

JERSEY / JUDGMENT

AG -v- Brown [2017] JRC 200 (29 November 2017)

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JUDGMENT

THE BAILIFF: 1. On 30 th October, 2017, the Court sentenced the defendant to life imprisonment and ordered that he serve a minimum period of 6 years' imprisonment from that date. Brief reasons for the sentence were given at the time, with the detailed reasons reserved. This judgment contains those reasons. Time for any appeal will run from the date these reasons are handed down. 2. The defendant is 52 years old and pleaded guilty to the manslaughter of the victim, a man in his 70s, in October 2016, that guilty plea being entered on the basis of the defendant's diminished responsibility. The defendant had been indicted for murder, but the Crown accepted the guilty plea on the basis indicated. 3. The defendant has a number of convictions for assault and criminal damage, but the last occasion prior to the present offence on which he has been before the Court was in 2003 when he breached the community service order imposed for a common assault the previous December. While in prison in 2003, the defendant was the victim of a serious grave and criminal assault which resulted in a brain injury and some cognitive impairment. We will return later in these remarks to his psychological and psychiatric state. 4. At approximately 7.15pm on the day in question, the defendant went to the victim's flat and attacked him with a knife when he answered the door. There were no witnesses to the assault, but the post mortem examination showed that the victim sustained 18 stab wounds to the left side of his body, and the deepest of these were approximately 10cms. The wounds entered the left chest cavity and there were puncture wounds to the left lung, heart and left anterior coronary artery. There were also slicing like injuries to the spleen, stomach and liver. Some of the wounds cut through to the bone of the victim's ribs, indicating that at least moderate force was used. Following the killing, the defendant made his way back to his flat where he called 999. He told the operator he had just stabbed someone, and the call was transferred to the Ambulance Control Room. During the call he stated that he had just stabbed someone "because he abused and used my daughter and I went mad and I stabbed him". When asked if the victim was still awake and breathing, the defendant stated "I don't give a fuck". He gave his name and address. He named the victim, who had been an acquaintance of his for some time, and he stated that he just wanted to hurt him "so bad" because "he raped my daughter". He had been "boiling up" for months and "just went bang I'm going to do it". When he was asked how he was feeling, the defendant stated "shaky and scared. I want to do it again ... I want to kill him". 5. Various prescription drugs were found in

the blood of the defendant, all of which had been prescribed to him. Alcohol was also present - the most likely concentration of alcohol was 160mg in 100ml of blood i.e. twice the prescribed alcohol limit for driving. 6. The Crown's conclusions were that having regard to aggravating and mitigating factors, the defendant's culpability and the risk which he poses, a discretionary life sentence should be imposed, with a minimum period of 10 years' imprisonment. The law 7. The Crown invited us to apply the three stage approach as set down by the English Court of Appeal in *R v Clive Wood*

[2009] EWCA Crim 651 . That would require us first to assess the seriousness of the offence, secondly the culpability of the offender and finally the question of whether a life sentence was necessary and proportionate to protect the public against the risk of future harm posed by the defendant. 8. In *AG v Rzeszowski*

[2012] JRC 198 the Royal Court indicated that it had to consider the principles to be applied when deciding on the sentence, and given the absence of recent authority in Jersey, the Court considered several English cases which have dealt with sentencing in the case of diminished responsibility manslaughter. *R v Wood* was described as the leading case, which as a decision of a five judge Court of Appeal, led by the Lord Chief Justice, must be considered correct in that jurisdiction. The Royal Court summarised the points arising out of *Wood* as:- (i) When assessing the seriousness of the homicide in a manslaughter case, the Court should have regard to the features listed in schedule 21 of the Criminal Justice Act 2003 ("the 2003 Act"), which is the equivalent of Article 9 of the Criminal Justice Life Sentences (Jersey) Law 2014 (the "2014 Law"). (ii) The Court of Appeal considered that the 2003 Act had increased the sentencing levels for murder and this must be reflected in increased sentencing levels for diminished responsibility manslaughter. (iii) Having assessed the seriousness of the killing, a court must then have regard to the culpability of the accused, which in some cases might be reduced almost to extinction whilst in other cases might remain very high. 9. The Royal Court in *Rzeszowski* applied without further analysis those tests. 10. We agree with the Royal Court in *Rzeszowski* that the case of *Wood* is helpful, but there are some qualifications which it appears to us it is important to make to that general statement. The argument in *Wood* turned heavily on the interplay between Section 225 of the 2003 Act, Section 143 of that Act and Schedule 21 of that Act. In particular, Section 225(2) required the Court to consider whether the seriousness of the offence justified the imposition of a sentence of imprisonment for life. Section 143 required the Court, when addressing the seriousness of any offence, to consider "the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused." Section 143(1) appears under a heading "General Provisions about Sentencing". We interpose there to say that there is room for the view that such statutory provisions are a trespass by the legislature on the functions of the judiciary, which might be expected to know rather more about sentencing than members of the legislature, and it is acknowledged with appreciation that no such interference has taken place in this Island. 11. It appears to us from a study of the analysis in *Wood* that, as a matter of statutory construction, the courts in England and Wales are

