

JERSEY / JUDGMENT

AG v De Freitas 4-Oct-2019

[2019] JRC 197 (04 October 2019)

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JUDGMENT

THE lieutenant BAILIFF: 1. On 20 th September, 2019, we sentenced the Defendant, following guilty pleas, to six months' imprisonment for sending indecent or obscene messages, contrary to Article 51(a) of the Telecommunications (Jersey) Law 2002 , (Count 1 of the Indictment) two years' imprisonment, consecutive, for sexually grooming a female child, contrary to Article 15 (5) of the Sexual Offences (Jersey) Law 2018 (the "2018 Law") (Count 2), and to two weeks' imprisonment, concurrent, for having been drunk and disorderly (Count 3). In addition, we made certain orders under the Sex Offenders (Jersey) Law 2010 and recommended that the Defendant be deported at the conclusion of his prison sentence. We understand that this is the first occasion upon which this Court has dealt with an offender under Article 15 (5) of the 2018 Law. This judgment sets out our reasons for the imposition of the sentences. 2. The Defendant, who is aged 25 and was born in Madeira, came to Jersey on 5th October 2017. Count 1: 3. On 30 th October, 2018, Cheyenne O'Connor (Ms O'Connor) was on Facebook, posing as a 13-year-old girl named 'Leila Daly'. She received a friend request from a profile name 'Miguel FREITAS'. She replied. The Defendant told her she was, "beautiful and to keep the conversation between the two of us". Ms O'Connor told the Defendant that she was aged 13. Very soon thereafter the Defendant was asking her for photographs of her in a bikini. The Defendant rapidly made the conversation sexual and sent her a photograph of himself, then one of an erect penis. The Defendant told her, "You're going to have sex with me, it's not beautiful (sic) and it's going to be your first" and, "yes it hurts and only at the beginning". 4. Ms O'Connor then sent a message to the Defendant about meeting. They agreed to meet by the bronze cow sculptures at West's Centre at 4:20pm on 1 st November, 2018. 5. The Defendant at about this point blocked the 'Leila Daly' profile, it would appear on the advice of his sister, who warned him that there was a risk that he was being "framed". 6. Ms O'Connor provided screenshots of the chat log between her and the Defendant to the States of Jersey Police, who carried out enquiries in an effort to identify 'Miguel FREITAS' and his home address. On 23 rd November, 2018, officers attended a Jersey hotel, where they arrested the Defendant and transported him to Police Headquarters. 7. The Defendant was interviewed under caution. He admitted to asking for a photograph of 'Leila Daly' in a bikini, claiming that this was in order to, "see whether she was a child or not." He admitted sending topless pictures of himself and pictures of his penis to 'Leila'. When asked why he had asked 'Leila', very soon after having started

to speak to her, to meet him for sex, his response was, "Can I say that it could only be that I was under the influence of drugs and drink and I wanted to empty myself?" When asked what he had meant when he had written, "I like you as a beautiful girl but still such (sic) thirteen we cannot be together beautiful" the Defendant claimed that Google Translate had confused things. The Defendant also admitted that he had been masturbating during the conversation and had said what he had said, "to get more pleasure out of it." 8. On 17th March, 2019, some four months later, Ms O'Connor received another friend request from the Defendant to her 'Leila Daly' Facebook account. She accepted the request and saw that it was the same man who had been in contact with her in October 2018. On the same day, at approximately 4:32pm, the Defendant sent 'Leila Daly' a "wave". The recipient did not respond. Ms O'Connor provided screenshots of this communication to the police. Count 2: 9. The Complainant, was 12 years old at the time of the offending. She lives with her parents and her 18-year-old sister. 10. On 16th February, 2019, the Complainant sent the Defendant a friend request on Facebook. The Defendant responded by messaging the Complainant, and they began communicating via Facebook Messenger. We read printouts of the exchanges; it is plain from those that the Defendant was well aware that the Complainant was a girl aged only 12 years. He encouraged her to meet with him alone and constantly addressed her as "beautiful". 11. The Defendant's messages to this 12-year-old girl included the following extracts: 19th February 2019: "... you have a gorgeous body actually" "... you're perfect but you're still too young..." "... if you were older, I would take you to the punishment!" "I would take you to bed." "I'm horny for you..." "Do you want to see it?" (presumably his penis). "Do you want to make love with me?" "Do you want to be my girlfriend?" 20th February: "I wanted to see you in a bikini, babe." 23rd February: "Do you want to see my dick? Yes or no?" "Are you scared to see my penis?" 12. At 9:27 PM on 23rd February, 2019, the Complainant wrote to the Defendant "You know that I am young and you can be arrested if anyone knows about our conversations..." 13. Thinking (as it transpired, wrongly) that he had established that the Complainant was deleting their conversations, the Defendant persisted in his grooming of her. Two minutes after her warning, he wrote, "... so I can send you the photo for you to see and then you'll delete it! And this way nobody knows anything." 14. The Defendant sent a photograph of his penis to the Complainant at about 9:46 PM. The grooming continued; he sent the following messages, among others, to the Complainant during the remainder of that evening: "Have you already had intercourse?" "It was bigger than mine?" "Have you made love with anyone?" "I can do it with you beautiful, if you want." "Would you make love with me?" "Why my love? Don't be scared." "Love, we will use protection if we make love." 15. The Complainant responded "No." at 10:20 PM. The Defendant replied, "Really?" and the Complainant responded, "Yes." 16. At 11:37 the Defendant wrote, "You left me seriously horny." 17. Two minutes later he wrote, "And now I'm emptying it!" (We take this to be a reference to masturbation to ejaculation.) 18. Following this exchange, the Defendant and the Complainant spoke less frequently on Facebook Messenger; the last messages between them were exchanged on 27th February, 2019. The Complainant told her sister about the messages that she had been receiving from the Defendant. 19. On 28th February, 2019, the Complainant's sister sought Ms O'Connor's advice in relation to the messages. The Complainant's sister sent screens shots of some of the messages to Ms O'Connor, who contacted the Police. On 1st March, 2019, the Complainant's sister and Cheyenne O'Connor went to the

