COURT: SUPREME COURT OF TASMANIA (COURT OF CRIMINAL APPEAL)

CITATION: *RDA v Tasmania* [2021] TASCCA 4

PARTIES: A, RD
v
STATE OF TASMANIA

FILE NO: 1261/2020

DELIVERED ON: 20 April 2021

DELIVERED AT: Hobart

HEARING DATES: 8 October, 17 December 2020

JUDGMENT OF: Pearce J, Geason J, Porter AJ

CATCHWORDS:

Criminal Law – Appeal and new trial – Appeal against sentence – Grounds for interference – Sentence manifestly excessive or inadequate – Sexual crimes against children forty years prior to sentence – Offender substantially rehabilitated – Failure to suspend part of the head sentence of five years' imprisonment made sentence manifestly excessive.

R v PJB [2007] VSCA 242, 17 VR 300; *TAP v Tasmania* [2014] TASCCA 5, applied.

Aust Dig Criminal Law [3521]

Criminal Law – Procedure – Information, indictment or presentment – Amendment – Generally – Sentencing judge amended name of charge to allege a different crime after pleas of guilty entered – Where legislation permitted the name change – Criminal Code provided for amendment "before trial or at any stage of the trial" – Whether power to amend following pleas of guilty – "Trial" to be interpreted broadly according to its context and included proceedings following a plea of guilty.

Criminal Code (Tas), s 326(1).

Aust Dig Criminal Law [3070]

REPRESENTATION:

***Counsel*:**

Appellant: S Keim SC, F Cangelosi, S Wright
Respondent: M Wilson

Solicitors:

Appellant: Bold Lawyers
Respondent: Director of Public Prosecutions

Judgment Number: [2021] TASCCA 4
Number of paragraphs: 140

Serial No 4/2021
File No 1261/2020

RDA v STATE OF TASMANIA

REASONS FOR JUDGMENT

COURT OF CRIMINAL APPEAL
PEARCE J
GEASON J
PORTER AJ
20 April 2021

Orders of the Court (17 December 2020)

1 Appeal allowed.

2 Sentence of five years' imprisonment from 1 May 2020 imposed by Wood J on 15 May 2020 set aside.

3 The appellant is re-sentenced to five years' imprisonment from 1 May 2020. Three years of that term is suspended on condition that the appellant not commit any offence punishable by imprisonment for a period of three years from his release.

4 The appellant is not eligible for parole until having served half of the operative part of the sentence.

5 The determination of the sentencing judge to not make an order under the *Community Protection (Offender Reporting) Act* 2005 is unaffected.

Serial No 4/2021
File No 1261/2020

RDA v STATE OF TASMANIA

REASONS FOR JUDGMENT

COURT OF CRIMINAL APPEAL
PEARCE J
20 April 2021

1 This is an appeal against sentence. The appellant pleaded guilty to four counts of indecent assault and two counts of penetrative sexual abuse of a child or young person. He was sentenced by Wood J to imprisonment for five years from 1 May 2020. It was ordered that the appellant not be eligible for parole until he had served one half of that term. No order was made under the *Community Protection (Offender Reporting) Act* 2005.

2 The crimes were committed between about 1977 and 1982. When the first indecent assault was committed the appellant was 18, or about to turn 18. In the course of play he inserted his fingers into the vagina of his 7½ year old niece. The other crimes were committed on two separate occasions against another niece, the sister of the first complainant, when she was aged between 6½ and 9½ and when the appellant was aged between about 19 and 22. On one occasion he penetrated her vagina with his fingers, sucked and licked her breasts and then penetrated her mouth with his penis until he ejaculated. On the second occasion he licked her vagina and licked and sucked her breasts before again penetrating her mouth with his penis until he ejaculated. He was to be sentenced on the basis that these were not the only occasions on which such acts occurred.

3 The seriousness of sexual crimes against children has been stated by this Court on many occasions. A significant term of imprisonment was called for. However, before the sentencing judge a number of important matters of mitigation were raised. One of those matters was that at the time of sentence the appellant was aged 60 and during the intervening 40 years or so since the crimes were committed he had committed no other offences and was significantly rehabilitated.

4 On 17 December 2020, orders were made allowing the appeal and setting aside the sentence. The appellant was re-sentenced to imprisonment for five years, but with three years of that term conditionally suspended for three years from his release. It was ordered that the appellant not be eligible for parole until having served half of the operative part of that sentence. The reasons I joined in the making of orders in those terms are the same as those given by Porter AJ. I agree with his Honour that the failure to suspend part of the term of imprisonment made the sentence manifestly excessive. I also agree, for the reasons given by his Honour, that none of the remaining grounds of appeal were made out.

File No 1261/2020

RDA v STATE OF TASMANIA

REASONS FOR JUDGMENT **COURT OF CRIMINAL APPEAL**
GEASON J
20 April 2021

5 The appellant pleaded guilty to four counts of indecent assault and 2 counts of penetrative sexual abuse of a child. He was sentenced by Wood J to 5 years' imprisonment commencing 1 May 2020. Her Honour imposed the minimum non-parole period.

6 By his appeal the appellant contends that:

"1 The sentence and non-parole period are manifestly excessive, and offend the principle of totality because:

(a) The majority of the offences were committed whilst the appellant was a youth or a young man.

(b) The long delay of around 40 years between the events and their prosecution.

(c) The fact that he has not offended since the offending occurred.

(d) The fact that he has rehabilitated.

(e) The fact that he is the primary carer of his mother-in-law.

(f) That, in all the circumstances, the Court placed too great an emphasis upon considerations of general deterrence and harm to the victims.

2 The sentencing Judge erred in finding that the accepted circumstance of hardship, that the Appellant is the sole carer of his mother in law, did not justify the exercise of mercy, such as to reduce the sentence imposed.

3 The learned sentencing judge erred in finding that section 326 of the Code permitted the Prosecution to amend the indictment, after the Appellant had been arraigned on the Indictment and entered pleas of guilty, by withdrawing two counts of Indecent Assault and replacing them with two counts of Penetrative Sexual Abuse on a Child."

7 The appellant was granted leave to amend his notice of appeal to add the following grounds:

"The learned sentencing judge erred by failing to apply the sentencing principle that, where offences which have been committed while an offender is a child or immature and are not prosecuted until many years after the event, there is good reason to mitigate penalty, or at least to do so where the offender has achieved a significant degree of rehabilitation and there has been no further offending such that although such an offender falls to be sentenced as an adult, common sense and fairness dictate that the assessment of the nature and gravity of the crime, and of the offender's moral culpability, take into account that what was done was done as a child, or as a person of immature years, and not as an adult or a person of greater maturity."

This became ground 1A.

8 A further ground was added. It became ground 1B. It asserts that:

"The learned sentencing judge erred by failing to give consideration to imposing a partially or wholly suspended sentence pursuant to s 7(c) of the Sentencing Act 1997 (Tas)."

9 On appeal it is for the appellant to show that the sentencing judge has made an error in the exercise of her discretion: *House v The King* (1936) 55 CLR 499 at 505.

10 Sometimes particular error is not discernible, but the nature of the sentence is "such as to afford convincing evidence that in some way the exercise of the sentencing discretion has been unsound": *Cranssen v The King* (1936) 55 CLR 509 at 520 per Dixon, Evatt and McTiernan JJ.

11 Ground 1 asserts that type of error.

12 In *Director of Public Prosecutions (Acting) v Pearce* [2015] TASCCA 1, 28 Tas R 1, Pearce J, with whom Blow CJ and Porter J agreed, summarised the case law with respect to this type of error at [8]:

> "It must be established that the sentencing order is so manifestly wrong that it could only be the result of some undefinable error in the exercise of the judicial discretion: *Bresnehan v The Queen* (1992) 1 Tas R 234 at 242. A court of criminal appeal may not substitute its own opinion for that of the sentencing judge merely because the appellate court would have exercised its discretion in a manner different from the manner in which the sentencing judge exercised his or her discretion: see *Lowndes v The Queen* (1999) 195 CLR 665 at [15], and the other cases referred to by this Court in *Director of Public Prosecutions v CSS* [2013] TASCCA 10. Sentencing judges should be 'accorded a wide measure of latitude': *Postiglione v The Queen* (1997) 189 CLR 295 per Kirby J at 336. Excess or inadequacy is either apparent or it is not: *Dinsdale v The Queen* (above) at [6]. In considering that question regard is to be given to all the matters that are relevant to determining the sentence: *Hili v The Queen* (2010) 242 CLR 520 at 539."

13 Grounds 1A, 1B and 2 assert specific error: a failure to apply a particular sentencing principle.

14 Ground 3 asserts that it was not open to the court to amend the indictment after a plea had been taken, and to sentence the appellant as if he had pleaded guilty to the amended indictment. By this ground the appellant seeks to have counts 4 and 6 on the indictment restored to charges of indecent assault. (The appellant's record would be amended accordingly).

The appellant's antecedents

15 At the time of sentence the appellant had a relevant prior conviction. In 1976 he was convicted of a single count of defilement. He was aged 16 at the time. The complainant was aged 7.

16 He was sentenced by Nettlefold J to perform "work orders" for a period of 15 days. He was made subject to a probation order for three years.

Overview of the offending the subject of the 2020 indictment

17 Between 1977 and 1983 the appellant lived with his eldest sister and her family. She had a daughter from a previous marriage. Her husband had been married before and had three children from that marriage. The youngest was born in February 1970. They had three children of their own, making 7 siblings in all.

18 During the Christmas holidays in 1977 the appellant and the older children were supervising the younger ones while their parents were out.

19 During the course of play, the appellant offered one of the children a piggy back. In the course of doing so he moved a hand into her underpants and inserted his fingers into her vagina. He moved his fingers, digitally penetrating her for about five seconds.

