

JERSEY / JUDGMENT

AG v B [2020] JRC 110 (08 June 2020)

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JUDGMENT

THE Commissioner:

Introduction

1. The Court sat on 2 nd June and sentenced the Defendant to four and a half years' imprisonment on one count of rape, the Defendant having been convicted by a jury in February this year. Reasons were reserved. This judgment contains those reasons. The facts
2. The Defendant and the Complainant, who were at the time both married and cohabiting, were on holiday together with their children aged 9 and 7 in 2018. Their holiday accommodation was a cabin with 2 double bunks, one above the other, but the bunks were sufficiently long that the children could have slept at the far end of the bunk occupied by their parents. With difficulty, the bedroom could thus have accommodated eight people.
3. The Complainant alleged that the Defendant raped her in the early hours of the morning on the last day of their holiday. Her evidence to the jury was that she had previously had an exchange of emails with him in which she said that he should not assume he would have sex with her whenever he felt like it and indeed some of those emails were before the jury. It was accepted by the Complainant that the two of them had had consensual intercourse while they were away on holiday, sometimes in the shower or sauna while the children were in the bedroom, and she said she could not remember if they had also had intercourse in the bedroom when the children were in there but asleep. However, she did agree that they had at least on other holidays and perhaps at home also had intercourse in a bedroom when the children were present or came into the room.
4. The night before the rape, the two of them had had an argument. Marital relations had been strained for some months as a result of a relationship between the defendant and another woman and indeed they had reached a provisional agreement that he would move out of the matrimonial home after their return from this holiday. He had asserted the other relationship was an emotional rather than a sexual one but the Complainant had discovered that it was more than merely an emotional relationship. Early the following morning the Complainant awoke to feel the Defendant's erection in her back. He removed her pyjama trousers and penetrated her from behind as she lay facing the wall. She told the jury that on several occasions she said "No" and she made plain to him she did not consent. She said her fists were clenched and she was crying.
5. He denied that account but the jury's verdict means that we must pass sentence on the

basis that either he knew that she did not consent or he had no reasonable belief that she did. When he had finished, she went to the sauna/shower and on her return to the bedroom, the Defendant and the children were up and dressed and he behaved as if nothing untoward had happened. There was no allegation by her to the jury of any threats or violence on the part of the Defendant. However, she clearly felt abused because she texted two of her friends that evening to describe what had happened in substantially similar terms to the evidence she gave to the jury. In the text messages she told them she did not fight him because the children were in the room and she did not want them to hear their parents fighting. 6. The intercourse took place in the bottom bunk of the cabin - that was admitted. There was disagreement between the Complainant and the Defendant as to where the children were sleeping at the material time, but it was agreed that while the intercourse took place the children were there - indeed, according to the Complainant, the eldest child woke up during the intercourse and was told by her father to go into the top bunk with her iPad. The Crown takes the presence of the children to be an aggravating factor consistently with the judgment of the Court of Appeal in England in the case of *R v Milberry*

[2003] 1 Cr App Rep 25 . We return to this later in this judgment. 7. The Complainant and the Defendant married in 2007. There are currently divorce proceedings on hand in the Family Division of this court. Relationship rape 8. Cases of marital or relationship rape in this court have been rare and this case requires us to consider the extent to which the relationship between the Complainant and the Defendant at the time can provide mitigation for what is by any standards a very serious offence. It is a subject which can excite strong emotion on either side of the debate. We have considered the authorities put before us namely, *AG v D* 5th December 1995, *AG v Jones* in the Inferior and Superior Number (1999/221 and 2000/22), *AG v Dobrin and others* [2019 JRC 097]; and those from England and Wales namely *R v Billam*

[1986] 8 Cr App Rep (S) 48, *R v M*

[1995] 16 Cr App Rep(S) 770 and *R v Milberry*

[2003] 1 Cr App Rep 25 . 9. We take into account that the English decisions are not binding on us but that *Billam* and *Milberry* have been applied in this court on a number of occasions in the past. We note that in *Billam* , regard was had by the English Court of Appeal to Criminal Law Revision Committee's 15th report on Sexual Offences (1984) Cmnd 9213 at para 2.2, and in *Milberry* to the advice of the Sentencing Advisory Panel in relation to sentencing for rape. We accept the approach adopted by the courts in those cases. 10. In our view the correct approach to this question can be summarised by these propositions: (i) The offence of rape can be just as or even more serious when committed against a spouse, partner or other person where there is a continuing relationship as when committed by a stranger. If in the case of stranger rape there is likely to be added fear on the part of the victim that the offence might be worse than rape and end up as murder as well as increased concern about the risks of infection, the offence in the case of a relationship rape can sometimes be regarded as aggravated by a breach of trust

