

JERSEY / JUDGMENT

AG -v- E [2011] JRC 217B (07 November 2011)

[2011] JRC 217B

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JUDGMENT

THE commissioner: 1. This is an application by the Attorney General for an extension of time for an appeal against the decision of Harris, Relief Magistrate, made on 15 th April, 2011, pursuant to Article 5(1) of the Sex Offenders (Jersey) Law 2010 ("the Sex Offenders Law") that a period of one year must expire before the respondent can make an application under Article 5(5) of the Sex Offenders Law for an order that he no longer be subject to the notification requirements. 2. Under Rule 3 of the Sex Offenders Law (Magistrate's Court Appeals) Rules 2010 ("the Rules") a notice of appeal must be lodged within 8 days of the decision. At the hearing on 15 th April, 2011, the prosecution indicated to the respondent and to Mr Begg that it would be considering an appeal. On 20 th April, 2011, in error, the prosecution applied under Article 21 of the Magistrate's Court (Miscellaneous Provisions)(Jersey) Law 1949 for the Relief Magistrate to state a case for the opinion of the Royal Court and on 3 rd May, 2011, the Relief Magistrate stated his case accordingly. We say in error because appeals against decisions under the Sex Offenders Law are governed by Part 5 of that Law, in this case Article 20, and by the Rules. 3. When this was drawn to the attention of the prosecution, it filed a notice of appeal under the provisions of the Sex Offenders Law on 6 th May, 2011, outside the 8 days specified by the Rules. Rule 10 provides that the Royal Court may extend the time appointed for doing anything in connection with an appeal. 4. Initially Mr Baker maintained that it was open to the prosecution to appeal under either law but in discussion accepted that the Royal Court would not entertain an appeal by way of case stated in the face of the express provisions governing appeals under the Sex Offenders Law. In any event, Mr Baker submitted that an appeal had been notified within the 8 days specified by the Rules and the short extension would cause no prejudice to the respondent. 5. In AG-v-M

[2011] JRC 174 , Bailhache, Deputy Bailiff, described the notification requirements under the Sex Offenders Law as a civil matter and in AG-v-Velosa

[2011] JRC 026 he expressed the following view at paragraph 5:- "In our view the structure of the legislation is such that it is primarily concerned with the protection of potential victims; the legislation requires the court to determine the period which must expire before any application to discharge the notification requirements is made and this must be done before the sentence is imposed. This indicates that the legislature did not intend the fixing

of this period to be part of the sentence and it suggests that the main purpose of the legislation is something other than criminal justice." 6. This is consistent with the view expressed in the report attached to the draft Sex Offenders (Amendment)(Jersey) Law 2011, which was lodged au Greffe on 26 th April, 2011. Under that Law it was proposed to delete Article 18(3), which provides that an appeal under Article 20 (inter alia) shall be taken to be an appeal in criminal proceedings, but this amendment was withdrawn by the Minister of Home Affairs because (quoting from the transcripts of the debate held in the States Assembly on 9 th June, 2011):- "... I am now of the view and advised and that it is best to leave this in place temporarily so that we do not have the situation with appeals from the same decision going off in two different directions, which is most undesirable but what will ultimately need to happen in my view is an amendment to the Court of Appeal Law to be passed in conjunction with this Article being deleted." 7. Thus, in this appeal, we are required by Article 18(3) to apply the criminal law and in that context Mr Begg referred us to AG-v-Fossey [1982] JJ 223 where Ereaud, Bailiff, stated:- "...an extension of time is not given as a mere matter of form, and substantial grounds must be shown for the delay before the Court will exercise its discretion in favour of the applicant. The longer the delay which has elapsed the more onerous is the duty of the applicant to show that there are substantial grounds to justify the grant of an extension of time." 8. In La Solitude Farm Limited [1985-86] JLR 1, a case in which an extension of some two years was being sought, Le Quesne JA stressed the importance in criminal matters that rules be observed and that it should be made clear that leave to appeal out of time in criminal matters "can only be given where special circumstances of an important character are disclosed". 9. Under English criminal law, substantial grounds are also required to be given for the delay before the court will extend time (see Archbold 2011 7-182) and in deciding whether to grant time, the court will be influenced by the likelihood of a successful appeal if the extension is granted (see R-v-Marsh 25 Cr. App. R. 49). 10. We therefore turn to the substance of the appeal. 11. The respondent was convicted on 14 th February, 2010, after a trial of three days of five charges of making indecent photographs of children contrary to Article 2(1)(a) of the Protection of Children (Jersey) Law 1994. They reflected computer images found on his computer of which 183 were rated at Copine level 1, 5 at level 2 and 1 at level 3. The respondent was additionally convicted of 12 charges of attempting to make indecent photographs of children. The files comprised in these attempted charges had file names (which are not measurable against the Copine scale) of which the following is representative:- "real child porn!!! (illegal preteen underage Lolita kiddy incest little girl rape anal cum sex lesbian blow". 12. Upon conviction and by virtue of Article 3(1) of the Sex Offenders Law, the respondent became subject to the notification requirements as set out in Article 6, which require him to notify an authorised officer of all names he uses and his home address and any change of address. He may additionally be required to give his fingerprints, a photograph of himself and a non intimate sample. The Minister may, by order, impose obligations if the respondent travels outside Jersey. 13. On 15 th April, 2011, when the question of the period to be specified under Article 5(4) arose, neither the prosecution nor the defence submitted that the period should be anything other than five

