

CB the defendant, has pleaded guilty to one count of indecent act with or directed at a child, and one count of indecent assault. The crimes, committed approximately seven months apart, involved his natural daughter, aged about four months on the first occasion, and later about 11 months old. I will refer to her as "A". The defendant and A's mother, who I will call "J", had been living together when J fell pregnant with A. After A was born, the defendant told J that he had a fetish for adult nappies. J told him that she was not interested, that it made her feel uncomfortable and that the defendant would have to keep it to himself. During the period of the relationship, the defendant engaged in solo sexual activities involving him wearing adult nappies. Sometimes he used a vibrator. In February 2023, the defendant and J mutually ended their relationship. They agreed they would remain friends and co-parent A. The defendant moved out of their home and went to live with his parents. A continued to live with J. An informal access arrangement was reached whereby the defendant would stay at his former home for four days, and then return to his parent's place for four days. He would stay in a separate room to J and it was common for him to be left alone with A while J went to work. During a period when he was staying with J, he showed her what is known as a "flesh light" which is an item which is similar to a torch in size and shape but which is designed to simulate a vagina. The offending came to J's attention only by virtue of the defendant's confessions to her on 15 May 2023. He revealed the essence of his conduct, the subject of count 2, provided an explanation and expressed remorse. J told a number of other people. That conduct was subsequently reported by a third party to a referral service. J was then told the police would be notified. She then contacted the defendant to tell him what was about to happen and he said he would report it to the police the following day. That he did and was fully co-operative. He revealed to police his conduct the subject of the first count, before which no-one knew about it.

Derived from the defendant's admissions, the facts of the two counts are as follows. As to count 1, this happened at a time when the defendant and J were still in a relationship. This was in about August 2022. J was not in the house. The defendant and A were in the bedroom, which he was still sharing with J at that stage. He was masturbating whilst wearing an adult diaper. A was on the bed facing away from him. He removed her jumpsuit so that her nappy was exposed, put her back on the bed facing away from him. At a distance of about one and a half meters away from her, he began to masturbate again while holding a vibrator against the nappy he was wearing. He was looking at A while he did this up to the point where he ejaculated. All of this lasted between 30 and 60 seconds. After he had finished he re-dressed A and went about his normal business. The events of count 2 took place in March 2023. The defendant was alone with A who was crawling by this time. The defendant was in a bedroom alone on the floor in front of a mirror masturbating by means of the flesh light. He had placed this on top of a large pillow so that it was at a convenient height. As he was masturbating, A crawled into the bedroom and moved to the side of the pillow. She was then wearing overalls, a T-shirt and a nappy, and the outline of the nappy could be seen from underneath her clothes. The defendant picked her up, put her on top of the flesh light – which was still on top of the pillow – and continued to masturbate with the use of the object for about 10 to 15 seconds before ejaculating. During this time, A's stomach was touching the flesh light, her legs were on either side of it, and her chest and arms were on the pillow.

When interviewed, the defendant revealed the details of his nappy fetish, described as "adult baby diaper lover", and known as ABDL. He had his own diapers, which he bought off the

internet and used for the purposes of his fetish. He disavowed an attraction to children and said he was not typically aroused by the complainant's nappies, distinguishing between ones needed for her personal care which he was not aroused by, and those for his own fetish which did arouse him. In respect of the first matter, he said on this occasion it was the diaper that was arousing him, not A, and he just wanted to see another nappy at the time so he thought he might as well look at hers. He acknowledged that he failed to realise the moral implications of what he was doing and said that he was immediately very remorseful wishing he had not done it. As to the second matter, he said the bulge of A's nappy assisted in his arousal; he did not think it would harm her because she was too young to know what he was doing, and she was playing with toys while it was happening. Afterwards, he was "overcome with an immense amount of guilt". He went on to admit to police that he had masturbated in A's presence on another occasion while she was in her nappy, and there were a few other occasions where he had done that in the same room but always concealed his activities from her by using blankets or doing it when she was asleep. He did not consider himself as having a sexual attraction to his daughter and was confident nothing like that would happen again. He told police that after the second occasion he felt extremely guilty and compelled to tell J and that they had since put in place measures to protect A, including him not being alone with her and not being allowed to do nappy changes. He said he did not disclose the conduct the subject of count 1 to J because he felt less guilty about that and did not want to traumatise her by disclosing at the same time, all of what had happened.