police to report their concerns. 20. On 27 th March, 2019, the Defendant was arrested and cautioned, then interviewed in Portuguese in relation to this offending. 21. The Defendant admitted that he had spoken to the Complainant about sexual matters, but claimed that he was not the only person to blame and that, "if she knew she was a minor, she knew that she could get into trouble why did she continue the conversations, right?" He asserted that the Complainant had 'goaded' him. He did accept, however, that he knew that he should not have done what he did: "I know I did wrong and I am regretting it already." 22. The Defendant was further interviewed under caution on 30 th May, 2019, and provided "no comment" answers to all questions. Count 3: 23. On 27 th February, 2019, at approximately 10:15pm, PC Bertram attended in response to a report of a disturbance in the area of Lewis Street. On arrival the officer noted that the Defendant was acting in a loud and animated manner. He made various threats to B, his former partner, who was at that stage pregnant with his child. PC Bertram spoke to the Defendant in Portuguese, warning him about his behaviour. 24. PC Bertram attempted to calm the Defendant down. His eyes were red and his speech was slurred. The Defendant at this point began to cry. PC Bertram continued to speak to him, attempting to calm him down and to offer assistance. The Defendant at that point became very angry and started speaking very loudly. PC Bertram continually asked him to keep his voice down, as they were in a built-up, residential area. The Defendant would not leave the area and continued to shout and make demands. He took no notice when PC Bertram told him that he would have to leave the area because he was disturbing other residents in the street. 25. Other officers arrived and offered assistance. The Defendant was given numerous warnings, but continued to shout and swear in the street. He punched a wall in an aggressive manner. All the officers formed the opinion that he was drunk. 26. PC O'Neill arrested the Defendant for being drunk and disorderly. The Defendant resisted arrest by clinging to his bicycle and refusing to be handcuffed. He swung the bicycle around, whereupon PC O'Neill struck the Defendant on his arm, causing him to drop the bicycle. The Defendant pleaded with PC Bertram to be allowed to go home. He was transported to Police Headquarters. Discussion 27. As regards Count 1, the maximum penalty for sending messages of an indecent or obscene character by means of a telecommunications device, under Article 51 of the Telecommunications (Jersey) Law 2002 , is two years' imprisonment and a fine. 28. The Crown drew our attention to Attorney General v B

