

WH, you have been found guilty by a jury of two counts of persistent sexual abuse of a child or young person and two counts of indecent assault. The persistent sexual abuse charges relate to offending against your two younger brothers, B and D, in the 1970's. The two counts of indecent assault relate to your niece and nephew, J and R. Those offences were committed in around 1983. It falls to me to determine the factual basis of sentence consistent with the jury's verdicts. It follows from those verdicts that the jury must have been satisfied beyond reasonable doubt of the honesty and reliability of the accounts provided by each of the complainants.

The crime of persistent sexual abuse of a young person is made out where a person commits an unlawful sexual act against a person under 17 years of age on at least three occasions. In respect of your brother B, the State relied on three occasions of indecent assault. It follows that the jury accepted that each of those occasions described by B occurred and that the sexual acts involved were unlawful and I find accordingly. The allegation concerning your brother D relied on six occasions of indecent assault. The jury needed only to be satisfied in respect of the charge concerning D that you committed at least three of the listed unlawful acts before it was open to find you guilty of the crime, and individual jurors did not need to be satisfied that they were the same three acts.

Before proceeding to my findings of fact in relation to those two crimes, it is necessary to refer to your family circumstances around that time. During the course of the trial, I heard consistent accounts from you and each of your siblings who gave evidence of the significant violence perpetrated against members of your family by your father. That evidence was harrowing. You are one of eight children to your parents' relationship. You are the eldest boy and the fifth child in the family. Your father was an alcoholic and a gambler. The evidence I heard satisfies me that he was extremely violent towards you and each of your siblings. The evidence also satisfies me that you often bore the brunt of your father's violence. Your younger siblings, including B and D, regarded you as a protector. Your younger sister agreed that you would take beatings to protect the other children from your father's violence. Your father's violence was extreme and gratuitous. He would beat you and other members of your family on returning home from the pub, particularly when he lost money on bets. I have no doubt, based on the evidence I heard, that you and your siblings were terrified of your father. I am also satisfied that neither of your parents were meaningful sources of comfort and support to you or any of your siblings. Your father's conduct was such that the family had to frequently move as he failed to pay rent and created conflict with neighbours. I am also satisfied that your mother was, on occasion, violent towards her children. I am satisfied that life in the family home was extremely difficult for you and each of your siblings and was characterised by physical and emotional deprivation.

Your brother B is three years younger than you. The three indecent assaults constituting the crime against him were committed when your family was living in a house in Sandy Bay. Your family lived there from about 1973 or 1974 to January 1975. B was attending years 8 and 9 at high school at the time and was aged between 13 and 15 years old. You, B and D all shared a bedroom at the house for a period of time. You each had your own bed. The first two occasions of indecent assault occurred in your bed in this shared bedroom. B described getting into your bed on occasion to seek comfort from you in the context of your family circumstances which I have already described. B believed his parents hated him and said he was a very insecure child. He recalls getting into your bed approximately nine or ten times at the most. At first you cuddled B's back. He noticed on a few of those occasions feeling a hardness in his back which

he later recognised was caused by you having an erection. On the first occasion, you were lying in bed with B. He noticed you moving and masturbating your penis. He could feel the sensation of your hand tapping on his back. You then grabbed his hand and brought it around to your crotch, placing it on your penis inside your pyjamas. The touching was brief as B pulled his hand away. Your penis was erect at the time. On the second occasion, B was again in your bed and noticed you moving. He felt your penis touching his back on the base of his spine. You were masturbating. When B got out of the bed, he noticed that the back of the waist band of his pyjamas was wet.

By the third occasion, you had moved into your own bedroom in the house after one of your older sisters left home. B returned home from school. Your mother was at work. You offered B five dollars to kneel down and let you penetrate his anus with your penis. B agreed. He lowered his trousers and you did the same. He was leaning over the bottom of your bed and you attempted to insert your penis into his anus. He describes that attempt taking place over the course of two or three minutes.

