

JERSEY / JUDGMENT

AG v De Oliveira [2017]

JRC 011 (16 January 2017)

[2017] JRC 011

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JUDGMENT

THE COMMISSIONER: 1. On 9th January, 2017, the Court sentenced the defendant, aged 37, to a term of imprisonment of 2 years and 8 months for an indecent assault and we now set out our reasons. 2. Late on the evening of 1st July, 2016, the defendant followed the victim (aged 41) through St Helier from Snow Hill to Devonshire Place, where he approached her from behind, put his arms around her and ushered her with force into a shop entrance. As he was doing this, he put his hand inside the victim's bra and touched her breast and once inside the shop entrance, he put his hand inside her jeans and pants, touching and rubbing, but not digitally penetrating, her vagina. 3. The victim had been celebrating with friends and on her own account, was drunk; as can be seen from the CCTV footage which recorded much of the defendant following her through St Helier. As a consequence, her reactions were slow, but after being initially stunned and shocked by the assault, she pushed him off and said she would call the police. On her account, he desisted and ran away. On his account, he stopped when she told him to, apologised and walked away; the CCTV footage of the adjacent shop does indeed show him walking, not running, away. 4. The defendant pleaded guilty at the earliest opportunity to an indecent assault, but he denied the following aspects of the prosecution case:- (i) That he had approached the victim from behind, put his arms around her, and ushered her forwards with force to the location of the indecent assault - it was the use of force that was in contention; (ii) That he had digitally penetrated the victim's vagina; (iii) That the tear suffered by the victim in the area between her labia minora and majora, an area where she suffered psoriasis, had been caused by the manner in which he touched her; and (iv) That he exposed his penis during the incident. 5. A Newton hearing was held before the Superior Number on 15th November, 2016, during which the allegation that the defendant had exposed his penis was withdrawn by the prosecution as there was no evidence to support it. The Court found it proved beyond reasonable doubt that the defendant had ushered the victim into the shop entrance with force and that he had caused the tear, but it was not proved beyond reasonable doubt that the defendant had digitally penetrated her. 6. Crown Advocate Maletroit referred the Court to the recent Court of Appeal decision in K-v-AG and AG-v-F

- [2016] JCA 219 which considered the approach to be taken to the use in the Royal Court of the England and Wales Sentencing Council Guidelines . The Court made it clear, he said, that these Guidelines do not and should not apply to Jersey, but at paragraphs 33 and 39 of the judgment, Bailhache, Bailiff, commented as follows:- "33 As has been said on other occasions the Guidelines helpfully set out factors which are properly regarded as distinguishing some offences from others in terms of seriousness. While we do not endorse the starting points or anticipated range of finishing points for particular offences, we think it is entirely appropriate for the Royal Court to have regard to factors which, according to the Guidelines, would assist an English Court to categorise the seriousness of the offence. ... the Royal Court was entitled to consider the approach taken in England and Wales, as set out by the Guidelines for the purposes of considering what would be the appropriate starting point in Jersey for these particular offences." 7. The Crown considered that reference to local cases prior to the Royal Court's decision in AG-v-K
- [2016] JRC 158 had been of limited value and none were cited. The nature of offending in the instant case was, the Crown said, unusual, and there were also significant aggravating features. Whilst the courts must strive to be as consistent as possible in sentencing, they have regularly warned against the dangers of sentencing by trying to compare the facts of one case too closely with another-- see paragraph 35 of the judgment in AG-v-K . 8. The Crown submitted that in AG-v-K , it was highlighted by the Attorney General that, whilst this Island had a separate sentencing jurisdiction, sentences for indecent assault in Jersey had fallen behind the levels of sentence for equivalent offences in England and Wales, and the difference did not appear to be justified. 9. This last submission goes further than can perhaps be justified by reference to the Royal Court decision in AG-v-K , and the Court of Appeal decision in K-v-AG . Those cases were concerned with indecent assaults on a child involving penetration and quoting from paragraph 53 of AG-v-K :- "It is clear that sentencing levels for an offence of the nature before us have increased in England and Wales as compared with the level established by Milberry ." (Our emphasis) 10. In the final paragraph of K-v- AG , Bailhache, Bailiff said this at paragraph 54:- "The comments which we have made in this judgment suggest that the Royal Court may wish to review upward sentences for indecent assaults involving digital penetration of children in future cases." 11. We do not think it was suggested in either case that the sentencing levels for all forms of indecent assault need to be reviewed upwards, although we accept it is always open to the Royal Court to do so in any given case, and for that purpose to have regard, inter alia , to the factors which according to the Sentencing Council Guidelines assist in categorising the seriousness of the offence. 12. It was not helpful, therefore, that the Crown had not cited local cases prior to AG-v-K , save in two respects, so that the Court could strive to seek some consistency in the sentence it was being asked to impose on the defendant. That lacuna was, however, addressed by Advocate Turnbull and we will turn to the cases he cited shortly. 13. The Crown placed some emphasis on the case of AG-v- Correia