[2015] JRC 022 and Attorney General v Olivotti

[2013] JRC 128 . With respect, we found neither of those cases to be of any significant assistance. The facts of each of them were markedly different from the facts of the present case. They are not landmark or guidance cases. 29. We proceed, therefore without significant judicial guidance, on the basis that Count 1 charges an offence of considerable seriousness. The Defendant thought that he was communicating with a girl aged only 13. If he had in fact been communicating with a child of that age rather than someone who was masquerading as one, this offending would have constituted grooming. Whilst we take into account that the Defendant did not corrupt anyone by this offending, and that no child could actually have been assaulted, nonetheless we are of the view that the offending was serious in that the Defendant was almost immediately grossly sexually explicit and endeavoured almost

at once to sexualise and corrupt his "victim". Aggravating features of the offending were that the Defendant was masturbating during the exchanges, and that he chose to re-establish contact with "Leila" some four months after the original exchanges, which was after the police had first taken him in for questioning in relation to these matters, and indeed after the date of the Count 2 offending. 30. In addition, sending anyone a picture of an erect penis is grossly offensive, and for the Defendant to have done this thinking that the recipient was an under-aged girl renders the matter correspondingly more reprehensible. 31. Turning to Count 2, the maximum penalty for sexual grooming of a female child under Article 15(5) of the Sexual Offences (Jersey) Law 2018 ("the 2018 Law") is five years' imprisonment. 32. In *Attorney General v W*

[2016] JRC 235, the 25-year-old accused was sentenced for the offence of attempting to meet a child following sexual grooming. That offence arose under Article 2(1)(a) of the Sexual Offences (Jersey) Law, but it carried, as here, a five-year maximum term of imprisonment. As part of a "sting" operation, a newspaper reporter created a fake account on an adult dating website for an 18-year-old girl called "Lucy". He told users who messaged Lucy that she was 14. The defendant in that case continued talking to Lucy despite being told her age. He was sentenced to nine months' imprisonment. At Paragraph 3 of the judgment, the learned Deputy Bailiff said: "Any attempt to groom a minor for sexual purposes is extremely serious and, in our view, a custodial sentence is almost inevitable. Naturally in this case, no child was in fact put at risk or was ever going to be assaulted as a result of this communication. Whilst we must view the correct sentence in that light, and we do, the offence is nonetheless a serious one." We respectfully agree. 33. The Crown identified the following aggravating features of the offending in regard to this Count: (i) the Defendant was in direct contact with a 12-year-old girl, i.e. not an adult posing as a child; (ii) contact with the girl took place after the Defendant had been questioned by the police in relation to the telecommunications offence involving, as he thought, a child; (iii) the Defendant persisted in the contact with the child notwithstanding that she told him that he could get into trouble, and (iv) a contact offence, involving penetrative sexual activity, on a girl of twelve years of age, was in contemplation and indeed intended, had the Defendant been afforded the opportunity. 34. In our judgment there are three additional, aggravating factors: (i) not only did the Defendant masturbate during or towards the conclusion of the 23rd February exchange with the child, but also he informed her of it in a crude and graphic way; (ii) he sent the child a picture of his penis, which as we have said would be a grossly offensive thing to do even to an adult. The fact that the recipient in this case was a child of twelve years of age makes the offending significantly more serious, and (iii) the content of the messaging was salacious, persistent, grossly explicit and sexualising. No young person should be subjected to communications of this sort. Young people are entitled to their innocence and to have their own ideas about what their future relationships will be. Their imaginings should remain untainted and protected from gross suggestions from unknown adult third parties. It was little short of heinous, in our view, that the Defendant sought to destroy all this within a matter of

