

LM you have pleaded guilty to one count of rape. You were sixteen years of age at the time you committed the crime. The complainant was then aged five years. The crime occurred between 1 October 2020 and 11 November 2020. During that time you were babysitting the complainant approximately two to three times per week. The offence occurred when you and the complainant were in a shed at the rear of the complainant's home. Your car was parked in the shed. You told the complainant he could sit in the car and pretend he was driving. You placed the complainant in the front seat of the vehicle. You entered the back seat of the vehicle. At one point whilst the complainant was moving throughout the vehicle he came to be standing in front of you in the rear foot well of the vehicle. You pulled the complainant's pants down, spat on your fingers, rubbed saliva around the area of his anus and inserted your middle finger into his anus momentarily and to the depth of approximately one centimetre.

The complainant disclosed the incident to his parent's on 11 November 2020. The complainant's mother contacted you and confronted you about the matter. You initially denied it and said you had not had an opportunity to be alone with the complainant. A few days later on 16 November you sent a text message to the complainant's mother. You asked to meet with her. At that meeting you told her the allegation was true. You said you had spat on your hand, wiped it on the complainant's bottom but had not penetrated him or raped him and had "stopped before it got that far". You asked the complainant's mother to not report the matter to police saying "I can't go to jail". The matter was reported to police. On 1 December 2020 you were arrested and participated in an interview. You said to police, amongst other things, the following: "I pulled his pants down licked my fingers sort of came to and was like 'what the fuck am I doing'"; "I was just going to rub it and then I thought 'yeah ok I could go ahead with it' but then I come to"; "all I did was wet his bottom because I had the intention to do something and then I was sickened in myself. I left I ran and later that day I did cut my arm up".

You admitted it was possible your finger had penetrated the complainant's anus. You told police you were not aroused and did not have your pants down at the time. You entered a plea of guilty to the matter. The State accepts that the plea was entered at an early stage although there has been some delay in the matter being finalised by way of sentence because there was a delay in obtaining some reports. In particular, there was delay in receiving a forensic mental health

pre-sentence report. The admissions you made to police and the plea of guilty, have in my view, considerable mitigatory value. You pleaded guilty in circumstances where proof of the charge to the requisite standard may have had its complexities given the age of the complainant. You have expressed remorse through the plea. You have facilitated justice at a time when the Court continues to be impacted by delays associated with the COVID-19 pandemic. And most importantly, you have saved a young child from the ordeal of giving evidence. You come before the Court with no recorded prior criminal history.

In February of this year, you turned 18 years of age. You reside with your mother who continues to be very supportive of you. You have had a most difficult upbringing. Your father subjected both you and your mother to significant family violence whilst he was living with you. This only ended in 2020 when your mother ceased the relationship with him. The abuse, I am told, was at times quite extreme. On one occasion your father physically assaulted your mother to the point her eye socket was shattered. You too have been physically assaulted by your father. You describe being "belted until the lights out". You were also regularly verbally and emotionally abused by your father and witnessed your mother being treated in a similar vain. I am told your father's behaviour had been reported on several occasions to police. You have been diagnosed with post-traumatic stress disorder as a consequence of the behaviour you endured during your upbringing. In addition to that you have also been diagnosed with autism spectrum disorder and it is considered likely that you suffer from ADHD, although because of a lack of access to services, this is yet to be formally diagnosed. I have had the benefit of several reports prepared in respect to you. I have regard to the contents of all reports. They have been most helpful. I have read and considered a report of Dr Theresa Flower, Child and Adolescent psychiatrist, dated 10 August 2021. Dr Flower reports your developmental history is indicative of autism spectrum disorder. She reports you demonstrate social difficulties, have never made friends with peers and appear to miss social cues. She reports you have experienced extreme bullying, giving an example of an occasion where you had to walk around like a dog whilst other children "kicked the dog". This led to you sustaining a perforated testicle. Dr Flower opines you meet the criteria for autism spectrum disorder with level 2 severity. She also indicates it is likely that you suffer from ADHD but because of limited access to relevant information and service providers she was unable to confirm it. Dr Flowers opines *"the combination of ASD, likely ADHD and probable learning difficulties means that LM has experienced considerable disability in his life which has impacted his developmental trajectory. He has had very little assistance with these difficulties"*. I have also read and

