

RS, the defendant, has been found guilty by a jury of two counts of rape. The complainant is his then wife, who I will call A. The relevant acts consisted of digital penetration of her vagina, committed in late 2019. The findings of guilt followed a trial on one count of persistent family violence, the identified occasions in respect of which all involved allegations of sexual offending – mostly rape and indecent assault – as constituting family violence acts. The defendant was acquitted of that crime but found guilty of the two counts of rape. Eighteen occasions were identified for the jury, the last three in time of which were derived from statements made by the defendant to police in a lengthy interview on 5 May 2020. After the verdicts, I asked the jurors if they would specify the offences and identify the occasions, and they did so. I need to make further findings of fact. The background is that A was sexually abused as a child. There were two separate courses of conduct involving two different men, the last course of conduct ending when she was 13. As a result, A was severely traumatised. She developed a condition in which certain things triggered in her an emotional and physical response; for example, being held down, roughly handled during sex and oral or anal sex. These responses can extend to such things as disassociation and blackouts. The defendant and A married in 2013 and they have two later born children. A's evidence was that the defendant was aware of the past abuse and her pre-disposition to triggering events and what those events were. This had come about by his attendance at counselling sessions with her and her direct communication with him. Her evidence was that consensual sex stopped in early 2015, but sexual contact continued, that of course, being the subject of the persistent family violence charge. The jury was either not satisfied of lack of consent, or, on each of the identified occasions and in relation to each alleged act of sexual offending on each occasion, it was not satisfied of an absence of honest and reasonable mistake. It matters not for the purposes of sentencing which element was not made out. I note that the defendant's evidence was that little was said by A about her triggering events until late 2019. As to that, although matters of degree may be involved, I prefer the complainant's evidence. The defendant also said that A had given him general permission to touch her vagina while she was asleep. He interpreted that as including digital penetration. I note that this issue of "standing consent" was not put to A in her cross-examination. In any event, the defendant's evidence was that this permission had ended in October/November 2019, although he told police that it was in late 2018, early 2019. During the trial, evidence was led of admissions of sexual assault in that period made to a doctor and to a counsellor. The defendant resiled from these in his evidence, saying he had reflected on what happened, and was now of the view that he had done nothing wrong. The two identified occasions the subject of the jury's verdict were in October/November 2019, and as put to the jury, involved digital penetration of the complainant while asleep, followed by penile penetration. It follows that the jury was only satisfied of guilt in relation to the digital penetration on those two occasions. The State proposed a factual scenario that I should find for sentencing purposes, in respect of which scenario the defendant's counsel did not dissent. I am satisfied that it accords with the evidence and it is an appropriate one on which to proceed. The relevant facts as I find them are as follows. The defendant had a knowledge and understanding of the abuse and the effects of that abuse on the complainant, to the extent that she had explained to him the triggering events. On each occasion, the circumstances were that the defendant and A were at home, A went to bed before the defendant, she was sleeping in a bed with the two girls, aged four and two, the defendant went into the room and penetrated her vagina with his fingers whilst she was asleep. On the whole of the evidence I am satisfied the complainant slept through the offending, or was awoken by the offending and disassociated. That may have involved amnesia. I am satisfied that touching was more than fleeting. I agree

with the State's submission that I do not need to make any further findings about what happened after the acts of digital penetration on those two occasions. Again, I was not urged by the defendant's counsel to do otherwise. Lastly, on the basis of the defendant's admissions to the police, the two identified occasions were not isolated. I am satisfied similar conduct occurred on about four other occasions.

I have a victim impact statement from A but, of course, it was prepared before the trial and in contemplation of a charge of persistent family violence. I note the parties separated in early January 2020. Very obviously, the complainant was a vulnerable person at the time of the offending. She says her rights and boundaries were broken by the defendant, and that her body "was not listened to" by him, a person she should have been able to trust the most with her body. She feels the loss of autonomy and decision making.

The defendant is now 33 years old. He has no relevant prior convictions. He has qualifications as a butcher, a trade he has worked in regularly for a considerable period of time, although interrupted by an illness in the form of ulcerative colitis. Since the marriage ended in early 2020, he has been living with his parents. He has struggled with the loss of his family following separation and has been receiving support from a psychologist. He was not able to see his children for a considerable period until the situation was regularised by consent orders in 2022. He now sees his daughters for six hours on every second Saturday, with his mother responsible for collection and handover.

The law of rape in Tasmania was amended in 2017 so that it included penetration involving body parts other than the penis. The purpose was to place all forms of non-consensual penetrative sexual activity in the same category of seriousness. And so all forms of rape are potentially of equal seriousness. However, on a case by case basis, the level of seriousness of a particular case will depend on a range of factors. It is the facts and circumstances of each case, including the nature of the penetration, that enable proper evaluation of the objective seriousness of that particular crime. As with this case, all non-consensual penetrative activities involves an unwanted invasion of bodily integrity. That integrity is something to which everybody is entitled. Rape within relationships amounts to a serious breach of trust. This is particularly so in this case due to the high level of vulnerability of the complainant known to the defendant. In addition, in this case, there is the aggravating factor of the presence of the children on each occasion, although their level of awareness cannot be ascertained. The defendant is to be punished only the two acts but, as I have already noted, he cannot claim that they were isolated instances. However, the extent of similar offending of which I can be satisfied is not great. I take into account the defendant's personal circumstances; in particular his work history and apparent previous good character, and the situation in which he has found himself with his children.

Mr S, I have set out the facts as I find them to be, along with the relevant considerations I need to take into account. I repeat that you abused the trust of the relationship when you were aware of your wife's vulnerability. You are convicted of the crimes and sentenced to 21 months' imprisonment. That will commence on 26 February 2024. I will grant you the maximum parole eligibility and I order that you not be eligible for parole until you have served one-half of that sentence. I make a family violence order in the terms of the present order dated 17 May 2023 and that will operate until and including 11 February 2035. I record these offences as family violence offences. Having carefully considered the issue under the *Community Protection (Offender Reporting) Act* and the submissions made, I do not consider that you will pose any

real risk of future offending such as to warrant registration, and I decline to make an order under that Act.