

STATE OF TASMANIA v NBC
COMMENTS ON PASSING SENTENCE

24 FEBRUARY 2025
JAGO J

NBC you have pleaded guilty to one count of persistent sexual abuse of a young person. Between 10 April 2023 and about 20 October 2023 when you were aged 26 to 27, you engaged in sexual acts with a young person then aged 15 years. The crime of persistent sexual abuse of a young person is committed when it is proved that an unlawful sexual act was committed on at least three occasions during the indictment period. Here, the State rely upon five specified occasions. There is significant dispute as to the nature of the first occasion which necessitated evidence being taken on the sentencing hearing. I will detail my findings shortly.

Shortly after the complainant's 15th birthday in April 2023, you and the complainant met via the social media application Snapchat. Thereafter, the two of you began to communicate regularly. During these communications you told the complainant you were 26 and she advised you that she was 15. After several communications you blocked the complainant on Snapchat. Shortly after, however, you reinstated communications and sent her an image of your erect penis. You also asked her to send photographs of her body and despite some hesitation, the complainant eventually acquiesced, and sent you photographs and videos of parts of her naked body.

After a while you exchanged phone numbers and began sending each other private messages. You made arrangements to meet. It was during this first meeting that the first sexual act occurred. As noted, there is significant dispute as to the nature of the first sexual act. The State alleged the first occasion involved an act of rape. You contend the first occasion involved consensual sexual intercourse. I note there are some other minor disputes between what you say occurred, and what the State assert. I do not consider any of them have sufficient impact upon the sentencing exercise to warrant determination.

The complainant gave evidence on the sentencing hearing. Her evidence was that the first occasion occurred in the shed at the defendant's home. She said that she was standing near the door of the shed and the defendant told her to sit down so it was not obvious that she was there. She said that she sat for a period before her phone "went off" so she stood to place it on the countertop. At that point the defendant also stood up and walked to the door area and pulled an axe down from above the door. She said the defendant "held it against my throat and threatened me and said if you tell anyone about this, I will kill you and your whole family". She said she felt scared. The defendant then laid the axe against the bar in the shed and sat on the couch. She said she stood there for a bit longer and then sat on the concrete floor. The defendant kept telling her to sit on the couch with him and was getting angry. She went and sat on the couch, at the opposite end to him.

The complaint said the defendant came closer to her and started kissing her and wrapping his arms around her back. She said she tried to move away from him but it "didn't work too well". She said the defendant put his hands up her shirt and took her bra off. She said the defendant kept telling her to get undressed, but she did not feel comfortable to do so. She said the defendant became angry, so she took her shirt off but left her jumper on. The defendant pulled the clothes from the lower half of her body. She kept trying to move away. She said she laid on the couch and the defendant kissed her, played with her breasts and then inserted his penis into her vagina. She said the defendant had his hands positioned beside hers so she could not move away. She said the defendant did not wear a condom, but she made sure "he pulled out of me" and he ejaculated on to the floor. She said after that they sat talking for a while, but she

wanted to leave. He kept telling her to wait because he needed to check to make sure "the coast is clear".

In cross-examination, the following exchange occurred:

Q: "When you had sex with N he didn't force you to have sex with him did he?"

A: "He was kissing me and ended up pushing me back down to the couch. And when he was kissing me, I tried to move back but couldn't because he had his hands wrapped around me."

Q: "Just so we can be clear though, the axe was used, as far as you were concerned, the axe was used to stop you telling people. Is that right?"

A: "Yes".

I found the complainant to be a believable witness, and I consider her evidence to be reliable. I note, however, the complainant was not asked, and did not give any evidence, as to what the time frame was between the axe being held against her throat and the act of sexual intercourse. She was not asked whether she submitted to the act of sexual intercourse because of what had occurred with the axe. Indeed, she was not, at any point, asked why she engaged in sexual intercourse with the defendant.

The defendant gave evidence on the disputed hearing. When asked whether before he had sex with the complainant on the first occasion, he had used any threats, he said "Maybe. I can't really remember". When later asked why he threatened her, he said "Cause I was scared. I wasn't actually going to do it though. I just make threats. I don't actually do it". He was asked what threats were made and he said, "If you tell anyone, I will kill you and your family." He was asked "did you use anything to help with that threat?" He replied, "I might have used the axe. I just couldn't remember at the time". When asked why he had uttered the threat, he said he was scared of getting caught and getting his head "smashed in" for having sex with a minor. He said in respect to the first act, he asked her "permission to have sex" and she agreed. Later in his evidence, the defendant said that when he uttered the words "I will kill you and your family" he did not have the axe in his hand, but it was up in the roof rafters, and he pointed at it.