20 Afterwards she went to another part of the house. She stayed away from the appellant. She subsequently described feeling dirty and uncomfortable. She described feeling frightened of the appellant and avoided spending time in the same room, afraid that if her mother was told it would result in an argument between her parents. She was frightened of causing trouble, aware that she and her brothers were staying with her mother pursuant to a court order.

21 Some years later, when she was 12 or 13, she told a friend what had happened.

22 Another child, the youngest born to the appellant's sister and her husband, was about 6½ years old when the family moved home. From then and until she was about 9½ years old, the appellant sexually assaulted her in the family home, including by sucking and licking her breasts and vagina and by penetrating her mouth with his penis.

23 She was able to recall two particular occasions when this occurred. On one of those occasions the appellant invited her to go with him so she could see something "really cool". He had tied a piece of cotton to a fly and it was flying around the room in circles. Once in the bedroom he told the complainant to lie on the end of his bed, where she was vaginally penetrated by the appellant with his fingers. When she told the appellant that it hurt, he stopped. He then sucked and licked her breasts. He asked her if it felt nice, and she said that it did. He then asked her to sit up on the bed, held her head and penetrated her mouth with his penis, moving it in an out until he ejaculated in her mouth. The complainant recalled choking whilst this occurred, and being confused. She said she hated what was happening. The appellant told her to swallow the semen which she described as disgusting and repulsive.

24 On another occasion in the appellant's bedroom, she was on the end of the bed, lying back with her legs over the side of the bed. Squatting or kneeling, the appellant licked her vagina before moving his mouth up her body, and licking and sucking her breasts. He then penetrated her mouth with his penis. He ejaculated. During this act he asked the complainant whether it "felt nice". He allowed her to go to the bathroom to spit out the semen.

25 Though conduct occurred three to five times apart from the specific occasions described, these other occasions are uncharged acts. On one of these occasions she was told by the appellant not to tell anyone.

26 The complainant recalls being told by her sister that she was not to let the appellant do anything to her; that she was to say no to him. She said she felt empowered by this conversation. Once after that, she rebuked the appellant when he tried to grope her, and he walked away. Though she knew what was happening was wrong, she did not say anything because she felt complicit, having agreed that at times it "felt nice".

27 She disclosed this conduct to her to her boyfriend in 1986 or 1987, when she was 14 or 15 years old.

28 She told her mother at about the same time. Her mother made arrangements for her to speak to family friends who offered her support, and to pray for her, but the matter was not reported, and the appellant was not confronted. Her subsequent complaints about the matter to other family members caused friction with her parents.

29 At around the same time the appellant had written a confessional note to the complainant's mother to the effect that he had "messed around" with the girls.

30 In 2008 this complainant approached the appellant. He was in his car. She told him that she forgave him for all the things he had done to her. She told him that what had happened had affected

her, and that her marriage had suffered as a result. She asked him whether he had ever sought help. He claimed to have done so, wound up his car window, and drove away.

31 In 2016, the complainant met up with her sister-in-law in Melbourne. Believing that her sister-in-law was aware of what had happened, she made reference to the appellant's conduct. Her sister-in-law responded by indicating that she, too, had been abused. This was the impetus for both women to report the matter to police.

32 The matter was investigated. The appellant declined to participate in a video record of interview. He was charged in August 2017.

33 He maintained pleas of not guilty when he appeared in the Magistrates Court, and subsequently in the Supreme Court. Preliminary proceedings were conducted in February and March 2018 and seven witnesses examined. The matter was prepared for trial. Witnesses were briefed. Ultimately the appellant pleaded guilty.

34 Upon his plea of guilty the appellant was convicted with four counts of indecent assault, and two counts of penetrative sexual abuse of a child.

Mitigation

35 The appellant was aged 60 at the time of the sentencing hearing. In mitigation counsel for the appellant urged the Court to deal with the matters by way of a wholly suspended sentence or home detention. That submission was predicated upon the absence of further offending in a period of about 40 years since the crimes were committed. It was submitted the appellant had been fully rehabilitated, and that in those circumstances, issues of general and specific deterrence were of no "great relevance", whilst the fact that the offending occurred whilst the appellant was a youth, was relevant. It was not submitted that the seriousness of the offending was diminished by reason of its having occurred so long ago.

36 A psychological report before the sentencing court indicated that at the time of the offending the appellant exhibited a "psycho sexual immaturity".

37 In the course of submissions the sentencing judge was referred to the Victorian authority *R v PJB* [2007] VSCA 242, 17 VR 300 (Also cited as *R v Boland* (2007) 17 VR 300). In that case the appellant had been convicted on six counts of indecent assault upon a girl under the age of 16 years, and two counts of indecent assault on a person under that age. The offences were committed when the appellant was aged between 13 and 19 years, and his victims aged between 6 and 12 years. A sentence of 43 months' imprisonment with a non-parole period of 24 months was reduced on appeal to 3 years' imprisonment, with the sentence wholly suspended for 2 years.

38 Nettle JA (as he then was), with whom Ashley and Dodds-Streeton JJA agreed, said at [16]:

> "[16] Decisions of this Court in *R v Nutter* and *R v Better* recognise that where offences which have been committed while an offender is a child or immature and are not prosecuted until many years after the event, there is good reason to mitigate penalty, or at least to do so where the offender has achieved a significant degree of rehabilitation and there has been no further offending. Although such an offender falls to be sentenced as an adult, common sense and fairness dictate that the assessment of the nature and gravity of the crime, and of the offender's moral culpability, take into account that what was done was done as a child, or as a person of immature years, and not as an adult or a person of greater maturity. Counsel for the appellant is also correct that general deterrence ordinarily has a lesser role to play in the sentencing of children and immature young people than in the case of mature adults, and that it is significant that the appellant has not re-offended in more than 24 years." [Footnotes omitted.]

39 Porter J referred to this authority in *TAP v Tasmania* [2014] TASCCA 5 at [28] as identifying the correct approach to sentencing an adult for offences committed as a juvenile.

40 The plea in mitigation emphasised considerations relevant to the *Community Protection (Offender Reporting) Act* 2005, and the effect of the COVID-19 pandemic on the impact of a sentence of actual imprisonment. As to the latter point, the Court was referred to *Brown v The Queen* [2020] VSCA 60.

41 It relied too, on the hardship said to flow from the fact that the appellant cared for his elderly mother, aged 86. It was submitted that no other family member was able to care for her, that she had early dementia, short term memory loss and mobility problems. The absence of other alternative carers was a result of the travel restrictions caused by COVID-19 which were in operation at the time.

42 In the course of the plea in mitigation it was put that general deterrence was not a significant sentencing consideration. That is obviously wrong. This was conceded on the appeal.

43 The Crown accepted that it was appropriate to treat the appellant as a youthful offender. However it submitted that even though the appellant was to be sentenced on that basis, the seriousness of the offending reduced the mitigating effect of that consideration. It submitted that the need for general deterrence in the circumstances of the seriousness of the offending rendered subordinate considerations such as good character and rehabilitation. It observed that notwithstanding the appellant's youth, he had been convicted of the single count of defilement, and was to be sentenced on the basis that he must have been aware of the wrongfulness of his conduct at the time. It relied upon comments by Porter J in *TAP* (above), at [26]-[27]:

> "[26] It is true that the justification for the principles governing the sentencing of youthful offenders is that such offenders are not able to appreciate the nature and extent of their criminality. They are more likely to make ill-considered and immature decisions. At the same time, counsel for the appellant accepts, by reference to *R v Tran* (2002) 4 VR 457 at [14], that the importance of rehabilitation of a youthful offender is usually far more important than general deterrence, but that there are cases in which just punishment and general deterrence become at least equally important.
>
> [27] As to the moderation of the emphasis given to rehabilitation, and the corresponding increase in the prominence given to general deterrence and retribution in cases of serious crime, I refer also to the detailed discussions by McLellan CJ at CL in *R v Carroll* [2008] NSWCCA 218 at [8], and by Redlich JA in *Azzopardi v The Queen* (2011) 35 VR 43 at 53–57 [30]-[44]. *There is no doubt at all that, in short, where the level of seriousness in the criminality increases, there will be a corresponding reduction in the mitigating effects of the offender's youth*." [My emphasis.]

44 It was contended by the State that the absence of consent was an aggravating feature of the appellant's conduct. This was not contested.

45 The Court received victim impact statements, one of which was delivered to the Court in person.

46 The State identified additional aggravating features of the offending:

> "1 penetration of and ejaculation into the mouth of one of the complainants;
>
> 2 that the abuse occurred within the household and involved a serious breach of trust;
>
> 3 the offending had had a devastating effect upon the victims."

47 I accept the State's submissions as to the objective seriousness of the offending.

48 The comments on passing sentence were as follows:

"RDA has pleaded guilty to four counts of indecent assault and two counts of penetrative sexual abuse of a child contrary to s 127 and s 124(1) of the *Criminal Code*. The charges concern two children, referred to as M and S.

These crimes were committed between about 1977 and 1982, when the defendant was aged between 17 or 18, and 22.

When the defendant was 16 and a half, he committed a crime involving sexual intercourse with a child, aged 7 years. He was charged with rape and a jury found him not guilty of rape, but guilty of defilement. On 19 September 1976, three months after the crime was committed, he was sentenced by Nettlefold J. After lamenting the fact that the only institution available was prison and there was a lack of suitable institutions to provide detention for a youth, the learned sentencing judge sentenced the defendant to 15 days of work orders and a probation order for three years.

After he was sentenced, the defendant's mother asked her eldest daughter Ms H to allow the defendant to live with her. Ms H was 13 years older than the defendant. She had a daughter from a previous relationship and she had two children with her husband including S, born in July 1972. Later, a third child was born. Her husband had three children from a previous marriage, one of whom was M, born in February 1970. M usually lived with her mother and siblings but spent her school holidays with her father and Ms H and their family unit.

