

JERSEY / JUDGMENT

AG -v- C [2015] JRC 033A

(18 February 2015)

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JUDGMENT

THE BAILIFF: 1. On 11 th February, 2015, the defendant was presented before the Superior Number to be sentenced on two Indictments. The First Indictment contained three counts. The first count charged rape of a young female aged between 9 and 14 years on diverse occasions between February 2009 and December 2013. The second count charged the defendant with procuring an act of gross indecency from the same girl over the same period, again on diverse occasions. The third count charged the defendant with indecent assault on the same girl during the same period, again on diverse occasions. The Second Indictment charged the defendant with six counts of making indecent photographs of children contrary to Article 2(1)(a) of the Protection of Children (Jersey) Law 1994 . The six counts reflected the making of such images on different pieces of equipment, including a desktop computer, a laptop computer, various memory sticks and media cards, an Apple i-Pad and two Apple i-Phones. On the desktop computer there were 1413 indecent images, of which 189 were still images at level 4 on the Oliver Scale, and 2 at level 5. On the laptop computer, there were 465 indecent photographs and 5 indecent movies; out of which there were 48 still images at level 4 on the Oliver Scale. On the various media cards and memory sticks, count three on the Second Indictment, there were 1363 indecent photographs and 62 indecent movies, with 165 still images at level 4 and 14 moving images at level 4; and 4 still images at level 5. In relation to counts 4 to 6, there were a fewer number of indecent images, and only 4 images at level 4 and above. 2. The Court sentenced the defendant as follows:- First Indictment (i) Rape

- life imprisonment, with a minimum term of 10 years' imprisonment; (ii) Procuring acts of gross indecency - 5 years' imprisonment concurrent to the minimum term; (iii) Indecent assault - 5 years' imprisonment, concurrent to the minimum term. Second Indictment 3. On each of Counts 1 to 3 to 3 years' imprisonment, concurrent to the minimum term and concurrent to each other, and provided no separate penalty for each of Counts 4 to 6. The Court also ordered the forfeiture and destruction of the computer equipment and other devices used in the commission of these offences. 4. It was indicated that reasons for these sentences would be delivered later and this judgment contains those reasons. 5. As a result of the guilty pleas entered on 28 th November, 2014, the defendant became subject to notification under the Sex Offenders (Jersey) Law 2010 . The Court in this judgment also

determines that the notification requirements shall be in place for a minimum of 15 years from 28 th November, 2014, after which time the defendant may apply to have them removed.

Facts

6. The defendant is 55 and a native of Jersey. In or about 2004 he commenced a relationship with a new partner who had a child from a previous relationship ("the victim"). The victim was 4 at the time. The defendant and his partner lived in Jersey from 2004, but the victim lived abroad with her grandparents until 2009 when she came to live in Jersey. According to the victim, the sexual abuse of her by the defendant started when she was 4 or 5, and the Court has been informed that there is video evidence to show that it had certainly begun by the time she was 7, because she is captured on film giving him oral sex. Between 2004 and 2009 the defendant would travel abroad with his partner and visit the victim at her grandparents' home. It appears that he and the victim would then go to a hotel where abuse would take place, sometimes over a number of days. On at least one occasion she was abused in the grandparents' home. 7. The victim's account is that the abuse started by inappropriate kissing and touching and indeed the defendant accepted that it initially involved touching the victim around her vagina and anus with his fingers, and also tickling her in the same areas with a small vibrator which he took with him. He encouraged her to touch his erect penis and took pictures and video of her naked and semi-naked. She viewed hard core pornography on the hotel television. Images and videos subsequently recovered show that by October 2006 she was performing oral sex upon him, and he would masturbate over her, ejaculating both on her stomach and in her mouth. She was 7 years old at this point. 8. A year later, video footage shows him attempting to penetrate her from a variety of positions. In a recording of 24 th October, 2007, when the victim was 8, he attempted to do so using three methods but was then heard to state:- "No not yet, not old enough yet. Maybe next year or the year after." 9. The abuse continued and certainly by 11 th February, 2009, there is an image showing full penetrative sex. At that point she was 9 years old and the defendant 49. The abuse continued until February 2014 when the victim disclosed the abuse to her mother. As a result of those disclosures, the victim was interviewed, the defendant arrested and a number of computer devices were recovered from him. These contained not only the indecent videos and images downloaded from the internet which formed the basis of the counts on the Second Indictment, but also some 450 images and 75 videos of the victim, which have not been charged as separate offences. The majority of these are at level 1 on the Oliver Scale, but over 40 were at level 4 and in some the victim appeared reluctant or distressed. The defendant has admitted that while he did not film all the rapes, he did film or photograph most of them. In addition he confirmed that there were other sexual assaults, not all of which were recorded. Analysis of the video and film footage shows at least six separate dates upon which rape took place, but it may well have been more. The offences in this case involve a full spectrum of sexual activity, including oral sex performed on the victim by the defendant and vice versa, mutual masturbation, digital penetration of the

