

You have been found guilty by a jury of one count of maintaining a sexual relationship with a young person contrary to the *Criminal Code*, s125A(2). The offending occurred over the period between on or about 6 November 2011 and 30 September 2012. The victim of your offending was a young boy, DM, who was the son of your nephew's partner. He turned seven in November 2011.

For the jury to find you guilty of this charge, it was necessary for them to be satisfied beyond reasonable doubt that you engaged in at least three unlawful sexual acts over the relevant period. The Crown particularized eight acts. Because the verdict does not indicate what, if not all, unlawful sexual acts the jury were satisfied were committed, it is necessary for the purpose of sentence, to make findings of fact.

It is the Crown's position that, for the jury to have been satisfied as to three unlawful sexual acts, they had to have accepted the evidence of DM, and it would be illogical in the circumstances to find anything other than that they were satisfied all eight unlawful sexual acts were committed. Your counsel on the other hand suggested it was open to find only a limited number of the acts occurred because of the way the evidence fell.

The Crown submitted that the eight acts it particularized were four counts of committing an indecent act with or directed at a young person contrary to s125B, three counts of rape contrary to s185 and one count of indecent assault contrary to s127(1). At trial your counsel accepted that, as to all except one asserted act of rape, if the jury found the incident occurred, it amounted to the crime particularized. As to that one asserted act of rape, your counsel submitted that it could only be the crime of sexual intercourse with a young person contrary to s124.

As to DM's evidence generally, it consisted of a recorded interview between him and a police officer conducted on 29 August 2013 and an examination and cross-examination of him which was pre-recorded in August 2015 pursuant to the *Evidence (Children and Special Witnesses) Act*, s6.

Certain aspects of DM's evidence need to be considered when making findings for the purpose of sentence. It is clear that he had matured between the interview in 2013 and the pre-recording two years later. He was more articulate and more confident in the telling of his story. In his 2015 pre-recorded evidence, he also displayed a significant homophobic outlook on life. That was clearly relevant because you are admittedly homosexual. While it was suggested in closing before the jury that that attitude may have led to allegations which were not true, that was never suggested to DM directly and it is not possible in my view to make a finding as to where the attitude came from. It could as easily have been the product of your behavior towards him. Certainly the evidence of your former partner did not suggest any obviously homophobic attitude towards you or him by DM.

In the pre-recorded evidence, DM made allegations about incidents which were not referred to in the first interview. The most significant was an allegation of anal rape. This was incident numbered eight in the Crown's list of particularized incidents. DM gave evidence this occurred in a bedroom in your home. DM said this anal rape hurt him and he was crying. He said that he told his mother about it and went to the police about it but did not see a doctor.

In her evidence, DM's mother did not say when in time DM made disclosures to her. The only dates mentioned by her were that she married and went away for a short honeymoon in November 2011 during which you helped with DM and his sister's care and that in September 2012 she was hospitalized with a breakdown. She said that DM made disclosures to her, her partner talked her out of going to police but she did take DM to his paediatrician. She had made notes of what DM had told her and showed those to the paediatrician. DM did not report any anal rape and there was no physical examination of DM by that doctor. It can be inferred from Senior Constable Barwick's evidence that child and family services were informed of an allegation and that entity referred the matter to police.

sometime in 2012. There was nothing in Senior Constable Barwick's evidence or her interview with DM to suggest she was aware of any allegation of anal rape.

While there is no legal requirement for there to be any corroboration of DM's allegations, for the purpose of sentence, I have to be satisfied beyond reasonable doubt this particular incident occurred. I am unable to be so satisfied. My reasons for that are that the nature of the act was very different from any other alleged to have occurred. Had DM complained of anal rape and of being hurt, it is impossible to believe he would not have been taken to a doctor immediately for the purpose of a physical examination. Despite making other serious allegations of sexual misconduct in 2012 and 2013, DM apparently said nothing to anyone about an anal rape until he gave evidence in August 2015. When Senior Constable Barwick spoke to DM he had every opportunity to tell her everything that had happened. Further DM said he made the disclosure of this act to his mother and they went to police but not a doctor. That is not supported by other evidence. I should make clear that I am not making any finding that DM lied, I am simply unable to be satisfied beyond reasonable doubt on the evidence available to me that that incident occurred.

As to the remaining seven particularized acts, your counsel submitted that I could not be satisfied beyond reasonable doubt that incidents numbered 4, 5 and 7 occurred. He submitted that these incidents were not the subject of initial complaint to DM's mother and that contradictions in the evidence should lead me to have a reasonable doubt about them. With respect I do not agree. I accept that it seems there may not have been detailed complaint about them to DM's mother. However, there were features of, for example, incidents numbered 1 and 7 which were similar. As to incidents numbered 4 and 5, both involved allegations of sexual intercourse and masturbation.

