

STATE OF TASMANIA v TSF
COMMENTS ON PASSING SENTENCE

28 JANUARY 2025
JAGO J

TSF has pleaded guilty to one count of rape. The defendant identifies as non-binary and prefers the use of pronouns "they/them" in relation to themselves. I also acknowledge they prefer the use of an alternate name, but for the purpose of these sentencing comments, I will refer to them as "TSF". The complainant is also non-binary. For the purpose of these comments, I will refer to them as "the complainant".

At the time of the offending, TSF and the complainant had been in a relationship for approximately one year. The relationship was a sexual one. Both TSF and the complainant were also in polyamorous relationships with other partners.

On 9 July 2022, the complainant and TSF were housesitting at the defendant's father's home. They went to bed and began to engage in consensual sexual touching. With the complainant's consent, the defendant handcuffed the complainant to the bed. The defendant then inserted a vibrator into the complainant's vagina. The initial penetration was consensual, but as the defendant moved the vibrator in and out of the complainant's vagina, it began to cause her pain, and she asked the defendant to stop. She told the defendant they needed to slow down and engage in foreplay and use lubricant. TSF did not stop and said to the complainant, "No you don't. You are already warmed up."

The complainant continued to protest, and the defendant continued to ignore the protests and kept using the vibrator, contrary to the complainant's obvious wishes. At one point, the complainant unsuccessfully attempted to undo the handcuffs. They struggled and told the defendant to stop. The defendant continued to move the vibrator in and out of the complainant's vagina saying, "you're obviously enjoying this".

At one point, the defendant sat on top of the complainant's back and continued to manoeuvre the vibrator in and out of the complainant's vagina. The complainant continued to ask the defendant to stop but the defendant responded by saying, "you're so wet, you're enjoying this".

Eventually, the complainant stopped resisting and lay silently crying into a pillow as the defendant continued to penetrate them with the vibrator. The defendant had also commenced using a vibrator on themselves and did not stop until they had orgasmed. The incident continued for about 20 to 30 minutes, and for much of this time the complainant was saying no and asking the defendant to stop. During the incident the defendant also slapped the complainant on the buttocks and thighs, which caused them pain. At the conclusion of the incident, the defendant undid the handcuffs and made a comment to the complainant about how good the sexual intercourse was.

The following day, the complainant woke up in pain. They contacted their partner and told him about what had occurred. The complainant and their partner spoke with the defendant about the incident. The defendant claimed their "disassociated identity disorder" had taken over.

Later in the day, the complainant and their partner took the defendant to the defendant's partner's home. Again, there was discussion about the defendant raping the complainant. This led to the defendant behaving in a heightened, emotional manner and an ambulance was called to take the defendant to hospital.

Later that evening, the defendant sent the complainant several Facebook messages indicating they were aware of their behaviour and the wrongfulness of it and apologising for it.

The matter was reported to police. The defendant was interviewed on 14 July 2022. During the interview, the defendant made several admissions, including the following:

- I understand my idea of consent isn't the right idea of consent;
- The next morning I realised I had assaulted her without meaning to;
- I realise now I got a bit carried away and wasn't really listening. I was just doing it from my perspective and not really communicating with what they want;
- I think the 'stop' or 'pull it out' request was made a few times'
- It took me a while to register and then eventually I stopped;
- I understand I assaulted them. I understand I didn't have a very good understanding of consent. I take full blame for that.

I have a victim impact statement from the complainant which was read to the Court. The rape has had a terrible impact upon the complainant and has exacerbated a number of pre-existing mental health conditions and illnesses. The complainant experiences nightmares and finds it difficult to trust other people. They now repel any intimacy and is fearful of touch. They have been left feeling angry, confused, and heartbroken. Further, the complainant has experienced physical pain since the incident, has been unable to focus on their employment and has experienced financial loss because they have been unable to continue with their art, which provided a secondary source of income. The continue to feel anxious and scared.

The defendant is 23 years of age, 21 when the crime occurred. They have no relevant prior convictions. The defendant has a complex history of mental health difficulties. They have been diagnosed with complex post-traumatic stress disorder, major depressive disorder, generalised anxiety disorder and agoraphobia. There has also been the exploration of the possibility that the defendant may have dissociative personality disorder, although this diagnosis is far from confirmed on the material available to me.

It seems the defendant's mental health difficulties arose because of a traumatic upbringing. When the defendant was 11, they were raped by a boy at school. Another male apparently witnessed the incident. The matter was not reported to police. TSF has also struggled with various trauma symptoms associated with molestation by a family member.

The defendant's mental health began to deteriorate in their mid-teens. They began to self-harm. By grades 11 and 12 they were becoming more isolated and were treated for anxiety and depression. There has been recurrent suicidal ideation from the mid-teen years until at least 2022. There have been a number of admissions to the North West Regional Hospital and contact with the community mental health team. The defendant continues to engage with both a psychologist and psychiatrist.

I have received a report from Dr Michael Jordan, dated 2 September 2024. Because the State challenged some aspects of that report, I also received evidence from Dr Jordan on 12 December 2024 as part of the sentencing hearing.

Dr Jordan gave detailed evidence as to the defendant's mental health at the time of the crime. In his view, the defendant was experiencing some level of disruption to their reality, which he described as a "depersonalisation event". He said the defendant most likely experienced the

incident with the complainant from a "somewhat different perspective". He said the defendant "may not feel ... quite as close to what was occurring at the time as they normally would. They might feel as if their watching themselves do it. That doesn't mean they can't, to some extent, experience and control what's occurring, but it's a sense of sort of distance and ... their ability to respond to maybe cues and verbal instruction from the other individual ... might be affected by that period of depersonalisation."