minutes of being in contact with the Complainant. 35. We regard the drunk and disorderly offence as moderately serious one, involving as it did threats and being verbally abusive to the Defendant's previous partner, attempting to assault the police officers and resisting arrest. 36. The Crown moved for a sentence of six months' imprisonment in respect of Count 1, 18 months' consecutive for Count 2 and two weeks' concurrent in respect of Count 3. We were also asked to recommend a Deportation Order and to make various orders under the Sex Offenders (Jersey) Law 2010 . 37. Advocate Haines, appearing for the Defendant, urged us to adopt the non-custodial disposal recommended by the author of the Social Enquiry report. The Defendant had pleaded guilty, and this was a valuable plea. He had only one previous conviction, which was a caution for theft in 2017. (Advocate Haines disclosed that the Defendant had served two community service sentences in Madeira for offences of violence, but we had no record of those and did not take them into account. In any event these involved a different type of offending). Counsel reminded us that the Defendant did not go to see the victim of Count 2, which we accept, though it is clear that the Complainant was unwilling to take matters any further with him. We were told that the Defendant had the support of his partner and sister, who were in court and who had submitted letters, which we read carefully. He had also written a letter of remorse to the Court and counsel emphasised that that remorse was genuine. Counsel adverted to the Defendant's troubled and difficult childhood, which was described in the Social Enquiry Report, and told us that this client had a consistent employment record. He urged us to give his client another opportunity. Advocate Haines submitted during the course of his address that this was, "a low level of offending". If a custodial sentence were imposed, however, counsel submitted that the total of two years' imprisonment moved for by the Crown was too long, and that the appropriate sentence should be of no more than 18 months' in total. 38. We listened carefully to everything that Advocate Haines had to say to us, but rejected the submission that this was low level offending. It was not. This was serious offending on any view. 39. The principal thrust of Advocate Haines's address to us was in regard to the deportation order that the Crown sought. The Defendant, "has no ties to Madeira" and his family there is not supportive of him. Counsel spoke of the Defendant's 'commitment' to his partner and their child. The relationship was, he said, one of some four and a half years' duration. The partner telephoned the Defendant daily and visited him at HMP La Moye every week. The couple intended to live together as a family unit in due course, when circumstances permitted. It was accepted that the first part of the test in *Camacho v Attorney General* [2007 JLR 462] (" *Camacho* ") was satisfied, but he urged us to find that the deportation of the Defendant would infringe his Article 8 rights to family life. 40. We were somewhat confused by defence counsel's submission as to the continuance of the relationship between the Defendant and his partner. The Social Enquiry Report refers at paragraph 9 to, "... two Police call outs of a domestic nature ", following the second of which B and the Defendant were asked to leave their accommodation, since which time they have been living separately. The Defendant told the Probation Officer that, "his relationship had broken up ..." (paragraph 29). B assured the Probation Officer that she had, "ended the relationship " prior to the baby's birth

(paragraph 11). In addition, in relation to Count 3 the evidence was quite clearly to the effect that B was the Defendant's former partner. We had, therefore, approached the sentencing hearing under the clear impression that the relationship was over. 41. As we were about to adjourn to consider sentence, the reporting Probation Officer, Ms Maurilia Veloso, asked to be allowed to address us, to which request we acceded. Ms Veloso told us that she and B, amongst others, had attended a child protection conference three days earlier, on 17 th September. At that conference, B had stressed that she was not in a relationship with the Defendant. She visited and telephoned him at the prison, she had said, because they were "friends" and for the sake of the child. B had had the benefit of an interpreter, and the conference had been documented and minuted. Ms Veloso told us that, as an officer of the Court, she felt compelled to share this information with us. We commend her for that. Decision 42. We carefully considered the comprehensive Social Enquiry Report, the letters that were before us and everything that Advocate Haines had urged upon us, but were in no doubt that a custodial sentence was inevitable in this case. We take into account the Defendant's previous good character and the guilty pleas, for which we have given full credit. We accept that there has been some expression of remorse on the part of the Defendant, but note that he sought to blame Cheyenne O'Connor and to some extent the Complainant, whom he accused during interview of goading him. Further, the author of the Social Enquiry Report states at paragraph 32 that she, "did not sense a great deal of remorse from the defendant as he appears angry, demonstrates a poor attitude with regard to his offending behaviour and shows no victim empathy." 43. We are also constrained to take into account the aggravating features of this case to which we have already referred, including that the Defendant has admitted grooming a 12-year-old girl and sending her sexually explicit messages at a time when he was already under investigation by the police for sending similar messages to someone he thought was 13, and while his then-girlfriend was pregnant. In addition, he is said in the Social Enquiry Report not to appreciate the seriousness of his actions, and is considered to be at high risk of reoffending. 44. As regards Count 1, we think that the Crown's Conclusion of six months' imprisonment was correct, and this was the sentence that we imposed. 45. The Crown's Conclusions in Count 2 were, in our judgement, too low: they took insufficient account of the aggravating factors to which we have referred, even when taken in the balance against such mitigation as there is in this case. This was egregious grooming. We therefore imposed a sentence of two years' imprisonment, consecutive to the sentence passed in respect of Count 1. 46. As regards Count 3, we accepted the Crown's Conclusion of two weeks' imprisonment, concurrent. This offending could have attracted a consecutive sentence as well, being as it is wholly unrelated to the other two offences, but we have had regard to the totality principle and consider a concurrent sentence to be appropriate. 47. We therefore sentenced the Defendant to a total of two years' and six months' imprisonment. 48. We turn next to deportation. The Defendant falls within the provisions of Section 3(6) of the Immigration Act 1971 , extended to Jersey by virtue of the Immigration (Jersey) Order 1993 in that he is not a British citizen, has attained the age of 17 years and has been convicted of an offence punishable by imprisonment. 49. We have