considered a forensic mental health pre-sentence report authored by Professor Brett McDermott, Child and Adolescent Mental Health Services, dated 16 February 2022. In that report Professor McDermott reports the following: your relationship with your father was very abusive, you have not consistently attended school since late 2020, much of your schooling has been difficult, you have experienced difficulties with reading and writing, you were teased and bullied at school particularly about your appearance, you had very few friends, you experienced social isolation, you had difficulty making and sustaining friendships, academically you experienced learning difficulties and there were also behavioural difficulties at school. He notes you have experienced considerable anxiety and/or depression, brought on by "a lot of things feeling tormented seeing domestic violence perpetrated against my mother and ongoing peer issues". You have seen counsellors in the past but have not found them particularly helpful. You are not currently seeing any counsellor. More recently you have had the additional significant stress of your mother developing breast cancer which was aggressive. This occurred in 2008. Professor McDermott opines *"he is a seventeen year old who has lived through many adverse childhood experiences, the most prominent of which are the experience of physical and verbal abuse, witnessing significant domestic violence and having at least one parent in the home with a significant illness...In the school domain he has ongoing experience of being bullied and the chronic experience of failure in that setting. The latter probably because of his social and learning deficits"*. Professor McDermott further reported there was no formal thought disorder that you had low mood complicated by significant anxiety and pessimism about the future. There were no symptoms of a psychotic nature. There was no evidence of any mental health conditions which included any sexual themes or content. There was no evidence you had experienced oppositional defiance disorder, there was no evidence of a conduct disorder and there was no evidence that you were on a trajectory towards anti-social personality disorder.

I have also read and considered a pre-sentence report prepared by Youth Justice. In that report it is noted you made comments without being prompted that suggested you understood the severity of the offence. It was reported that you felt *"terrified, horrified, disgusted and ashamed"* in relation to the offending. It was further reported that you had expressed strong thoughts about wanting to enter a plea of guilty to avoid the victim having to attend Court and be put through the stress. The report indicates that you do not think about wanting to offend again and the thought of what you have done "kills you". The report indicates that you stated you need to live with your mistake and that you recognise you have dragged your whole family

through the dirt. The report further indicates you displayed genuine remorse for your behaviour and recognise the impact it has had on others. The report confirms you maintain strong support from your mother and outlines a number of difficulties the family has experienced as a consequence of the community's reaction to your offending in the small town where you live. The report notes that both you and your family have received death threats from community members. On one occasion when you were in a social setting in the town, you were verbally attacked and threatened. The report indicates that such behaviour has had a significant effect upon your mental health and also upon your wider family.

The Youth Justice report further indicates that you have experienced considerable difficulties at school and lead a socially isolated lifestyle, spending most of your time at home. It notes that you have no ongoing friendships, and have been engaged in self-harming behaviours. It notes because of your diagnosis of autism spectrum disorder you are eligible for NDIS assistance and that is currently being explored. It is hoped that NDIS assistance will result in you being able to receive some ongoing mental health assistance given Child and Adolescent Mental Health Services have ceased appointments with you as a consequence of you turning eighteen. The author of the Youth Justice Report opines *"LM is a vulnerable young man who appears to require several supports for his cognitive disability, developmental trauma and mental health conditions. LM would benefit from significant support from several specialist services to ensure an effective rehabilitation pathway... It is the assessment of Youth Justice that LM will require a comprehensive rehabilitation intervention plan to focus on the sexual offending behaviour"*. The Youth Justice Report also notes that this may be best achieved under the supervision of Community Corrections or Forensic Adult Mental Health Services due to the specific assessment tools and interventions required.

Rape is always an extremely serious crime. By its very nature it is violent and demeaning. Here your conduct involved digital penetration which was very brief in duration. It was described in the State facts as "momentary". The violence involved did not extend beyond that inherent in the act of penetration itself. As to that, there was a minimal level of penetration, approximately one centimetre. It was an isolated, single incident. Fortunately, there is no evidence to suggest the complainant was physically harmed. I have no victim impact statement but I nevertheless accept the complainant would have been at least upset and confused by your behaviour. The true extent of the impact of the crime upon the complainant may well not manifest itself immediately. Often the traumatic effects of a crime of this nature do not reveal themselves for

many years. I accept your behaviour was spontaneous, opportunistic and was not directed at humiliating or dominating the complainant. In sentencing the defendant I have regard to S 11A of the *Sentencing Act*. The complainant was very young, only 5. Obviously the protection of young children is most important to both the Court and the community. The complainant was under defendant's care when the crime occurred. The defendant was responsible for babysitting him-and breached the trust associated with that position. I am told the complainant has autism. I have no information however as to the effect that condition has upon him. I am asked to conclude that is an aggravating factor because of the operation of S 11A(1)(b) of the *Sentencing Act*. On my reading of that section the disability must be such as to result in a restriction or lack of ability to perform an activity in a normal manner. I simply do not have the evidence before me to properly reach any conclusion as to the effect the complainant's condition had upon him. It seems to me however, that it matters not. The most important consideration in respect to the complainant's functioning is his age. He was a vulnerable 5 year old who was entitled to be treated respectfully and decently by the person in whom his care was entrusted. An appropriate sentence is one which denounces the conduct, vindicates the victim and sends a very clear message to the broader community that such behaviour is intolerable. I accept Mr M have genuine remorse for your behaviour and have insight (consistent with your cognitive limitations) into the affect your offending has had not only upon your victim but members of both his and your family. You have expressed remorse for your behaviour. I accept you are genuinely ashamed by what you have done and have acted in a way that minimised the trauma for the complainant by entering a plea of guilty. Your contrition shame and guilt are relevant to sentencing, as is the fact you continue to have ongoing support from your family, in particular your mother, who obviously condemns your behaviour, but is well aware of the immense difficulties you experienced in your childhood and remains willing to support you into the future. I have regard to your personal circumstances generally, and in particular, the conditions from which you suffer and the effects they have upon you. Given the content of the reports I am satisfied those impairments, in particular your autism and the difficulties with appropriate social interactions you experience, have contributed in some unspecified way to the commission of the crime, such that your moral culpability is reduced and general deterrence ought to be afforded less weight in the sentencing process. That is certainly not to say, it has no role to play.