- very damaging not just within the relationship in question but possibly to the ability of the victim to trust people in future relationships. It is clear that rape within a relationship is still rape. When either partner says "no" to sex, that should be an end to it. (ii) Nonetheless, as said in *Milberry*, there are cases where it would be right to have regard to the relationship when it comes to sentence. The example given in that case was where "the offender and the victim are sharing the same bed on a regular basis and prior to retiring to bed both had been out drinking and because of the drink the offender failed to show the restraint he should have"; as the court put it, common sense tells us that this is in a wholly different category from stranger rape. This is one example and there may be others. At the heart of it is the question of identifying the harm which the victim has suffered - the greater that harm, the less impact on the mitigating effect, if any, of the relationship between defendant and victim. Indeed, the offence may in some cases be even more serious than stranger rape. (iii) Where there is a subsisting relationship at the time of the offence, with a single act of rape committed in circumstances of a close relationship between complainant and defendant, the impact of the offence on the victim needs to be carefully scrutinised - it may be just as bad as in a case of stranger rape, but it may be much less significant. Victim personal statements 11. In her victim statement - and we interpose to say that the law enforcement authorities should ensure that statements of this kind are described as victim personal statements and not victim impact statements which are a different creature - made on 21 st May this year, the Complainant says that the offence has changed her life. She sees it as the final assault after years of coercion and control. In effect, his conduct in the rape has led her to re-evaluate their married life together and has caused the lives of her children and her own life to be thrown into disarray. She alleges that he has alienated her from her family by his control and has sought to isolate her and remove her support networks. She alleges that he has elongated the proceedings in the divorce proceedings in the Family Court at every stage and she, perhaps not unnaturally as a parent, blames him for calling their child to give evidence at trial on his behalf. She asserts that the Defendant has sought to destroy her professional life by reporting her to her professional governing body. She has had time off from work through stress and has suffered financially as a result. The Crown says that we are entitled to have regard to these statements as showing the impact of the offence upon her. 12. The difficulty with this list of impacts upon the Complainant is that while some may be down to the rape, others could just as easily be down to the breakup of the marriage or to her re-evaluation of their lives together, which she now finds to have been unacceptable in ways hitherto not appreciated. 13. What she says is at least in part disputed by the Defendant. We do not think we could resolve these issues without a full scale trial of them with evidence on either side, and it seems to us that that would be undesirable from almost every perspective - it would lengthen the sentencing process, it might draw into that process factors which are not relevant to sentence, and it might encourage the court to reach conclusions which are better reached in the Family Division divorce proceedings, if indeed it is necessary to reach them at all. 14. We have considered the guidance of the English Court of Appeal in *Perkins*

[2013] EWCA Crim 323 and Chall

[2019] EWCA Crim 865 . Although we do not have the equivalent of the applicable English Practice Direction, we have taken that guidance generally into account. We agree that with a victim personal statement, the court should be cautious to avoid the possibility of any overstatement of harm caused by the offence

- and that is particularly so with sexual offences where the victim personal statement will very likely be affected by the intensely personal feelings of the victim. Furthermore, in cases like the present, whether she appreciates it or not, the feelings of the victim may well be affected by a range of factors which are not directly connected with the offence - the Defendant's affair if that led to the breakdown of the marriage, the impact of that breakdown on the children, the conduct of the defendant after the holiday and his alleged harassment of her, and so on. We can have the utmost respect for her feelings and at the same time appreciate that the need to deliver objective justice in sentencing is such that we proceed with the caution that the English Court of Appeal suggests. 15. In the present case we have as indicated a victim personal statement from the Complainant but we do not have a victim impact statement as was before the court in AG v Majid

[2003] JRC 101 . In that case the court said it could not take into account the impact on the victim of what the defendant was said to have done during the course of a two year relationship because he had not been charged with any offence other than that for which he was to be sentenced. If that were true of a victim impact statement, it would be all the more true of a victim personal statement, which is prepared by the victim and not by an objectively independent professional. 16. We have concluded that we should proceed on the basis that it is to be expected that a wife who has been raped by her husband in the circumstances which exist here will be likely to have suffered distress, humiliation and a blow to her self-esteem in her relationships and there is support for that expectation in the victim personal statement which the Complainant has made in this case. Starting point 17. In accordance with the case law to which we have referred, we have considered whether the proposed starting point of 5 years' imprisonment is appropriate. In our view it is. 18. Although the court is given guidance as to the starting points to be used in different kinds of rape, the court is also required to take a step back and look at all the facts to identify what seems to be the right sentence for the defendant before it in respect of the particular offence committed. It is why this Court has previously leaned against the application of strict sentencing guidelines and why in particular starting points have not always been adopted - see in particular AG v Dobrin and others . In that case the adoption of a starting point of 15 years in accordance with the authorities might have been regarded as too low and would have resulted in a sentence that the court considered was unreasonably low for some of the defendants, and the court did not adopt it. In other cases we can estimate that the starting point would be regarded as too high for the sentence adjudged to be appropriate. Sentencing is not and has never been regarded as a mathematical exercise in this jurisdiction. 19. However, the guidance given in Milberry