DM's sister's evidence was to the effect that DM simulated masturbation and said that was what was done to him. DM's sister had also seen DM more than once climb up on a door, hold on to the top and put his feet on the handle. That is what DM described doing in incident 4 when he alleged you sucked his penis. There is in my view sufficient evidence to persuade me beyond reasonable doubt that incidents 4, 5 and 7 occurred. I do not have any doubt at all as to the other ones.

There is however another issue arising in respect of incident number 5. Your counsel argued at trial that, if this incident were found to have occurred, it did not amount to rape but could amount to the crime of sexual intercourse with a young person. Counsel for the State argued that the evidence was sufficient to satisfy the Court that the act of intercourse occurred without DM's consent. The difference between incident 5 and incident 4, also an allegation of rape, is that in relation to incident 4 there was clear evidence DM actively objected to what was being done. In respect of incident 5, that type of evidence was absent.

At the time of incident 5, DM was 7 years old. He had already objected in an obvious way to what was outlined as incident 4. To characterize incident 5 as rape, I have to be satisfied beyond reasonable doubt that the act of intercourse was without DM's consent. I am so satisfied. At the time DM was a seven year old boy. An incident had occurred shortly before to which he had actively objected. When regard is had to those circumstances and the definition of what is consent, there can be no basis for suggesting there was free agreement to the act of intercourse and every reason to accept there was no such agreement. I am satisfied that the act particularized as incident 5 amounted to rape.

You are 46 years old. You have four children between the ages of 22 and 17. At the time of the events detailed in this case, the children were of course younger and spent some time with you. You separated from their mother in 1999 and came out as homosexual in 2001. You hold qualifications in disability care and have worked in that area for the last 18 years. You have a number of siblings. Your mother is elderly and in ill-health. You have accepted that you will serve a jail term and are worried you may not see your mother alive again. You own your home subject to a mortgage. Given you will not be able to meet repayments if jailed, you may have to sell that. You have no relevant prior matters.

It is accepted that you were, as a family member, in a relationship of trust as far as DM was concerned. It does not appear that you sought out situations when you could abuse him. You took advantage of his visits to your home and other contact. DM used to visit your home regularly, often alone but sometimes with a young friend, to play on a play station. During at least part of the period covered by the indictment, you lived across the road from DM. There is no suggestion you involved him in any activities of a sexual nature involving your then partner. According to DM you at times threatened to bash him. I am not satisfied that occurred in the manner DM described. My observations of DM were that, at the time he gave his pre-recorded evidence, there was an element of being dramatic and perhaps embellishing situations.

I have been provided with a victim impact statement by DM. It emphasizes his homophobic attitude. He says he is angry at what occurred and has told his mother he wants to hang himself. While I accept that he has been adversely affected by your actions towards him and that he now has in my view a very distorted picture of the world, I cannot accept that this is wholly as a result of your actions. While there was no evidence of this before the Court on the trial, it is clear from the Crown papers that DM may have been a troubled boy before you abused him. To what extent that was the case and to what extent things are different now, I am unable to say because there is insufficient material before me.

Cases such as this are coming before the Court on a regular basis. Many children abused are abused by family members or friends who have access to children as a result of their family or friends connection and who take advantage of it. The effects on children abused can last for the rest of their lives. There must be a sentence which will act as a deterrent to those who might be minded to take advantage of such situations. I have found that the acts committed by you were two acts of rape, four acts amounting to committing an indecent act with or towards a young person and one act amounting to indecent assault. These acts involved your masturbating DM's penis, performing oral sex upon him, masturbating in front of him and showing him pornographic videos and photos. These acts amount to serious crimes in themselves and any sentence must also reflect that seriousness.

In addition to any sentence I impose, I must consider the impact of the *Community Protection (Offender Reporting) Act 2005*. The crime in respect of which you have been found guilty is a reportable offence for the purpose of that Act. That act provides that unless the Court is able to be satisfied that you do not pose a risk of committing a reportable offence again, it must place your name on the register of those required to report and order that you comply with the reporting obligations set out in the act for a specified time. I have not been provided with any material to suggest you do not pose such a risk.

In all the circumstances, the orders of the Court are that:

1. You are convicted of one count of maintaining a sexual relationship with a young person contrary to the *Criminal Code*, s125A(2).
2. You are to serve six years' imprisonment with effect from 9 February 2016. You are to be eligible for parole when you have served one half of that sentence.
3. Pursuant to the *Community Protection (Offender Reporting) Act 2005*, your name is to be placed on the register of those required to report under the Act and you are to comply with relevant reporting obligations for a period of 10 years.
4. You are to pay a victim of crime compensation levy of \$50 within 28 days of your release from custody.