In respect of each of the unlawful sexual acts comprising the offending against B, as you were less than five years older than him, the jury were directed that they could only be satisfied beyond reasonable doubt that the indecent application of force was unlawful if: (a) they were satisfied beyond reasonable doubt that B was under 15 years old at that the time; or (b) if they were not so satisfied, that they were satisfied beyond reasonable doubt that B did not consent to the act. Consent at the relevant time meant consent freely given by a rational and sober person who is able to form a rational opinion upon the matter to which he consents. The definition further provided that consent procured by force, fraud or threats of whatever nature is not freely given. There is no question, in my view, that B did not consent to the conduct comprising occasions one or two. There is no suggestion that B was anticipating your conduct, or that you gave any indication to him of what was about to occur. The evidence in respect of occasion three was different. It establishes that B agreed to participate in this sexual act with you, albeit that he was induced to do so by you offering him money. The evidence did not explore in detail B's understanding at the time of the sexual nature of what you proposed. B did say he had not known of homosexuality or the nature of the act, but that was the extent of the evidence. The jury must have concluded that B was not yet 15 years old at the time of this occasion and that his consent did not make the conduct lawful and I so find. It follows that you would have been under 18 years of age when you committed these three unlawful sexual acts against B.

The second count of persistent sexual abuse of a child or young person concerned your younger brother D who is seven years younger than you. As I have already noted, six occasions of indecent assault were relied upon by the State to make out this charge. Those occasions took place at two locations: the family home in Sandy Bay, where the persistent sexual abuse of B also occurred, and then at the family home at Rokeby. I am satisfied beyond reasonable doubt that each of the occasions of indecent assault outlined by D in his evidence occurred. As I have already noted, the jury must have been satisfied beyond reasonable doubt that the account D gave of your conduct towards him was honest and reliable. He outlined five occasions of indecent assault. D was nine years old and attending primary school when the family first started to live in Sandy Bay. He commenced attending the Church of England Boys Society (CEBS) at a local church. This was an activity arranged by your mother. D was sexually abused when attending CEBS by the priest who ran the church group. This abuse commenced before his tenth birthday. D, like B, looked up to you and regarded you as a protector. He confided in

you that he was being abused by the priest. You told him that it was part of life and said that you could help make it easier for him so that it does not hurt.

Shortly after this conversation, you called D over to your bed in the bedroom that the two of you shared with B. While you were lying to D's back, you touched him on his genitals on the inside of his pyjamas. D felt that your penis was erect at the time. D remained in bed with you that night. After this incident, I am satisfied that you commenced sexually abusing D on a regular basis. Aside from the further specific occasions which I will turn to shortly, you also began touching D's anus with your finger, using Vaseline to assist. I accept D's evidence that this probably happened on a weekly basis.

The second occasion relates to an incident that occurred in a play tent D received for his tenth birthday. He was sitting in the tent with his dog when he heard you approaching. He tried to get the dog to bark to keep you away but you came into the tent. You started rubbing your penis, you took your pants off, then D's, and rubbed against his buttocks with your erect penis. On this occasion you attempted to penetrate D's anus. This caused D to yell. You told him to "Sshhh". You continued this attempt for a couple of minutes. Penetration was not fully achieved. D described you as not being able to get your penis right in. There was a further particularised occasion that occurred in Sandy Bay. This also occurred in your bed and involved you touching D's genitals with your hand while rubbing your naked body against his back for approximately three minutes. D noticed that his back was wet at the end of that contact.