bound to consider the question of the offender's culpability when considering the seriousness of the offence. It appears therefore that in England and Wales, culpability is taken into account not only in considering the seriousness of the offence for determining whether or not a life sentence ought to be imposed, but also in determining the minimum period of imprisonment which should be served where a life sentence is imposed. For the reasons given in the judgment, the Court of Appeal did not accept the submission that the assessment of the seriousness of an offence of manslaughter of diminished responsibility had to be focused exclusively on the defendant's culpability, however. It concluded that the Court should assess both the seriousness of the offence to address culpability and the harm consequent on the defendant's action. The position in England and Wales was possibly further complicated at that time by the existence of imprisonment for public protection. 12. As the Court recognised in *Wood*, there will be occasions where there is a finding of diminished responsibility that the culpability of the defendant may sometimes be reduced almost to extinction. If that were the case, it is hard to see how the seriousness of the offence with nearly zero culpability could of itself result in a discretionary life sentence - to reach that conclusion would really be to say that the seriousness of the offence was governed only by the consequences of the offence, namely the loss of life and it would seem to follow that if that were the approach to be adopted, a sentence of life imprisonment would be imposed routinely in cases of diminished responsibility manslaughter. It appears to us that would be unfortunate. The statute does not so provide, and the sentence for manslaughter is at large. We therefore reach the conclusion that culpability is a factor which can be taken into account by the Court when weighing the seriousness of the offence, and therefore may result in the imposition of a life sentence, but conversely, the fact that there is little culpability does not preclude the imposition of a life sentence. The decision in *C v The Attorney General*

[2015] JCA 159 to which we will come shortly, justifies that approach. 13. In its written summary, the Crown contended that the Court should have regard to the statutory aggravating and mitigating factors in Article 9 of the 2014 Law. In one small respect we think this is to misconstrue that provision in the 2014 Law and when the point was put to the Attorney, he readily agreed. Part 2 of the 2014 Law concerns the minimum periods of imprisonment for mandatory life sentences. In those cases, the Court is required to fix a minimum period of imprisonment in respect of an offender by first arriving at a starting point, having regard to the provisions of Articles 4 to 8, and then applying the aggravating or mitigating factors which are set out in Article 9. Manslaughter, however, does not call for a mandatory life sentence. Article 9 does not therefore fall to be applied by reference to the statutory regime for discretionary life sentences. The maximum sentence for manslaughter is life imprisonment, but there have been many cases where life imprisonment is not the sentence which has been imposed. Part 3 of the 2014 Law provides for a process by which the Court can fix a minimum period of imprisonment in respect of a discretionary life sentence. It may well be that in the course of doing so, some of the aggravating and or mitigating factors which are set out in Article 9 may be relevant to the particular case

