

Indecent Assault & Agg Indecent Assault

s 323 & s 324 *Criminal Code*

From 1 January 2021

Transitional Sentencing Provisions: This table is divided into thirds based on the three relevant periods of Sentencing Provisions:

- Post-transitional provisions period
- Transitional provisions period
- Pre-transitional provisions period

These periods are separated by a row which shows when the transitional provisions were enacted, and another showing when they were repealed.

Glossary:

AOBH	assault occasioning bodily harm
agg	aggravated
att	attempted
burg	burglary
circ	circumstances
con	concurrent
cum	cumulative
ct	count
dep lib	deprivation of liberty
imp	imprisonment
indec	indecent
ISO	intensive supervision order
PG	plead guilty
PNG	plead not guilty
sex pen	sexual penetration without consent
susp	suspended
TES	total effective sentence
TIC	time in custody

No.	Case	Antecedents	Summary/Facts	Sentence	Appeal
4.	<p><i>The State of Western Australia v Rayapen</i></p> <p>[2023] WASCA 55</p> <p>Delivered 12/04//2023</p>	<p>24 yrs at time offending. 26 yrs at time sentencing.</p> <p>Convicted on late PG (in full satisfaction of the ind) (15% discount).</p> <p>No criminal history.</p> <p>Born Italy; moved to UK aged six yrs; moved to Australia with family aged 17 yrs; raised loving and caring family; not subjected to any severe physical punishment, trauma, abuse or adversity during childhood.</p> <p>Positive and supportive references; offending inconsistent and out of character.</p> <p>Time of offending studying law at university; moved to Melbourne to complete his studies.</p> <p>In a relationship at time sentencing.</p> <p>No history of illicit drug use; commenced drinking alcohol aged 18 yrs; variable drinking pattern,</p>	<p>Ct 2: Agg indec assault. Ct 4: Sex pen without consent.</p> <p>The victim, aged 21 yrs, was celebrating the end of exams on Rottnest Island. During the afternoon the victim, along with a male friend, socialised at a nearby unit.</p> <p>Later, Rayapen arrived at the unit. The victim and Rayapen did not know each other. During the night they interacted with each other.</p> <p>In the early hrs of the morning the victim returned to her unit with her male friend. Rayapen tagged along with them and was told he could stay the night.</p> <p>The victim got into bed, which was made up of two beds pushed together. Rayapen lay in the bed next to her. On the other side of the bed was the victim's male friend.</p> <p>During the night Rayapen squeezed the victim's breasts, causing her pain and bruising, and penetrated her vagina with his fingers. She physically resisted him and curled herself up into a foetal position. Six times she told him 'no'. Rayapen only desisted when she pushed on his throat with her hand.</p> <p>The next day the victim confronted Rayapen and he told her he was sorry for what had happened.</p> <p>Some days later the victim made a pretext call to Rayapen and he made some admissions of wrongdoing.</p>	<p>Ct 2: 12 mths imp (conc). Ct 4: 2 yrs imp (conc).</p> <p>TES 2 yrs imp, susp 2 yrs.</p> <p>The sentencing judge found 'the inherent exercise of mercy' in combination with other factors, concluded that it was not appropriate to impose an immediate term of imp.</p> <p>The sentencing judge found that while there was a degree of persistence in the offending, it was opportunistic and overall it lacked any real premeditation; the widespread mainstream and social media reporting had no doubt been a source of humiliation to Rayapen and he had lost the ability to practice law in WA, or anywhere in the Commonwealth.</p> <p>Significant steps taken towards rehabilitation; attending alcohol counselling.</p>	<p>Allowed.</p> <p>Appeal concerned length of sentence and error in sentencing (degree of remorse and plea discount).</p> <p>Resentenced (10% discount):</p> <p>Ct 2: 12 mths imp (conc). Ct 4: 3 yrs 3 mths imp (conc).</p> <p>TES 3 yrs 3 mths imp.</p> <p>EFP.</p> <p>At [164] ... we have concluded that the learned sentencing judge erred in concluding that Mr Rayapen had 'deep and genuine remorse' at the 'highest end or remorse'. ...</p> <p>At [171]-[172] ... we are satisfied that the discount of 15% from the head sentence was such that we should infer error on the part of the sentencing judge. ... Mr Rayapen did not PG, or indicate he</p>