The family moved from Sandy Bay in January 1975. You did not live with the family for a period of time following that move. You lived with your grandmother and then joined the army in January 1976. Your family moved to Rokeby when D was in grade seven. You returned to live with your family at Rokeby after you were discharged from the army in July 1977. By then, only D and your youngest sister were living at the house. B was returning intermittently, but things continued to be bad between him and your father. Your mother was working as a cleaner at a high school which meant that she did not return home until after 8.30pm or 9pm. The fourth and subsequent occasions of indecent assault against D occurred at the Rokeby home. D returned home from school and found you in your mother's dressing gown. You were preparing the vegetables for the evening meal which was D's usual job. You approached D and tried to grab him. He tried to get away from you and ran to the shed but was unable to close the door in time. You got inside the shed, grabbed D and dragged him into the house by his arms into the lounge room, pulled his trousers down and bent him over the couch. You penetrated his anus, initially with your fingers, having lubricated them first with Vaseline. You then penetrated his anus with your penis. You ejaculated on his back. He went to the bathroom to try and wash it off. He described himself as "a skinny little kid" at the time. You were a fully grown adult. D protested and told you "Don't!" and "No!" but you kept on going. On the fifth occasion, you penetrated D's anus with your penis causing it to split and bleed. D went to the bathroom to clean himself up. Your father returned home and saw the blood in the bathroom and you told him that D had been mucking around with an arrow and had hurt himself.

I am satisfied that these particularised occasions at Rokeby occurred against the background of regular abuse of a similar nature. I am satisfied that you committed similar sexual acts against D on nearly a weekly basis. D's evidence was that you ceased trying to penetrate his anus for a period of time after you caused the bleeding on the fifth occasion, but continued to engage in rubbing your penis between his buttocks.

D moved out of the family home for a period to live with your sister, J. When giving evidence, D was unable to independently recall any further occasion of indecent assault. The State were granted leave pursuant to s 32 of the *Evidence Act* 2001 to refresh D's memory, and then pursuant to s 38 of the *Evidence Act* to cross-examine him regarding a further allegation he outlined to police in 2019. This final occasion occurred in circumstances where D had apparently told your parents what was happening. You were angry with him. You attacked him in your bedroom, applied Vaseline to his buttocks and penetrated his anus with your penis. You did so with force. D managed to get away and run to the kitchen. You got hold of him and bent him over the sink and resumed penetrating his anus with your penis. He ran away again but you managed to push him into your room and locked the door. D was crying. Your father came and banged on the door and asked what was going on. You told him through the door that you were punishing D because he had broken the branch of an apricot tree in the garden.

D agreed that this is what he told police. He also agreed that what he told police was correct. His explanation for not being able to recall the incident during the course of his evidence was that while he could remember things back in 2019, he had since seen a psychiatrist for a number of years. He gave evidence that he had been engaging in EMDR treatment which had caused him to forget a lot of the stuff that had happened. This evidence was not the subject of any expert evidence or otherwise explored by the State. I am, however, satisfied beyond reasonable doubt that this sixth occasion of indecent assault occurred. D made his statement to police at a time when his memory of events was clear. I am also assisted in reaching this conclusion because I am satisfied that the evidence I heard on this trial established that you had a tendency at that time to have a sexual interest in children to whom you were related, and to act upon that interest by engaging in sexual activity with child relatives in the family home, regardless of the risk of detections by others and that you used Vaseline as a lubricant while engaging in that sexual activity from time to time. D's account to police of what you did is consistent with that tendency.

The State accepts that it has not proved beyond reasonable doubt that the unlawful sexual acts you committed towards B and D at the Sandy Bay home occurred after your 18th birthday. You turned 18 in September 1974. The unlawful sexual acts against D at the Rokeby home were, however, committed at a time when you were 20 and 21 years old.

