

STATE OF TASMANIA v KCW
COMMENTS ON PASSING SENTENCE

1 SEPTEMBER 2023
GEASON J

KCW a jury found you guilty of three counts of indecent assault, and one count of rape. You appear today for sentence.

Each of the offences was committed against the same complainant.

The jury can be taken to have accepted the complainant's evidence, and I find in accordance with that evidence. Your crimes occurred whilst she was attending upon you in her capacity as your carer, a role she had undertaken for about four months at the time this offending occurred.

Your offending involved the following acts:

- Forcibly kissing her and putting your tongue into her mouth, which is count 1 on the indictment;
- Touching her breast over her clothing, count 2 on the indictment;
- Touching the outside of her vagina underneath her underwear, count 3 on the indictment;
- Forcing her down and placing your penis in her mouth, count 4.

On the morning of 22 October 2021 the complainant was undertaking her duties as a carer. She visited you at your home in Rocherlea in the morning. Her duties involved general housework and the provision of personal care if that was required.

You made her a coffee, and you were both sitting in the loungeroom watching western movies and chatting.

The complainant applied some cream to your lower legs and feet before discarding gloves into the bin, and returning her coffee cup to the kitchen.

Shortly after that you asked her for a cuddle before placing your hands around her neck and kissing her, forcing your tongue into her mouth. She turned away by which time you had rubbed your hand on her left breast outside her clothing. You then placed your left hand inside her trousers and touched her vagina, but you did not insert your fingers into her vagina. The complainant was attempting to get away from you by moving backwards, but inhibited in those efforts by reason of your hand being inside her trousers. After you removed your hand you next placed both your hands on her shoulders and forced her down, your penis exposed. You placed her hand on your penis and asked her to have oral sex with you. You turned her head bringing her closer to you and forced your penis into her mouth. When she finally managed to break free, she got up and moved away, leaving your home before driving a short distance at which point she contacted her employer, advising what had occurred. In turn police became involved. You were subsequently charged.

You are now 79 years old and suffering multiple incurable medical conditions with a life expectancy, according to a medical report tendered on sentencing submissions, of months not years.

You are physically frail and suffering dementia. You have type 2 diabetes and peripheral arterial disease and diabetic peripheral neuropathy causing chronic pain. You have chronic liver and kidney disease, chronic obstructive pulmonary disease atrial fibrillation gastroesophageal reflux disease and hearing impairment.

You are currently residing in a nursing home where you have been accommodated since February this year. You have two children, your daughter having provided you with support during this process. You have two grandchildren.

You were one of 13 children and experienced severe physical abuse at the hands of your father and you were committed to the care of the state residing in the Ashley boys home between the ages of 14 and 17.

At aged 18 you were sentenced to a term of imprisonment and two subsequent terms of imprisonment during your 20s. None of that offending involved any behaviour of a sexual nature and nothing in your record suggests such tendencies.

You have no prior convictions other than for a drink driving offence for the last 30 years.

I have received a report from Dr O'Donnell which demonstrates the relevance of the principles articulated in *Verdins* to your case.

It is her opinion that your moral culpability is reduced by reason of your dementia and she identifies sexual inhibition and sexual violence as behaviours which can be symptomatic of dementia. It can contribute to inappropriate sexual behaviour and impairment to judgement regarding such behaviour. It is her opinion that your dementia process is impaired your ability to exercise appropriate judgement in respect of your sexual behaviour towards the complainant and that there is a causal link between your dementia and that conduct. I accept that opinion.

She further opines, and I accept, that *Verdins* limbs 2,5 and 6 are applicable in your case. She observes that you are severely frail and a high fall risk and someone requiring the administration of extensive medications numerous times each day-some 23 medications a day I understand. She considers that your medical needs would be difficult if not impossible to accommodate in Risdon prison. This is in contrast to the plans in place at the nursing home where you currently reside which provide for your care needs and the safety of staff. I accept a custodial sentence would weigh more heavily on you than a person of normal health. It will impact too upon your mental health.

Because your moral culpability is diminished personal deterrence has only a limited application in your case.

The need for a sentence which addresses general deterrence is not diminished. Notwithstanding your reduced moral culpability, carers who provide support, in private homes particularly where they may be more vulnerable, require protection, and sentences from this Court which uphold that consideration are required.

I must also vindicate your victim who has exhibited considerable courage in pursuing this matter.

This was an episode which had considerable physical and psychological consequences for her and she has set out those consequences in her victim impact statement, the contents of which I accept. Those impacts are continuing and have had consequences for her personal relationship.

Because of, the relevance of *Verdins*, your medical conditions and my acceptance of the opinions which have been provided to me by a medical specialists and a psychologist I am satisfied an individualised sentencing response is required in your case. I am persuaded that in the circumstances, that notwithstanding the seriousness of your crimes it is inappropriate to make a sentencing order which would result in your immediate incarceration. I have not had you assessed for a home detention order because such order is not possible in your current circumstances.

It is however well settled that a suspended sentence fulfils the need for a sentence which serves to deter others and vindicates the victims of crime. In your case such sentence will accommodate the concerns articulated by the medical practitioners which in my view cannot be ignored in the circumstances of this case and will serve to punish you.

KCW upon your conviction I sentence you on the indictment to two years' imprisonment, which sentence I wholly suspend on condition that you are of good behaviour for a period of two years and commit no offence punishable by a term of imprisonment in that time.

Because you have engaged in some inappropriate activity of a sexual nature since this offending, and notwithstanding the likelihood that is at least in part a result of your condition, that is your dementia condition, I have decided to place your name on the register under the *Community Protection Offender Reporting Act* for a period of 5 years.