

STATE OF TASMANIA v JAC
COMMENTS ON PASSING SENTENCE

7 JULY 2022
ESTCOURT J

The defendant, JAC, aged 33 at the time of the commission of these crimes, has pleaded guilty to two counts of raping his former partner, aged 27 at the time.

The two were in a relationship from around September 2018 to around October 2020. They have a daughter from that relationship who was approximately 18 months old at the time of this offending. Following their separation, the defendant and the complainant shared the care of their daughter.

In around November 2020, the complainant entered into a new relationship. This was the cause of arguments and hostility between the defendant and the complainant.

On Thursday 1 April 2021, the complainant received a phone call from the defendant to discuss care plans for their daughter on Easter Sunday, 3 days later. During the call, the defendant told the complainant that their daughter would be staying at his home the night before Easter Sunday. The complainant said that she wanted to be with their daughter when she woke up on Easter morning. The defendant said *“well you’ll be staying here and if you’re staying here we are going to be having sex”*. The complainant told him that wasn’t going to happen. The defendant told her if that were the case, she was not welcome to stay, again saying *“come here, stay here...have sex with me, wake up, do the family thing on Sunday for Easter and then you can go your own way”*. The complainant again told the defendant she did not want to do what he was suggesting and that she would come to his home early Easter morning and sit outside in her car until their daughter woke up. The defendant responded *“I told you what’s happening, that’s how it’s going to happen, ok”*. The call ended.

The complainant had recorded that phone call by placing her phone on loudspeaker and recording it on her daughter’s iPad.

In the following days, the defendant and complainant exchanged some text messages about Easter Sunday. They ultimately agreed that the complainant would arrive at the defendant’s home early on Sunday morning. The defendant told her that he would leave the front door unlocked so she could come inside and that he would leave his bedroom door open in case she wanted to come in and lay down with their daughter if they were still asleep. As a result of these messages, the complainant felt comfortable attending the defendant’s home.

The complainant arrived at the defendant’s home at around 7.00am on the Sunday. She entered the house, went to the defendant’s bedroom and found the defendant still asleep in bed. Their daughter was also asleep in her cot next to the defendant’s bed. The defendant’s mother was also asleep in another bedroom in the house.

The complainant laid on the defendant’s bed in between the defendant and the cot. She laid facing the cot with her back to the defendant. She was fully clothed – wearing a t-shirt, tights and underpants. She drifted off to sleep.

Shortly after, the complainant woke to the defendant behind her putting his hand down the back of her tights. The complainant was still facing the cot. The complainant

reached behind her and pulled the defendant's hand away, however the defendant got his other hand and put it down her jeans again. This occurred four or five times. The complainant repeatedly said "*no, I don't want to*" and the defendant said "*why not?*" The complainant replied "*I've already told you why and that this isn't happening*". The complainant attempted to cover her vagina with her own hand to try and stop the defendant from touching her. However, he persisted and ultimately forced two of his fingers inside her vagina. The complainant grabbed the defendant's hand and quickly pulled his fingers out of her vagina. As she did this, she felt his fingers scrape her vagina on the way out. This is the first count of rape.

By this stage, the defendant was lying almost completely on top of the complainant who was almost lying flat on her stomach. Her right arm was pinned underneath her. Her left arm was behind her.

The defendant pushed the complainant's head up against a pillow with one of his hands and tried to pull her tights down with the other. Using her left hand, the complainant attempted to pull her tights back up and push the defendant away.

The defendant managed to pull the complainant's tights and underpants down to just below her buttocks. He then inserted his penis into the complainant's vagina. The complainant began to cry and told the defendant "*no*". She was too scared to make much noise as she was fearful of her daughter waking up and seeing what was happening. After around thirty seconds of sexual intercourse, the defendant climaxed. and the complainant was then able to move away from the defendant, pull her pants up and leave the bedroom.

The complainant went outside and sat on the front steps to the house. The defendant followed and the complainant confronted him about what he had done. The complainant recorded this conversation on her mobile phone. The defendant then woke their daughter up and gave her to the complainant who then left with her.

The complainant contacted her partner and organised to meet with him later in the morning. When they met, she disclosed the incident to him and he encouraged her to report the matter to police.

She attended the Bellerive Police Station the following day and reported the matter. She was then taken to the Royal Hobart Hospital for a forensic medical examination. She then made a formal statement to police. The defendant was arrested later that afternoon and interviewed.

Initially, he stated to police that his fingers didn't go in the complainant's vagina but rather, she aroused him and they had consensual intercourse which she later told him she regretted.

Police then played the defendant the recording of the conversation between him and the complainant after the offending. He then stated:

- He didn't think it was rape until she was crying outside.
- She wasn't saying no.