[2015] JRC 083 , in which the defendant was sentenced to 5 years' imprisonment following a trial on one count of attempted rape. Notwithstanding the difference in the offences, many of the circumstances and aggravating features were, the Crown said, similar to those present in the instant case. The victim had been walking home in an intoxicated condition and the defendant saw her and began following her. He subsequently approached her and took her into a private parking area, where he pinned her against a wall and attempted to rape her. In considering the seriousness of the offence, the Court found that there were two main aggravating features:- "First that [the defendant] selected a lone, intoxicated and vulnerable female, and secondly that there was a modest level of abduction, in that [he] took her to this dark car park in a quiet street." (Paragraph 7) 14. The Crown said that both these aggravating features were present in the instant case. We accept that this is so, but we sound a note of caution, in that Correia pinned the victim to a wall and attempted to penetrate her with his penis from behind, ejaculating on her; hence the charge of attempted rape. Without in any way wishing to diminish the seriousness of the assault on the victim in the instant case and its effect upon her, the defendant desisted from the assault when asked and did not attempt to rape her. The two cases cannot be equated in terms of their seriousness. 15. Apart from Correia , the Crown relied almost entirely on the Sentencing Council Guidelines , which have different guidelines depending on whether the assault involves penetration, and reached the conclusion that this case, which does not involve penetration, would fall within Category 1(A), indicating a starting point of 4 years' imprisonment and a sentencing range of 3 to 7 years' imprisonment. 16. By reference to the tables set out in the Sentencing Council Guidelines , under "Harm" the Crown relied on "Severe psychological..harm " and "Abduction" and under "Culpability" on "Significant degree of planning". 17. We had a detailed personal impact statement from the victim and a letter from her general practitioner, the latter stating that her symptoms were consistent with an acute stress reaction and that the duration of her symptoms placed her at risk of this condition evolving into post-traumatic stress disorder. The victim was attending psychological therapy. 18. There was no question that this incident had had a serious effect upon the victim, but we had no advice from a psychologist and therefore no basis for concluding that she had suffered " severe psychological harm ". It seemed to us that if the sentence on a defendant is to be placed into a category which materially increases the starting point of a sentence on the basis of "severe psychological harm " , then the Court should be provided with appropriate advice to support that conclusion. 19. We questioned whether it was fair to regard this as a case of abduction for the purposes of the Sentencing Council Guidelines. Abduction means to "lead or carry away illegally " (Shorter Oxford English Dictionary). In Correia , the defendant had taken the intoxicated victim into a dark car park in a quiet street, and this was described by the Court as " a modest element of abduction" . In AG-v- Jalam

[2015] JRC 169 , cited by the Crown and to which we refer below, the defendant picked up the intoxicated victim and carried her bodily into a dark corner of a small open private car park to a narrow gap between a car and a wall from which she could not escape. 20. In the