From approximately early 1977, the defendant began to live with Mr and Mrs H and the three children in the house including S.

Count one, indecent assault, concerns the child M and occurred first in time. The details are as follows. It occurred during the school holidays in 1977/1978, when the defendant was likely 18 years of age, or possibly just shy of his 18th birthday. M came to stay with the family. She was then aged 7 and a half. All seven children and the defendant were at the house. Mr and Mrs H were out and the younger children were being supervised by the older children and their uncle, the defendant. The children were playing in the lounge room at the front of the house. M was wearing a summer dress and the defendant offered to give her a piggy back. He took her for a piggy back ride through the house away from the lounge room. With one hand he held her up on his back and with the other hand he moved her underpants to one side and inserted his fingers into her vagina and moved his fingers. He digitally penetrated her vagina for about 5 seconds. The complainant felt scared, dirty and uncomfortable and squirmed her way down off his back. She went to another bedroom and stayed away from him. She knew something bad had happened but felt frightened of causing trouble if she told anyone. She was aware that there was a court order that she and her brothers spend the holidays with their father and she was concerned about making a disclosure of what had happened. She was frightened of the defendant and avoided him. When she was 12 or 13 she disclosed to a friend that her uncle had molested her, but did not discuss the detail of what he had done.

The remaining five counts relate to two incidents and involve the complainant, S. She was aged approximately 6 and a half when the family moved in late 1978. By then, the defendant was aged approximately 19 years of age. When she was aged between 6 and a half and 9 and a half, and the defendant was aged between approximately 19 and 22, he sexually assaulted her by sucking and licking her breasts and vagina and by penetrating her mouth with his penis. S recalls two particular occasions when she was sexually assaulted by the defendant against a background of other occasions that she is unable to particularise. The defendant is to be sentenced only for those two specific occasions. But because of the other incidents, he cannot claim in mitigation that those two specific occasions were isolated incidents.

One of the two specific occasions was during summer when he told her to go with him and he wanted to show her something 'really cool'. She followed him into a bedroom. He had tied a piece of cotton to a blowfly and it was flying around the room in circles. He told her to lie on the end of his bed. She did so and he penetrated her vagina with his fingers. This hurt the complainant. He asked her if it felt good and she told him no, and that it hurt. He removed his fingers, and I note that he did not ever repeat that conduct. He sucked and licked her breasts, committing a second indecent

assault. He asked her if that felt nice and she replied that it did. The defendant asked her to sit up on the bed. He held her head and penetrated her mouth with his penis and moved it in and out, until he ejaculated inside her mouth. He held her head hard involving coercion and restraint. She recalls choking while he penetrated her mouth. She was confused and hated what he was doing to her. After he ejaculated, he told her to swallow the semen and she did what she was told. She found it disgusting and repulsive.

The second of the two specific occasions happened in the defendant's bedroom. The complainant recalls being in the bedroom but cannot remember how she came to be in there. She was sitting on the end of the bed and laid back on the bed with her legs over the edge. The defendant was squatting or kneeling. He licked her vagina and moved up her body and licked and sucked her undeveloped breasts. He asked her to sit up. He penetrated her mouth with his penis until he ejaculated. Throughout the occasion he asked her if it felt nice, to the complainant it seemed that he was trying to convince her. On this occasion, he told her that she could spit out the semen. She ran to the bathroom where she rinsed out her mouth. She recalls feeling anxious that someone would see her or find out what the defendant had been doing to her.

The number of uncharged acts involving oral intercourse were a total of 3-5 occasions. On one of these occasions the defendant told the complainant not to tell anyone. She did not tell anyone for a number of years.

The complainant recalls a conversation she had with her older sister, R and she spoke to her sometime before they moved in 1983. Her sister asked her what she had been doing with R. The complainant did not say anything and her sister told her not to let him do anything to her and that she had to say no. Subsequently, the defendant tried to grab her and she rebuked him and walked off. The conversation she had with her older sister had empowered her to say no to the defendant. This is revealing about the lack of protective strategies that the complainant had, as a young child, to deal with the defendant's conduct.

The complainant felt very confused by what the defendant was doing to her. She knew it was wrong and that she did not like it but she felt complicit, conscious that he had asked her if it felt nice and at times she had said it did. It is common for child victims who have been sexually abused to wrongly feel complicity or guilt, having been inveigled into compliance or some level of co-operation by their abuser.

An aggravating factor with respect to each of the acts of sexual assault and oral intercourse is that the complainants did not consent. Lack of consent is not an element of the crimes, but it may be taken into account as an aggravating factor.

The charges involve two very young victims. The individual acts amount to serious crimes and carry a high level of moral culpability. The crime involving oral penetration is a most demeaning and degrading form of sexual abuse, and it was repeated. The defendant was an older relative, there was an age difference of approximately a decade. He was trusted to be part of the family. He abused that trust and carried out his assaults in what should have been for these two children, their safe, family environment. He took advantage of the complainants' young age, their innocence and the power imbalance resulting from his adult authority. His conduct was purposive, entitled and dominant.

The defendant knew full well his conduct was a serious wrong. His conduct was surreptitious and he told S not to tell anyone.

He committed these crimes with the knowledge that sexual interference with a child was a serious crime. He had sat through his own criminal trial which had brought that home to him, he knew such conduct warranted imprisonment, and that he had only escaped gaol because of his age. Also relevant, is that he was described by the sentencing judge as intelligent, and thus had the capacity to understand these matters. He was also described as remorseful, and as 'guilt-ridden about the effects of his actions on this child.' The supervised probation order for three years was still current for at least one of his crimes before the Court.

These kind of crimes cause enormous harm to child victims. So often the Court will be informed that the emotional and psychological toll was lasting and profound. This case is no exception. Indeed, these effects are now so well recognised that even in cases where the Court is not provided with a victim impact statement, the Court will

presume that significant, emotional and psychological harm is almost inevitable. Both victims have made a statement of the impact upon them. M still suffers with feelings of guilt and anxiety, and family relationships are fraught and damaged. As I commented when S read her victim impact statement, victims should not feel any guilt, it is only the perpetrators who bear guilt for their crimes. Throughout her life, S's relationships have been affected. The trauma she endured has had a devastating impact upon her childhood and her adult life, undermining her sense of self-worth, and her relationships with her husband, and her children. She has struggled with depression and anxiety and has needed psychological counselling. For these two complainants, the trauma associated with these crimes has endured for 40 years and their suffering may be life-long.

The complainant S first disclosed what had happened to her boyfriend when she was 14 or 15. At about the same age she told her mother that the defendant 'had done stuff to me'. Her mother referred to a confessional note the defendant had written when they were living at […] which she had found saying that he had 'messed around' with the girls. Her mother arranged for the complainant to speak to some family friends who offered support and to pray for her. The matter was not reported to police and the defendant was not confronted. Over the years, the complainant told other family members that the defendant had abused her.

In 2008, the complainant approached the defendant outside her family home, after he had been visiting. She told him she wanted him to know that she forgave him for all the things he did to her during her childhood. He looked at her blankly and said 'right'. She told him that it had really affected her and her marriage had suffered. She asked him if he had sought counselling or therapy, and he said he had. He left without saying anything further or expressing any remorse. The complainant was shocked and adversely affected by his reaction.

In June 2016, the complainants each became aware that the other had been abused. This was the impetus for both women to report the crimes to police. The defendant declined to participate in a police interview. He was charged in August 2017. He pleaded not guilty and first appeared in the Supreme Court on 20 November 2017. The matter was due to proceed for trial in 2019, but that was not possible and it was listed for the March sittings this year. The matter was prepared for trial, witnesses were briefed including the complainant from the 1976 incident. She found that very confronting.

A new indictment was filed in February this year. The defendant pleaded guilty in March. While this is not an early plea, I have reduced the sentence I would otherwise have imposed. The complainants have been spared the additional stress and anxiety associated with giving evidence on a trial and they have been vindicated by his pleas.

In assessing the defendant's moral culpability and the nature and gravity of his crimes, I take into account his young age at the time he committed these crimes, he was a young adult in his late teens/early 20s.

I have read the report of Consultant Clinical and Forensic Psychologist Mr Jeffrey Cummins dated 14 April 2020. Mr Cummins highlighted that the defendant was raised by his mother and stepfather, from birth to age 9, when his mother left his stepfather. His stepfather was an alcoholic and was physically violent. His mother was a victim of his violence, and the defendant was also verbally and physically abused by his stepfather. It is Mr Cummins opinion that it is likely that at the time of offending, he was still suffering from symptoms relating to trauma reflective of being raised in a dysfunctional family. He opines that it is likely he was suffering from a Trauma-and Stressor-Related Disorder in the form of an Adjustment Disorder with Mixed Disturbance of Emotions and Conduct, reflective of his dysfunctional upbringing and low self-esteem. He considers that it is probable that suffering from this condition interfered with the defendant's normal development and may therefore have played a role in his psychosexual development, such that, during the time of offending, he was 'psychosexually immature'. I note this opinion draws a causal link between his childhood trauma and a level of psychological and sexual immaturity and I give this some weight. This opinion provides some context for his offending. It appears he was more immature than typically his age would suggest. It also provides an explanation for why his sexual offending involving young girls did not continue as he grew older and matured.

The level of the defendant's criminality, notwithstanding his age and immaturity, involved a high level of culpability.

I take the defendant's personal circumstances into account. He is now 60 years of age. He has committed no offences of any relevance since. This is obviously an important consideration.

He has demonstrated a strong work ethic throughout his life. As a young man he obtained qualifications in motor mechanics and as a panel beater and has a long work history in the motor insurance industry until 2019. He then worked for a stonemason as a labourer until he was recently remanded in custody. His employer is aware of his crimes but an offer of employment remains open to him.