already briefly adverted to the two-part test set out in *Camacho*. The Court must first ask, is the Defendant's continued presence detrimental to the Island? If 'yes', then we must go on to consider the effect of his deportation on the human rights of innocent persons connected to the Defendant, and, of course, of the Defendant himself. 50. As regards the first part of the test, the Defendant has been sentenced for two serious sexual offences against a child and a quasi-child. Whilst we accept that in relation to Count 1 there was no danger to a child, because the person with whom the Defendant was communicating was an adult, in respect of Count 2 the Defendant was in explicit and highly sexualised contact with one of our community's children. He has not been in Jersey for long; as we have said, he arrived in October 2017. In the short time during which he has been in Jersey he has committed two serious offences, the first just one year after his arrival, and the second following interview for the first offence - and at a time when his then partner was pregnant with a child who is now considered to be at risk from him - plus a third less serious one. We are in no doubt whatever that this man's continued presence would be detrimental to the Island, and thus the first part of the test in *Camacho* is satisfied. 51. In relation to the second part of the test, we note that one of his siblings lives here, but he has five others and also both parents, albeit separated, in Madeira. He is not entitled to any benefits locally. We are satisfied that the Defendant and his former partner are no longer in a relationship. The Social Enquiry Report notes at paragraph 11 that whilst the child is at present safe from significant harm from the Defendant, "worryingly, there has been little change in B's understanding of the risk that Mr Freitas poses to her unborn child or herself..." and adds this: "It is difficult ... to accept that B will prevent Mr Freitas having continued involvement and contact with the baby should he be released from prison." We concluded that not only is the claim to a right to a family life not made out, but also there are positive risks if the Defendant were allowed to remain in Jersey. In our judgement these outweigh any impact that deportation would have upon him. 52. We therefore recommended the deportation of the Defendant upon the completion of his sentence. 53. We were, in addition, asked to make orders under the Sex Offenders (Jersey) Law 2010 ("the 2010 Law"). 54. As a result of his conviction, the Defendant became subject to notification under the 2010 Law. As to the time period of the notification requirements, the Crown submitted that a period of seven years was appropriate before which he may seek to have the notification requirements disapplied. We held that a period of six years would be sufficient in the circumstances and so ordered. 55. The Crown also invited the Court to make the following restrictive orders, as from the date of sentence, for a period of seven years under Article 10(4) of the 2010 Law: (i) That the Defendant is prohibited from using any device capable of storing electronic data unless he makes such device available on request for inspection by a police officer and at the same time he provides the police officer with full access by whichever means access is achieved to enable such data to be analysed; (ii) That the Defendant shall notify the Offender Management Unit of all devices he owns, or to which he has access, which are able to store electronic data; (iii) That the Defendant is prohibited from having any unsupervised contact or communication of any kind with any female child under the age of 18 years, other than: (a) Such as is inadvertent

and not reasonably avoidable in the course of lawful daily life; or (b) With the consent of the child's parent or guardian who has full and accurate knowledge of his conviction and who is not subject to restrictions under the terms of any order pursuant to the said Law or (We added further text here, as per Paragraph 56 infra .) (iv) That in circumstances where the Defendant finds himself in breach of paragraph c above, he has a positive duty to remove himself from that situation as soon as is reasonably practicable; (v) The Defendant must allow access to any accommodation which he owns, lives in or from time to time stays in to police officers who are checking upon this Order; (vi) The Defendant must allow access to any vehicle owned or used by him to police officers who are checking upon this Order; and (vii) The Defendant is prohibited from having any contact, direct or indirect with the victims of Count 1 and 2. 56. We granted this application, but restricted it to a period of six years. In addition, we varied paragraph 53 (c) above at the instance of defence counsel, by adding a further sub-paragraph in the following terms: (c) "Such contact or communication with his daughter or any further child of the Defendant, which is unsupervised and not opposed by the Children's Service, or which is permitted by order of a court in legal proceedings." 57. There is no order as to costs. Authorities Telecommunications (Jersey) Law 2002. Sexual Offences (Jersey) Law 2018 Sex Offenders (Jersey) Law 2010 Attorney General v B

[2015] JRC 022 Attorney General v Olivotti

[2013] JRC 128 Attorney General v W

[2016] JRC 235 Sexual Offences (Jersey) Law, 2007 Camacho v Attorney General [2007 JLR 462] Immigration Act 1971 Immigration (Jersey) Order 1993 Page Last Updated: 15 Oct 2019 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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