

Mr T, the defendant has been found guilty by a jury of one count of assault and one count of rape consisting of vaginal sexual intercourse. The complainant was in a significant relationship with the defendant for about five years until that came to an end in early 2018. However, a sexual relationship continued. The defendant was tried on four counts, with the jury being unable to agree on charges of attempted rape by oral penetration, and a further rape. All crimes were alleged to have been committed in the course of the one evening with the two counts for which he was found guilty, being the first and last in time. I need to make findings of fact. The complainant is deaf and gave evidence through interpreters. As well as the complainant's evidence, there was evidence from M, her teenage daughter, whose evidence I accept. The facts are as follows. From the time the significant relationship ended, it seems the defendant still "technically" resided at the complainant's home, although he stayed elsewhere for most of the period. The defendant often sought a reconciliation but she told him that they were finished and wanted him to move out. In the time before the relevant events, he had twice stayed with the complainant and they had spent one night away together. There is evidence of a meeting elsewhere on one occasion for the purposes of having sex. On the Saturday morning of 21 April, the complainant and her three children went away for the weekend leaving the defendant to mind her house, he having stayed the previous night. He stayed there for the weekend and beyond with his son, then aged 9. The complainant returned early in the evening of 24 April. When the complainant got back, the defendant physically moved and guided her around the house showing her things that he had done by way of domestic chores around the house whilst she was away. I am satisfied that this arose from his desire to go back to the type of relationship they had before separation. He cooked dinner but did not eat with the others; he stood nearby drinking bourbon. After dinner all four children went to bed. The complainant's daughter M, then 15, was the oldest of the children; the defendant's son was the youngest. There was no evidence to suggest that at that point, the defendant had been asked to leave. The complainant said she tried to go to bed but the defendant would not leave her alone. He kept telling her he loved her and wanted her to be with him. When she was sitting on the side of the bed he forcefully took her head into his hands by covering each ear, pulled her forwards and forced her to kiss him. That constitutes the crime of assault. She had hearing aids in, and the force was such that it made her dizzy. It seems that at about this time a drink was spilt on the bed; both had glasses of bourbon. The complainant said she did not finish the one she had. After the bedding was changed, M came into the bedroom. She said she did so because her mother had called to her, although the complainant gave no evidence about that. M then went to check the letterbox and returned with some mail. While the complainant and M were reading through the mail, the defendant was abusive to both the complainant and M. The complainant said he called them whores; M said he called them sluts. The complainant told M to go back to bed but that if she heard anything to call the police straight away. I infer that the two adults remained in the bedroom. A short time later, the complainant went to the toilet. The evidence is very sparse as to what happened next, but when she returned she seems to have laid down on the bed on her back. The defendant accused her of cheating on him with another man. He then got on top of her. She told him to get off, that she did not want him, and to get out. He held her hands by the wrists up above her head, took off her underpants and penetrated her vagina with his penis. The complainant gave no direct evidence about this, but in a complaint made shortly after, she said that he continued until ejaculation, and there is no reason to reject that. The defendant kept saying that they should be together and how much he loved her. The complainant used the toilet as an excuse to move away. When she returned, she told him to get out of the house but he took hold of her and kept saying he loved her, that they should be together. She managed to get to

the kitchen. M said that sometime after she went back to bed, she heard her mother yell out "get off me" at which time M rang emergency services on '000'. A recording of the '000' call reveals M telling the operator of a man yelling at her mother, and of hearing her mother yell "get off me". Police arrived shortly after and the defendant was arrested. Officers noted that he was obviously affected by alcohol and he was wearing shorts of some description inside out. The jury's verdict establishes the lack of consent and the absence of an honest and reasonable mistake as to consent. I am satisfied that the defendant knew the complainant was not consenting or at least was grossly reckless as to whether she was or was not. The complainant underwent a detailed medical examination in the early hours of the following morning. Bruising was found behind the right ear, as was bruising to her left wrist but I cannot be satisfied that was caused during the rape of which the defendant has been found guilty.

