

The defendant, Liam Oh Marris, has been found guilty by a jury of one count of indecent assault and one count of penile vaginal rape. He was acquitted on two other counts of digital vaginal rape. At the time he was 19 years old and had not long finished school. The complainant was a 17 year old Year 12 student.

Over the Easter weekend of the year 2020, the complainant spent time with the defendant. They had only met a few times and they were not what you would describe as close friends. They had consumed illicit drugs together including hallucinogenic mushrooms and cannabis.

On Easter Sunday, the defendant sent a number of Instagram and Snapchat messages to the complainant asking if he could come to her house. It would appear that the defendant was at that stage, already intoxicated, but not so the complainant, at least not to the extent of being unable to give or withhold free consent. As a result of his intoxication, the defendant told police that he had very little memory of the events of the evening.

Eventually the defendant arrived at the complainant's unit where the complainant was watching a movie on her bed. The defendant gave her a hot cross bun, which contained cannabis. The complainant ate it and they sat together on the complainant's bed to watch a movie.

During the evening, the complainant moved to sit at a table and chairs and the defendant followed. He smoked a cigarette out the window, and they shared the remains of a bottle of raspberry gin and tonic.

The complainant put on another movie and she and the defendant moved back to the bed. The defendant put his arm around the complainant, cuddling her and holding her hand. He told her that he wanted to kiss her and she said she did not want to. He kept asking and trying to kiss her and she was dodging him. He then lifted her shirt and pulled down her bra, kissing and touching her to the breasts. She tried to get him off and away from her. She got up to get changed and as she did, the complainant put his hand onto her bottom and his hand into her pocket, slapping her to the bottom as he did.

They continued to spend time in the room, the defendant kept asking the complainant if he could kiss her. He made sexual comments to her that made it clear that he wanted to have sexual intercourse with her. She told him to stop. Eventually he got on top of her and he kissed her. She said the words "stop" and "no" a number of times and pulled his arms away from her.

Finally, the accused pulled off his shorts, tried to place the complainant's hand on his penis. He then took the complainant's leggings off and pulled her underwear to one side and he penetrated her vagina with his penis. He continued to have sexual intercourse with her until he ejaculated. He asked if he could ejaculate inside the complainant's vagina and she did not respond. He wasn't wearing a condom.

The defendant left the bedroom to go to the bathroom and urinated and when he returned the complainant left to go to the bathroom and showered. When she returned she got a spare mattress out and put it on the floor of her room and went to sleep on the floor.

The next morning the complainant would not speak to the defendant until he finally left her unit. When he had left, the complainant first contacted her friend and later her boyfriend, telling them both that she had been raped.

Later that morning she received a message from the defendant, with an image saying, "sorry" and then a message that read, "I am a little crazy. Might have forgot to tell ya." The complainant responded "No shit. I'm not into your rape kink." The defendant sent a further message saying "If I got the vibe you seriously wanted me to stop, then I would have but I was a bit intoxicated and you didn't seem to be that deadest (sic) if you're smiling at me."

On 13 April police spoke to the defendant and he participated in a video recorded interview in which he told police that he had only a fuzzy memory of the evening because he had been, in his words, "out of his mind drunk" and he was "on magic mushrooms".

He told police that he believed the complainant was indicating something because she invited him to sit on the bed and watch a movie. He said that they were lying there cuddling and the complainant told him to stop and he stopped, but then he continued. He told police that he believed the complainant was flirting with him because she was smiling at him and hugged him on one of the previous times they had hung out. He agreed that he asked to kiss her and she told him no, so he did not. He agreed that he pulled her bra down and touched her "boobs" and then she said stop and he stopped.

He at first said that he did not remember having sex with the complainant and did not remember much of the night, past her asking to stop, although he did remember her sleeping on the floor and thinking there was something wrong with that and that she did not speak to him the next morning and gave him the silent treatment.

He later told police he did remember having sex, that the complainant was not upset once they started having sex because she was grabbing him and making out with him. He remembered that when he ejaculated, the complainant "looked extra mad" but before that, he believed she was enjoying it.

He agreed that there was no discussion of consent beforehand and he feels like the main issue, leading to what happened, was his alcohol consumption. He told police that the complainant might not have told him "no" enough for him to understand because of his intoxication.

All that can necessarily be implied from the guilty verdict on the count of rape was that the jury was satisfied that the respondent did not have an honest *and* reasonable belief that the complainant consented. However, I am satisfied that defendant was not reckless, for the very reason that the evidence satisfies me to the requisite degree that the defendant did not appreciate that the complainant may not have been consenting.

Section s 14A(1)(a) of the *Criminal Code* deprived the defendant of the defence of mistake as I am of the view that his mistake is one that he would not have made had he not been intoxicated. Nonetheless, as Wood J said in *Director of Public Prosecutions v J S P* [2020] TASCCA 3 "even when the defence has been disproved because it was not a reasonable belief, an honest mistaken belief in a state of affairs bears on culpability and is relevant to the sentencing process", whether it be mitigation or the absence of an aggravating factor.

The same case makes it clear that even if there were, for some reason, no chance of pregnancy, and no chance of sexually transmitted disease, the victim will commonly have no means of knowing those things during or immediately following the commission of the crime. Fear of pregnancy or disease adds to the trauma and distress to which she is subjected. The absence

of a condom also serves to illustrate a careless and irresponsible attitude towards the complainant and disregard for her welfare.

There is no suggestion, in this case, that pregnancy or transmission of disease resulted.