The defendant has taken a responsible path in other aspects of his life, as a caring member of his family and of his community. He married in 1986 and he and his wife had a happy marriage and family life with their two sons. His wife died from cancer in 2018, impacting him greatly. He nursed her at home during her illness. His adult sons are aware of these criminal proceedings and remain supportive of him.

I have been provided with eight character references providing various perspectives of the defendant's life, from the pastor of his local church, family members and extended family members, and his employer. These referees are aware of these proceedings. They speak of him as a caring person who helps others. He has been a member of his Church for many years, he is described as a person of faith, kindness, and someone who is trustworthy and reliable. His good character and strong values are evident in practical support he provides to his family and his church community; for a number of years he drove the Church bus to collect elderly people to take them to Church. His care for his mother-in-law suffering from dementia has been exemplary. Family members speak of him as a devoted husband to his wife and as a loving father. They maintain that they have never had any concerns about him in the presence of their own children or grandchildren. I note, that there is no suggestion of any such concerns since his offending. These references are useful as they provide content to the submission made by the defendant's counsel that he is a totally reformed person.

As I have mentioned, he is now caring for his mother-in-law who is 86 and suffers from dementia. He moved in with his mother-in-law to care for her after his wife died. She requires care and assistance in daily living. The arrangement has been very helpful to her family, as her son and daughter live interstate and there is no one else in Tasmania who can care for her. I accept that making alternative arrangements for her care has been difficult because of COVID-19 restrictions. The defendant's incarceration will give rise to very real difficulties for the family in terms of her care and, if her present living arrangements cannot be supported, hardship to her. It must be noted that he assumed that responsibility at a time when the charges had been laid, and when there was the prospect that the arrangement would not be long-term. I do give some weight to this factor of hardship to others but in view of the severity of these crimes, I do not accord it significant weight.

I also take into account that in serving his term of imprisonment, the defendant will be aware that as a consequence of his crimes, a vulnerable person who was in his care is adversely affected as a consequence of his crimes. In this respect, imprisonment will be felt by him more harshly than it would generally for other prisoners.

I take into account that generally for all prisoners at this time, due to the COVID–19 pandemic, imprisonment is now a more punitive experience due to the restrictions that have been imposed. As someone close to his family and who has never been to prison, the defendant will find these restrictions difficult.

I have mentioned Mr Cummins' report, and I note that the defendant expressed remorse to Mr Cummins for his crimes and he acknowledged his wrongdoing and the harm he has caused to the complainants.

I accept that the defendant being sentenced today is a different person to the young man who offended some 40 years ago. The Court can see that in the time that has lapsed, he has rehabilitated. He has been assessed by Mr Cummins as low risk of reoffending. Indeed, he describes the risk of future offending as 'farfetched and fanciful'. This is a case where specific deterrence and a need for the community to be protected from the particular offender is not a concern.

> There are though, other sentencing goals which must be reflected in the sentence. The Court has a fundamental duty to deter other offenders and thereby protect children from sexual abuse. The need for general deterrence is a prominent consideration in all cases of child sexual abuse including historical cases. Frequently, because of the nature of the crimes and the effect on child victims or the conduct of perpetrators in silencing their victims, such conduct only comes to light many years after the events. It is essential for potential offenders to see that if that is the case, they will not escape the punishment that is commensurate with the gravity of their conduct.
>
> Time does not dull the gravity of the criminal conduct or diminish culpability. In fixing the sentence, it is important to adequately reflect the harm inflicted upon victims, and to reflect the seriousness of the crimes and the defendant's moral culpability. There are three separate incidents involving penetrative acts, all serious, and resulting in lasting harm to two victims.
>
> As I have said, there are mitigating factors to be reflected in the penalty, the defendant's young age and immaturity at the time of offending, his complete reform, the responsible and law-abiding life he has led since then, his contribution to his family and community, his remorse, and pleas of guilty. These factors have been given significant weight. The penalty has been moderated so that it is proportionate to his total criminality. Also taken into account, as I have said, is that there is no need for personal deterrence.
>
> I record convictions. I impose five years' imprisonment backdated to 1 May 2020. I impose the minimum non-parole period, which is half of that sentence.
>
> I am conscious that the defendant will feel this is a harsh penalty, but a lesser sentence would not adequately reflect the seriousness of the conduct, and the harm that has been done.
>
> In light of Mr Cummins' report there is no need for an order under the *Community Protection Offender Reporting Act*."

49 Her Honour's reasons correctly articulate the objective seriousness of the appellant's conduct and identify the relevant sentencing considerations. Her Honour observed that there were uncharged acts involving sexual interference with a complainant, such that the appellant could not claim the conduct the subject of the indictment, was isolated or out of character. This was correct.

50 Her Honour gave appropriate weight to the non-consensual nature of the conduct, the fact that the victims were very young, the demeaning and degrading nature of the abuse, and its repetition.

51 Her Honour's treatment of the appellant's guilty plea was, with respect, entirely correct. She afforded the appellant credit while noting that the plea was not an early one. It is well understood that the utilitarian effect of a plea of guilty is reduced when the plea comes late. The delay in the appellant taking that course warrants a limited discount.

52 In overview, this was appalling conduct, the seriousness of which was not diminished by the passage of time. It required a penalty which reflected the criminality involved. The sentence imposed was proportionate to that conduct.

53 In the result, I consider the head sentence of five years' imprisonment to be entirely appropriate for the gravity of the offending to which the appellant pleaded guilty.

54 It is only in respect of one aspect that I discern a departure from sentencing principle. That matter relates to the appellant's rehabilitation and the principle articulated in *PJB* (above). Rehabilitation was evidenced by the absence of conviction in a 40 year period since the subject offending. That was a significant matter because rehabilitation is a paramount consideration in sentencing a youthful offender. Indeed, in respect of any offender, a significant time lapse without further offending is a matter evidencing rehabilitation, impacting upon the need for personal deterrence.

55 Among a number of other matters, ground 1 identifies the failure to give appropriate weight to this very long period, as contributing to a sentence that is "manifestly excessive"; ground 1A engages the issue in terms which describe it as a failure to apply the principle articulated in *PJB* (above); ground 1B as a matter evidencing a failure to consider the suspension of the sentence at all.

56 The pathway to the outcome sought by the appellant in each of grounds 1 and 1A is open; the pathway identified in ground 1B is not. As to that ground, the fact that a matter is not referred to in the sentencing comments does not indicate that consideration was not given to it. I am not prepared to accept that the failure to refer to the question of suspension of the sentence, evidences such an error.

57 Before I turn to grounds 1 and 1A, I would like to add something about the approach to suspending sentences which arises in the context of ground 1B, and because the learned sentencing judge did not expressly advert to the matter of suspension of sentence. In *Dinsdale v The Queen* [2000] HCA 54, 202 CLR 321, at [79], Kirby J, with whom Gaudron and Gummow JJ agreed, said that the starting point in respect of the imposition of a suspended sentence:

> "... is the need to recognise that two distinct steps are involved. The first is the primary determination that a sentence of imprisonment, and not some lesser sentence, is called for. The second is the determination that such term of imprisonment should be suspended for a period set by the court. The two steps should not be elided. Unless the first is taken, the second does not arise. It follows that imposition of a suspended term of imprisonment should not be imposed as a 'soft option' when the court with the responsibility of sentencing is 'not quite certain what to do'." [Footnotes omitted.]

58 That passage indicates the need to first determine that a term of imprisonment is an appropriate sentence, before consideration is given to the decision to suspend the execution of some or all of that sentence. There are two steps involved.

59 As to these two steps, in a paper published in 2009, [Vol 1 No 9 (QUTLJJ)], Lorana Bartels undertook a survey of judicial officers in this State who were asked "What is your reasoning process in deciding to impose a suspended sentence?" She observed that it "quickly became clear that there is far from universal application of the two-step process laid down in *Dinsdale*. The majority of respondents appeared not to adopt the reasoning in *Dinsdale,* instead relying on a more instinctive approach to determining the correct sentence". Of the judicial officers surveyed, she concluded that "five sentencers correctly applied the process laid down in *Dinsdale,* although two did not in fact refer to the case on this issue." She concluded that "the decision in *Dinsdale* is not well understood or applied by the Tasmanian Judiciary." She considered "this finding is not entirely surprising as a previous examination of the Australian Case Law on this issue, indicates that courts around Australia have struggled with the paradoxical reasoning process required to impose a suspended sentence." (A reference to her own paper "*The Use of Suspended Sentences in Australia: Unsheathing the Sword of Damocles*" (2007) 31 Crim LJ 113.)

60 In referring to that passage I do not suggest that the learned sentencing judge has misunderstood *Dinsdale* (above) or approached the matter other than in accordance with the principle articulated there. I refer to it only to make my own point, that upon it being determined that a sentence of imprisonment is appropriate the issue of suspending some or all of that sentence is engaged and I think it is desirable to speak to that step even if the conclusion is that none of the sentence should be suspended. In that way the application of the approach articulated in *Dinsdale* is exposed.

61 I turn to ground 1A. It is submitted that the learned sentencing judge adverted to the youthfulness of the appellant at the time of the offending, but ignored the evidence of his rehabilitation in the period since then, and prior to his conviction nearly 40 years later. The error which is asserted by this ground is a failure to have regard to a relevant sentencing matter; in essence ignoring the approach articulated in *PJB* (above).