The offences against your nephew and niece, J and R, occurred when they were living in Moonah with their mother, who was one of your older sisters, and her partner. You moved into a flat in the same street in 1983. I am satisfied beyond reasonable doubt that during this period, you spent time with your sister and had contact with her children. You confirmed as much in your own evidence when you agreed that your nephew, J, had gone to your place for a sleep over on one occasion. It was on that occasion that you indecently assaulted J. During the course of the evening, J took a shower. You were in the bathroom while he did so. J put his pyjamas on and went to bed. His next recollection was waking up in bed with you and finding that he was naked and that you were naked. You passed him a container of Vaseline and showed him to put the Vaseline on his penis. You had hold of his hand and got his hand to touch your penis. He then felt you touching his penis. He was unable to identify what part of your body you used as you were fully concealed under the bed covers, but your conduct caused him to ejaculate. At one stage, you turned J over on to his knees, pulled his arms from behind him and told him your penis could go in his bum. You ejaculated during the course of this incident. This conduct was brought to an end when your sister knocked at the door. You let her in and she saw J on your bed. She told J to get out of bed, and called him a "dirty little such and such". He has no memory of what happened afterwards. According to J, that was the last time he saw you. It

appears from the evidence, including your own, that your sister ceased contact with you after this. You gave evidence that she accused you of "being filthy to her son", went off her tree and that you never saw them again. Clearly, the jury rejected your account that you had seen a lump on J's penis while he was getting changed and asked him about it. This occasion occurred in around January or February of 1984 when J was nine years old.

The indecent assault involving your niece R must, therefore, have occurred at a time prior to the indecent assault on J late in 1983 or early 1984. R was three or four years old at the time. You were at your sister's home one evening. R was in her pyjamas. You were in R's bedroom on her bed. In circumstances which R was unable to explain, you were naked on the bed. You were playing what you described to R as a game of "mummy, daddy and babies". The game involved getting R to try and fit a cloth nappy onto you. The cloth nappies were ones that had been used on R as a baby and that she used on her dolls. During the "game" you instructed R to sniff your bottom to see if you had done a poo. R found the "game" funny because she could not get the nappy over your penis which she described as straight. After that part of the "game" finished, it was R's turn to pretend to be a baby. You pretended that R had soiled her nappy and sniffed her genitalia. You then touched her vagina with your fingers and then licked it. You did not penetrate her vagina with either your fingers or your tongue.

It is clear that your offending has had a devastating impact on each of the complainants. I have received victim impact statements from them all. B describes how he looked up to you and thought of you as someone who cared about him. He says his life was not the same after you abused him. He left home when he was 15 and lived on the streets where he experienced further traumatic events. He came into contact with the criminal justice system. His expectations in life and his relationships were adversely impacted. He struggles to trust people. D similarly describes his life being changed completely by your abuse. You made him believe that your conduct was just part of life and growing up. His education was adversely affected. He also left home at the age of 15 to get away from the family home and your ongoing presence there. As an adult, he began to drink heavily as a coping method. This has also brought him into contact with the criminal justice system and affected his capacity to maintain employment. He has had periods where he wanted to end his life. He was diagnosed in 2016 with Complex Post Traumatic Stress Disorder (PTSD) when he had a breakdown and spent three months in a psychiatric facility receiving therapy. It was following his admission to hospital that he was finally able to report your abuse to police. J started using cannabis at the age of 14 as a way of numbing pain and stopping negative intrusive thoughts. He has struggled to be intimate which has affected his relationships. He has intrusive thoughts about older men. He has also been diagnosed with PTSD. He has received a disability support pension due to this diagnosis. In his late 20's he experienced a decline in his mental health and also came into contact with the criminal justice system. He was hospitalised for approximately a month. He has also had periods of being suicidal. His relationships with other family members have been adversely affected. R started wetting the bed again shortly after you committed the indecent assault upon her. Her mother reacted poorly to this change in R's behaviour. She describes feeling ashamed, particularly as she went through puberty. She felt uncomfortable with her body and avoided doing anything that would make her look for feminine and pretty. She began wetting the bed again when she became sexually active as an older teenager. She has had periods of experiencing suicidal thoughts and also abused alcohol. She relied on being intoxicated to allow intimacy to happen. In general, her intimate relationships, including with her husband have been adversely impacted. She also experienced setbacks in her mental health when her own daughter reached the age she was at the time of her abuse. She was particularly triggered

by witnessing her daughter play with dolls. She has been diagnosed with Complex PTSD, generalised anxiety disorder and sexual dysfunction.

