

COMMENTS ON PASSING SENTENCE

WOOD J

The defendant, AWS, has been found guilty of the crime of persistent sexual abuse of a child.

The State's case at trial was that the defendant committed an unlawful sexual act or acts against the complainant on four specific occasions. The period specified in the indictment was between 1 January 2011 and 31 December 2015. During that period, the complainant was aged between nine and 14 years of age. The evidence established that, in fact, the four specific occasions occurred during a narrower timeframe of approximately 18 months when the complainant was aged between approximately 10 and 11 years of age.

The circumstances were that the complainant's adult sister was the accused's partner. They lived together for a number of years and had two children, the first born in February 2012, and the second in November 2015.

The complainant would go and stay with her sister and the defendant on weekends and during school holidays. For the jury to find the accused guilty as they did, they had to be satisfied beyond reasonable doubt that the defendant committed an unlawful sexual act on at least three of the four specified occasions. To do so, the jury had to be satisfied beyond reasonable doubt of the honesty and reliability of the complainant's evidence.

The complainant gave evidence of four occasions. I am satisfied beyond reasonable doubt of the honesty and reliability of the complainant's account with respect to each of those four occasions and I find all occasions proved. Each of the four occasions involved unlawful sexual acts of indecent assault, and two of the four occasions involved the defendant penetrating the complainant's vagina with his fingers, which at the time those acts were committed, amounted to the crime of aggravated sexual assault.

In relation to the first occasion, the complainant was staying at her sister's and the defendant's house. Late at night, she walked into the living room to get a drink and the defendant was watching pornography on the television. She was curious and stood looking at what was on television. The defendant approached her and said, "Don't tell [her sister]" and that "there would be consequences" if she did. He kissed her neck, pinned her against the couch, and unzipped her pyjamas, which she described as a "onesie". She could smell alcohol on his breath.

He touched her breast and his hand started to move down her body and she pushed him away and said, "No". He grabbed her hand and made her touch his erect penis over the top of his underpants. She pulled her hand away and said, "No".

The defendant, however, put his hands under her underwear and rubbed her vagina. The complainant's sister could be heard approaching and the defendant pulled away, saying, "Don't say anything".

The complainant's evidence assists with fixing the time of this occasion. It was the first specific occasion and it happened before the birth of her sister's first child. The first child was born in February 2012 and at the time of his birth, the complainant was 10 years of age and in grade 5.

I accept the complainant's evidence about the second specific occasion, and I make the following findings in accordance with her evidence. She was in her sister's bedroom, lying on

the bed on her stomach, looking at her phone. The defendant entered the bedroom and sat on the side of the bed. He touched her leg, moving his hand upwards.

She turned to see what was happening, but he pushed her to her upper body back down onto the bed and said not to tell her sister. He moved his hand up her leg, rubbing her inner thigh, and began rubbing her vagina over her trackpants. Then he put his hand under her clothing and underwear, moved his hand over her buttocks, and pushed her legs apart. He rubbed her vagina and inserted his fingers into her vagina. She pushed him off and said, "Stop, I don't like it." She repeated that. After about the third time she said she didn't like it, he stopped and removed his hand from her clothing. He pulled her underpants and trackpants back up, tapped her on the buttocks, and then left the room.

The facts as I find them to be in relation to the third occasion are as follows. Her sister had gone shopping at Woolworths nearby and she was in the spare bedroom, which was the room she slept in when she stayed, and she was "hiding from him". She was wearing her nightie, and she was lying on her back under the doona.

The defendant came into the bedroom and, in the complainant's words, "hovered" over her and grabbed the blanket and pulled it back. He started touching and rubbing her breasts over the top of her nightie. He pinched her nipples and rubbed them.

He moved his hand down her body and pulled up her nightie. He pulled down her underwear and started rubbing her vagina. He rubbed her vagina with one hand and with the other was touching her breasts, going from one to the other. She describes herself "staying still", like she was "frozen" and couldn't move, and that her mind was blank, and she was too scared to say anything.

He rubbed the top of her vagina and kept rubbing until it started hurting. She described it as a "very harsh rub" in the area of her clitoris and that he was "digging" forcefully. This conduct amounts to an indecent assault. The complainant's sister was expected to return and, after a time, he stopped and threw the doona back on her and left, saying nothing to her. She stayed in bed, shocked, scared, and in pain. She cried and did not know what to do.

The second and third occasions occurred within a few weeks of each other and when her sister was pregnant with her first child, indicating they occurred in late 2011 – early 2012.