62 The principle identified in that case was engaged here. Whilst the period between the offending and the conviction is referred to in the sentencing comments, and described as an "important consideration", to my mind, the irresistible conclusion is that the factor was not afforded application. I have reached that conclusion because I cannot discern any amelioration of penalty in consequence of it. Whilst the nature of the offending was appalling and the court was required to denounce it and to vindicate the victims, the fact of the appellant's rehabilitation required credit, and the gravity of the offending did not supplant that requirement. In the language of *PJB* (above) it was a "very good reason to mitigate penalty" and "common sense and fairness dictate" it be afforded consideration. The length of the sentence imposed, the whole of which was to be served, reveals a failure to do that.

63 Suspension of the term of imprisonment, or part of it, was one way to recognise the appellant's rehabilitation. Such course enables the court to impose a head sentence which marks the gravity of the offending and to ameliorate the effect of the sentence to recognise rehabilitation.

64 I have concluded that a relevant sentencing consideration was ignored. I uphold ground 1A.

65 I need not reach a view on ground 1 in light of my conclusion in respect of ground 1A. However, while the same reasons might appear capable of sustaining a conclusion that the sentence was manifestly excessive, I do not think they do. The head sentence was an appropriate one. It was not excessive for the gravity of the offending. The decision to suspend all or part of a sentence emerges from different considerations from those pertinent to fixing the quantum of sentence. Rehabilitation is one such consideration. As a general proposition, I think it is unlikely that in determining the question of manifest excess, it is correct to refer to the failure to suspend a sentence as a possible basis therefor. Notions of manifest excess relate to the length of sentence relative to the objective seriousness of the offending, and the circumstances of the offender, not the way in which the sentence is to be carried out. (The effect of a sentencing order is sometimes relevant in reviewing a sentence. In cases of disparity in sentencing co-offenders, for example, it will be relevant to the question of whether there is a justified sense of grievance; see for example *Postiglione v The Queen* (1997) 189 CLR 295, per Dawson and Gaudron JJ at 303). In the circumstances I need not develop this point. I express no concluded view about whether the failure to suspend an otherwise appropriate sentence, can result in a manifestly excessive one.

66 In light of my conclusion I need not consider ground 2.

Ground 3

67 After the plea had been taken, the learned sentencing judge permitted the amendment of the *title* of the crimes in counts 4 and 6 to read "penetrative sexual abuse of a child contrary to s 124 of the *Criminal Code*". That is, the indictment was amended so that "Indecent Assault" was crossed out and "penetrative sexual abuse of a child" was added; the section references were amended accordingly. The conduct alleged was not changed.

68 The appellant acknowledges that the amendment did not expose him to a more severe penalty and that the conduct constituting the offence is the same. No prejudice is claimed in consequence of the amendment to the indictment. All that is sought is restoration of the indictment to its previous form, and an amendment to the appellant's record of conviction.

Background to this issue

69 The oral penetration which was alleged against the appellant would, today, constitute rape. At the time of the conduct it did not. It was an indecent assault. Consent was not an element of an offence against s 124 of the Code. Section 124 provided:

"**124 Penetrative sexual abuse of child or young person**

(1) Any person who has unlawful sexual intercourse with another person who is under the age of 17 years is guilty of a crime.

Charge: Penetrative sexual abuse of a child [or young person].

(2) ...

(3) The consent of a person against whom a crime is alleged to have been committed under this section is a defence to such a charge only where, at the time the crime was alleged to have been committed –

(a) that person was of or above the age of 15 years and the accused person was not more than 5 years older than that person; or

(b) that person was of or above the age of 12 years and the accused person was not more than 3 years older than that person.

(4) This section is to be taken to be in force from 4 April 1924.

(5) ...

(6) Nothing in subsection (4) impugns or otherwise affects the lawfulness of a conviction arising from conduct that occurred before the commencement of the Criminal Code Amendment (Sexual Offences) Act 1987.

70 I adopt the following from the respondent's written submissions on the appeal.

"2 On 18 March 2020 the appellant appeared in the Hobart Supreme Court and entered pleas to the indictment. The appellant pleaded not guilty to count 2 rape, but guilty of the alternative charge of indecent assault. He pleaded guilty to each of the remaining five counts of indecent assault. The matter was adjourned to 20 April 2020 for the sentencing hearing (AB 110-115).

3 On 20 April 2020 the appellant appeared in the Hobart Supreme Court before the learned sentencing judge. A Crown statement of facts was filed in the court (AB 10-15). At the sentencing hearing the respondent read the facts onto the record, victim impact statements were tendered and sentencing submissions were made (AB 117-141).

4 The respondent submitted that notwithstanding that the appellant had been charged with the crime of indecent assault, some of the allegations involved penetration and that that was a factor that could be taken into account as an aggravating feature of the indecent assaults (AB 69 and 123-124). It was agreed that notwithstanding the fact of penetration in counts 1 and 2A, that the charge of indecent assault was an appropriate one. However, in relation to counts 4 and 6, which involved allegations of penile penetration of the complainant's mouth, questions arose as to whether or not the appellant could have been charged with a more serious crime. The Crown submitted that the appellant could not have been charged with rape, as the definition of sexual intercourse that existed at the time of the crime did not extend to penile penetration of the mouth and that subsequent amendments to the definition of sexual intercourse, which encompassed that factual scenario had not been made retrospective. The respondent ultimately departed from its position in the written submission that (in relation to counts 4 and 6) 'at the time, there was no other 'more serious offence' that the accused could have been convicted of' (AB 69) and adopted the position that in respect of those counts, the appropriate charge was pursuant to section 124 of the *Criminal Code*. An application was made pursuant to section 326(1) of the *Criminal Code* to amend the statement of the crime in respect of counts 4 and 6 on the indictment. The matter was further adjourned for the application to be made (AB 145-146).

5 On 1 May 2020 the respondent made oral submissions in relation to the application to amend the indictment (AB 149-152). The respondent later filed written submissions in respect of the application to amend the indictment (AB 89-96). During oral submissions the respondent alerted the Court to the *Criminal Code Amendment (Sexual Abuse Terminology) Act 2020* ('the Act') which

amended the title of crimes charged under s 124 of the *Criminal Code* to 'Penetrative abuse of a child/young person' (AB 182-183).

6 The learned sentencing judge ruled in favour of the respondent's application and authorised the amendment of the title of the crimes in counts 4 and 6 of the indictment to penetrative sexual abuse of a child contrary to s 124 of the *Criminal Code* (AB 187-190). The learned sentencing judge then proceeded to sentence. The appellant was convicted of four counts of indecent assault and two counts of penetrative sexual abuse of a child. He was sentenced to five years' imprisonment with a non-parole period of two years and six months.

7 The appellant has appealed the learned sentencing judge's ruling and sentence."

71 Whilst the amendment in the name of the crime related to conduct which occurred prior to the change in terminology, the new terminology is given retrospective operation by reason of s 5 of the *Criminal Code Amendment (Sexual Abuse Terminology) Act* 2020. (The amendment omitted the offence of unlawful sexual intercourse with a young person and replaced it with a new offence known as penetrative sexual abuse of a child (or young person). The commencement day for the amendment was 9 April 2020.)

72 That the alleged conduct fell within the terms of that charge is not in dispute, nor is it contentious that the offence was available to the State at the time the appellant was charged. The issue is whether an amendment can be made after a plea is taken.

73 The power to amend an indictment appears in s 326(1) of the Code. It is a limited right. The section provides:

> **"326 Amendment of indictment: Power to order separate trial**
>
> (1) Where, before trial or at any stage of the trial, it appears to a judge that the statement of the crime or the particulars, or the name or description of any person or thing mentioned therein is or are defective or erroneous, he shall make such order for the amendment of the indictment as he thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendment cannot be made without injustice.
>
> (2) Where an indictment is so amended a note of the order for amendment shall be endorsed on the indictment, and the indictment shall be treated for the purposes of the trial and of all proceedings in connection therewith as having been filed in its amended form.
>
> (3) Where, before trial or at any stage of the trial, it appears to a judge that an accused person may be prejudiced or embarrassed in his defence by reason of being charged with more than one crime in the same indictment, or that for any other reason it is desirable to direct that he should be tried separately for any one or more crimes charged in the indictment, the judge may order a separate trial of any count or counts in such indictment.
>
> (4) Where, before the trial or at any stage of the trial, it appears to a judge that the postponement of the trial of the accused person is expedient as a consequence of the exercise of any power of a judge under this section to amend an indictment, or to order the separate trial of a count, the judge shall make such order as to postponement of the trial as appears necessary.
>
> (5) Where an order is made for a separate trial or for the postponement of a trial –
>
> (a) if such order is made during the trial the judge may order that the jury are to be discharged from giving a verdict on count or counts the trial of which is postponed or on the indictment, as the case may be;
>
> (b) the procedure on the separate trial of a count shall be the same in all respects as if it had been charged in a separate indictment, and the procedure on the postponed trial shall be the same in all respects (if the jury have been discharged) as if the trial had not commenced; and

(c) the judge may make such order as to admitting the accused person to bail, and as to the enlargement of recognizances and otherwise, as the circumstances of the case may require.

(6) The power conferred by this section shall be in addition to, and not in derogation of, any other power of the court for the same or similar purposes; and may before trial be exercised upon summons by a judge in chambers."

74 The power is exercisable only in a trial. Since it can be exercised during a trial it is, self-evidently, a power exercisable after the plea is taken. The issue is whether a plea hearing, such as occurred here, is a trial.

75 Her Honour concluded that generally the term "trial" is a reference to a jury trial, but that in some contexts within the Code it has a more expansive meaning. She referred to examples of the use of the word "trial" in the Code, including ss 349, 351, 368A and 372 which were suggestive of that conclusion. She concluded that "trial" includes a sentencing hearing after a plea of guilty has been entered, and that the power to amend in s 326(1) is available to the court. She rejected the proposition that "trial" is limited to contested pleadings on an indictment tried by jury.