I have a victim impact statement of the complainant made on 17 June 2022. She reports that immediately after the events she experienced a mixture of emotions. She was shocked and frightened, and also concerned for the defendant's welfare when she felt she should not have been. She felt frustration that he could not respect her, saying her personal space was invaded and her body was his to use however he pleased. She said that she had counselling for 18 months following the events. She "went into a very dark place mentally" where she would sleep a lot become angry and often cry. She has post-traumatic stress disorder and now often panics or becomes defensive when she sees something that triggers memories of what happened that night. She is wary and alert and is reminded of the events when she sees someone who is angry or being aggressive. She says she is no longer able to work fulltime due to supporting her and her children's needs through the aftermath. As a result she has suffered financially. I note that the material I have does not suggest that the PTSD was solely caused by this incident. The complainant was in an abusive relationship for a time before the relationship with the defendant. I was told that the complainant had been off work for about a year leading up to early 2018 because of PTSD or similar symptoms that related to the previous relationship. However, it can be said that this incident exacerbated and prolonged the symptoms.

The defendant is now 40 years old; 36 at the time. His recorded history of offending contains only driving offences. His early years were spent in Victoria. On leaving year 10 he commenced and completed a toolmaker's apprenticeship of four years and has obtained a certificate in engineering from TAFE. He has a good work record, working for lengthy periods with successive engineering companies in both of which he was made foreman of his sections. He suffered two family deaths in 2007. His brother committed suicide and then his mother died. Those events caused him to seek a new start in Tasmania in 2008. Having moved here, he quickly obtained employment, spending long periods at two different major employers in the South. He came to Tasmania with his then partner with whom he has the child I have already mentioned. The couple separated in 2010, and he commenced a relationship with the complainant in about 2012. After being arrested on 24 April 2018, on 30 April he was granted bail a condition of which was that he live in Victoria. He since commenced a relationship with a woman and they married on 25 November 2019. She sat through the trial and I have a letter from her indicating her support for the defendant. She says that she has not seen anything in him to cause any concern, and he has made her feel safe, protected, loved and cared for. I have a report from a psychologist dated 29 October 2019 that outlines a diagnosis of and treatment for depression and anxiety. At that time he had been retrenched and was "in a state of significant distress regarding the pending court matter." He became teary when considering the possible outcome. His partner had also recently suffered a miscarriage, and the couple was struggling emotionally. In addition, I have letters from two previous employers who, with knowledge of this offending, have attested to the high regard in which he is held. Finally, I note that the

defendant suffers from chronic persistent tachycardia with exertional shortness of breath, but his does not seem to be something that cannot be properly addressed within the prison system. He also has a tumour in his back and the prison is not able to supply the strength of painkiller to which he has become accustomed.

Regrettably, I need to say something about sentencing in general and, in particular, the approach to sentencing for the crime of rape. The law is that when a Court considers the circumstances of an offence, it considers the gravity of the offending from both a generic and specific perspective. As to the generic gravity of rape, because the Criminal Code does not differentiate between crimes so far as punishment is concerned, this Court has for itself placed the various crimes under the Code into different categories of gravity, and there is no doubt that rape is a crime that is high in the hierarchy of crimes. Fundamentally, it is treated as a serious crime. Rape in a relationship is generally a serious matter, and it is so for different reasons that would make a rape outside of that category a serious instance of the crime. Importantly, a breach of trust and grave disrespect are involved, as are often aspects of domination and control. As with every crime, however, there is a scale of specific gravity depending on the facts of the particular case. The law is that the key sentencing consideration is proportionality: that is, the sentence should be one that properly reflects the gravity of the particular crime in light of its objective considerations. I repeat what I said during the sentencing hearing; each case depends on its own facts. A sentencing judge must make an assessment of the gravity of the particular criminal conduct. That is, where the particular crime sits on a scale of seriousness. There is no one standardised level of seriousness for every instance of the particular crime. There are many factors which determine the objective seriousness of a crime. The exercise involves assessing the presence or absence of aggravating and mitigating factors. The ultimate sentence will involve an assessment of the objective seriousness of the crime along with other relevant considerations relating to the offender's personal circumstances including criminal history, if any.