The fourth specific occasion was after the first child was born. The complainant gave evidence that the baby was walking and about one year old. The complainant was therefore approximately 11 years of age, approaching 12, at that time.

She was sleeping in the child's room as she usually did when she stayed over. The child had been put into his mother's bed because he had wet his bedding. The complainant's sister was asleep. The complainant was up and picking up toys in the child's room. The defendant came home from work, and it was late at night. He entered the bedroom and came up to the complainant and held her upper arm with a tight grip then began rubbing her arms. She tried to move away from him so there was space between them, but he wouldn't allow it. He told her to "be quiet". She could smell alcohol on his breath. With one of his hands, he touched and rubbed her vagina over her jeans, his other hand gripping her arm forcefully.

He unbuttoned and unzipped her jeans, and his grip on her arm became even tighter. He slid his hand under her underwear and rubbed the top part of her vagina and inserted two fingers

into her vagina. When asked whether he said anything the complainant gave evidence, no words were said he was just groaning. With her free hand, she pushed him on his shoulder but he continued to abuse her by penetrating her in this way, gripping her arm tightly so she could not move. She told him to stop and to leave and repeated that, and she told him she did not like it. Again, she told him to leave. He stopped and pulled his hand away and left the room. She shut the door and put something underneath the door so he could not come back in and went to bed in her clothes but was unable to sleep. She found she had a mark on her arm from his tight grip. On this occasion, the defendant committed unlawful sexual acts of indecent assault and aggravated sexual assault.

A further finding of fact of which I am satisfied beyond reasonable doubt is that the defendant touched her sexually on other occasions. It began with ambiguous contact when no one was around or not noticing. He came into the bathroom on one occasion when she was in the bath with his first-born child. He touched her sexually when she was alone in her sister's bedroom and on car trips. The defendant is not to be punished for this other general or unspecified conduct, but it is relevant to his moral culpability. It also means he is not to be sentenced on the basis that the four specified occasions of sexual touching are isolated acts.

The defendant exercised authority over the complainant in a family setting and on one occasion, he slapped her very hard as a form of discipline for criticising him.

Relevant for the purpose of s 11A of the Sentencing Act is that on the third occasion, the complainant was exclusively under his care and supervision while her sister was out at the supermarket.

Another factor relevant for the purpose of s 11A of the Sentencing Act is that I find the complainant was under 13 years of age at the time of his offending. The complainant was a particularly vulnerable child as she has an intellectual disability; her cognitive ability falls within the borderline range.

The complainant did not disclose what had happened to her as a child until she was a young adult. She told a good friend in 2020 and later that same year she told her mother after her mother asked her a direct question. In her evidence, she explained that she had not earlier disclosed what the defendant had done because she was frightened. Her mother discouraged her daughter from going to the police; because of the lapse of time, she thought her daughter would not be believed.

Some months later, the complainant took the step of going to the police because of other concerns, which was a responsible step to take.

The defendant was interviewed by police on 19 May 2021 and denied the allegations.

At no stage has he showed any degree of remorse or insight into the seriousness of his offending.

The complainant's evidence revealed her fear and distress. She also explained her sense of being powerless. When giving evidence about the third occasion of abuse, she said, "I felt like I was small and couldn't do anything". After she was abused on that occasion, she described feeling like she was trapped "in a box".

The complainant read her victim impact statement to the Court which is informative about the extensive and lasting harm she has suffered as a result of this crime. The Court is grateful for the provision of victim impact statements as they provide essential insight into and understanding about the impact of these crimes on child victims. I also have a report from her counsellor, Brook Gruber, dated 13 August 2024, which provides additional insight into the complainant's trauma symptoms and the impact of the abuse upon her functioning.

The complainant's childhood was irreparably harmed by the abuse. Keeping the conduct secret from her family took a very significant toll upon her, and she lost friends who did not understand what she was going through. The loss of her innocence caused her to lose trust in people and become distant. She struggled at school and because of her anxiety symptoms was afraid to ask for help.

The complainant struggles daily with intrusive thoughts and memories of what the defendant did. She suffers from depression and has needed and continues to need extensive therapy and regular counselling. The complainant is prescribed medication to help with the constant anxiety she suffers. She describes feeling crushed, lonely, and lost, and has low self-esteem. There are times she feels overwhelmed and cannot attend to the routines of everyday living.

Due to her trauma and anxiety symptoms, she has lost good jobs which had the potential to provide a career pathway.