76 The State submits that s 8A of the *Acts Interpretation Act* 1931 is applicable to the question, and requires an interpretation that promotes the purpose of the Act, as opposed to one which does not. It submits that the purpose of the amendment relating to sexual abuse terminology is to introduce terms which more appropriately reflect the nature of the conduct alleged. It argues that an interpretation of "trial" which promotes the purpose of the Act is to be preferred, so that unless expressly limited to trial by jury, "trial" should be given a meaning which enables that purpose to be achieved. The alternative is that in circumstances where the matter proceeds to trial by judge and jury, the amendment is operative, and the indictment is able to be amended to more appropriately reflect the nature of the conduct, but in circumstances where a plea of guilty is entered, such course is not permitted. There is force in the respondent's submission that a narrow approach, which limits the meaning of trial, to trial by jury, handicaps the operation of s 464(3) of the Code. In my view s 464 makes clear that it was Parliament's intention that amendments to a charge were to have retrospective operation by permitting a court to amend charges before it to reflect the new charge.

77 It is open, as her Honour demonstrated by reference to ss 349, 351, 368A and 372, to construe "trial" as extending to a plea hearing, and thus falling within the operation of s 326(1). No error is demonstrated in her Honour's ruling.

78 I dismiss ground 3.

79 For these reasons I joined in an order upholding the appeal and resentencing the appellant to a term of imprisonment for five years commencing on 1 May 2020, three years of which was suspended for three years from his release, on condition that he not commit another offence punishable by imprisonment during the period. The appellant is eligible for parole having served half of the operative part of that sentence. The determination of the sentencing judge to not make an order under the *Community Protection (Offender Reporting) Act* 2005 is unaffected.

File No 1261/2020

RDA v STATE OF TASMANIA

REASONS FOR JUDGMENT **COURT OF CRIMINAL APPEAL**
PORTER AJ
20 April 2021

80 This is an appeal against sentence. Following pleas of guilty to four counts of indecent assault and two counts of penetrative sexual abuse of a child or young person, the appellant was sentenced by Wood J to five years' imprisonment commencing on 1 May 2020. It was ordered that the appellant not be eligible for parole until he had served one half of that term. No order was made under the *Community Protection (Offender Reporting) Act* 2005.

81 On 17 December 2020, this Court made orders allowing the appeal and setting aside the sentence. In lieu, the appellant was sentenced to five years' imprisonment, the execution of three years of which was suspended on condition he not commit any offence punishable by imprisonment for a period of three years from his release. The Court ordered the appellant not be eligible for parole until he had served one half of the operative part of that sentence. The determination of the sentencing judge not to make an order under the *Community Protection (Offender Reporting) Act* was unaffected. I joined in the making of those orders. The Court said it would publish its reasons in due course.

82 I have had the advantage of reading the reasons for judgment of Geason J. An overview of the offending, the matters in mitigation put to the sentencing judge, her Honour's comments on passing sentence in their entirety, and the grounds of appeal are set out in his Honour's reasons and there is no need for me to repeat them. Grounds 1, 1A, 1B and 2 relate directly to the sentence. Ground 3 relates to amendments made to the indictment after the appellant had pleaded guilty, so as to alter the description of two counts of indecent assault contrary to s 127 of the *Criminal Code*, to two counts of penetrative sexual abuse of a child or young person contrary to s 124. Following the amendments, the appellant pleaded guilty to the amended counts.

83 Although I agree with the outcomes of the challenge to the sentence and of the amendment issue, with respect, I reached the decision on the sentence by a different pathway. I took the view the sentence was manifestly excessive as asserted in ground 1; the other grounds relating to the sentence should fail. I will explain my reasoning. I will also add some remarks in relation to ground 3 – the amendment issue.

Manifest excess

84 By ground 1, the appellant asserted that the sentence and non-parole period were manifestly excessive. This was based on six factors as follows:

- The majority of the offences committed by the appellant were as a youth or a young man.
- There was a long delay of about 40 years between the events and their prosecution.
- The appellant had not offended since the subject offending.
- The appellant was rehabilitated.
- The appellant was the primary carer of his mother-in-law.
- In all the circumstances, the sentencing judge placed too great an emphasis upon considerations of general deterrence and harm to the victims.

The offending

85 The complainants, M and S, are the appellant's nieces. At the time, he was living with his sister; the mother of the girls. The first count on the indictment was one of indecent assault of M by the appellant inserting his fingers into her vagina. M was 7½ years old. The sentencing judge found that the appellant was likely to have just turned 18 years of age, or possibly just shy of his 18th birthday. The remaining counts all involved S. As it related to S, in its final form, the indictment alleged two counts of penetrative sexual abuse of a child or young person, and two counts of indecent assault. The sentencing judge found that S was aged between 6½ and 9½, with the appellant aged between about 19 and 22.

86 The five counts involving S arose from two incidents. In the first, there was an indecent assault when the appellant penetrated the complainant's vagina with his fingers, followed by a further indecent assault when he sucked and licked her breasts. That was followed by oral penetration. The second incident involved an indecent assault by licking the complainant's vagina and her undeveloped breasts before an act of oral penetration. The penetrative sexual abuse charges both involved penetration of the mouth by the penis until ejaculation.

87 Obviously, this offending is grave in nature. It involved breaches of trust. The offending resulted in lasting harm to the two victims. M still suffers with feelings of guilt and anxiety, and family relationships are fraught and damaged. S has struggled with depression and anxiety, and has needed psychological counselling. The appellant's conduct had what the sentencing judge described as a "devastating impact on her childhood and adult life, undermining her sense of self, worth, her relationship with her husband and her children".

The appellant – personal circumstances

88 The first thing to be noted is that when the appellant was 17, he was convicted of what was then defilement and ordered to perform 15 days of community work. He was also placed under the supervision of a probation officer for three years. That conviction preceded the first count on the indictment by a few months, and the remainder by about two years. Some of the charged conduct would have happened while the appellant was on probation.

89 The appellant was first spoken to by police in 2017, about 35 years after the events. At the time of sentencing in 2020 the appellant was 60 years old. His record of offending in the meantime consisted only of two traffic offences in 1977 for which he attended court, and a few traffic infringement notices, the last of which was about 20 years before he was sentenced on these matters. The much broader way in which the appellant had rehabilitated himself is set out in the sentencing judge's comments. Suffice it to say that as the sentencing judge said – in perhaps a slight understatement – the appellant is a totally different person to the young man who offended some 40 years ago. I should also note that her Honour accepted that specific deterrence and a need for community protection were of no concern.

90 There are other matters that can be taken into account as generally operating in mitigation. First, there is the material in the psychiatric report of Mr Cummins dated 14 April 2020 which was before the sentencing judge. It was not challenged in any aspect. It provided a good insight into the appellant's personal circumstances and mental state both at the time of the offending, and at the time of sentencing.

91 There was evidence suggesting the appellant's father was a very violent alcoholic who continually abused his mother, causing her to be admitted to hospital for treatment on many occasions. The appellant witnessed his mother being beaten and abused. His father encouraged him to drink alcohol. He was also using cannabis at the time of the offending. He told Mr Cummins that at the time of the offending, he was very sexually inexperienced but simultaneously sexually curious and also

seeking affirmation and love for which he was desperate. He appears to have voluntarily accepted that this was no excuse for his offending, for which he took responsibility.

92 In Mr Cummins' opinion, at the time the appellant had problems with self-awareness, those problems being linked to his psychosexual immaturity. It was probable that at the time of the offending he had difficulties with coping because of his low self-esteem, and was perhaps drinking too much alcohol and smoking cannabis.

93 Mr Cummins says it was probable that at the time the appellant was still suffering from symptoms relating to trauma arising from his dysfunctional upbringing. The probable diagnosis is one of an "Adjustment Disorder with Mixed Disturbance of Emotions and Conduct", reflective of his dysfunctional upbringing and low self-esteem. Mr Cummins also considers it probable that this condition interfered with the appellant's normal development, "and may therefore have played a role in his psychosexual development such that during the time of offending he was still to be regarded as psychosexually immature".

94 The sentencing judge said that some weight should be given to that link, and I agree. Her Honour said it appears the appellant was more immature than typically his age would suggest, and it provides an explanation for why his sexual offending involving young girls had not continued as he grew older and matured. It seems that his first sexual contact with an appropriate age partner was after these offences.

95 Mr Cummins' report also shows full acceptance of responsibility by the appellant, insight into his wrongdoing, understanding of the harm done and empathy for the victims, and remorse, shame, regret and embarrassment.

Other matters

96 The first matter is one that relates to the offending. The two incidents relating to S were not isolated ones, and accordingly no claim to mitigation could be made in that respect. Although the sentencing judge correctly outlined the use of this fact, saying that the appellant was only to be sentenced for the two occasions, I wish to comment on an aspect of this. It may have some relevance to the impact on S of the charged conduct. If an accused is not to be punished for uncharged acts, some care may need to be exercised in relation to the question of victim impact. See *R v Daniels* [1999] TASSC 62, 8 Tas R 397 at [4].

97 After describing the second act of oral penetration, the prosecutor told the sentencing judge that S recalls feeling anxious that someone would see her or find out what the appellant had been doing to her. Immediately after that statement, the prosecutor said, "The complainant says this occurred against a background of other uncharged acts, a total of 3 to 5 times".

98 In the sentencing comments her Honour stated:

> "S recalls two particular occasions when she was sexually assaulted by the defendant against a background of other occasions that she is unable to particularise. The defendant is to be sentenced only for those two specific occasions. But because of the other incidents, he cannot claim in mitigation that those two specific occasions were isolated incidents. ... The number of uncharged acts *involving oral intercourse* were [sic] a total of 3-5 occasions." [My emphasis.]

99 It seems the prosecutor was putting that there were three to five other occasions involving uncharged acts. But to my mind, it is not entirely clear whether the prosecutor intended to assert that oral intercourse took place on each of those occasions.