I say "regrettably", because the need to set out these things has arisen from a brief and incomplete media report of the sentencing hearing, and the criticisms that seem to have flowed from that report. In the hearing, as was reported, counsel for the accused submitted that there is a significant distinction between rape between two people who do not know each other or have not been in a relationship, and a situation where there was consensual sexual activity going on after separation as a couple. Later, counsel said that this is a "different kind of rape than the more serious kinds of rape that can happen". What was not reported was that at the time, I did not accept that prior consensual sexual activity between the parties was a mitigating factor. I spoke of what might aggravate the crime of rape generally. As was reported, I made a comment to the fact that there could be circumstances of greater aggravation than the present type of situation and gave two examples involving strangers that *might be* generally regarded as more serious. Those comments were made in the context of the submissions on mitigation and aggravation, and I did not intend them to be conclusive or definitive. By those remarks I did not intend to diminish the general level of seriousness of rape in a relationship. In fact, discussion of the point came to a close when, as was reported, Crown counsel submitted that it was not helpful to compare the present type of situation to cases that are not similar, and did not accept the premise that a "stranger" type rape is bound to be more aggravating or more serious than this type of crime. It was not reported that I indicated my acceptance of those submissions and immediately added that each case depended on its own facts.

In this case, in terms of objective seriousness, there is the abuse of the trust inherent in domestic relationships as well as that of controlling behaviour. The defendant wanted the permanent type

relationship to resume and the casual sexual relationship to end. On the night, he generally behaved in an abusive and jealous manner, and subjected the complainant to his will in the form of a violent bodily invasion. As to the assault, it was not a high level of violence and did not cause any lasting physical injury but no doubt had an emotional impact, and it has to be put in the context of the defendant's general behaviour. When referring to the ongoing sexual relationship, counsel noted that on the Saturday morning before the complainant and her children left the house, the two had consensual sex at her instigation. The complainant did not remember that happening but she did not deny it, and I am satisfied from what she told the clinical nurse examiner that it did happen. But that is not to the point. The complainant had the inviolable right to say no. Section 13 of the *Family Violence Act* means that the defendant's conduct is aggravated by the known presence of the four children in the house. The crimes were not committed in their immediate presence but one became involved when she heard her mother yell at the defendant and had to call the police. When dealing with domestic violence and sexual abuse, attempting to deter others and denunciation are very important factors in the sentencing process.

I take into account the defendant's personal circumstances. As to the question of delay, a little over four years elapsed before trial. The delay is lengthy but not excessively so. I was told that the trial was twice listed but had to be adjourned, once because of the state of affairs arising from the miscarriage, and then because of the inability to find interpreters. The delay is not the fault of the defendant in any relevant sense. I take into account that he suffered some anxiety for the period involved and that during the period on bail up until 2020, the defendant's ex-partner and his son lived in Tasmania and he was not able to see the child. I take into account that he has since married and found stable employment. That factor has some weight but it is not of any great significance. I recognise that he will be imprisoned in this State away from his immediate support. The defendant is not to be punished for having exercised his right to a trial, but he is not entitled to the mitigation that would normally flow from a plea of guilty, and particularly an early one. Of course, the complainant had to endure the delay before giving her evidence and the resolution of the matter.

Mr T, I have set out what I see to be the relevant factors, circumstance and considerations. There is nothing I can usefully add at this stage. You are convicted of the two counts and sentenced to four years' imprisonment to commence on 14 June 2022 to take into account the periods spent in custody. I order that you not be eligible for parole until you have served one half of that sentence. I direct that these offences be recorded as family violence offences. I must make an order under the *Community Protection (Offender Reporting) Act* unless I am satisfied you do not pose a risk of future relevant offending. I do not think the risk is great but I cannot be satisfied there is no risk and I must make an order. I order that your name be placed on the register and that you comply with the reporting obligations under that Act for a period of two years from your release from prison.