victim both anally and vaginally, the use of sex toys on the victim, penetrating her both anally and vaginally, with some bondage scenes where the victim was tied to a bed using her school tie before being digitally penetrated by the defendant. On another occasion there was blindfolding of the victim during the abuse. The victim was instructed on another occasion to tell the defendant that she wanted him to " Fuck her ". She masturbated herself in his presence, including digital penetration and he would also masturbate in her presence, ejaculating over her body. The victim would also view pornographic films with the defendant. 10. The grooming of the victim clearly took place over a considerable period. The defendant later gave her expensive presents, or paid her for the sexual favours which he procured from her. All of this occurred in gross breach of trust, the defendant owing the victim a special duty of care and protection, a duty to nurture her according to the standards which our community expects so that on her attaining adulthood, she would have a firm basis for making sound decisions affecting her life and the lives of those about her. It is clear that however resilient the victim may be, she will have been deeply scarred at a psychological level by these experiences. Her childhood has been taken away from her and of course that can never be replaced. The defendant 11. The defendant has no relevant previous convictions. However, there were three matters which were dealt with at Parish Hall level between 1986 and 1995. Almost certainly those cases would today have been charged and indeed would have been referred up to the Royal Court by the Magistrate. In 1986, when aged 27, the defendant would hide behind bushes near Trinity School watching children pass. He had cut a hole in the pocket of his long coat to allow him to masturbate discreetly as he watched them. One young girl saw him so engaged, and reported the incident. The defendant apparently received psychiatric help after making admissions. 12. In 1994, two girls aged 11 and 12 complained that he was masturbating as they walked away from him along a country lane in Grouville. 13. In September 1995 there was a complaint from an 11 year old girl that the defendant had driven past her on a country lane before parking a short distance away. When she walked past, he got out of the car and followed her. In interview he said that " I didn't have any intentions to talk to her (the 11 year girl). I was just looking at her sexually-wise. " He admitted at that time that he had been visiting the area for over 2 years and had sexual fantasies about teenage girls. He said it was not confined to that part of the Island and indeed that " I have been watching children all over the Island ". He was offered and accepted psychiatric help and voluntary supervision, and the psychiatric treatment was apparently completed in July 1996. 14. The Court has received reports from the probation officer and from two psychologists, Dr David Briggs and Dr Ruth Emsley. There is a consensus that the defendant has minimised and from time to time sought to justify his behaviour, and that he lacks any real insight into the impact of his behaviour on the victim. Indeed, to some extent he partly blamed her for the abuse, telling the probation officer that the victim had used sex to her advantage to " get things ". There is also consensus that the defendant presents a significant risk of harm to pre-pubescent and adolescent females. 15. In an addendum report, Dr Briggs expands on a statement that the defendant's attitude to change is ambivalent when he says:- "Quite simply we do not know if any future treatment is likely to be effective. To reiterate, C has shown capacity for great

deception. We do not know whether he is genuinely motivated to put boundaries around his future sexual behaviour. Indeed in some ways these are only questions that can be answered if further work is undertaken with him. Given the history of matters we cannot assume C will find it easy to engage honestly with any therapy. Risk management in any case will not rely solely on his response to treatment. Upon his release into the community there will be a need for him to be subject to monitoring and surveillance." 16. These assessments resonate with the defendant's conduct in 2007 when an e-mail communication from him to an agency abroad read " I'm coming ... in October and looking for a young girl to have a fun time with. Can you help? " 17. The offence of rape carries at customary law a maximum sentence of life imprisonment and the Crown's conclusions were that life imprisonment with a minimum term of 10 years should be the sentence on Count 1. Those conclusions were based on alternative grounds, and as we do not share the thinking in respect of at least one of those grounds, we need to say more about them. 18. The Crown has contended that the offending in this case is so serious that a life sentence is justified. It was also contended before us that the defendant is a dangerous offender within the meaning of the English statutory regime. Although Advocate Pedley conceded that the English statutory regime had no application in Jersey, he submitted that Article 15(3) of the Criminal Justice (Life Sentences)(Jersey) Law 2014 (the "2014 Law") was relevant for the Court in determining whether to impose a life sentence as well as what the length of the minimum term might be. It seems to us that this was really an attempt to introduce the English statutory regime around dangerous offenders into Jersey by the back door, and notwithstanding Part 4 of the 2014 Law we do not think it is justified. Part 4 applies to a process subsequent to sentence and does not confer a different jurisdiction as to the imposition of the sentence itself. 19. As we understand it, the position in the United Kingdom was for many years that an executive power would be exercised, whether by the Home Secretary or by a body having accountability to him, for the release on licence of prisoners subject to a sentence of life imprisonment. That evolved into the Home Secretary setting minimum terms for such prisoners to serve, and that power was subsequently removed, recognising the objections to its exercise on grounds of the European Convention on Human Rights . In Jersey, statutory provision was made in the Criminal Justice (Mandatory Minimum Periods of Actual Imprisonment)(Jersey) Law 2005 in relation to persons who were subject to a mandatory life sentence - primarily, if not exclusively, persons convicted of murder in the Island. There was, of course, then a gap following that legislation in respect of setting minimum periods of actual imprisonment for non-mandatory life sentences. As a result, the Crown is right to say that the Royal Court's discretionary power to impose a sentence of life imprisonment had been rendered effectively unusable. This was the subject of criticism by the Royal Court in *AG v Rzeszowski*