- He didn't actually stop straight away, he was three quarters of the way through when she told him to stop. So he lied before. He didn't stop straight away but it didn't go for much longer after. Maybe thirty seconds.
- He's not a bad person but he honestly doesn't know what he was thinking.
- He knows he should have stopped but he didn't. He doesn't know why.
- She didn't say yes.
- He kept going as he was close to ejaculating.

He was charged and bailed.

The State does not accept that the complainant consented to sexual intercourse at any point, nor that she touched the defendant other than to push or pull him away from her once he began to touch her without her consent. The State asserts that the complainant was actively and repetitively saying the word 'no' during the incident. These facts are not now challenged by the defendant.

The defendant was charged and bailed.

At the time of the commission of the two acts of rape, the defendant was on bail in relation to a complaint which alleged one count of aggravated robbery, one count of causing grievous bodily harm and one count of aggravated burglary. These crimes are said to have been committed on 3 January 2021 against a man, who was then in a relationship with the complainant in the present case. The defendant has pleaded not guilty to those charges and is awaiting trial on them, but it is aggravating that he was on bail at the time he committed the crimes for which he is about to be sentenced.

On behalf of the defendant it is said that he understood that the complainant was seeing a new partner and was heartbroken and his thoughts about her then became irrational. He held a delusional belief that if they had sex their romance would be rekindled. He now accepts that was an appalling way to be thinking and accepts responsibility for his conduct.

It is submitted that he has used his time in custody since 8 September 2021 to reflect on his offending, feels awful about what occurred, has developed insight into how his actions may have impacted upon the complainant and is remorseful for his conduct.

It is further submitted that remorse was "partially demonstrated" in his police interview, where he made "partial admissions". I do not accept that submission. He at first denied the rapes and only made admissions after he was confronted with the recording of the post offence conversation between him and the complainant .

It is then submitted that a "more genuine" indication of his remorse is that he has since pleaded guilty to the charges he faces and does not contest the complainant's account of events.

I have difficulty in accepting that submission as well. Although the State accepts that the defendant's plea of guilty has saved the complainant giving evidence and the State the cost and time of a trial (and I do take those matters into account), nonetheless:

- (a) The plea was very late, 12 months after the offending, and was indicated at 3.25pm on Friday 6 May 2022 when the trial was set to start at 10am on Monday 9 May 2022.
- (b) The plea came in the face of a strong prosecution case.
- (c) The State's case was fully prepared and
- (d) The complainant had already been through a number of briefings with lawyers for the State during which she became distressed.

It is submitted on behalf of the defendant that while his offending is serious, there is a lack of aggravating factors commonly seen in sexual offending. That is true, but every case depends on its own facts. Worse cases can be cited. So too can less serious cases.

The *Family Violence Act* 2004 s 13(a) provides that it may be considered aggravating that an offender knew that there was a child present at the time of offending. It is also a specified aggravating feature provided for by s 11A (1)(d) of the *Sentencing Act* 1997 that a sexual offence was committed "in the presence of any other person".

I think the better view is that the circumstances in this case would engage the *Family Violence Act* provision but would not necessarily engage the *Sentencing Act* provision which in my view involves the concept of conscious presence only.

It is submitted on behalf of the defendant that while the complainant's daughter was present at the commission of the crime there is no evidence that she was aware of what occurred and that the complainant's victim impact statement suggests her daughter was asleep the whole time. It is submitted that this significantly reduces the aggravation that attaches to her presence and also indicates that the level of violence and aggression involved in the offending was not at a level so as to wake up a baby one metre away.

I don't accept those submissions. Even if the fact the child may have been asleep constitutes the absence of an aggravating feature for the purposes of the *Sentencing Act*, that fact is countered by the aggravating feature that her presence inhibited the complainant's ability to resist the crime, by screaming or fighting. She was too scared to make much noise as she was fearful of her daughter waking up and seeing what was happening. It added to the distress and sense of entrapment the complainant felt. They are matters relevant to the *Family Violence Act* provision in my view and are aggravating.

Next it is submitted on behalf of the defendant that while violence is inherent in the act of rape, the violence involved in this case did not go "very far beyond" the violence required to commit rape.

I don't accept that submission either.

The first count of rape involved the defendant placing his hand down the complainant's jeans and when the complainant reached behind her and pulled his hand away the

defendant used his other hand and put it down her jeans again. This occurred four or five times with the complainant repeatedly said "*no, I don't want to*". The complainant then attempted to cover her vagina with her own hand to try and stop the defendant from touching her however, the defendant persisted and ultimately succeeded in forcing two of his fingers inside her vagina.