The defendant is now approaching 35 years old and has no recorded history of offending at all. He is presently still living with his parents and maintains employment as a guide at a nature park, which does not involve contact with children. I have the benefit of counsel's submissions and a detailed psychological report from Dr O'Donnell, dated 17 October 2023, along with a short report from the defendant's treating psychologist, Ms Wong. Dr O'Donnell's report reveals that the defendant was diagnosed with Asperger's Disorder when he was a child, a diagnosis now subsumed under the category of Autism Spectrum Disorder. He was removed from primary school in grade 4 due to severe bullying but relocated to a different school, which improved his self-confidence. He has a good industrial record. Dr O'Donnell describes that from puberty the defendant developed a fetishist disorder focusing on nappies. He is currently engaged with therapy to speak about that, and the traumatic outcome for all parties when he involved A in satisfying his fetish. The defendant told Dr O'Donnell the first instance was indicative of him being sexually excited by A's nappy, not A herself. The second incident occurred because he wanted to add another layer to the tactile experience of masturbating with the flesh light while being aroused by A's nappy, by holding her weight on the flesh light. He reported that he held A on the waist and touched no other body part. He told Dr O'Donnell that immediately after this had happened he realised what he had just done was to involve his daughter in his sexual act, and he immediately felt shame; remorse hit him "like a freight train". He has not wanted to indulge the nappy fetish since the last incident, and he immediately threw out all paraphernalia associated with it. I accept those as the facts. In Dr O'Donnell's view, he is highly tuned to the harm caused by sexual abuse and does not present with attitudes or beliefs that minimise or condone sexual abuse; to the contrary, the defendant expressed pro-social attitudes during the interview. Dr O'Donnell offers the opinion that the defendant has taken responsibility for his behaviour by self-reporting the two instances that would otherwise have remained unknown. He presents a strong profile of protective factors against re-offending, for example engaging in offence specific treatment, self-disclosure, pro-social attitudes, responsible engagement in education and employment, a support network including J, absence of substance abuse problems and an absence of a history of criminality. Ms Wong's report says that the defendant was committed to therapy as he was feeling anxious remorseful guilty,

exhibiting self-hatred and feeling sad. He said that he was unforgiving to himself and had suicidal thoughts at the time the conduct was revealed. As at the end of March 2024, he had attended 13 therapy sessions. She says he is motivated to change and repair relationships with people affected by the incident.

This is an unusual case involving a balancing exercise of some difficulty. Plainly, these are serious crimes. A profound breach of trust is involved. A, a vulnerable infant, was in the defendant's care and under his supervision, and because of her age, there are statutory aggravating factors. It might also be said, as was submitted by the counsel for the State, that the second incident represented an escalation in the nature of the offending from the first matter. It may also be said, as was submitted, that the two counts are not isolated incidents given the other acts of masturbation in A's effective presence. General deterrence and denunciation of crimes directed to or involving children are paramount sentencing considerations. At the same time, there are factors which warrant a significant degree of leniency. Primarily, there is the fact that but for the defendant's admissions to J, which triggered the report to police, and but for his admissions to police, none of this conduct would have come to light. Leniency in those circumstances is often referred to the "Ellis principle" that being a reference to *R v Ellis* (1986) 6 NSWLR 603 in which the principle was very clearly articulated. Its application is established as involving a "significant" discount. The disclosure discount has been endorsed by the High Court: see *Ryan v The Queen* [2001] HCA 21, 206 CLR 267 and *CMB v Attorney-General* [2015] HCA 9, 256 CLR 346. The discount is a matter of general principle, not a rule to be quantitatively rigidly or mechanically applied. In this case, even assuming A realised the import of the conduct, she had no capacity to make a report and there were no witnesses. I am satisfied that without the revelation of both incidents by the defendant, neither would have been detected. At the same time, somewhat paradoxically, general deterrence in child sexual abuse cases is often described as including recognition of the fact that such offending is difficult to detect. However, the *Ellis* principle remains intact. In addition, the defendant is entitled to a significant degree of credit for his early pleas of guilty. As well as the utilitarian value, they can be taken as evidence of remorse and contrition. I also take into account that there was no actual touching of genitalia, that A would have been quite unaware of the nature of what was happening, and is unlikely to have any recall of events. I note there is no suggestion of any paedophilic disorder or tendencies. All of that said, as to the second count, the defendant used his infant child as an object, in the strict sense, to assist in his sexual gratification. As to both matters, I take the view that because of the involvement of an infant in his otherwise solo sexual activities, imprisonment is necessary, but that a significant part of it can be properly suspended.

Mr B, I have set the facts and what I see to be the relevant considerations, and I have explained my views as to the appropriate sentence. All child sexual abuse or sexual activity involving children needs to be discouraged. But as I have explained, there are aspects of your case which entitle you to a good deal of leniency. You are convicted of the crimes and sentenced to 15 months' imprisonment to commence on 27 March 2024, the execution of 12 months of which is suspended on condition that you commit no offence punishable by imprisonment for a period of two years. I have carefully considered the application of the *Community Protection (Offender Reporting) Act*. Given Dr O'Donnell's report, the fact of your disclosure of these crimes and your response to these proceedings, I am satisfied you do not pose a real risk of offending within the meaning of that Act, and I decline to make an order.