In cross-examination, the defendant admitted that around the time of the relationship he was using a lot of drugs. He said "I was on drugs all the time and it was messing with my head. I didn't know what I was doing half the time". He agreed that he had told police that he could not remember the first time he had sex with the complainant. When it was suggested to him that given his drug use, he would not know whether he had permission to have sex with the complainant on the first occasion, he said "I can't remember". He later denied that he had sexual intercourse without her consent on the first occasion. I did not find the defendant's evidence at all convincing. He presented as having little true recall of the first occasion, and his evidence appeared contrived and reconstructed. I reject the defendant's evidence. The issue is, of course, whether the complainant's evidence is sufficient to satisfy me, beyond reasonable doubt, the sexual intercourse occurred without her consent.

In my assessment, it is a very reasonable inference that the complainant submitted to the first act of sexual intercourse because of fear. Before the act of sexual intercourse, she had an axe held to her throat and was told that if she told anyone, the defendant would kill her and her family. Such a threat must colour everything that occurs thereafter, as the complainant would understand any resistance may be met with violence. Given, however, she did not give direct evidence as to that, I should only draw that conclusion if there is no other reasonable inference, consistent with the innocence of the accused, available on the evidence. In my judgement,

there is not. Given what the complainant said occurred between the placing of the axe against her throat and the act of sexual intercourse, only a short period of time could have passed. The threat and display of aggression by the defendant must have been uppermost in the complainant's mind. That is consistent with the complainant's behaviour. After the threat with the axe, she sat on the concrete floor and only joined the defendant on the couch when he became angry. She sat at the opposite end of the couch. She was reluctant to remove her clothing. She tried to move away from the defendant but could not so do. Ultimately, the complainant said the defendant pushed her onto the couch and then pinned her there whilst sexual intercourse occurred.

I acknowledge that in cross-examination the complainant indicated she understood the threat was directed at her not disclosing the sexual intercourse but given the proximity of the threat to the act of sexual intercourse, the only reasonable conclusion is that it was acting on her mind at the time of sexual intercourse. In the context of the accused having immediately prior to sexual intercourse, demonstrated a preparedness to inflict violence if she did not do what he wanted, I am satisfied beyond reasonable doubt that the complainant did not freely agree to the act of sexual intercourse. I will sentence on the basis that the first occasion amounted to the crime of rape.

Following this first occasion, the defendant continued to send the complainant messages. The complainant would not always respond. The defendant would become angry and enquire about what she was doing and who she was with if there was a delay in her responding. At times, the complainant made excuses to avoid the defendant but eventually agreed to return to his house.

The second occasion involved the crime of penetrative sexual abuse of a young person. This occurred at the defendant's residence in the shed. The defendant and the complainant had vaginal sexual intercourse on the couch. Shortly after the intercourse, the defendant received a message from his mother who had unexpectedly returned home. The defendant made the complainant hide behind the bar in the shed whilst he went to see his mother.

The third occasion also involved the crime of penetrative sexual abuse of a young person. The defendant and complainant again had vaginal sexual intercourse in the defendant's shed. This occasion is identified by the complainant because the defendant's dog was present in the shed.

The fourth occasion also involved vaginal sexual intercourse occurring on the couch in the shed. The complainant specifically recalls this occasion as she and the defendant had gone to his bedroom first, although nothing occurred there, before they went to the shed.

The fifth occasion also involved the crime of penetrative sexual abuse of a young person. On this occasion, the defendant and the complainant had vaginal sexual intercourse on a concrete floor, behind the bar in the shed.

In addition to the five specified occasions, there were also times where the defendant would touch the complainant's breasts and penetrate her vagina with his fingers. All of this sexual abuse also occurred whilst the defendant and complainant were in the shed at the defendant's property.

These matters came to light when the complainant's older sister became concerned about with whom she was communicating. Eventually, she worked out it was the defendant and went to his home to confront him. The defendant denied there had been any wrongdoing. The

complainant's older sister asked the complainant about it and eventually she disclosed what had been occurring. After the relationship came to light, the complainant's parents confiscated her mobile phone. Whilst the phone was in her father's possession, he received a phone call from the defendant. The defendant told the complainant's father that if he did not give him \$1,000, he would release photographs of the complainant onto the internet. This behaviour demonstrates a complete lack of insight and remorse and highlights the lack of regard the defendant had for the complainant's well-being. To him, the relationship was very transactional and pursued only for sexual gratification, although I am conscious that such a characterisation must be evaluated in light of the defendant's neurodivergence, which I shall discuss shortly.

In January 2024, the matter was reported to a school social worker and police subsequently became involved. The complainant's phone was provided to police and was subject to a forensic examination. Numerous explicit images and videos of the complainant were located on the phone, together with images of erect penises. A brief conversation history between the complainant and defendant was also located on the phone. Amongst the communications found were messages from the defendant telling the complainant to delete all messages they had exchanged. There was also a message from the complainant indicating to the defendant that she still wanted to be friends.