The impacts described by each of the complainants are ones with which this Court is sadly all too familiar. It is well recognised that offending of this type on children has devastating and long-term impacts beyond the immediate aftermath of the abuse. Each of the complainants has powerfully described their own experience of the ongoing harm caused by your offending. I accept your offending has had adversely affected each of your victims. I am mindful, however, that D, B and J have each described sexual offending perpetrated against them by others when they were young. In the case of D and B, they also experienced similar childhood deprivation to yourself.

You are now 69 years old. You are Aboriginal. I have already noted your terrible family history and the emotional and physical deprivation you experienced. You lived with your grandmother for a number of years when you were very young. You understand you were removed from your parents' care at 17 months of age due to being significantly underweight and having bruising on your body. Your grandmother provided you with a safe and loving home and positive connection with the Aboriginal community. You were returned to your parents when you were about seven years old. Your schooling, like that of your siblings, was disrupted by your family circumstances and ultimately you left school just prior to ending year nine. When you were 14 years old you were raped by a male friend of one of your sisters. You did not report that offending to the police.

After leaving the home in Sandy Bay you again returned for a short period to live with your grandmother. You joined the Army in January 1976, but were discharged in July 1977 due to your poor mental health. You experienced your first episode of schizophrenia, including hallucinations. You were absent without leave for a short period and then discharged on your return to barracks. Since leaving the Army, you have had relatively limited employment. You have principally relied on social security benefits since that time. Your mental health condition is well managed with medication. You did abuse alcohol for a time, but in your later adult years, you brought your drinking under control. You married in the late 1970's. There is one child of your relationship, a daughter born in 1981. You and your wife separated in around 1982 and you raised your daughter alone from that time. You are still on good terms with your daughter and speak to her regularly on the phone. On the information before me, you have largely lead a law abiding life since you committed these offences. You have no prior convictions of any significance except for a drink driving matter in 1987.

These are very serious offences. It is necessary to impose a sentence which gives weight to general deterrence, denunciation and vindication of the victims of your offending, recognising the harm each has suffered. The sentence must make it clear to you and others who commit sexual offences against children that they can expect to receive significant punishment. This Court must endeavour to protect children and deter such abuse by the imposition of sentences which reflect society's condemnation of such behaviour.

You are not entitled to the mitigating benefit of a plea of guilty. Each of the complainants were required to give evidence. While you are not to be punished for exercising your right to trial, you have not demonstrated any remorse or insight into the serious nature of your conduct.

The sentencing exercise in respect of the two offences against your brothers is complicated by your young age during the entirety of your offending against B and the initial stages of your

offending against D. In *Director of Public Prosecutions v JSP* [2020] TASCCA 3, Pearce J at [109] (Wood J agreeing) confirmed that youth remains a sentencing factor of some weight, albeit the seriousness of the crime reduces the mitigatory effect. It is recognised that young offenders are immature, may lack the degree of insight, judgment and self-control possessed by an adult and may not fully appreciate the nature, seriousness and consequences of their criminal conduct.

The other matter that I need to consider is your own experience of childhood deprivation, which courts have consistently recognised as relevant to sentence and which may operate to mitigate penalty: see *Bugmy v The Queen* [2013] HCA 37, 249 CLR 571. In *Banfield v Tasmania* [2024] TASCCA 1, the Court of Criminal Appeal recognised that being raised in an environment surrounded by alcohol abuse and violence may mitigate sentence because an offender's moral culpability is likely to be less than that of an offender whose formative years have not been marred in that way. Such experiences may compromise a person's capacity to mature and learn from experience. These effects are recognised to not necessarily diminish with the passage of time. In my view, your experience of childhood deprivation is particularly relevant in this case because your offending occurred at a time proximate to that experience. Your offences against your brothers occurred while you were still a member of the household where your father's violence was ongoing and significant. The offending against your nephew and niece occurred later but when you were still relatively young. There is no suggestion that you have committed any similar offences in the period since early 1984.