which is before the Court at the given date, but it does not follow that any of them will be. The proper construction of Part 3 of the 2014 Law is that it does not provide for those cases where a discretionary life sentence should be imposed, but it does provide for a mechanism for establishing the minimum period of imprisonment where a discretionary life sentence is imposed, with some restrictions none of which are relevant to the instant case. 14. In considering whether a discretionary life sentence should be passed on this defendant, we apply the principles which were canvassed in detail in *C v HM Attorney General* [supra], a proper summary of which may be found in this extract:- "32. We are of the clear view that the principles identified in the decisions of the English Court of Appeal in *Hodgson*, *de Havilland*, *Whittaker* and *Chapman* should apply in Jersey. A discretionary life sentence should be passed only where the offender has been convicted of a very serious offence and where there is good reason to believe that the offender may be a serious risk to the public for a period which cannot be determined at the date of sentence. On this basis, the imposition of such a sentence is consistent with the structure of the 2014 Law: the minimum term is fixed to represent the period of imprisonment necessary to reflect the seriousness of the offending (retribution and deterrents) while release is a matter for the panel created under Article 17 when the offender no longer poses a danger to the public (see Article 19(5)). To impose a discretionary life sentence where the offender does not pose a serious danger to the public would be inconsistent with the 2014 Law, and wrong in principle." 15. Manslaughter is a very serious offence - inevitably, because the crime involves the loss of life and, as we said when passing sentence, the Court extends its sympathy to the family of the deceased. Thus the first part of the test in *C v HM Attorney General* is satisfied. If we are wrong in that, and were obliged to look at culpability to assess whether, in a case of manslaughter, the test is passed (which we do not think is the position), we would reach the same conclusion. In this case, but for the provisions of the *Homicide (Jersey) Law 1986*, the defendant would unquestionably have been found guilty of murder. He deliberately went to the victim's flat, armed with a knife, and when the victim opened the door, he used the knife at the very least having an intention to cause grievous harm. The seriousness of the offence - and therefore his culpability - is increased by his self-induced drunkenness. It is not apparent that the conduct of the victim towards the defendant's daughter was anything like as serious as the defendant understood it might have been and it has to be added that the defendant's daughter is adult and well able to make her own choices. In all the circumstances, we take the view that this offence justifies a discretionary life sentence on the first part of the *Whittaker* test - this was a very serious offence. 16. However, we must now turn to the medical evidence. That is relevant in two respects. First of all it is a necessary ingredient in determining whether he is a risk to the public for the purposes of the imposition of a discretionary life sentence. Secondly, it assists in determining the defendant's culpability and therefore the minimum term he should serve. 17. As to the first issue, which is the risk of the defendant committing a future offence of serious violence, the evidence conflicts. In his written report, Dr Joseph considered that the risk is relatively high, because it stemmed largely from the defendant's untreatable brain injury. He concluded that there was little likelihood that the defendant

would be able to maintain abstinence from alcohol when eventually released into the community. He is likely to continue to feel disrespected and belittled by others, as a result of the brain injury and the underlying personality disorder, and he is therefore likely to experience continuing difficulties in interpersonal relationships. As a result, Dr Joseph treated the risk of impulsive serious violence as significant for the foreseeable future. 18. The clinical psychologist Dr Krljes has provided two reports in connection with sentencing. In the main report, she described the future risk to others as low. She placed heavy reliance on the protective factors such as personal support from his family, a well-established daily routine and adequate professional care and support. In her addendum report, Dr Krljes criticised the conclusions of Dr Joseph as being based entirely on his clinical impression in the process of assessment and she thought that Dr Joseph had not mentioned clinical and historical factors or identified the relevant protective factors that would mediate the defendant's future risk of violence. In her judgment, the critical fact was that there had been no offending between 2003 and the commission of this offence which in her view showed that offending had become atypical for the defendant. She also criticised the Social Enquiry Report where the probation officer had concluded that the defendant was of moderate risk of committing future violence, in circumstances where, if he did, the degree of harm likely to be caused was assessed as high. Once again reliance was placed on the 14 years during which the defendant did not offend. 19. Dr Poole considered that the defendant's organic personality disorder is permanent and that it is likely that the defendant would continue periodically to drink alcohol to excess if he were resident in the community. The defendant had a tendency towards impulsivity, which had been enhanced by the organic personality disorder and cognitive impairment, and was further increased by alcohol intoxication on the occasion of the offence. 20. Professor Eastman also expressed the view that the risk of future violence on the part of the defendant should properly be seen as low, assuming that the defendant was subject to proper risk management. While we note the reference to risk management, it appears to us to be too early to indicate the extent to which such risks as there are might be capable of management - in part they will be determined by any further deterioration in the defendant's psychological condition and in part by the success or otherwise of the prison regime to which he is subject. 21. Dr Poole was not present to give evidence before us, but we heard live evidence from Dr Joseph, Dr Krljes and Professor Eastman. The thrust of Dr Joseph's oral evidence was that the combination of his brain damage and the abuse of alcohol amounted to risk factors which showed that the defendant was not able to control his feelings since his brain injury and in his view, this was not necessarily a one off situation. Indeed, there is a reported comment in the Social Enquiry Report and in Dr Joseph's Addendum report that the defendant told Dr Joseph that had he not been in prison he would have killed his son if he had found out that he had committed incest. Dr Joseph thought that when the defendant was released from prison, he would need the structure which he is currently getting in prison and the discretionary life sentence would assist by enabling those who had responsibility for the defendant to put the relevant controls in place so that he could be released at some future date. As for the criticisms of