I have read a victim impact statement from the complainant in which she states:

"With regards to the incident itself, I guess I am a bit of pushover and a people pleaser. I feel like I should have asked him to leave. I was unsure, annoyed and nervous when he was trying to kiss me at the start. Whilst he was there I felt stagnant. I was shocked and confused. I felt ashamed at the time. Afterwards, I was at my wits end when he wouldn't leave, even when I was giving him the silent treatment."

Fortunately, the complainant seems to have had no lasting psychological effects from the events that occurred that evening. She states:

"I no longer feel ashamed about what happened. He could have just listened to my words at the time and none of this would have happened. I am coping with what's happened to me as more time goes by with the support of my friends and family and my witness assistance officer.

I think about future relationships and are wary of meeting someone like him. I'm glad I spoke up as this might help other men and women to speak up as well if this happens to them and to help spread the message to ward off other perpetrators."

I have had the benefit of a pre-sentence report on the defendant. He is the eldest of three children born to his parents on 30 March 2001. He reports a good upbringing with no issues of family violence or abuse. He reported that the early part of his childhood was spent living in a remote area on the East Coast of Tasmania. He advised that his parents separated when he was ten years old, prompting the family's move to Hobart when he was aged 13.

The defendant has a strong relationship with and is well supported by both of his parents, and siblings as well as his grandparents and broader family.

He is employed on a full-time basis as a landscape construction worker and has been working for his current employer for approximately 18 months. His employer confirmed that he is a valuable and reliable employee.

The defendant advised the author of his pre-sentence report that he and the complainant were both intoxicated at the time, stating *"I thought it was consensual, I regret getting together with her and I feel sorry that was the way she felt about our actions."* He advised that he would have stopped having sex with her if she had asked, and he would apologise to her if he was able to talk with her. He affirmed he is sorry for the victim, advising he did not realise she was not consenting at the time.

The defendant reported that since being charged for the offences, he does not socialise any more, preferring to keep mostly to himself. He reported that he has ceased using all illicit drugs.

The defendant was at the time, and still is, a young man, who has never offended before, much less been sent to prison.

I agree entirely with the statement of principle of Pearce J in *JSP* at [108] where he said:

"There was a distinct need to impose a sentence which gave weight to general deterrence, denunciation and vindication of the victim. As to general deterrence, there was a need to uphold the policy of the consent and mistake provisions of the Code, to make clear to men, especially young men, their criminal responsibility for sexual acts committed against a person so affected by alcohol or drugs [as it was in that case] as to be unable to freely agree."

However, in view of my correction by the majority in that case and in any event I am persuaded that this case warrants an individualised approach to sentencing notwithstanding the gravity of the offence.

In particular I note that Wood J in *JSP* agreed with Pearce J when his Honour said:

"I respectfully differ from Estcourt J in one other important respect. I agree that the seriousness of the crime reduced the mitigation which arose from the respondent's youth, but, in my view, youth remained a sentencing factor of some weight. One reason that the law generally allows lenience to young offenders is they, being immature, are 'more prone to ill-considered or rash decisions': *R v McGaffin* [2010] SASCF 22, 206 A Crim R 188 at 210, [69]. They 'may lack the degree of insight, judgment and self-control that is possessed by an adult' and may not fully appreciate the nature, seriousness and consequences of their criminal conduct: *Director of Public Prosecutions v TY (No 3)* [2007] VSC 489, 18 VR 241 at 242, [43]. [His Honour said] I think that those factors had a part to play here. The sentencing factors of general deterrence directed to young men for crimes of this nature and punishment are competing countervailing considerations with allowance for the immaturity and lack of judgment of a young man. That is not to say however that the latter factors are to be given no weight."

I am mindful of the view of Blow CJ expressed in *DPP v King and Webb* that the imposition of both a suspended sentence and a period of home detention "is a course that should not normally be taken by a sentencer in relation to a single escapade because it is clear from s 8(2) and s 42AC(1)(b) that home detention is meant to be an alternative to a sentence of imprisonment, suspended or otherwise, rather than as a form of penalty that might be combined with a suspended sentence".

I respectfully disagree with that view, which was not shared by Wood J or me in that case. It is a valid sentencing combination, as demonstrated by Wood J in her reasons, particularly where a sentence is fashioned to be as punitive as it can be without imposing actual imprisonment.

I note that Community Correction hold concerns due to the defendant's self-reported condition of depression, for which he is currently un-medicated. Community Corrections will monitor this condition throughout any order the defendant is given, encouraging him to seek medical assistance if required. The author of the pre-sentence report notes that home detention would also allow time, with oversight and assistance from Community Corrections and organisations such as Men's Resources Tasmania, for the defendant to address his offending related factors. Assistance will also be provided from these sources to assist him in improving the stable and protective factors in his life.

The defendant is convicted of the crime of indecent assault and the crime of rape.

For the crime of indecent assault the defendant is sentenced to 15 months' imprisonment, which sentence I wholly suspend on condition that he commit no offence punishable by imprisonment for a period of three years.

For the crime of rape the defendant is sentenced to 18 months' home detention and in addition I make a Community Correction Order with an operational period of three years, with a special condition that within that period the defendant complete 240 hours of community service.

As to the Home Detention Order, all 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) and (h), 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. another person whose functions involve the installation or operation of a device, or a system, used for the purposes of electronic monitoring

The following conditions be 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 Highfield House for induction onto this order. You must attend this service for induction during normal business hours and no later than 10:00 am tomorrow
- 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 prescribed substances. Illicit and prescribed substances include
 - a. Any controlled drug as defined by the Misuse of Drugs Act 2001
 - b. 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.

Finally, having regard to the evidence at trial and the pre-sentence report, I am satisfied for the purposes of s 6(1)(b) of the *Community Protection (Offender Reporting) Act 2005* that the defendant does not pose a risk of committing a reportable offence in the future and I make no order under that Act.