		during university would get drunk on a regular basis; taking antidepressant medication since offending.		Low risk of reoffending; deeply and genuinely remorseful; deep sense he had brought dishonour to his family; attempt at self-harm.	<p>would PG, at the earliest reasonable opportunity. On the contrary, ... Mr Rayapen PG at the latest available opportunity.</p> <p>At [186] ... the State case is properly characterised as strong. That was a matter relevant to the discount to be given for Mr Rayapen's PG.</p> <p>At [228] The sentencing judge was wrong to conclude that there were exceptional circumstances capable of justifying the exercise of mercy ... his Honour was wrong to conclude that, having regard to all relevant sentencing factors, there was a proper basis for imposing a sentence other than immediate imp.</p> <p>At [240] ... The sentence [for the offence of sex pen without consent] was not commensurate with the seriousness of the offence, ...</p> <p>At [241] ... the TES did not bear a proper relationship to the overall</p>
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					<p>criminality involved in all of the offences. ...</p> <p>At [243] As to the objective seriousness of the offence, the offence in the present case, while not in the most serious category, was nevertheless a serious case of its kind. The victim was in a vulnerable position, affected by alcohol and, at least on the verge of sleep, when Mr Rayapen began the offending conduct. Prior to the offence of sex pen, Mr Rayapen had persistently touched the victim without her consent, with sufficient force to cause her bruising. Her repeated attempts to prevent that conduct, by physical resistant Mr Rayapen and saying 'no', left no ambiguity as to her wish to be left alone. Notwithstanding those attempts, Mr Rayapen persisted, escalating to the offence of unlawful sex pen.</p>
3.	<i>The State of Western Australia v Buscunan Cabrera</i>	35 yrs at time first offending. 44 yrs at time sentencing. Convicted after trial.	5 x Sen pen without consent. 1 x Indec assault. The offending occurred when the victims visited Buscunan Cabrera in his capacity as a practitioner	Ct 1: 2 yrs imp (conc). Ct 2: 2 yrs imp (conc). Ct 3: 18 mths imp (cum). Ct 6: 2 yrs imp (cum). Ct 8: 9 mths imp (conc).	Allowed. Appeal concerned sentenced on mistaken basis ct 3 offence of indec