In February 2024, the defendant was interviewed by police. He agreed he met the complainant on Snapchat. He agreed they began speaking about "sexual stuff". He said he sent her nude photographs of himself, and she sent him nude photographs of herself. He agreed that he had sexual intercourse with her, although claimed he did not appreciate that she was 15 until after the first time they had sexual intercourse. As I understand it, this claim is no longer maintained. The defendant told police that it was a regular thing for them to have sexual intercourse and that they usually had sex on the couch in his shed and sometimes on the floor. He also told police he was not thinking straight at the time of the relationship because he was smoking a lot of cannabis.

The defendant is 28 years of age. He has a limited prior criminal history. He has been dealt with in the Youth Justice Court for four counts of common assault, and one count of destroy property. He has not been convicted in respect of any of those matters, but they have been dealt with by way of good behaviour bonds and undertakings being imposed. There are no prior matters of a sexual nature, although that is frequently the case when sentencing a matter such as this.

The defendant has presented with significant behavioural difficulties since he was a young child. He has been diagnosed with moderate intellectual disability, attention deficit hyperactivity disorder, traits of autism spectrum disorder and conduct disorder, which is a childhood disorder which may transition to anti social personality disorder in adulthood. Due to the defendant's functional impairments, he has had limited educational opportunities and is unable to live independently. He relies upon his mother as his carer.

The defendant also receives support intermittently from disability support services. Initially, he was case managed through the complex and exceptional needs section of disability services, but in more recent times he has had NDIS funding in place to support his needs. His interaction with support workers is described as limited. Unfortunately, it seems there are insufficient supports in place to accommodate many of the defendant's needs, particularly in far north west Tasmania where the defendant resides. Much of his care falls to his mother and other family members. At times, his mother has been subject to physical abuse and aggression from the defendant, necessitating a restraint order.

I have received a number of reports authored by Dr Georgina O'Donnell. I have considered and take into account her reports dated 30 August 2024, 3 October 2024, 9 December 2024 and 12 December 2024. Dr O'Donnell reports that the defendant has an established history of social impairment due to his intellectual disability and neurodivergence. She notes that such difficulties are "chronic in nature." Examples of the difficulties include low frustration tolerance when interacting with others, aggressive responses to his needs not being met, difficulty in reading and understanding the social cues of others, and difficulty in forming sustained friendships and intimate relationships.

The defendant reported to Dr O'Donnell that he has had "sex with lots of women". His primary mechanism for meeting people and arranging sexual "hookups" is by social media. The defendant advised Dr O'Donnell that when he was aged 11, he was sexually abused by another youth whilst residing in a group home. He also advised Dr O'Donnell that since the age of 12, he has watched a considerable amount of pornography, viewing it most days. He reported to Dr O'Donnell that "a lot of the pornography scenarios that he views involve violence towards women, but he does not have a specific interest in bondage or sadistic sexual practices." Dr O'Donnell noted that the sexual interests described by the defendant were "mainstream and not indicative of a paraphilic disorder."

The defendant reported to Dr O'Donnell that he had met the complainant on Snapchat and knew at the time he had sexual intercourse with her that she was "too young and it was illegal". He reported to Dr O'Donnell he tried not to be seen with her. He also reported that the complainant was "not his girlfriend and that she was just someone to have sex with". He told Dr O'Donnell that he was having sex with several women during the same time period. The defendant also told Dr O'Donnell that at the time of the crime he was using cannabis very heavily.

Dr O'Donnell opines that there is a causal link between the defendant's level of intellectual disability and neurodivergence, and the offending behaviour. Dr O'Donnell noted the defendant's sexual expectations and behaviours were shaped by his experiences of watching pornography frequently since the age of 12 and his first sexual experience being one of sexual violence at age 11. His limited intellectual functioning when compared to his aged-matched peers means he presents as less sophisticated and less emotionally attuned. In Dr O'Donnell's opinion, he most likely related to the complainant as a peer rather than a minor. Dr O'Donnell concluded that the defendant's ability to exercise appropriate judgment in relation to his sexual practices and choice of partners, is impaired due to his level of intellectual disability and neurodivergence.

Dr O'Donnell also noted, given the nature of the defendant's disabilities, he is less likely to be able to cope in a prison environment and his impairments including, an inability to read social cues and a lack of appreciation of the emotional signals of others, are likely to place him at risk of conflict and disciplinary segregation in a prison environment, which may well have adverse consequences for his mental health.