his reliance upon his clinical impressions, and the fact that he had not routinely carried out an HCR20 test, which involves actuarial and statistical evidence, he pointed out that this was a man who, prior to the incident in 2003 which caused the brain damage in question, had demonstrated anti-societal tendencies, and furthermore that if the HCR20 had been carried out three months before the killing of the deceased, the defendant would have been assessed as a person of low risk. Nonetheless he had in fact killed. Dr Joseph regarded the imposition of a life sentence as not meaning that the defendant would in practice be locked up for the rest of his life. That was not a definite view, but he was optimistic. Dr Krljes had nothing she wished to change from her written report. She thought that the HCR20 test was the most effective and accurate way of predicting and managing risk. She thought that the probation officer who had applied the second version of the test had not applied the most recent version, and furthermore, because she was not psychologically qualified, she was not in the best position to perform that test anyway. She agreed that structure was very important for the defendant as well as a good social network, and she thought that management of his condition with appropriate psychiatric services was a possibility. He was a very vulnerable prisoner whose care needs would have to be met in the future. She agreed with Dr Joseph on the three factors which created risk - brain damage, alcohol and the situation in which from time to time the defendant might find himself. We also heard from Professor Eastman who stood by his reports. In his view Dr Joseph had elided risk assessment with management issues and he thought that Dr Joseph should be criticised for not using the tool (HCR20) which was a standard tool in the profession. In his view, the defendant was manageable because of his personality and his disabilities - the brain damage could not be treated but it could be managed. Nonetheless, he agreed in his evidence that if the defendant were to be released into the community, he needed to be watched "like a hawk". 22. In addition, the Court had the benefit of evidence from the probation officer Miss Luce, which we found helpful. We recognise, of course, that the probation officer is not a professional psychiatrist or psychologist and she did not purport to give professional evidence of that kind. 23. Putting all that together, the Court's view is that the real question is whether the risk to the public is such that the Court ought to pass a sentence of life imprisonment in order to be in the best position that the risk which the defendant presents can be managed adequately in the future. This is consistent with the approach taken in *C v HM Attorney General* [supra]. Having regard to all the medical evidence, the Court was in no doubt that the defendant presented a risk to the public against which protection should be put in place on his release, and the life sentence was the only mechanism for achieving that. Manslaughter is a very serious offence, and there is good reason to believe that the defendant presents a serious risk. It did not seem to us that there was really any doubt about that risk. We thought the objection which Dr Joseph put up to the criticism of him for not using the HCR 20 test was a good one

- if it had been performed a month before the defendant in fact killed the victim, he would have been assessed as a low risk and that does not seem to be disputed. This is not to say that the tool is not capable of being useful - of course it is - but it is to say that with

assessments of this kind, there must always be room for clinical judgment to be applied in the light of known facts, and one of those was critically the fact that this defendant had actually killed in the last 12 months. Furthermore, the defence expert Professor Eastman, whilst criticising Dr Joseph for eliding risk assessment with management issues, gave evidence that the defendant would need to be watched "like a hawk" if released into the community - and that is as conclusive evidence as may be that he presented a risk to the public. In our view, that risk is such that the public must be protected on the defendant's ultimate release, and the life sentence is the only way of ensuring that protection. We add that the Court expects this defendant to be released. The Court was unanimous in considering that he should not be locked up for life, and that he should indeed be released with adequate measures being taken to minimise the risk to the public at the date of his release whenever that is. Accordingly, the court imposed a sentence of life imprisonment for the diminished responsibility manslaughter which the defendant had committed. 24. We then considered the minimum term which the defendant should serve. In that context, we have had to consider his culpability. In this respect, the evidence which goes to the culpability of the defendant suggests that his culpability is low - see for example the prosecution psychiatrist Dr Philip Joseph in his addendum report dated 27 th September, 2013, at paragraph 3. There is some culpability attached to the voluntary intoxication with alcohol, which was likely to increase the defendant's level of impulsivity and propensity for violence, but a mitigating factor in that respect is that his use of alcohol is partly related to his way of coping following the brain injury. 25. The underlying factors show that, in the circumstances of his brain injury coupled with his consumption of alcohol, this defendant could not contain adequately his emotional response to what he perceived to be an interference with his daughter, an attack on his family. As a result of that loss of emotional control, he lost physical control and killed his victim. His brain injury enables him to say fairly and squarely to the Court and to the public that he is not as culpable as would be the case if this were a cold blooded killing by someone who had not suffered such an injury. 26. We accept that his culpability is much lower than that for which the Crown has contended. Apart from anything else, one could look at what the position would have been had this defendant been convicted of murder and not manslaughter. The Court, applying Part 2 of the 2014 Law, would have been required to fix a starting point. It seems to us that none of the aggravating features in Articles 5 and 6 of the 2014 Law would apply and accordingly the appropriate starting point would have been a mandatory minimum term of 15 years' imprisonment. That starting point falls to be increased or decreased having regard to the aggravating and mitigating factors in Article 9. If the starting point was liable to be slightly increased by reference to the degree of planning or premeditation, or the vulnerability of the victim by reason of his age, then no doubt it was also likely to be reduced having regard to the level of mental disorder or disability which, on this hypothesis, was not enough to bring the Defendant within Article 3(1) of the Homicide (Jersey) Law 1986 . Although the guilty plea is not set out in Article 9 as a mitigating factor, it appears to us that in the normal circumstances it would probably be applied because there is no logical reason for not applying it - all the same policy objectives in giving a discount for a guilty plea would apply

