

STATE OF TASMANIA v DJS
COMMENTS ON PASSING SENTENCE

28 AUGUST 2024
WOOD J

The defendant, DJS has been found guilty of the crime of indecent assault. On 9 October 2020 he indecently assaulted his daughter A S who was 10 years of age.

He was charged with and pleaded not guilty to the crime of persistent sexual abuse of a child. There were three particularised occasions of sexual abuse involving anal rape. After a trial, the jury found him not guilty as charged but with respect to the third particularised occasion, and the most recent of the three occasions, guilty of the crime of indecent assault.

To find the accused guilty of this crime, the jury had to have been satisfied the complainant's evidence was in substance both truthful and reliable. The crime of indecent assault was left on the basis that if the jury were satisfied beyond reasonable doubt of the truthfulness and reliability of the complainant's evidence, but had a reasonable doubt about the issue of penetration, they could find the accused guilty of the alternative crime of indecent assault. It was open to the jury to find the complainant may have been honest and reliable generally, but mistaken on this issue.

The facts as I find them to be and of which I am satisfied beyond reasonable doubt are as follows.

The crime was committed when the complainant was alone at home with her father, watching a movie, and when her mother, brother, and sister had gone to the supermarket.

The movie had some sexualised content. While the complainant was seated on a couch with her father, the defendant kissed her "inappropriately"; as she described it, he kissed her on the lips. He grabbed her legs and put them over on top of him. She got really scared and was too scared to say 'stop' and wanted her mother to come back home. He touched her breasts under her crop top.

He pulled down her trousers and underpants and touched her vagina, moving his hand around that area. At one point, he made her touch his penis by grabbing her hand and putting it on his penis. She tried to take her hand away but he kept putting it back. He told her not to tell anybody.

He pushed her into a position so she was lying on her side facing away from him. He was facing the same way as her and his stomach was touching her back. He pulled down his pants and he put his penis between her buttocks. He pressed his penis against the area of her anus. She felt scared and disgusted. The complainant could not move and was locked in place because the accused had one hand around her waist, "pinning" her, and his other hand was over her mouth.

He did that for a period she described as two minutes and then the car her mother drove pulled into the driveway. Her father said he would take photographs of her later.

The complainant said her father did not say anything to her afterwards, and she described her father as acting like it didn't happen.

She felt frightened and sick. Later on that evening, she was afraid he would come into her bedroom and had an anxiety attack.

Defence counsel submitted that in sentencing the defendant, I could not take into account the preliminary conduct involving kissing, touching her breasts and vagina, and making her touch his penis, as it amounts to various indecent assaults that are additional to the act of indecent assault that is the subject of the verdict. While these circumstances would not have warranted a conviction for a more serious offence, it is submitted that the defendant should not be punished for those other indecent assaults for which he has not been convicted.

While it is true that this preliminary conduct could have been the subject of distinct charges on indictment, this is a situation where it is permissible, indeed appropriate, to take into account these various acts in sentencing the defendant. They are so close in time to the act of indecent assault that they should properly be viewed as preparatory to and facilitating the indecent assault, and as part of the surrounding circumstances. They are closely tied to the element of indecency which requires consideration of the circumstances.

By its nature, the indecent assault the subject of the verdict is the culmination of a course of conduct which formed part of the indecent assault, and the indecent assault should not be viewed in an artificial light. Indeed, often in cases involving sexual crimes there are preliminary indecent assaults which are not the subject of additional charges but are integral to the course of conduct. This is such a case and it is not a case where the additional conduct *should* have been the subject of other charges in the indictment or left to the jury as an alternative verdict. The conduct was identified in the particulars as part of the specific circumstances of this occasion and that was both sufficient and appropriate. I can detect no unfairness to the accused in taking this preliminary conduct into account and, in my view, it does not infringe the proper application of the principle in *De Simoni* (1981) 147 CLR 383.

A further finding of fact of which I am satisfied beyond reasonable doubt is that this occasion of indecent assault was not the only occasion of sexual abuse committed by the defendant in relation to the complainant. There were other occasions of similar sexual abuse. While, consistent with the jury verdict, I do not find proved beyond reasonable doubt either of the other two specified occasions relied upon by the State, I am satisfied, in accordance with the evidence of the complainant, that there were other unspecified instances when the defendant acted in the same sort of way. He is not to be punished for those other occasions, and his sentence cannot be increased because of them, but at the same time, he is not to be sentenced on the basis that this instance of indecent assault was an isolated occurrence of sexual abuse. The fact that he had acted in a similar way before increases his moral culpability for the crime before the Court, which already is regarded as very high.

On 12 October 2020, the complainant disclosed to a teacher what her father had done and, then when asked, to another teacher and the principal of the school on 13 October 2020.

