with, damage, disable or interfere with the proper functioning of any electronic device or equipment used for the purpose of electronic monitoring;
 - (b) you must not allow anyone else to remove, tamper with, damage, disable or interfere with the proper functioning of any electronic device or equipment used for the purpose of electronic monitoring;
 - (c) you must comply with all reasonable and lawful directions given to you in relation to the electronic monitoring, including in relation to the installation, attachment or operation of a device, or a system, used for the purposes of electronic monitoring by:
 - i a police officer;
 - ii a probation officer or prescribed officer; or
 - iii any other person whose functions involve the installation or operation of a device, or a system, used for the purposes of electronic monitoring.
- you must during the operational period of the order, if directed by a probation or prescribed officer to do so, engage in a personal development activity, counselling, or treatment, engage in the activity, counselling or treatment in accordance with any directions given by the probation officer or prescribed officer.

The following special conditions are added to the order:

- you must, during the operational period of the order, remain at [address specified] at all times unless approved by a probation officer;

- you must attend the Community Corrections office at Glenorchy for induction onto this order. You must attend this service for induction during normal business hours and no later than 10:00 am on the business day after this order was made;
- you must, during the operational period of the order, maintain in operating condition an active mobile phone service, provide the contact details to Community Corrections and be accessible for contact through this device at all times;
- you must submit to the supervision of a Community Corrections officer as required by that officer;
- you must not, during the operational period of the order, take any illicit or prohibited substances. Illicit and prohibited substances include:
 - Any controlled drug as defined by the *Misuse of Drugs Act* 2001;
 - Any medication containing an Opiate, Benzodiazepine, Bupropion, Hydrochloride or Pseudoephedrine, unless you provide written evidence from your medical professional that you have been prescribed the relevant medication.
- you must not, during the operational period of the order, consume alcohol, and you must, if directed to do so by a police officer or Community Corrections officer, submit to a breath test, urine test, or other test, for the presence of alcohol.

Finally, the State seeks an order pursuant to s 6 of the *Community Protection (Offender Reporting) Act* 2005 that the defendant's name be placed on the register. Persistent sexual abuse of a young person is a class 2 reportable offence. After consideration however, in my view, of the length of time between the offending and the present date, during which no similar conduct has been reported, the reported cause of the defendant's offending, namely alcohol abuse, which has been fully addressed, and the below average risk of re-offending reported after assessment by Community Corrections, I am satisfied that it is not necessary to make an order under the Act.