Generally, I accept the opinion of Dr O'Donnell, and I am satisfied that there is a causal link between the defendant's intellectual impairment and neurodiversity and his offending behaviour. His moral culpability is reduced accordingly. Whilst it is apparent that he appreciated the wrongfulness of his conduct, the defendant had less of an ability to understand social constraints and read emotional cues. The defendant's intellectual impairment (within the lowest 1% when compared with individuals his age) results in him being less sophisticated,

less emotionally mature, less able to develop age-appropriate relationships and leaves him more prone to behavioural disinhibition. In addition, I accept the defendant will be vulnerable within the prison environment and is likely to have a reduced capacity to cope. It is likely that he may react in an aggressive manner leading to segregation and the risk of deterioration in his mental health. All of those factors are concerning. I take them into account in assessing sentence, but note these factors must be balanced and weighed against the important sentencing factors of denunciation, deterrence and vindication.

There is no question this is serious criminal conduct. The relationship lasted for several months. There was a not insignificant age gap. The gap in sexual experience was vast. The first act of sexual intercourse was rape. The threats and pressure that the defendant placed upon the complainant on the first occasion of sexual intercourse, undoubtedly set the tone for the balance of the relationship. Thereafter, the relationship was not characterised by affection or respect. The defendant saw the complainant simply as a means of gratifying his sexual desires. There was a degree of coercion associated with his interactions with the complainant. At times, if the complainant did not do as the defendant requested, he would become angry.

Whilst I make it clear that I sentence on the basis that the balance acts of sexual intercourse are not said to have occurred without her consent, I have no doubt that after the first occasion, the complainant was confused and conflicted. As noted, the defendant was much older than the complainant, although I accept his intellectual impairment meant the respective levels of maturity and emotional development were not as disparate as their ages. There was, nevertheless, a degree of cunning associated with the defendant's behaviours. He threatened the complainant to secure her silence, he kept inappropriate photos of her, and threatened to release them onto the internet if he did not receive money. The defendant directed the complainant to delete the messages the two of them had exchanged. These circumstances aggravate the crime, in my judgement. I am satisfied that it is clear that the defendant understood that what he was doing was wrong.

The law prohibits conduct of this nature because of the very real likelihood of harm being occasioned to young persons from premature sexual activity. When the relationship occurred, the complainant was young and at an impressionable and formative stage of her emotional and sexual development. The first occasion was the first time she had engaged in sexual intercourse. The law recognises that young people require protection, not only from adults who might seek to take advantage of them as occurred here, but also from their own poor and immature choices often made at a time when they lack the emotional and intellectual maturity to fully understand and appreciate the consequences of engaging in sexual activity. A young person is often simply not able to adequately recognise or assess the harm that almost inevitably flows from premature sexual activity.

Here, the complainant has been badly affected by the defendant's crime. She has suffered stress and anxiety and experienced suicidal ideation and self-harm. Her sleep has been disturbed. She has experienced nightmares. Her schooling has suffered, her family relations have been damaged, she has hidden herself away from friends. She now struggles with forming new relationships. She found having to come to Court very challenging. The type of impact she describes is very typical of what court's understand and recognise as being the consequence of the sexual abuse of young persons.

The defendant took advantage of the complainant's youth and her vulnerability for his own sexual gratification. I do not ignore the defendant's own vulnerabilities but as I have noted,

there is no suggestion the defendant did not appreciate the wrongfulness of his behaviour. The defendant was, at times, prepared to resort to threats and coercion to get what he wanted. I take into account the defendant's plea of guilty, although its mitigatory effect is largely muted by the need for the complainant to give evidence on the sentencing hearing. I detect no genuine remorse in the defendant's attitude.

This sentencing exercise necessitates the balancing of a number of considerations, many of which conflict. I must acknowledge the defendant's reduced moral culpability and the impact that has on the weight to be given to general deterrence. I do not consider, however, it is appropriate to eradicate general deterrence as a consideration entirely. It remains necessary for the Court to act to deter others who may be minded to act as the defendant did. I acknowledge and accept that in this case, the weight to be given to general deterrence must be moderated because of the defendant's vulnerabilities. The Court also has a duty to endeavour to protect children through the imposition of appropriate penalties and, in this case, I consider there is an ongoing personal risk because of the defendant's intellectual impairment and neurodivergence. Specific deterrence and protection of the public are, therefore, relevant sentencing considerations. Finally, I must impose a sentence which reflects the objective seriousness of the crime. In balancing all these matters, and after careful consideration, I am of the view that the only appropriate sentence is a period of imprisonment. The head sentence will be less than I would otherwise have imposed because of the defendant's reduced moral culpability.

I must make an order under the *Community Protection Offender Reporting Act 2005* unless I am satisfied that the defendant does not pose a risk of committing a reportable offence into the future. I am not so satisfied. I order that the defendant's name be placed on the register pursuant to the Act and that the defendant comply with the reporting obligations under that Act for a period of eight years following the defendant's release from custody.

NBC, you are convicted of the crime to which you have pleaded guilty and sentenced to imprisonment for a period of four years and six months. I order that you not be eligible for parole until you have served one half of that period of imprisonment.