<p>[2023] WASCA 34</p> <p>Delivered 21/02//2023</p>	<p>No prior criminal history.</p> <p>Born Chile, moved to Australia with family in 1983.</p> <p>Completed yr 12; Bachelor of Iridology and Advanced Diploma in Natural Medicine.</p> <p>Employed father's naturopath business; eventually took over business with his brother.</p> <p>Married 10 yrs; two children.</p> <p>Good physical and mental health.</p> <p>No issues with drugs and alcohol.</p>	<p>of natural medicine.</p> <p>The offending extended over a period of about five-yrs on five separate occasions.</p> <p><u>Ct 1</u> The victim, AL, was aged 18 or 19 yrs. In the company of her boyfriend AL consulted Buscunan Cabrera, who performed iridology on her. He told her she had thrush. She was then told to remove her clothes and to lay down on the examination table. She was uncomfortable but did as instructed. He then touched her clitoris. He repeatedly told her that she had thrush. AL told him that she knew what thrush felt like and she did not have it.</p> <p><u>Ct 2</u> The victim, NL, was aged 31 yrs. She consulted Buscunan Cabrera for shoulder and knee pain. During the examination he asked her to remove her pants. She did so, keeping her underwear on. He then manipulated her knee. After performing iridology on NL he told her she might have thrush and that he had to check her vagina. NL agreed because she felt desperate about her pain and thought it somehow might help. During the examination he inserted a finger into her vagina, then informed her he had found inflammation.</p> <p><u>Ct 3</u> The victim, FJ, was aged 33 yrs. She visited Buscunan Cabrera for recurring thrush. After performing iridology on FJ he told her he needed to know what he was dealing with and asked her to remove her lower clothing. She complied. He used his fingers to press her clitoris and down</p>	<p>Ct 9: 2 yrs imp (cum).</p> <p>TES 5 yrs 6 mths imp.</p> <p>EFP.</p> <p>The trial judge found the respondent's offending very serious; it was opportunistic and carried out for sexual gratification over a considerable, lengthy period of time; the victims were vulnerable and the offending aggravated by his position of trust, which he ultimately breached by conducting examinations that were not medically warranted.</p> <p>No findings of remorse; acceptance of responsibility or demonstrated insight into his offending; low risk of re-offending if employed different role and not as a naturopath.</p> <p>The trial judge found the only appropriate sentencing disposition was a term of imp.</p>	<p>assault; length of individual sentences cts 1, 2, 3, 6 & 9 and totality principle.</p> <p>Resentenced:</p> <p>Ct 1: 3 yrs 9 mths imp (cum). Cts 2 & 6: 3 yrs 9 mths imp (conc). Ct 3: 3 yrs 3 mths imp (conc). Ct 8: 9 mths imp (cum). Ct 9: 3 yrs 6 mths imp (conc).</p> <p>TES 7 yrs 3 mths imp.</p> <p>EFP.</p> <p>At [57] ... it is apparent from his Honour's findings of fact that the pen the subject of ct 3 (while very serious) was less invasive than the penetrations the subject of cts 2, 6 and 9 (all of which involved digital pen of the vaginal canal) and slightly less invasive than the pen the subject of ct 1.</p> <p>At [81] In the present case, the facts and circumstances of the respondent's</p>
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			<p>around her labia for about one minute.</p> <p><u>Ct 6</u> The victim, TC, was aged 29 yrs. She consulted Buscunan Cabrera as she suffered from migraines and had coeliac disease. After he performed iridology on her the conversation turned to sexual intercourse. TC was taken aback. She said intercourse was fine but sometimes painful. He said there could be ulcers on her vaginal walls and asked to examine her. During the examination he circled the entrance to her vaginal canal with his finger, then inserted two fingers about 3 cm into her vagina.</p> <p><u>Cts 8 and 9</u> CM was aged 26 yrs. She had lupus, which caused her fatigue, joint pain and rashes so she consulted Buscunan Cabrera. During the consultation he performed iridology on her. Following a discussion of her symptoms he asked to look at her joints and chest. She removed her top and bra. She was not given anything to cover herself. He examined her breasts by touching them (ct 8).</p> <p>Buscunan Cabrera then spoke to CM about vaginal discharge and asked to check her for it. CM agreed. During the examination he used a torch and inserted a finger into her vagina and moved it around (ct 9).</p>	<p>offending in relation to cts 1, 2, 3, 6 and 9 were very serious. The respondent was in a position of trust in relation to the complainants and he breached that trust. The complainants regarded the respondent as a professional healer and they put their faith in him. The complainants suffered from a variety of ailments and were vulnerable. The impact of the respondent's offending upon the complainants was significant. His offending adversely affected their trust in medical professionals. The relevant examinations carried out by the respondent were not medically warranted. His motivation was sexual gratification. The offending was brazen, especially in relation to the complainant the subject of ct 1 ... whose boyfriend at the time was in the consulting room when the offending occurred. ...</p> <p>At [85] ... each individual sentence imposed on the respondent for cts 1, 2, 3, 6</p>
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					<p>and 9 was not commensurate with the seriousness of the offence. ... the length of each individual sentence was unreasonable or plainly unjust.</p> <p>At [87] Each individual sentence for cts 1, 2, 3, 6 and 9 was substantially less than the sentence open to his Honour on a proper exercise of the sentencing discretion. ...</p> <p>At [93] ... the TES ... did not bear a proper relationship to the overall criminality involved in all of the offences, viewed together, and having regard to all relevant facts and circumstances and all relevant sentencing factors. ... The TES was unreasonable or plainly unjust.</p>
2.	<p><i>The State of Western Australia v Tumata</i></p> <p>[2022] WASCA 161</p> <p>Delivered</p>	<p><u>Tumata</u> 24 yrs at time offending. 28 yrs at time sentencing.</p> <p>Convicted after PG (cts 1, 6, 34 and 35) (10% discount). Convicted after trial (cts 2-5; 7-22; 25; 28; 29; 31; 32;</p>	<p><u>Tumata</u> 8 x Agg sex pen without consent. 3 x Agg indec assault. 1 x Demanding property with oral threats. 10 x AOBH. 8 x Act with intent to harm. 2 x Threats to harm.</p> <p><u>Sheppard</u></p>	<p><u>Tumata</u> TES 14 yrs imp.</p> <p><u>Sheppard</u> TES 13 yrs 6 mths imp.</p> <p><u>Woods</u> TES 12 yrs imp.</p>	<p>Allowed.</p> <p>Appeal concerned totality principle (individual sentences not challenged).</p> <p>Resentenced:</p> <p><u>Tumata</u></p>