[2012] 2 JLR No 26. The gap was remedied by the 2014 Law , the material parts of which are as follows:- "Minimum periods of imprisonment for discretionary life sentences 14 Court to order minimum period of imprisonment A court which sentences an offender to a discretionary life sentence shall order, in relation to that offender, a minimum period of imprisonment in respect of that offence or offences. 15 Determination of minimum period of imprisonment

- (1) The court may, under Article 14, order a minimum period of imprisonment of any length, including a period that is the whole of the offender's life.
- (2) Notwithstanding paragraph (1), the court shall only order a minimum period of imprisonment that is the whole of the offender's life if -
 - (a) the offender was 21 years of age or older when he or she committed the offence or offences to which the order relates; and
 - (b) the court is satisfied that such a period is justified because of the seriousness of the offence or the seriousness of the combination of the offence and other offences associated with the offence.
- (3) In determining the length of a minimum period of imprisonment in relation to an offender, the court may take into account such matters as it thinks fit, including any of the following -
 - (a) the seriousness of the offence;
 - (b) the seriousness of the combination of the offence and other offences associated with the offence; and
 - (c) any period that, before the offender was sentenced for the offence to which the minimum period of imprisonment relates, the offender spent on remand in relation to the offence. 16 Court must give reasons for order made After making an order under Article 14 the court shall state, in open court, in ordinary language, its reasons for making the order." 20. It is apparent to us that Article 15(3) does not introduce the provisions which dictate whether the Court should impose a life sentence, and to the extent that any contrary submission was made, we reject it. In our judgment, the provisions of Part 3 of the 2014 Law are not intended to introduce any form of comparable regime to that which is to be found in Part 12 of the Criminal Justice Act 2003 ("the 2003 Act") and the 2014 Law does not introduce a new power to sentence an offender to a discretionary life sentence. Article 15(3) is only concerned with how the Court goes about assessing a minimum period of imprisonment in relation to an offender. 21. Before leaving Part 3 of the 2014 Law, we note that the Court must state in open court in ordinary language its reasons for making the order it has. The reasons were reserved when sentence was passed because it was necessary to address specifically the Crown's contentions in respect of its conclusions. While in many cases the Court will state its reasons at the time of passing sentence, we do not think that the provisions of Article 16 prohibit us from delivering reasons later in an appropriate case, and this is one. 22. It is relevant to refer to the 2003 Act in more detail because the Crown's contention here

was that the defendant is a dangerous offender within the meaning of the English regime. This contention seems to us to have been an assertion that a life sentence ought to be imposed on the grounds of public protection. For the avoidance of doubt, the sentence of life imprisonment in this case was not passed on the grounds of public protection or on any grounds similar to those set out in Section 225 of the 2003 Act. If the States consider that it is appropriate to enact such legislation, that is entirely a matter for them. Indeed it should not be implied from anything now said that we think there should be any such sentencing regime here. What is apparent to us is that this Court cannot pass a sentence on the basis of a sentencing regime which does not form part of the law of this Island. We are required to impose a sentence which is appropriate for the offence which is committed - and indeed it is essential that the offender is sentenced for what he has done, and not for what he might do. Reasons for sentence of life imprisonment 23. The leading case in Jersey for sentencing in relation to rape is the case of *Da Graca v AG*