instant case, the defendant took the victim a few feet from the pavement upon which she was walking into a shop entrance in a relatively well-lit street. The level of force required was minimal because of her condition - indeed she described the defendant as guiding her into the entranceway - but nevertheless, as found by the Superior Number, there was force, in that she was taken a very short distance (a matter of feet) against her will. We doubt, however, whether this could properly qualify as "abduction" for the purposes of Category 1 of the Sentencing Council Guidelines . 21. Turning to culpability, the Crown accepts that the defendant's decision to follow the victim was opportunistic and clearly from the outset, or at some point, he decided to assault her. There was planning to this extent, but we could not regard that as a "significant degree of planning". 22. It was arguable, therefore, as submitted by Advocate Turnbull, that in fact this case would come either within Category 1B, which has a starting point of 2 years' and 6 months' imprisonment and a sentencing range of 2 to 4 years' imprisonment, or even Category 2(B), which has a starting point of 1 year's imprisonment and a sentencing range of a High level Community Order to 2 years' imprisonment. Those starting points would, of course, be increased to reflect any aggravating factors. 23. However, we did not think it helpful to be drawn into the starting points and sentencing ranges as set out in the Sentencing Council Guidelines , because the Court of Appeal has made it clear that it is the factors which are properly regarded as distinguishing some offences from others in terms of seriousness to which we should have regard; the starting points and sentencing ranges were not endorsed. 24. We start from the premise that any indecent assault of this kind is a serious offence, namely touching a woman's naked breast and touching and rubbing forcibly her vagina, causing a tear to the tissue, which on its own crosses the custody threshold, but there are two aggravating factors here (recognised in the Sentencing Council Guidelines) which take the case to a higher level of seriousness:- (i) The defendant targeted a lone and intoxicated, and thus vulnerable, woman and stalked her some distance through St Helier, waiting for her to reach a quieter area where he could make the assault. It is quite chilling to watch the CCTV footage and as the Court said in Correia , it must be every woman's nightmare to be stalked and attacked in the street at night. (ii) Whilst the defendant has no previous convictions for indecent assault, he does have a conviction for harassment in 2013, where in two separate incidents he followed lone women at night on the streets of St Helier. 25. In his psychological report on the defendant, Doctor David Briggs, a forensic and clinical psychologist, said this at page 18:- "I believe that [the defendant] is at a significant risk of repeating the type of offending behaviour which features in this current offence before the Court. There is a risk that he will follow other women he perceives to be vulnerable, most likely when they have been drinking, and that in moments of opportunism he will seek to engage them in unwanted sexual contact. The more likely age of any victim of this behaviour is an adult female rather than adolescent or child. I believe that the act of him following potential victims will be an inherently arousing aspect of his offending behaviour." And at Page 19:- "As stated, I believe there is a significant possibility that [the defendant] may reoffend by way of some form of sexually motivated crime, one most likely to involve him stalking an adult

female stranger and molesting her at a time whilst the victim was vulnerable, e.g. by way of intoxication." (his emphasis) 26. The Probation Department assessed the defendant as a medium risk of generalised re-conviction within 12 months and using the SA07 assessment, he is assessed at a raised risk of sexual recidivism. Quoting from paragraph 43:- "Taking all of the above into consideration, the defendant is assessed as a raised risk of sexual recidivism. Whilst he has no previous sexual convictions, he has two previous offences for following lone females at night. Of specific concern is the escalation from non-contact i.e. following/harassing women to a contact offence. In my opinion, the most likely risk scenario would be offences of a similar nature to the current offence." 27.

Taking the starting point of 4 years' imprisonment as set out in the Sentencing Council Guidelines (starting points not endorsed by the Court of Appeal), the Crown had increased that to 5 years and 3 months' imprisonment to reflect the aggravating factors and then reduced it back down to 4 years' imprisonment, having given the defendant some credit (but not full credit) for his guilty plea, and a percentage for general mitigation. The Crown thus moved for a sentence of 4 years' imprisonment. 28. The Crown had not given the defendant full credit for his early guilty plea, because it was entered on a basis that was not acceptable to the Crown and two of the disputed points were subsequently proven at a Newton hearing at which the victim was required to give evidence. 29. We did not regard that as fair to the defendant, because the most relevant factor from the point of view of sentencing was whether or not there had been digital penetration, as it was penetration that would bring the case into a more serious set of guidelines set by the Sentencing Council Guidelines. Crown Advocate Maletroit accepted that this was the case.