100 The next matter is one which is specifically the subject of ground 1A, but should be mentioned in the present context. In *R v PJB* [2007] VSCA 242, 17 VR 300[1] at [16], Nettle JA (Ashley and Dodds-Streeton JJA agreeing) said it was recognised that where offences which had been committed while an offender was a child or immature and were not prosecuted until many years after the event, there is good reason to mitigate penalty, "or at least to do so where the offender has achieved a significant degree of rehabilitation and there has been no further offending".

101 His Honour explained the rationale for this as being that common sense and fairness dictate that the assessment of the nature and gravity of the crime, and of the offender's moral culpability, take into account that what was done was done as a child, or as a person of immature years, and not as an adult or person of greater maturity.

102 That approach has been accepted in this State: *TAP v Tasmania* [2014] TASCCA 5 at [1], [28], [56]. In the present case, the qualifying features of a significant degree of rehabilitation and no further offending, at least none of any relevance, are met. However, the adoption of the approach is not as straightforward as the appellant maintained. An assessment of moral culpability, taking into account that what was done was done as a person of immature years, has to take into account the facts of the prior conviction and that some of the offending was done while on probation following that conviction; he ought to have clearly understood not to do such things.

103 That said, it seems plain enough that the offending which gave rise to the earlier conviction also has to be viewed in light of the appellant's mental health at the time. It was on that basis that the approach in *PJB* should have been adopted.

104 The next matter is the effect of, and weight to be given to, the appellant's pleas of guilty. As to this, the sentencing judge said:

> "A new indictment was filed in February this year. The defendant pleaded guilty in March. While this is not an early plea, I have reduced the sentence I would otherwise have imposed. The complainants have been spared the additional stress and anxiety associated with giving evidence on a trial may have been vindicated by his pleas."

105 Later, the pleas of guilty were said to be part of factors that had been given "significant weight." In spite of the sentencing judge giving weight to the pleas to that extent, the issue is whether it is correct to describe them as not "early" ones. The appellant complained that her Honour did not mention the utilitarian value of the pleas, but otherwise the appellant did not address the matter. It seems to me there may well be a difficulty with the sentencing judge's characterisation, and that an assessment of the sentence under this ground of appeal should include the issue.

106 The Court file reveals that the appellant was charged on 21 August 2017. (The delay of about one year between being spoken to by police officers and being charged was not explained to the sentencing judge.) The complaint contained one charge of indecent assault in respect of M, and two charges of rape and two charges of indecent assault relating to S. Both charges of rape alleged "sexual intercourse". At the relevant times, the wording of s 185 of the Code (rape) was, "Any person who has carnal knowledge of a female not his wife without her consent is guilty of a crime." One of the indecent assault charges on the complaint relating to S, alleged an insertion of "something into her vagina".

107 In 1987, s 185 of the Code was amended to read "Any person who has sexual intercourse with another person without that person's consent is guilty of a crime." The definition of "carnal knowledge" was omitted, and the reference in s 185 to carnal knowledge of a female was discarded. A definition of "sexual intercourse" was introduced. That definition included penetration of the mouth

[1] Reported as *R v Boland*.

by the penis. The 1987 amendments to the rape provisions were not made retrospective. I will outline further amendments in relation to sexual offending when later dealing with ground 3.

108 Three indictments were filed over time. The indecent assault charge relating to M remained the same throughout. The first indictment, filed in December 2018, contained seven counts and essentially reflected the complaint except that in the two rape charges, oral penetration was alleged rather than "sexual intercourse". The second indictment, in April 2019, contained six counts. It retained one rape charge but one which alleged vaginal sexual intercourse, with an indecent assault by digital penetration of the vagina as an alternative. Two of the remaining counts of indecent assault alleged "oral sexual intercourse". There was also some tinkering with the particulars of the other indecent assaults that does not need to be detailed.

109 The only change from the second indictment to the third (as originally pleaded to), was in relation to the two indecent assaults alleging "oral sexual intercourse". That phrase was abandoned in favour of alleged acts of "penetrating her mouth with his penis". The rape remained an allegation of unlawful vaginal sexual intercourse. The appellant pleaded guilty to the indecent assault involving S, that was pleaded as the alternative to the rape. The Crown accepted the plea to the alternative.

110 It follows that until 2019 the appellant faced two rape charges of which he could not have been found guilty, and then subsequently faced a count of rape – alleging vaginal sexual intercourse – which was ultimately not pursued. It was made plain to the sentencing judge that the finalisation of the third indictment had come about because of discussions between the parties.

111 The point was not argued but I respectfully suggest the pleas ought to have been regarded as having been entered, if not at the first available opportunity, then at least at a point and in circumstances warranting greater weight than appears to have been given to them. In *Cameron v The Queen* [2002] HCA 6, 209 CLR 339 Gaudron, Gummow and Callinan JJ at [20]-[21] and Kirby J at [74]-[75] approved of the approach taken in *Atholwood v The Queen* [1999] WASCA 256, 109 A Crim R 465. In that case at 468, Ipp J said:

> "It is particularly important in such circumstances to establish the time when it could first be said that it was reasonably open to the offender to plead guilty to the offence of which he was convicted. Regard should be had to the forensic prejudice that the offender would have suffered were he to have pleaded guilty to counts persisted in by the prosecution while others (that were subsequently withdrawn) remained pending against him. During the period that the prosecution maintains counts that are ultimately abandoned, there is a strong incentive for a person who recognises his guilt on other counts ... to persist in a not guilty plea to all counts. In such circumstances it should not be assumed, mechanically, that the offender has delayed pleading guilty because of an absence of remorse, or that, reasonably speaking, he has not pleaded guilty at the earliest possible opportunity."

112 The indictment to which the appellant pleaded guilty was filed on 27 February 2020. He pleaded guilty to the six counts of indecent assault on 18 March 2020. He later pleaded guilty to the amended indictment.

113 The final matter for discussion is the role of the appellant as carer for his mother-in-law. The issue is the question of hardship to her and the weight to be given to that matter. The parties disagree about whether it is a relevant factor. The appellant's wife died in October 2018, after which the marital home was sold. The appellant took on the role of carer for his 87 year old mother-in-law who suffers from significant dementia. This was done with the full knowledge and consent of his brother-in-law and sister-in-law who both live interstate. The appellant's son lived with them but he works full-time. Material before the sentencing judge confirmed the need for care and assistance in activities of daily living day and night, with medical opinion being to the effect that the woman's health and safety would be at risk if she did not have a responsible adult living with her.

114 The sentencing judge accepted that the appellant's incarceration would give rise to very real difficulties for the family in terms of the woman's care, and if the present living arrangements could not be supported, hardship to her. Her Honour noted that the appellant assumed the responsibility as carer at a time when the charges had been laid, and there was some prospect that the arrangement would not be long-term. However, there was no suggestion that the adoption of the role was done in an attempt to gain some sort of advantage in the sentencing process. Objectively it seems to have been a reasonable thing to do.

115 Her Honour said that she gave "some weight to the factor of hardship to others" but in view of the severity of the crimes, that weight was not significant. Her Honour also took into account that the appellant would be aware that his imprisonment would adversely affect a vulnerable person in his care. That issue of distress to the offender caused by hardship to others is a separate issue, and has a mitigatory effect if established: *Markovic v The Queen* [2010] VSCA 105, 30 VR 589 at [5], [20].

116 The weight of authority is to the effect that hardship to family members can mitigate penalty, but there is an "exceptional circumstances" test, strictly applied. The hardship must be such that it goes beyond what is appropriate in securing the community's welfare and protection through the enforcement of the criminal law: *R v Constance* [2016] SASCFC 87 at [67]. It is not entirely clear from the sentencing judge's comments whether her Honour in fact found exceptional circumstances but gave the factor some but no significant weight, or was not satisfied that the test had been satisfied, although she was prepared to give it some weight nonetheless. The appellant argued exceptional circumstances existed; the respondent submitted the sentencing judge was clearly not satisfied that the circumstances were exceptional.

117 If the sentencing judge applied the strict common law principle, then in the absence of a finding of exceptional circumstances, the factor of hardship to others is irrelevant: *R v Nagul* [2007] VSCA 8 at [46]; *Markovic* (above) at [3]. It is difficult to avoid the conclusion that her Honour found exceptional circumstances, and gave the factor of hardship "some weight" but not did "not accord it significant weight." That her Honour made the finding is reinforced by the reference to the mother-in-law's vulnerability. On the basis of that finding, the factor was to be given appropriate weight alongside all other factors including, of course, the seriousness of the offending. Whether the degree of weight given was appropriate can only be measured by looking at the sentence on an overall basis, taking all things into account.

Comments

118 Plainly, the offending was grave and in all the circumstances a lengthy term of imprisonment was inevitable. The appellant argued that the term imposed was too long, and that suspension of the execution of the whole or part of an appropriate term was justified. (A failure to "consider suspension" was the subject of ground 1B.) Ultimately, the appellant suggested that the whole of a lesser term could properly have been suspended. That submission had to be rejected. The term imposed was justified in the circumstances. But given the application of the approach set out in *PJB* to the extent I have indicated, and given the significant matters in mitigation, the suspension of the execution of a significant part was called for. The failure to do so made the sentence manifestly excessive. It was on that basis that I joined in the making of the orders.

Ground 1A – a failure to apply *R v PJB*

119 The ground alleges a failure to apply the sentencing principle stated by Nettle JA in *R v PJB* (above). With all due respect, I am not able to agree that this ground was made out.