has been adopted by this court in a number of cases previously and we would need good reason to depart from it. We see no reason to do so in this case. Taking a step back, as we are enjoined to do, it results in a sentence we think is appropriate. While there was no violence or threat of violence, the offence was an abuse of the trust and intimacy which ought to exist within a relationship like this one. Mitigation 20. We heard a lengthy speech in mitigation from Advocate Steenson, who did not represent the defendant at trial, but who has said everything which could possibly be said on his behalf; and we took account of all he said. As he accepted, in the light of the Defendant's not guilty plea and pending appeal against conviction, he cannot ask this court to give credit for the most pertinent items of mitigation which apply in cases like this - the guilty plea obviating the need for the victim to give evidence at trial and the expression of remorse. 21. The Defendant is of good character. It has often been said that good character, while a mitigating feature in most cases, carries less weight in offences of this nature. But that good character still carries some weight, perhaps particularly in the context of a single count of rape within a marriage without other aggravating features; as do the fulsome references which the Defendant was able to put before the court from a range of family, friends and patients. Furthermore while we take note of the impact on the Complainant, we can also have regard to the fact that this offending has dramatically affected the Defendant's life - his reputation, his ability to practise his profession and most likely, his relationship with his children. Of course it is easy to say he should have thought of all that before offending, but the redefined offence under the Sexual Offences (Jersey) Law 2018 requires a conviction where a defendant genuinely but unreasonably believed there was consent although in fact there was not, whereas hitherto the prosecution had to prove knowledge of a lack of consent or recklessness as to whether there was consent. The likelihood of the reckless/unreasonableness test for mens rea having the same outcome in stranger rape cases is probably high but in relationship rape cases it seems to us there is a greater probability of the rapist having a genuine but unreasonable belief that his or her partner was consenting. That does not mean that the offence is not made out in such cases; of course it is, but it does mean there may be greater scope for an allowance for good character, especially - but not only - if the unreasonable belief is linked to acute emotional difficulty within the relationship. 22. The Crown contend that whatever allowance for mitigation is made can be discounted by the presence of the children in the room at the time of the rape. We accept the general principle but we do not consider that to be an appropriate factor to which we should give much weight in this case. The Complainant herself agreed that when on holiday she and the Defendant had frequently had sex while the children were in the same room. Indeed, her evidence in chief was that on this particular holiday, the two of them had had sex in the shower and the sauna while the children were in the bedroom and she told the jury she could not recall if they had had consensual sex in the bedroom as well while the children were asleep. The sexual habits of the Complainant and the Defendant may or may not be commonplace in that respect but we do not think the Defendant's offence should be aggravated by taking into account activity in which he and the Complainant had indulged consensually on other occasions. There is no

indication that the children saw anything which would have upset or affected them at the time. 23. Accordingly, on the application of the Milberry guidelines, we think the appropriate starting point is 5 years imprisonment. Having regard to the fact that this was an offence without significantly aggravating features and to the mitigation we have described, we reached the sentence of four and a half years on the single count of rape of which the Defendant was convicted. Notification requirements 24. We have considered the Social Enquiry Report and the psychological report of Dr H and while the Defendant does not in our judgment present a very significant risk of further sexual offending, we are not satisfied that a shorter period than 5 years would be appropriate pursuant to Article 5(4) of the Sex Offenders (Jersey) Law 2010 . Accordingly we specified that period as the applicable period before the Defendant may apply to be released from the notification requirements under that Law. Restraining order 25. Crown Advocate Thomas sought restraining orders pursuant to the Crime (Disorderly Conduct and Harassment) (Jersey) Law 2008 , the effect of which would be to provide protection for the Complainant against any harassment from the defendant in the future. The proposal was that these would remain in force until further order. The risk to the Complainant in this respect seemed to us to be small but, given the offence committed, we reached the view that some protection was appropriate for a limited period. Accordingly we have imposed restraining orders that for a period of four years from today's date, the Defendant must not: (i) Contact the Complainant directly or indirectly, (it being noted that indirect contact would not prevent contact through lawyers); (ii) Intentionally go within 50 metres of the Complainant at any time and if on finding himself within that distance he should take immediate steps to remove himself from her; and (iii) Encourage any third party to behave in a way towards the Complainant that would be likely to cause her harassment, alarm or distress. Authorities AG v D [5th December 1995] AG v Jones in the Inferior and Superior Number (1999/221 and 2000/22) AG v Dobrin and others

[2019] JRC 097 R v Billam [1986] 8 Cr App Rep (S) 48, R v M [1995] 16 Cr App Rep(S) 770 R v Milberry

[2003] 1 Cr App Rep 25 . English Court of Appeal to Criminal Law Revision Committee's 15th report on Sexual Offences (1984) Cmnd 9213 at para 2.2 Perkins

[2013] EWCA Crim 323 Chall

[2019] EWCA Crim 865 AG v Majid

[2003] JRC 101 Sex Offenders (Jersey) Law 2010 Crime (Disorderly Conduct and Harassment) (Jersey) Law 2008 Page Last Updated: 01 Jul 2020 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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