[2006] JCA 038 . In that case, the appellant, who was 23, had entered the house of the victim, aged 42, wearing a balaclava mask and carrying a knife. He directed her to the bedroom where he undressed her and tied her to the bed with cord. He placed a tape over her mouth. He pressed the point of his knife against her vagina. He caused cuts to her arms and throat with the knife and repeatedly threatened that he would kill her. He put his tongue in her mouth, he licked her breast and performed oral sex on her, and he put on a condom and then raped her. After the sexual act was completed, he again threatened her by drawing his hand across his throat indicating that he would kill her at a particular time. Da Graca then dressed himself and removed his mask so that the victim recognised him as one of the farm workers at the premises where the attack took place. He appeared ashamed and apologetic and broke down in tears. After his arrest, Da Graca was cooperative and admitted what had taken place. 24. The Court of Appeal upheld the Royal Court's approach which was to adopt the sentencing principles set out in the English decisions of *R v Billam*

[1986] 1 WLR 349 and *R v Millberry*

[2003] 1 WLR 546 . Our decision to impose a life sentence on count one of the First Indictment in this case is based upon those authorities. At the same time, we also recognise that Billam was decided nearly 30 years ago, and Millberry 12 years ago and in our view the community's awareness of the effects of child abuse has continued to grow, even in the last 12 years, and the abhorrence of ordinary people to offences of the kind involved in this case is such that it may be appropriate to reflect further on the underlying principles in those cases. 25. In the case of *Millberry* , Lord Woolf CJ made it plain that the Court of Appeal accepted the advice of the Sentencing Advisory Panel that there should be a revision of the then current sentencing practice for offences of rape. The Panel's advice was to retain the basic structure established in the case of *Billam* in 1986, but with modifications to take into account new legislation and the changes in the nature of the offence since the guidelines were issued. In particular, the Panel suggested in its

proposals that:- "... there are, broadly, three dimensions to consider in assessing the gravity of an individual offence of rape. The first is the degree of harm to the victim; the second is the level of culpability of the offender; and the third is the level of risk posed by the offender to society". 26. At paragraph 8 of the Millberry judgment, the Court of Appeal accepted that courts should consider each of those three dimensions whenever a sentence for rape was imposed. It was repeated that rape will always be a most serious offence, but its gravity would depend very much upon the circumstances of the particular case and it would always be necessary to consider an individual case as a whole taking into account the three dimensions which have been referred to above. 27. The Court of Appeal identified three particular starting points - 5 years, 8 years and 15 years on the basis that from that initial starting point, the actual sentence would be increased or decreased having regard to aggravating or mitigating circumstances in the case in question. Importantly however, at paragraph 23 the Court of Appeal said this:- "The Panel also agrees with this court in Billam that a life sentence will not be 'inappropriate' where the offender 'has manifested perverted or psychopathic tendencies or gross personality disorder, and where he is likely, if at large, to remain a danger to women for an indefinite time'. The Panel points out that unless there are exceptional circumstances (as now defined by the Court of Appeal in R v Offen

[2001] 1 CR App R 372) if a defendant has a previous conviction for rape or a conviction for another serious offence he will be subject to an automatic sentence of life imprisonment under S.109 of the Powers of Criminal Courts (Sentencing) Act 2000." 28. When we come to consider the seriousness of this offence, we consider we are entitled to have regard to this approach reflected by paragraph 23 of the Court of Appeal's judgment in Millberry . In this case, there is no evidence that the defendant has psychopathic tendencies or any gross personality disorder, although there is evidence that he is likely, if at large, to remain a danger to adolescent and pre-pubescent girls for an indefinite time. In our view, the offending which we have set out in detail earlier in these reasons clearly establishes that the defendant has manifested perverted tendencies. There are individual deviant sexual practices - tying up the victim by her school tie and her belt, writing on her body with lipstick, filming the offences taking place, making her watch pornographic films whilst the assaults are committed and ejaculating over a schoolgirl's body and into her mouth. One could take such deviant practices individually into account as revealing perverted tendencies, for the purposes of Millberry , but in our view the sexual activity in the round which we have described above also shows clearly such perverted tendencies. The members of this Court are drawn from a wide range of professional disciplines and have no doubt that they are reflecting the views of the community in this approach. We do not take the age of the victim into account for the narrow purpose of this analysis because if sexual intercourse with an underage girl was on its own to be reflective of perverted tendencies, then all such offenders would find themselves liable to life imprisonment on this aspect of the Millberry test. We do consider, however, we are entitled to look at the activity in the round and that in any event the judgment in Millberry provides guidance. It