	06/12/2022	<p>36-38</p> <p>Lengthy criminal history.</p> <p>Parents separated when aged 4 yrs; raised by mother; sent to live with a relative in NZ aged 12 yrs due to his behaviour; returned to live with his father, now estranged.</p> <p>Limited literacy and numeracy skills.</p> <p>No history of paid employment; other than labouring work about aged 17 yrs.</p> <p>Commenced cannabis and alcohol use aged 12 yrs; regular user of methyl and alcohol excessively.</p> <p><u>Sheppard</u> 23 yrs at time offending. 27 yrs at time sentencing.</p> <p>Convicted after PG (ts 1, 4, 6, 7, 16 and 35) (10% discount). Convicted after trial (cts 2; 3; 5; 8-15; 17-22; 25; 28; 29; 32; 34; 36; 38 and 39).</p> <p>Lengthy criminal history.</p>	<p>8 x Agg sex pen without consent. 3 x Agg indec assault. 1 x Demanding property with oral threats. 11 x AOBH. 7 x Acts with intent to harm. 1 x Threat to harm.</p> <p><u>Woods</u> 8 x Agg sex pen without consent. 1 x Agg indec assault. 1 x Demanding property with oral threats. 4 x AOBH. 4 x Acts with intent to harm. 1 x Threat to harm.</p> <p>The victim, M, was aged 22 yrs. He was remanded in custody and had never been to prison before.</p> <p>Tumata, Sheppard and Woods, who were also prisoners, entered M's cell, alleging he was an informant. Sheppard told M he had to pay a fine, to increase each wk until it was paid. If the fine was not paid M was told he would be killed.</p> <p>After this incident, over a period of 18 days and on an almost daily basis, Tumata, Sheppard and Woods subjected M to violence and brutality of the most extreme kind. This included beating, kicking and indecently assaulting him, choking him to the point he lost consciousness, burning him with boiling water and repeatedly sexually penetrating him with their bodies, a broom handle and a pencil.</p> <p>Tumata, Sheppard and Woods also threatened to rape his partner.</p>	<p>The sentencing judge found Tumata and Sheppard the ringleaders and that Woods' acted 'more as a follower' and he was overall less culpable than Tumata and Sheppard; after the initial extortion the three respondents, sometimes as a pair or individually, engaged in a concerted, persistent and ongoing course of conduct against M over an extended period; they subjected M to increasingly violent physical and sexual attacks to enforce their demand for money; Tumata and Sheppard were physically powerful men, M, helpless and defenceless and extremely frightened and scared of the three respondents who terrorised him; the attacks designed to intimidate and frighten; they attacked M's personal dignity and caused him to suffer significant embarrassment; the sexual offences designed to cower, humiliate and demean for the purpose of</p>	<p>TES 17 yrs imp. EFP.</p> <p><u>Sheppard</u> TES 16 yrs 6 mths imp. EFP.</p> <p><u>Woods</u> TES 14 yrs 6 mths imp. EFP.</p> <p>At [113] The offending was aptly characterised by the State ... as sadistic, malicious, humiliating and intimidating. The respondents, in concert, deliberately preyed upon a highly vulnerable victim. ... Together, the respondents waged a campaign of terror upon M, which caused him significant physical injury and broke him psychologically. The respondents' acts were merciless. They involved a level of deliberate callousness, cruelty and depravity seldom seen by this court.</p> <p>At [114] An especially serious feature of the offending was that it was committed in a prison by</p>
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		<p>and four brothers serving terms of imp.</p> <p>Left school during yr 10; never had paid employment.</p> <p>Long-term relationship; two children.</p> <p>Introduced to methyl by his father.</p>			<p>of the offences of agg sex pen without consent was heightened because they occurred in the context of the ongoing extortion of M, ... All of these offences, when considered together, substantially increased each respondent's overall criminality, ...</p>
1.	<p><i>Musgrave v The State of Western Australia</i></p> <p>[2021] WASCA 67</p> <p>Delivered 23/04/2021</p>	<p>23 yrs at time offending. 25 yrs at time sentencing.</p> <p>Convicted after trial.</p> <p>Prior juvenile and adult criminal history.</p> <p>Youngest of three siblings; home environment free from substance abuse and violence; experienced some difficulties growing up; overweight; father a strict disciplinarian with high expectations; sexually abused by two ministers of religion aged 14 yrs.</p> <p>Left school aged 14; bullied; often retaliated resulting in his expulsion.</p> <p>Commenced TAFE pre-apprenticeship; did not</p>	<p>Ct 1: Indec assault. Ct 2: Sex pen (digital).</p> <p>The victim, S, was a young female backpacker from Europe. On her arrival in Perth she obtained work at a country tavern owned by Musgrave's parents. She was provided with a room, containing two beds, attached to the tavern.</p> <p>On New Year's Eve S completed her shift and joined patrons and Musgrave's family in the celebrations. During the evening she sat at a table and spoke with Musgrave, his mother and other people. However, S did not know Musgrave's name and at no time did she talk solely with him.</p> <p>At about 4.00am S went to her room and went to sleep in her bed. Sometime later Musgrave went to her room without invitation. He knocked persistently on the door until she answered. He said something which she did not understand before asking S for a hug. She told him, 'no'. S then made it clear she was not interested in him and that she wanted to sleep on her own. He then asked if he could sleep in her bed, to which she</p>	<p>Ct 1: 6 mths imp (conc). Ct 2: 3 yrs 6 mths imp (conc).</p> <p>TES 3 yrs 6 mths imp.</p> <p>EFP.</p> <p>The trial judge characterised the sexual penetration as no less serious by the fact that it was a digital penetration than it would have been had it been a penile penetration.</p> <p>The trial judge found the appellant's offending aggravated by his persistence; the victim's vulnerability and defencelessness and the power imbalance, in that she was a foreigner who</p>	<p>Dismissed.</p> <p>Appeal concerned error in characterisation of the seriousness of ct 2 and length of sentence of ct 2.</p> <p>At [3]-[6] Ground 1 challenges the ... remark that the offence of sex pen without consent committed by the appellant, which consisted of [him] inserting his fingers into the complainant's vagina, was 'no less serious' by the fact that it was digital pen than it would have been had it been a penile pen. Underlying that challenge is the proposition that penile-vaginal sex pen without consent is inherently more serious criminal conduct ... That</p>