I have carefully considered the judgment of *DPP v Nop* [2011] TASCCA 15. I note in particular the comments of Evans J (as he then was) at par 41:

"Consistent with the views expressed by Neasey and Cosgrove JJ in *R v Laredo* (supra), if the only matter to be considered by the learned sentencing judge when sentencing the respondent was his rehabilitation, the sentence imposed may have been justified. However, what I take from the authorities and sentences referred to is that when imposing a sentence on a youth for the crime of rape, whilst rehabilitation is ordinarily the primary consideration for youthful offenders, this does not mean that the Court may disregard the needs of general deterrence and denunciation. As to denunciation, what I have in mind is the need to deal with the crime in a way that is sufficient to provide the victim with appropriate vindication and to assuage informed public outrage. The personal violation suffered by the victim and the legitimate public outrage at the rape of a child of six are matters that needed to be addressed by the sentence imposed on the respondent. With respect, I am of the view that in this case the most lenient sentence that could adequately address these issues was one of suspended detention..."

I have regard to those comments, not only in considering the appropriate sentence but in determining whether I should sentence the defendant as an adult offender under the *Sentencing Act* or as a youth pursuant to the provisions of the *Youth Justice Act*. The defendant's counsel urges me to sentence pursuant to *Youth Justice Act*. That Act mandates emphasis be placed upon the defendant's rehabilitation. The State do not submit to the contrary. I am satisfied given the nature of the crime, the defendant's age at the time he committed the crime and the defendant's personal circumstances that it is appropriate to sentence pursuant to the *Youth Justice Act*. In determining that I do not overlook my obligation to impose a sentence which reflects the seriousness of the crime and the need to impose a sentence that appropriately incorporates principles of general deterrence and is sufficiently strong to provide the victim with "appropriate vindication and [to] assuage informed public outrage". I am of the view that I can adequately meet all of those sentencing needs by the imposition of a sentence provided for in the *Youth Justice Act*.

In determining this I am also conscious of the comments made in the Youth Justice report about the need for a "comprehensive rehabilitation intervention plan to focus on the sexual offending behaviour", and the limitations that may be experienced by Youth justice. In my experience in the area where the defendant resides, it is unlikely Community Corrections will be any better

positioned to provide such specialised intervention in-house. It is likely both organisations will need to outsource the provision of such support. Youth Justice in my view are able to do that as readily as Community Corrections. I have reached the conclusion that a period of detention and a conviction is required to mark the gravity of the offending. Because however of the emphasis that must be placed on rehabilitation, and the defendant's personal circumstances, I have decided the detention order should be wholly suspended. In determining that I am also of the view that offering the defendant the opportunity for rehabilitation ultimately best serves the needs of the community. I make the following orders:

- LM you are convicted of the crime.
- You are sentenced to a period of detention of 15 months wholly suspended on condition that for a period of two years from today's date you are not to commit any offence that if committed by an adult could be punishable by imprisonment.
- I also impose all other conditions provided for in s 90(3) of the *Youth Justice Act*. You will be given a written copy of these conditions. They are:

during the period of suspension you must report to the assigned youth justice worker as required by the youth justice worker;

during the period of suspension you must receive visits from the assigned youth justice worker as required by the youth justice worker;

you must notify the assigned youth justice worker of any change during the period of suspension of residence, employment or school, or other educational or training establishment, before, or within 2 working days after, the change;

during the period of suspension you must obey the reasonable and lawful instructions of the assigned youth justice worker;

you must attend educational, personal, health and other programs as directed by the assigned youth justice worker;

you must, as directed by the Secretary, submit to testing for controlled substances or alcohol;

you must undergo medical, psychiatric, psychological and drug counselling and treatment as directed by the assigned youth justice worker.

I also impose one special condition which will apply during the whole of the period of suspension and that is you must attend, participate in and complete any sexual offending

rehabilitation program, treatment or counselling as directed by the assigned youth justice worker.

I have given consideration to whether I need to also impose a probation order but given the provisions of s 90 of the *Youth Justice Act* essentially incorporate all of the conditions that would be imposed on a probation order, I am of the view that a secondary order is not required.

I am required to make an order under the *Community Protection (Offender Reporting) Act* 2005 unless I am satisfied that you do not pose a risk of committing a reportable offence in the future. Having regard to the entirety of the circumstances of this case I am not so satisfied and accordingly I make an order. I order that your name be placed on the register pursuant to that Act and that you comply with the reporting obligations under that Act for a period of 5 years from today.