120 The principle and the authority of *PJB* were brought to the sentencing judge's attention, along with some later Victorian cases to like effect. In her comments on passing sentence, the sentencing judge said the following things at various points:

> "In assessing the defendant's moral culpability and the nature and gravity of his crimes, I take into account his young age at the time be committed these crimes, he was a young adult in his late teens/early 20s. … The level of the defendant's criminality, notwithstanding his age and immaturity, involved a high level of culpability. … I accept that the defendant being sentenced today is a different person to the young man who offended some 40 years ago. The Court can see that in the time that has lapsed, he has rehabilitated. … Time does not dull the gravity of the criminal conduct or diminish culpability."

121 Some of the factors said to have been given "significant weight" were the appellant's young age and immaturity at the time of offending, his complete reform, responsible and law abiding life he has led since then, and his contribution to his family and community. The relevant principle is that in the stated circumstances, the assessment of the nature and gravity of the crime and of the offender's moral culpability should *take into account* that what was done was as a person of immature years, and not as an adult, or a person of greater maturity. That is, in the identified circumstances a sentencer should, in assessing the nature of the offence and the offender's moral culpability, take into account youth and immaturity.

122 In all of that I am not persuaded that it can properly be said that the sentencing judge failed to apply the relevant principle. The fact remains that her Honour effectively said she gave the relevant matters, including the appellant's age and immaturity at the time of the offending, significant weight. Whether the weight given was appropriate can only be measured by the outcome.

123 The ground of appeal is akin to a ground of appeal that a sentencing judge failed to give "sufficient weight" to a particular factor. In the absence of an express refusal to take the factor into account, such an assertion is not a proper ground of appeal. The only way in which a court can evaluate a complaint about the sufficiency of weight given to a particular consideration is as a particular of the manifest excess ground: *TAP v Tasmania* [2014] TASCCA 5 at [30]; *Mulholland v Tasmania* [2017] TASCCA 2, 25 Tas R 313 at [17].

Ground 1B – a failure to consider suspension

124 This ground alleges error by failing to give consideration to imposing a partially or wholly suspended sentence. The argument proceeded on the assumption that as there was no reference in the comments on passing sentence to possible suspension of the term, the sentencing judge did not consider it. As authority shows, that is an unsafe assumption. No authority was cited for the proposition that there is an obligation to mention all sentencing alternatives and all matters that might be considered. As it happens, there is authority to the contrary, and in this particular context.

125 In *Trueman v Tasmania* [2009] TASSC 29, 18 Tas R 435 at [59], Slicer J said the fact that a trial judge does not spell out all the alternate penalties available does not imply that he or she did not consider them. His Honour referred to *R v Ciccone* (1974) 7 SASR 110 and *Tame v Fingleton* (1974) 8 SASR 507 at 510. At [33], Crawford CJ (with whom Tennent J agreed), made it clear that a sentencing officer is not obliged to mention all matters which might conceivably be relevant in the sentencing process relating to the particular case: "To do so will not necessarily amount to an error. Each case will depend on its own circumstances."

126 I agree with Geason J; the fact that the matter was not referred to does not demonstrate that consideration was not given to it. The appellant has not made out an error. I would mention one additional matter. In his reasons, Geason J said that upon it being determined that a sentence of imprisonment is appropriate, the issue of suspension is engaged and it is desirable to speak to that step even if the conclusion is that none of the sentence will be suspended. Of course, his Honour does not say it is *necessary* to speak to the step, but with respect, I am not able to endorse the proposition in such general terms. I am not convinced that an expression of universal desirability is warranted.

127 If imprisonment is appropriate but suspension is not thought to be justified, the reasons may be quite clear from the nature of the crime or the whole of the comments. If imprisonment is appropriate but suspension of all or part is justified, brief reasons may be given for why that is so, or it is made clear from other remarks. In either event, there will be cases where it might be appropriate or desirable "to speak to the step"; there will be many cases in which it is simply not necessary.

128 As to a decision not to suspend any part of a sentence, in *Trueman* at [23] Crawford CJ said :

> "It was submitted for the appellant that the learned judge 'should have firstly justified his decision that incarceration was necessary and then in a further and separate process of reasoning justified the displacing of a suspended sentence with actual incarceration in the context of a relatively youthful offender with no prior relevant convictions'. There is no rule of law that the learned judge should have expressed himself in that way in his comments nor is there any rule of law that having decided that a sentence of imprisonment is necessary, a judge is obliged to justify a decision not to suspend any of the imprisonment. It is common for courts to sentence offenders to imprisonment with no mention at all of the question of suspension in the sentencing comments. Obvious examples are to be found in sentencing comments for murder, rape and other serious crimes. It is clear in this case that the learned judge considered the question of suspension and rejected it for reasons that he stated or may be inferred."

Ground 3 – amendment of the indictment

129 The amendment of the indictment had its origins when, during the hearing, the sentencing judge raised the issues as to how oral penetration might be taken into account in relation to the two relevant counts of indecent assault. The Crown submitted that the appellant could not have been charged with the more serious crime of rape, and that oral penetration was the physical conduct alleged to constitute the assault: *TGW v Tasmania* [2017] TASCCA 10, 26 Tas R 106 at [18]-[21]. In any event the debate led to a consideration of s 124; the crime previously known as sexual intercourse with a young person, but from 2020 known as penetrative sexual abuse of a child or young person.

130 Then counsel for the appellant argued there was no power to amend but disclaimed any prejudice to the appellant. Following submissions from both parties, the sentencing judge ordered the amendment of counts 4 and 6 so that they alleged penetrative sexual abuse rather than indecent assault, with the particulars remaining the same. As I noted earlier, the appellant then pleaded guilty to the amended counts.

131 The pathway from an indecent assault under s 127 involving oral penetration, to penetrative sexual abuse under s 124 is as follows. In 1987[2], the *Criminal Code* was amended so that s 124 – the crime of defilement – was repealed and the crime of sexual intercourse with a young person was substituted. The proscribed conduct was unlawful sexual intercourse with a person under the age of 17 years. The definition of carnal knowledge was omitted, and a definition of "sexual intercourse" was introduced. That definition included penetration of the mouth by the penis.

132 In 1997[3], s 124 – sexual intercourse with a young person – was amended by the addition of subs (4) which provided the section was to be taken as in force from 4 April 1924. In *R v Perriman* [2000] TASSC 108, 114 A Crim R 486 at [14] Slicer J held that the effect of the 1997 amendment to s 124 was to include the definition of sexual intercourse enacted in 1987, saying that "The definition attached to the substantive amendments effected by the 1987 legislation which, in turn, was expressly stated to be retroactive."

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[2] *Criminal Code Amendment (Sexual Offences) Act* 1987, No 71 of 1987.
[3] *Criminal Code Amendment Act* 1997, No 12 of 1997.

133 By virtue of s 5 of the *Criminal Code Amendment (Sexual Abuse Terminology) Act* 2020, the name of the charge under s 124 was changed to "Penetrative sexual abuse of a child [*or* a young person]." (Original emphasis.) The proscribed conduct was unchanged.

134 The effect of all of that was to render the appellant liable, on the basis of admitted oral penetration, to be dealt with for penetrative sexual abuse of a child or young person. As I earlier mentioned, after the sentencing judge ordered the amendments to the indictment, the appellant pleaded guilty to the amended counts.

135 According to the notice of appeal, ground 3 was a ground in relation to the appeal against sentence. When pressed as to the relief sought were the ground to succeed, senior counsel for the appellant submitted that what was sought was the amendments be set aside and the record corrected to disclose pleas to two counts of indecent assault, as originally pleaded to. During the exchange, the appellant accepted that to do this, the Court would effectively have to set aside the pleas of guilty to the amended counts. That could only be done by quashing the convictions. Quite how that was to be done in the absence an appeal against conviction and satisfying the Court of a miscarriage of justice under s 402(1) of the Criminal Code, was not explained. See generally *Marlow v The Queen* [1990] Tas R 1.

136 In any event, I generally agree with the reasons of Geason J for rejecting this ground of appeal. It is quite plain that the Criminal Code uses the word "trial" to include a sentencing hearing after a plea of guilty has been entered. It is a word which takes it meaning from its context. The sentencing judge gave examples of s 349 – "Bringing up a prisoner for trial", s 351 – "Motion to quash indictment", and referred in contrast to the phrase "trial on indictment" used in sections such as s 368A – "Notice of alibi", and s 372 – "Separation of juries during adjournments of trial" which, I note, was omitted in 2003. Her Honour also noted the definition of "court of trial" in s 399, that section being the interpretation provision for the appeals chapter – Ch XLVI.

137 I would add a reference to s 348, the heading of which reads, "On adjournment of trial accused may be remanded, &c." That section contains 15 subsections. Subsection (2) provides that when a trial is adjourned, the judge may direct that the trial be held either at that or a later sitting in the court, and may remand the accused person accordingly or admit the person to bail. Provisions that follow enable a judge to commit the person to a secure mental health unit in certain circumstances and where certain prerequisites have been satisfied, instead of remanding the person to gaol or a detention centre.

138 The remaining provisions deal with the management of the person in a secure mental health unit, and variational revocation of the committal order. Other procedural matters are dealt with. It would be quite bizarre if this section was said only to apply to the situation in which an accused person has pleaded not guilty so that the "trial", in the ordinary sense of the word, has commenced.

139 Section 464(3) of the Code also has relevance. The section contains transitional provisions relating to the *Criminal Code Amendment (Sexual Abuse Terminology) Act* 2020. Subsection (3) provides that a charge for a crime affected by the amendments *is to be amended* to refer to the charge as amended by that Act. This is to be done at the next appearance of a person charged with the crime if the person was charged by reference to the charge as in force for that crime before the commencement day of the amendment Act and on, and after, the commencement day proceedings in respect of the crime charged have not been finally determined. There is no reason to think this does not apply to proceedings following a plea of guilty that have not been finally determined by sentence.

140 There was no merit in this ground.