Furthermore, as Advocate Turnbull said, the allegation that he had exposed his penis, if found to be the case, would have been a seriously aggravating factor. 30. The defendant could not be expected to agree to material parts of the prosecution case which he said did not occur, and was therefore justified in bringing about a Newton hearing at which, inevitably, the victim had to give evidence, regrettable as that is. The Superior Number found in his favour on the key issue of digital penetration; the allegation that he had exposed his penis having been abandoned during the course of the hearing. In our view, the defendant was entitled to full credit for his early guilty plea notwithstanding the Newton hearing. 31. In looking at the appropriate starting point, which on our approach would include any aggravating factors, we started with the case of AG-v- Jalam

[2015] JRC 169, where the defendant was sentenced to 4½ years' imprisonment, on a guilty plea but with a bad record, for an indecent assault (following a starting point of 6 years' imprisonment) in which:- "he demanded that she perform oral sex on him and she refused. He hit her four times to the head in rapid succession and she fell to the ground. He then forced his penis into her mouth and repeatedly forced her to perform oral sex on him. The ordeal lasted a full 20 minutes, as recorded by CCTV. The defendant threatened and verbally abused her. She was terrified. It only came to an end because a passer-by heard her cries and called the police. When the police came, they found the defendant crouched over the woman on the floor with his trousers down." 32. Whilst Jalam had not

stalked the victim, there was a real element of abduction, but the assault itself was much more serious than the instant case. The Court in Jalam had granted the conclusions sought by the Crown but it might well be regarded as a lenient sentence. 33. In AG-v-Mendes

[2010] JRC 237 , the defendant took advantage of intoxicated women on two occasions at night in the streets of St Helier:- (i) On the first occasion by trying to put his hand up her skirt and placing her hand on his groin - she walked away; (ii) On the second, more serious occasion, he attempted to kiss the victim, who resisted his attentions. He then led her to a secluded area, in what was described by the Court as an element of abduction, where her breasts were touched through her outer clothing and at one point she was placed on her back on the ground with the defendant astride her; he was trying to pull her leggings down, which she prevented him from doing. The incident was brought to an end by the intervention of a passer-by, who had seen the defendant with his hands round the wrists of the victim and pulling her out of sight. 34. The defendant, who pleaded guilty and was of good character, was sentenced to 9 months' imprisonment for the first incident and 18 months' imprisonment, concurrent, for the second incident. 35. In AG-v- Lally

[2014] JRC 120B , the defendant and the victim were friends, occupying separate rooms in a lodging house. He came back intoxicated, got into her bed naked, and slid his hand under her lower clothing, touching her vagina and her breast. He eventually fell asleep and the victim left to call the police. He had no memory of the event. The defendant pleaded guilty. He had no previous convictions and the incident was described as being out of character. He was sentenced to 180 hours' community service, which was equivalent to 12 months' imprisonment. 36. In AG-v-Sousa

[2001] 219 the defendant, who had been making unwelcome advances on the victim and who was not known to her, followed her through the door of her home, and despite being ordered to leave, placed his hands around her waist and kissed her face. A struggle developed and the two fell to the floor with the defendant falling on top of the victim, continuing to kiss her face. He did eventually leave the premises. He had no previous convictions of this kind and on a guilty plea was sentenced to 10 months' imprisonment. 37. Finally, in AG-v-Gomes

[2013] JRC 020 , the defendant forced his way into the bedroom of the victim, whom he knew, and forced himself upon her, attempting to kiss her on the lips. She turned away but he kissed her on the cheek and face and then put his hand on her breasts, rubbing them over her clothing. She tried to leave the room but the defendant restrained her by grabbing her arm, causing a bruise. The victim was able to escape. The defendant was of relatively good character and on a guilty plea was sentenced to 12 months' imprisonment. 38. We accept that none of these cases fully equates with the facts of the instant case and the Court needs to be wary of comparing the facts of one case with another, but it did give the Court some indication of the range of sentences imposed by the Court in the past for indecent assaults on adult victims not involving penetration. 39. The element of stalking a lone intoxicated woman late at night in the streets of St Helier made this a serious offence and we