Given your plea of not guilty, I do not have the benefit of submissions to address whether these matters in fact had an impact on you at the time of these offences. It is, however, open to infer that your youth and experiences of deprivation at that time in combination compromised your capacity to fully appreciate the seriousness of your conduct and affected your judgment and self-control. I am referring particularly to the offending against B and the early stages of your offending against D.

I note your mental health issues, however there is no suggestion that they played any part in your offending. From what I have been told, your mental health was being treated at the time of your offending against your nephew and niece.

There are a number of aggravating features of your offending which I am required to take into account: s 11A of the *Sentencing Act 1997*. In the case of the indecent assaults of your niece and nephew, they were under your care and supervision at the time of your offending. Your niece and nephew were also very young at the time of the offences. In my view, they are bad examples of such offending. Your offending against B occurred when he was between 13 and 14 years old. D was only 10 years old when you commenced your abuse of him. Each of your offences involved a gross breach of trust. You were clearly trusted by your sister to have the care of her children and you abused that trust dreadfully. Each of your brothers looked up to and sought protection from you in the context of their own childhood experiences. You exploited their trust in the most terrible way.

The offending against D is deserving of particular mention. First, three of the unlawful sexual acts I have found proved involve you penetrating his anus with your penis or fingers. Another occasion involved an attempt to do so. Secondly, you caused injury to D on occasion 5. Thirdly, D actively resisted your sexual assaults on a number of occasions and you used significant force to overcome that resistance (see occasions 4 and 6). Fourthly, your sexual abuse of D was preceded by him confiding to you he had been abused by the priest. Rather than providing him

support and assistance to report this offending, you took advantage of his vulnerability and used it as a ruse to commence abusing him yourself. Fifthly, this abuse occurred over a number of years, although I note there was a gap when you were not living in the family home. Sixthly, the specific occasions constituting the crime occurred against a background of regular sexual abuse of D, albeit that other conduct is unable to be particularised. The occasions constituting the offence were by no means isolated events. Finally, although the State accepts that they cannot prove that you were over 18 when you started abusing D, you were at least 20 years old when you committed the unlawful sexual acts at the Rokeby home. While the occasions involving penetration were characterised as indecent assaults, this was because they occurred before the law recognised that rape could be committed against a male. The conduct you engaged in towards D at Rokeby would, according to current law, constitute rape.

I intend to impose a single sentence of imprisonment. As a consequence, I am required to identify the sentence which would have been imposed for each crime had separate sentences been imposed. The sentences for the offences of persistent sexual abuse of a young person are, in turn, reflective of the sentences that would have been imposed if the individual unlawful sexual acts had been charged as separate offences. The identified sentences do not take into account considerations of totality or proportionality which will be reflected in the ultimate sentence I impose. I am required to take into account current sentencing patterns and practices.

The sentences I would impose separately for each crime are periods of imprisonment as follows: count 1: 12 months; count 2: ten years; count 3: 18 months; count 4: 18 months.

The aggregate sentence I impose must be proportionate to the overall offending, including by reflecting that these crimes were committed against separate complainants. It must also reflect the harm that your conduct caused. Any sentence imposed must not be too crushing.

Taking into account all of the relevant considerations, a lengthy period of imprisonment is necessary. I take into account your age and the prospect that you will spend a proportion of your remaining years in custody. I will order that you be eligible for parole, but only after you have served a term which the interests of justice require to be served before you are released from prison.

WH, you are convicted for each count on the indictment. I make an order under the *Community Protection (Offender Reporting) Act 2005* directing that the registrar causes your name to be placed on the register, and that you comply with the reporting obligations under that Act for ten years following your release from custody. You are sentenced to imprisonment for ten years from 17 February 2026. I order that you are not eligible to apply for parole until you have served 6 ½ years of that sentence.