The second rape involved the defendant lying almost completely on top of the complainant who was almost lying flat on her stomach. Her right arm was pinned underneath her. Her left arm was behind her. The defendant pushed the complainant's head up against a pillow with one of his hands and while trying to pull her tights down with the other. Using her left hand, the complainant attempted to pull her tights back up and push the defendant away. The defendant managed to pull the complainant's tights and underpants down to just below her buttocks. He then inserted his penis into the complainant's vagina. The complainant began to cry and told the defendant "no".

Both counts of rape, to my mind, involve a violent crime accompanied by, and committed by using, additional violence.

The State submits that it is aggravating that despite the complainant's explicit requests for him to stop during the first rape, he persisted and committed the second. I accept that submission with respect to the second rape.

Finally, it is submitted on behalf of the defendant, as to the second rape, that the penetration lasted only 30 seconds, "whereas it is common for rapes to last several minutes or longer" and the lack of longevity is the lack of an aggravating factor. I have no idea where the basis for that submission came from but I give it no weight given that the complainant has suffered terribly, psychologically and emotionally from the act of rape, not its duration.

I have heard a victim impact statement read out by the complainant, until she broke down and cried and then read out by counsel for the State.

The complainant said:

"The weeks and months of arguments, demands and aggression that had followed our separation had been mentally tough and emotionally exhausting but nothing could have prepared me for what you did that day.

You used the most precious thing in the world to me – our absolutely gorgeous daughter – to totally destroy me.

The bubbly, outgoing, very sociable person that I was before meeting you no longer exists at all.

Instead I need heavy dosages of medication just to get through the most basic tasks of every day; I am literally a shadow of my former self – I can't eat, I can't sleep and as a result I have lost a dangerously large amount of weight and continue to do so, I now suffer crippling anxiety and panic attacks.

Your actions that day also robbed our daughter of her father And by extension a grandmother. That lack of family has had financial ramifications as well. The financial struggle is barley liveable."

No challenge is made to the victim impact statement read by the complainant. Counsel for the defendant accepts that such victim impact "is not unusual for crimes of this nature".

I note that the defendant has prior convictions for assault but no priors for sexual offending or family violence. All of his prior convictions are said without demur to relate to a period when he was a young offender and consumed alcohol to excess. He has overcome the problem he had with alcohol as a young offender, has built a strong industrial record and has been a person of good character outside of this offending. This is emphasised in character references tendered on his behalf.

It is therefore submitted that despite the seriousness of his offending, the defendant ought to be sentenced on the basis that he is a person with good prospects of rehabilitation and that family violence and sexual offending is highly out of character for him.

I accept that submission and I will allow the maximum amount of parole eligibility.

Pursuant to s 36 of the *Family Violence Act* 2004, the State asks that a final Family Violence Order be made in the terms of the Interim Family Violence Order dated 11 March 2022 which potentially expires today.

No submissions are made in relation to this application on behalf of the defendant, although it is noted that the effect of such an order is that he will not be able to see his daughter for the foreseeable future which is a significant consequence to him of his offending.

I make that order for a period of five years from today.

Pursuant to s 13A of the *Family Violence Act* 2004, the State seeks a direction that both crimes be recorded as Family Violence offences.

I so direct.

Both counts are reportable offences for the purposes of the *Community Protection (Offender Reporting) Act* 2005. The Act requires the Court to make an order placing the defendant's name on the register unless satisfied that the person does not pose a risk of committing a reportable offence in the future.

It is submitted on behalf of the defendant that given his lack of prior convictions, his guilty plea and his insight into his offending, he has a very low risk of reoffending and that this goes to the length of any order. I accept that submission.

I make an order directing that the defendant's name be placed on the register and that he comply with the reporting conditions under the Act for a period of five years from the date of his release from prison.

Rape is a serious crime no matter what the circumstances in which it is committed. Let there be no mistake about that in anyone's mind.

In the present case the crimes involved a shocking breach of trust by the defendant, made all the more egregious by the fact that at the time, he was motivated by an egocentric belief that if the complainant was subjected to sexual intercourse with him her romantic interest in him would be rekindled. He was upset that the complainant had a new partner and he acted deliberately, thinking that he might counter that state of affairs. Moreover he involved his infant daughter in the scenario of his crime.

Because of the need for punishment, vindication of the victim, denunciation of the defendant's conduct, and general deterrence, the only sentence that is appropriate is one of imprisonment. As I have already said, I will allow the defendant the maximum ability to rehabilitate and will allow for his release on parole at the earliest time.

The defendant is convicted of two counts of rape and I impose a single sentence of four years imprisonment backdated to 8 September 2021. The defendant is not to be eligible for parole until he has served half of that sentence.