The complainant was distraught, angry and disturbed when she spoke to her teachers. She was very reluctant to disclose what her father had done, expecting that if she did, she would get into trouble at home and her mother would be angry with her. She expressed fear and worry that her father would find out that she had told her teachers and was scared to go home, expressing that she felt unsafe there. The complainant's disclosures and discussions with her teachers also reveal she was fearful of her parents splitting up and her father going to gaol.

Arrangements were made for the police to take a video recorded statement from her on 13 October 2020. This statement formed part of her evidence and was played at the trial. She was shy but conscientious, serious, and convincing, but evidently worried.

The teachers the complainant spoke to, namely Ms Dare, Ms Nandan (Ms Rattle) and the principal, Ms Oldham, gave evidence on the trial. They were impressive witnesses; their response and management of the situation involving a distraught child in a busy school environment disclosing serious criminal conduct and their eliciting of essential information was carried out with compassion and professionalism.

I have a victim impact statement from the complainant. In that statement, she describes the damage and pervasive harm resulting from the sexual assault. The defendant's criminal conduct caused her to feel disgusted with herself and to blame herself for what her father did to her. Family members blamed her and she was not believed as she should have been.

It is a terrible consequence of sexual abuse that it is not uncommon for child victims to feel a sense of blame. It is hoped that with time she will realise that she was not to blame in any way for the dreadful crime that her father inflicted upon her. The defendant is to blame, solely to blame, for his crime, and for the harm he has caused her and her family.

In telling her teachers and telling the police, she showed courage; it was difficult, but she did what she knew was right. In her evidence, she explained she did not ever want it to happen again.

The courts and the community depend on victims to stand up and come forward to ensure perpetrators are brought to justice and so the courts can carry out their important responsibility of protecting children from such crimes.

The complainant described in her evidence at one point how she now feels about what her father did. Her answer provides some insight into the impact and loss she has suffered as a child sexually abused by a parent. She said: "I feel disgusted, but at times, I miss our relationship as father and daughter, but he can't take back what he did ... and I wish that he never did it."

The complainant experienced a lonely and isolated time when she felt she had nobody to help her. She used to have nightmares about what her father did to her and felt tired all the time. She is nervous around men and keeps a distance from them. Her school-work was affected and she could barely concentrate. She is now doing well at school, but there are still times when she becomes distressed.

In determining the sentence, I must take into account the defendant's personal circumstances. The defendant is 46 years of age. He has a solid employment history as a security guard, removalist, and a cleaner. He has a medical condition affecting his knees which causes pain and affects his mobility.

He was raised by his mother and grew up without a father, which he found difficult. His mother formed a relationship with a man who was violent towards her and the defendant, and as a young child he was subjected to serious physical assaults. Since being charged, he became reclusive. He has been separated from his three children and he has in mind instigating proceedings in the Family Court to enable contact with his other two children which, given his

crime, is likely to be supervised. Contact with the complainant, for obvious reasons, is most unlikely to be granted.

There are no matters in mitigation with respect to the crime. He cannot receive the mitigation that is extended to other offenders who plead guilty and demonstrate remorse.

This crime of indecent assault is particularly serious; it is difficult to imagine a more serious example. His conduct of placing his penis between the complainant's buttocks was intrusive and distressing, and inherently disturbing, such that it is likely to have long-term emotional or psychological effects. He did not intend anal penetration and I am well aware he is not charged with attempted rape and cannot be sentenced as if he were guilty of that crime.

Lack of consent is not required to be proved as an element of this crime when a child is the victim, but it has been established in this case that the complainant not only did not consent or agree, but also that the defendant knew she did not consent.

In carrying out the assault, the defendant was physically coercive and restrained her in position.

He only desisted when his wife and other children returned home and interrupted his abuse. He told the complainant not to say anything, and this was likely to be effective in silencing her, given the dynamics of the relationship. As a father, he was an authoritarian figure and at times very intimidating. The family dynamic was that what he said prevailed and no dissent was allowed, and he used physical force to back up his authority.

His moral culpability is very high. It involved an appalling breach of trust. I regard it as a callous crime in which he treated his daughter as a sexual object and afterwards acted as if nothing had happened. He has showed no remorse or regret, then or since.

The sentence must be effective as a general deterrent in order that the Court fulfills its duty to protect children from such abuse. Denunciation is important and specific deterrence is needed.

I record a conviction and impose a sentence of four and a half years' imprisonment, backdated to 1 July 2024. The defendant is not to be eligible to apply for parole until he has served half of that sentence of imprisonment.

I mention, in the interests of making plain the Court's approach in fixing the sentence, that if the defendant had been found guilty of anal rape with respect to this occasion, with no mitigation for a plea of guilty, I would have imposed a sentence in the order of seven years' imprisonment.

I make an order pursuant to the *Community Protection (Offender Reporting) Act 2005* directing the Registrar to cause the defendant's name to be placed on the Register and directing the defendant to comply with the reporting obligations under this Act for a period of ten years.