Dr Jordan explained that in a state of depersonalisation, it may take an individual longer to understand and respond to external stimuli, such as an auditory stimulus, but that such a delay did not amount to an inability to react. He described it as a slower reaction rather than an impaired reaction. He described the delay as being in the field of "seconds rather than minutes".

With reference to the defendant being able to respond to the protests of the complainant, Dr Jordan said this:

"Well, shall I put it like this. You will eventually, you will understand that there's a 'no' there, but you may not respond to it as quickly as you would if you weren't suffering from depersonalisation...if you are in a depersonalisation state, it may take you a while to sort of fully comprehend the word as you're processing it. You will pick up on the understanding of the word, but it may take you a little bit longer to do it."

Dr Jordan said that during the incident, the defendant would have retained "volition and control, but it may have taken longer than normal to 'action' the volition and control because of the depersonalised state".

I accept the evidence of Dr Jordan. I am satisfied the defendant was in a state of depersonalisation at the time of the incident. Such a state would have delayed, by a matter of seconds, their ability to react to the situation but not, in my view, in any substantial way, particularly when one bears in mind that this incident occurred for a 20-to-30-minute period and during that time, the complainant was regularly and persistently expressing their wish for the incident to end.

Therefore, whilst I accept the defendant has complex mental health difficulties which are relevant, in a general way, to sentencing, I am not satisfied there is a nexus between the mental health of the defendant and the crime, such that it, in any substantial way, reduces their moral culpability. That said, I accept that a period of incarceration, particularly given they identify as non-binary, will make incarceration more onerous. They are likely to be subject to ostracism and bullying within the prison environment, which will make their experience of prison harsher and more difficult. The reality is, however, that there are many people who possess individual characteristics that render them vulnerable within a prison environment. This Court must sentence on the understanding that it is simply incumbent upon prison authorities to accommodate all prisoners in a safe, secure and supported environment.

I take into account the defendant's plea of guilty to the crime. Whilst it could not be said that the plea of guilty came early, and I note the complainant expressed concern about the length of time it took for the matter to be resolved and the impact that had upon them, I also accept that there were many complex issues pertaining to the defendant's mental health which had to be explored and there were some delays associated with obtaining relevant reports from appropriately qualified experts. The plea of guilty retains value in the sentencing exercise as

it has saved the complainant from the ordeal of having to give evidence. Having observed the complainant present their victim impact statement to the Court, I have no doubt they would have found the process of giving evidence a most difficult one, and it is likely to have exacerbated their trauma.

This is a difficult sentencing exercise. There are numerous factors in this case which must be reflected in the penalty, and many of them are at odds with each other. The crime was a very serious one. It went on for a considerable period, despite the complainant's protests. The complainant has experienced significant harm and trauma as a consequence of it. The complainant was handcuffed to the bed at the time, and thus was in a vulnerable position. Their persistent protests were ignored by the defendant. The defendant placed their desire for sexual gratification above the right of the complainant to be treated with integrity, care and respect. This crime involved a serious breach of trust.

Rape of any nature is always a very serious crime. Irrespective of the manner of penetration, it is a form of violence that involves an invasion of bodily and emotional integrity. Here, of course, there was additional violence in the form of the defendant slapping the complainant. The defendant also sat on the complainant's back. They suffered some physical harm and discomfort for a time after the incident and have been deeply traumatised emotionally. The penalty imposed must vindicate the complainant and reflect the very strong need for general deterrence.

On the other hand, the defendant has complex and deep-seated mental health difficulties. I have already commented on the limited basis upon which I consider those mental health difficulties impact moral culpability, but they remain relevant to sentencing generally and provide a context for the offending. The defendant is continuing to engage with both a psychologist and psychiatrist and Dr Jordan was of the opinion that they are making progress in terms of dealing with past traumas and understanding the complexities of their mental health. The defendant's continual preparedness to engage with mental health professionals can be seen as an acknowledgment of their wrongdoing and a willingness to do the work that is necessary to ensure this sort of incident does not re-occur. That is relevant to the weight to be attributed to personal deterrence in this sentencing exercise.

I take into account the defendant's still relatively young age, the lack of criminal history and the plea of guilty. Weighing those matters carefully and having reflected on this sentence for some time, I have determined that a period of imprisonment must be imposed. I had the defendant assessed for Home Detention. There was some confusion and the report was not prepared. I make it clear I make no adverse finding against the defendant as a result of that. But, in any event, upon reflection, I have determined a Home Detention Order is not an appropriate sentencing response. The need to send a very clear message that non-consensual sexual conduct, in whatever form, is unacceptable, is paramount and demands the imposition of a period of traditional imprisonment.

TSF, you are convicted of the crime of rape. You are sentenced to imprisonment for a period of two years and six months. I have determined that it is appropriate, given the factors I have identified, to suspend the last 12 months of that period of imprisonment. That portion will be suspended on condition that for a period of two years, you commit no offence punishable by imprisonment. I order that you be eligible for parole after you have served one-half of the operative period of imprisonment. The nett effect of the sentence is that you will be eligible for parole after you have served nine months' imprisonment. I am not satisfied that you do not

pose a risk of committing any reportable offence in the future. Because I can not be so satisfied, I must impose an order pursuant to the *Community Protection (Offender Reporting) Act*. I order that your name be placed on the register and that you comply with the reporting obligations under that Act for a period of three years following your release from custody.

I order the crime of rape be recorded as a Family Violence offence. Given the sentence I have just imposed, I decline to make a Family Violence Order.