concluded that the appropriate starting point, including the aggravating factors, was 4 years' imprisonment. From that, we reduced the sentence to 2 years and 8 months' imprisonment allowing full credit for the early guilty plea, but nothing more, as in our view there was little other mitigation available to the defendant. Sex Offenders (Jersey) Law 2010 40. Prior to imposing this sentence, the Court had addressed the notification requirements under the Sex Offenders (Jersey) Law . The Crown had sought a period of 10 years' imprisonment from the date of sentencing before the defendant could apply to lift those requirements, but noting the comments of the Court of Appeal in K-v-AG at paragraph 47, we regarded that period as disproportionate, reducing it to 7 years' imprisonment. In doing so, we had in mind the advice of Dr Briggs as to the risk to the public of the defendant repeating this kind of offence. 41. In terms of restraining orders under Article 10 of the Sex Offenders Law , the Crown sought two orders in relation to the defendant approaching the victim, to which the defendant had no objection. The Crown sought to impose those restraining orders for a period of 10 years from the date of sentencing, but we agreed with Advocate Turnbull that this was disproportionate, reducing it to 7 years. In doing so, we bore in mind that a breach of a restraining order is a criminal offence, making the defendant liable to imprisonment for up to 5 years. This was an opportunistic offence by the defendant on a stranger, and there was no evidence that he might have any interest in seeking her out again. At the same time, the victim is fearful that he might do so and in our view, 7 years was proportionate. 42. The Crown also sought the following restraining order:- "The defendant must not approach, follow or have any physical contact with any lone female in any outdoor public place in Jersey between the hours of 8 p.m. and 6 a.m. This restriction shall not apply to conduct which is inadvertent and which cannot reasonably be avoided in the course of lawful daily life. Nor shall this restriction apply if - (a) the female is the defendant's wife or child; or (b) the States of Jersey Police Offender Management Unit have given prior written approval to the defendant having contact with the female." 43. Crown Advocate Maletroit informed us that this proposed order had no precedent in this Court, although he said restrictions of this kind had been made in England under the equivalent legislation. The Crown considered it necessary and proportionate to restrict the defendant in this manner to protect the public from the risk of serious sexual harm. The States of Jersey Police Offender Management Unit apparently supported the inclusion of this order. 44. The Court in AG-v- Jalam had declined to impose such an order, but gave no reasons other than that it did not regard it as proportionate or necessary to do so. 45. Crown Advocate Maletroit referred us to this guidance in the case of R-v-Smith and Ors

[2012] 1 Cr App R (S) 82 , where the English Court of Appeal said this at paragraphs 4 and 5:- "4 The SOPO offers a flexibility in drafting which is in one sense welcome because it enables the order to be tailored to the exact requirements of the case. That flexibility, however, must not lead draftsmen to an inventiveness which stores up trouble for the future. It will do this if it creates a provision which is, or will become, unworkable. That may be because it is too vague or because it potentially conflicts with other rules applicable to the

defendant, or simply because it imposes an impermissible level of restriction on the ordinary activities of life. The SOPO must meet the twin tests of necessity and clarity. The test of necessity brings with it the subtest of proportionality. As to clarity, a convenient analogy is the framing of an injunction in a civil court, which also attracts the sanction of imprisonment. The terms of a SOPO must be sufficiently clear on their face for the defendant, those who have to deal with him in ordinary daily life, and those who have to consider enforcement, to understand without real difficulty or the need for expert legal advice exactly what he can and cannot do. Real risk of unintentional breach must be avoided. See *R v Hemsley*

[2010] EWCA Crim 225 ,

[2010] 3 All ER 965 , 174 CL&J 172." 46. The probation report commented at paragraph 50 that whilst such an order may reduce the risk of the defendant engaging in similar behaviour, the practicalities of enforcing it would be challenging. Advocate Turnbull said that he had had little time to consider the implications of this order, but, in his initial view, it was disproportionate and unworkable. The order is limited to outdoor public places between the hours of 8pm and 6am but various scenarios were canvassed which the Court had insufficient time to discuss with counsel properly. 47. We are not saying that this proposed order is disproportionate or unworkable, but we felt that it required further consideration, with assistance, if available, of its successful imposition in England and Wales. We therefore adjourned the matter for more detailed argument, on the basis that if this order is imposed, it will be for a period co-terminus with the other restraining orders. Authorities *K-v-AG* and *AG-v-F*

[2016] JCA 219 . Royal Court of the England and Wales Sentencing Council Guidelines. *AG-v-K*

[2016] JRC 158 . *AG-v- Correia*

[2015] JRC 083 . *AG-v- Jalam*

[2015] JRC 169 . *AG-v-Mendes*

[2010] JRC 237 . *AG-v- Lally*

[2014] JRC 120B . *AG-v-Sousa*

[2001] 219. *AG-v-Gomes*

[2013] JRC 020 . Sex Offenders (Jersey) Law 2010. *R-v-Smith and Ors*

[2012] 1 Cr App R (S) 82 Page Last Updated: 18 Jan 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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