	<p>complete the course.</p> <p>Some short term relationships; no established long term relationships.</p> <p>Short periods of work various roles; employment terminated primarily because of alcohol and drug misuse; unemployed two yrs prior to sentencing.</p> <p>Good physical health; history of hospital admissions for drug induced psychosis; periods of depression and suicidal ideation.</p> <p>History of cannabis and alcohol use; later amphetamines and other drugs, including LSD; intravenous methyl use aged 14-15 yrs.</p>	<p>responded 'no'.</p> <p>As he was the son of her employer S did not consider herself to be in any danger from Musgrave, and appreciating he was drunk and would be unable to drive a motor vehicle, she offered him the other bed in her room. He agreed.</p> <p>As S was falling asleep she realised Musgrave was getting into her bed. She screamed and told him to leave her alone. She then got out of her bed and into the other bed. Sometime later Musgrave offered to get out of her bed. S agreed and she returned to her own bed and went back to sleep.</p> <p>Later S woke up to find Musgrove in her bed. Her clothing was pulled down. He was touching her breasts and penetrating her vagina with his fingers. Shocked, S tried to push Musgrove away. She immediately got out of bed and left the room crying.</p> <p>A short time later S returned to her room, locked the door, showered and prepared to leave. S then left the tavern and hitchhiked to a regional urban area. She reported the matter to the police that same evening.</p>	<p>had recently arrived in Australia, she had limited English skills and she was employed by his parents.</p> <p>Offending very significant and continuing impact on victim.</p> <p>No victim empathy or demonstrated remorse; continued to deny the offences; little understanding of appropriate conduct towards women; elevated risk of reoffending if treatment needs not addressed.</p>	<p>proposition is not only wrong, as a matter of law. It is incoherent. ... this Court has repeatedly confirmed, there is no hierarchy of sex pen. The seriousness of every offence of unlawful sex pen must be determined by its own individual circumstances. ...</p> <p>At [186]-[187] ... the statement by the sentencing judge ... that the appellant's offending in relation to ct 2 was 'no less serious by the fact that it was a digital penetration than it would have been had it been a penile penetration' indicated that, in her Honour's view, the sentence that should be imposed on the appellant for ct 2 involving digital penetration should not be materially less than the sentence that would have been imposed if the ct had involved penile penetration. ... her Honour's view was not erroneous.</p> <p>At [205] ... The appellant did not simply digitally</p>
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				<p>penetrate the complainant's vagina without her consent. [He] sexually penetrated [her] despite [her] having made plain ... that she was not interested in him. Later, when the appellant was getting into her bed [she] reiterated ..., forcefully and unequivocally, that she did not want any physical contact with him. The appellant ignored [her] wishes and, despite her having in substance expressly refused consent, sexually penetrated her while she was sleeping. [His] offending was persistent and involved some premeditation. He breached the trust which the complainant had shown by permitting him to sleep separately from her but in her room.</p> <p>At [283] Nothing in the definition in s 319(1) or in s 325 of the <i>Criminal Code</i> suggests that any particular form of sex pen is, of itself, more serious than another. ... That is not to suggest, ... that all offences of sex pen</p>
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					<p>without consent will be equally serious. Rather, the seriousness of a particular offence will fall to be assessed by reference to all of the circumstances of the case, ...</p> <p>At [322] ... The offending in ct 2 was clearly not at the most serious end of the spectrum of offending conduct of this kind. Nevertheless, ... this case involved a very serious instance of sex pen without consent.</p>
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