in relation to murder as they do to other offences notwithstanding that there is an automatic life sentence. It still is in the interests of the public that guilty pleas are entered and the expense of a trial avoided. The guilty plea still indicates the acceptance by the offender of responsibility for his offence. Article 9(1) requires the Court to take into account any aggravating or mitigating factors, and paragraphs (2) and (3) list some of those factors which may be relevant. It cannot be implied into Article 9 that those are the only relevant aggravating or mitigating factors. It follows that in the usual way, when fixing the minimum period of imprisonment, one would look at a starting point of 15 years and allow up to one third off for a guilty plea. In *AG v McCormick*

[2015] JRC 004A the Royal Court endorsed the approach in *R v Last*

[2005] 2 Cr App R (S) to the effect the maximum amount of mitigation for a guilty plea should be assessed at one sixth of the sentence or 5 years whichever be the greater. A key factor in that decision was the application of the Sentencing Guidelines published by the Sentencing Guidelines Council. We do not necessarily reject that approach, though it does not arise for the purposes of this case. It seems to us that there may be factual circumstances - for example where it is firmly established that the sentence is to be served in Jersey - where the rationale of the Court of Appeal in *Last* as indicated at paragraphs 11 to 13 of its judgment might not apply. 27. The law requires us to distinguish between a minimum term served for murder and a minimum term to be served for diminished responsibility manslaughter, because that is the nature of the different offences. The Crown's conclusions for a minimum term of 10 years do not make a sufficient distinction. We do not specify a precise figure for each mitigating factor in accordance with the established practice of the court because, as frequently stated, mathematical rigidity is undesirable. 28. Two Jurats were of the view that the right minimum term would be that of 5 years from the date of sentence. Four Jurats were of the view that the right minimum term would be 6 years from the date of sentence. In both cases, account has been taken of the time spent in custody, and in all the circumstances the Court ordered a minimum period of imprisonment which the defendant must serve to be that of 6 years from the date of sentence. 29. Article 16 of the 2014 Law requires the Court, after making an order under Article 14, to state in open court in ordinary language its reasons for making the order. When we handed down our brief reasons at the time of imposing the sentence we did so. The Attorney suggested that this Article on one construction might require the Court to give full reasons at that time. We do not think that is the appropriate construction of this Article, and if it is, we think the legislature should repeal it. It is of course absolutely the case that the Court should give in ordinary language its reasons for making the order which it makes. That is invariably so, because a court which makes an order without giving a reason is always liable to find its orders overturned on appeal - rightly, because no one can tell why the order was made, leaving an inference that there may well have been no proper basis for making it. There is therefore a serious question in this small jurisdiction as to why Article 16 was necessary at all. In our view, it must have been recognised by the legislature at the time that in dealing with serious cases of this kind -

murder, manslaughter or possibly rape

- there would often be complex factual evidence or legal argument. It must have been considered undesirable to require a Court to deliver full and detailed reasons at the time of imposing the sentence. It clearly would also be undesirable for the imposition of the sentence to be delayed, which would be most unfair on any defendant. The natural explanation for Article 16 is therefore that the legislature anticipated that in cases of this nature, detailed reasons would frequently be delivered later, but, where that was the case, it was right that the defendant should know immediately in brief why the sentence had been imposed. For that reason we expressed brief reasons at the time, and have now delivered full reasons in writing. Authorities R v Clive Wood

[2009] EWCA Crim 651 . AG v Rzeszowski

[2012] JRC 198 . Criminal Justice Act 2003. Criminal Justice Life Sentences (Jersey) Law 2014. C v The Attorney General

[2015] JCA 159 . Homicide (Jersey) Law 1986. AG v McCormick

[2015] JRC 004A . R v Last

[2005] 2 Cr App R (S) 64 . Page Last Updated: 08 Dec 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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