The counsellor concludes her report by remarking that through hard work engaging in counselling, the complainant has shown improvement, however, the impacts of trauma often affect a person for many years, or even throughout their life. This statement about the likely prospect of long-term harm reflects the understanding and knowledge the courts have acquired over many years and many cases.

Denunciation and deterrence are important sentencing considerations. The aim of denunciation is to reassert societal values and give proper weight to the harm done to victims: *DPP v NOP* [2011] TASSC 15 at [41].

In determining the sentence, I have taken into account the defendant's personal circumstances. The defendant is now 38 years of age. He is in a stable relationship with his partner and, until he was remanded in custody, he was living with her and her ten-year-old daughter. They had been living as a family unit for four years.

The relationship with the complainant's sister ended in 2016. There were family court proceedings, and some progress was made but that stalled while these criminal proceedings were on foot. As a consequence of these proceedings, he has not seen his children since March 2023.

His alcohol consumption was significant during his relationship with the complainant's sister, but he reduced his consumption after that relationship ended. He has a number of convictions for drink driving offences from 2007. He has been convicted of three breaches of police family violence order involving the sending of text messages in June 2020 to his former partner, the complainant's sister. His convictions have limited, if any, relevance to the offending before the court.

He has had a productive employment history working with Tassal from 2006 until 2018 and then in other work until recently when his trial was pending.

The defendant is now to be punished for crimes that were committed over ten years ago when he was approximately 25 or 26 years of age. There is no suggestion of any repetition of offending since this crime was committed and I take that into account as a positive consideration.

In terms of the lapse of time, the defendant may regard his life as having moved on and his circumstances as having improved, reflected in his current stable relationship. Now, this and other aspects of his life will be adversely affected by the inevitable period of imprisonment. The situation he is in where he is now to be sentenced for crimes committed over 10 years ago is really of his own making. The timing of the disclosure is a direct consequence of his conduct in silencing his victim. He, of course, could have brought these crimes to the attention of the authorities at any time after their commission.

The sentence must be proportionate to the nature of the sexual crimes he committed and adequately reflect the gravity of each specific occasion of abuse. The defendant sexually assaulted the complainant on four occasions. On three occasions, his partner was in another room in the house. His conduct was determined, and he persisted with his assaults on each occasion in the face of the complainant's resistance. On two occasions, his assaults upon the child progressed to digital penetration of her vagina.

While absence of consent is not an element of the crimes he committed, the complainant clearly conveyed on each occasion that she was frightened, overborne, wanting him to stop, and not consenting. He continued to abuse her regardless, and it was only the threat of discovery which caused him to desist.

After the first occasion, the defendant had the opportunity to reflect on his wrongdoing and to resolve not to repeat such conduct. He instead chose to repeat the abuse on later occasions.

His conduct was forceful and aggressive, by acts such as holding her tightly, or grabbing her arm. He ignored the complainant's protests and her asking him to stop and he silenced her by telling her not to tell her sister.

I regard his criminal responsibility as very high.

The defendant's conduct on the four occasions and generally show he both regarded and treated the complainant as a sexual object, showing no concern for her or her well-being or the trust in which he was held by his partner and her family.

He caused serious harm to a child who was a member of his partner's family and was frequently part of the life of his own family. He has not shown any remorse for his conduct. He is not entitled to a reduction in his sentence that is extended to other offenders who plead guilty.

Intoxication was a factor on at least one occasion, if not more. It would seem that on another occasion he was aroused after watching pornography. There is nothing about these circumstances which provides any explanation, excuse, or mitigation for his offending.

Indeed, there is nothing that mitigates the seriousness of his criminal conduct.

For the crime of persistent sexual abuse of a child, a defendant should receive a sentence that reflects the sentence the person would have received if charged with the crimes that arise from the specific occasions that fall within the charge, but which allows for the fact that he is being sentenced for a number of incidents and that the charge involves a course of conduct. The final

sentence imposed in this case has been checked to ensure that it is just and proportionate to the totality of his offending and his overall criminal culpability.

As well as adequately reflecting the nature and gravity of his offending, the sentence must also reflect the trauma and harm suffered by the complainant, and the harm to her family and the community.

In determining the sentence in this case, the protection of children is a paramount concern, and general deterrence a critical sentencing objective. The court fulfills its duty to protect other children from sexual abuse by imposing sentences which will be an effective deterrent to other potential offenders.

AWS, I record a conviction and I impose 8 years' imprisonment from 31 July 2024. I have a discretion as to parole. I will allow the minimum non-parole period. Mr S, you are not to be eligible to apply for parole until you have served a non-parole period of 4 years.

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.