is not to be construed as a piece of statutory legislation. 29. This defendant has quite deliberately groomed a young girl over the period of the offences into deviant sexual practices. The evidence before us shows that she was not a willing victim, despite that grooming. We recognise that the defendant has pleaded guilty and that he has no material previous convictions. We recognise that he has written us a letter in which he expresses remorse and shame and that he was cooperative with the police during their investigation. We nonetheless consider that this offending is so serious that a sentence of life imprisonment is an appropriate sentence to impose not only having regard to the sentencing structure of *R v Millberry*, but also as a reflection of the present day views of this community. 30. We have of course recognised that there may be offending which is worse than the instant case. There has, for example, been no use of violence in this case, or at least no significant use of violence. Even though there has been the grooming which we have identified, violence as an additional factor would not be impossible. There has not been much by way of sadistic behaviour, although the victim clearly did not like being blindfolded. There has been only one victim, and not many. In the view of this Court, the fact that there might be worse instances of offending does not make it wrong to impose a life sentence in relation to this offending. Indeed, we think it is the appropriate sentence. The minimum term 31. In accordance with the 2014 Law we are now charged to indicate a minimum term. The Crown contends that it would have moved for a sentence of 15 years' imprisonment if it had been moving for a determinate sentence. On that basis it is suggested that, allowing for remission for good conduct, the defendant would have been released after 10 years. Hence the Crown suggest a minimum term of 10 years. 32. If we had not been satisfied that an indeterminate life sentence was the appropriate sentence for offending of this seriousness, having regard also to the three dimensions to be taken into account under *Millberry*, there would have been some logic in taking a starting point of 15 years, given that this was offending over a protracted period of time; and increasing that starting point for aggravating factors that were relevant - in particular the gross breach of trust, the age of the victim, and the other deviant factors already referred to, but in particular the filming of the offending. Even taking into account the mitigation set out in paragraph 28 above, a sentence of imprisonment of between 15 and 18 years seems to us to have been one that could easily have been justified. Having regard to the remission for good conduct which the defendant would have been entitled to claim had a determinate sentence been passed, and to the time already spent in custody, we think that, albeit by a slightly different route, the Crown was correct in its conclusions that the minimum term to be set pursuant to Part 3 of the 2014 Law is 10 years' imprisonment which is to be calculated from the date of his detention in custody on these offences. At such time as the defendant applies to the Panel for release on licence pursuant to Part 4 of the 2014 Law, he will clearly have to show that he has undertaken the necessary treatment such that the Panel is satisfied pursuant to Article 19(5) of the 2014 Law that it is no longer necessary to confine him to prison for the protection of the public. 33. We do not think it is necessary to give further reasons in relation to Counts 2 and 3 of the First Indictment. Sentences of 5 years' imprisonment to be served concurrently with the minimum term,

seem to us to be appropriate having regard to the offending which is the subject of those charges and the aggravating factors already referred to. Second Indictment 34. In so far as the Second Indictment is concerned, we think that given the number of still and moving images at level 4 on the Oliver Scale, a starting point of 3 years' imprisonment before adjustment having regard to mitigating and aggravating features is correct. We accept the Crown's conclusions that it is right to increase the starting point to 4½ years, and, having regard to the mitigation there is, it is appropriate to impose a sentence of 3 years' imprisonment concurrent on each of Counts 1, 2 and 3 of the Second Indictment. There is no separate penalty on Counts 4, 5 and 6 of that Indictment although had it been necessary to impose a sentence for those charges, the sentencing guidelines in AG v Godson and Crowley

[2013] 2 JLR 1 would have been applied. Authorities Sex Offenders (Jersey) Law 2010. Protection of Children (Jersey) Law 1994. R-v-Oliver

[2002] EWCA (Crim) 2766 ,

[2003] 2 Cr App R (S) 15 . Criminal Justice (Life Sentences)(Jersey) Law 2014. European Convention on Human Rights. Criminal Justice (Mandatory Minimum Periods of Actual Imprisonment)(Jersey) Law 2005. AG v Rzeszowski

[2012] 2 JLR No 26. Criminal Justice Act 2003. Da Graca v AG

[2006] JCA 038 . R v Billam [1986] 1 WLR 349. R v Millberry

[2003] 1 WLR 546 . AG v Godson and Crowley

[2013] 2 JLR 1 . AG v Da Graca

[2006] JLR N8. R v Millberry

[2003] 1 Cr App R 25 . AG v Foster

[2007] JRC 201. AG v Hamon

[2006] JRC 160. AG v B. R .

[2006] JRC 155 . AG v Godson and Crowley

[2013] JRC 091 . R v Smith and Ors

[2012] 1 Cr App R (S) 82 . Page Last Updated: 16 Jan 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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