years, Article 5(4) being in the following terms:- "Unless the court is satisfied that there is an exceptional reason why a shorter period would be appropriate, the period specified under paragraph (1), (2) or (3) must be a period of at least 5 years, being a period that the court is satisfied takes into account - The likelihood of the person re-offending; and The seriousness of the offence committed by the person". 14. The Relief Magistrate said this:- "Mr Redgrave for the Prosecution isn't asking for it to be any more than that and Advocate Begg isn't submitting that it should be anything less than that. However, as I have my own mind I am going to make an order that you are subject to notification requirements for one year. The reason why I am making that order is because it is apparent from the social enquiry report that you still don't, or haven't taken fully on board, why the offence is made out, in terms of viewing instantaneously or for a very short period of time, and I think it is in your best interest that you engage with the appropriate services, Probation would be the obvious one, to address those questions. If in one year's time, and that date obviously runs from the date of conviction, if you wish to make an application to be released from the requirements you are going to have to illustrate that there is no or minimal risk of re-offending. To do that you are going to have to engage with services, so you will be subject to the requirements until such time as such an application is successful. I am hoping to give you the incentive to deal with the issues to see if that application can be made". 15. In his case stated, the Relief Magistrate explained his reasoning in the following way:- "Although charged with making and attempting to make indecent images of children, I regarded the activity of the defendant as more akin to possession of such images, as it did not involve any original creation. It had not been possible to apply a scale to the attempt charges but the vast majority of images discovered (183) were at SAP scale 1, 5 were scale 2 and 1 was scale 3. They were therefore not at the more serious end of the scale of such offences and involved no direct contact between the defendant and children. The social enquiry report concluded that there was a low risk of further sexual conviction, although as there are currently no assessment tools validated with Internet offenders, that assessment was to be treated with caution. The report went on to consider particular aggravating and protective factors. Because the defendant still did not accept that he was guilty of the offences he was deemed "not suitable to undertake a sexual offending programme at this time" and as such Probation supervision was not appropriate "at this juncture." Because [E] had thus far failed to engage with the Probation Service I regarded the desirability of prompting his involvement in a risk assessment as an exceptional reason for imposing a shorter period than might normally be regarded as appropriate. I am satisfied that this took into account - (a) the likelihood of the person re-offending; and (b) the seriousness of the offence committed by the person (Article 5(4)). In regard to (a), [E] had one conviction for an unrelated offence some 23 years previously and was assessed by the Probation Service as at low risk of re-offending generally. There was no application for a Restraining Order. In regard to (b), my assessment of the offences is as set out above and there was no suggestion by the prosecution that the offences were of extraordinary seriousness. In all the circumstances I regard the protection of the public as the primary consideration and believed that [E], as an otherwise law-abiding member of

society, would be keen to make an application to the Royal Court under Article 5(5). That he would be obliged to engage in a risk assessment for that purpose, and that this would happen sooner rather than later, was in my view an exceptional reason why a period shorter than five years was appropriate in this case." Appellant's submissions 16. Mr Baker submitted that the legislature had imposed a standard minimum of 5 years, reduction from which is restricted to cases where 5 years is not necessary and/or not proportionate to the need to prevent crime. The standard period of 5 years must reflect the desire of the legislature to ensure that those convicted of relevant sexual offences will generally remain subject to the notification requirements for a significant time in order to protect the public from sexual harm. 17. He said it may be a matter for judicial notice that offenders of this kind are rarely if ever cured "quickly". They commonly fail to accept that they have done wrong. This is a reason to continue to subject them to a degree of monitoring (i.e. requiring them to say where they are living and what they are calling themselves) and not a reason to enable them to bring notification requirements to a swift end. 18. If the prospect of an early end to the notification requirements were to incentivise a respondent to engage with the appropriate agencies and accept his guilt, then there would be doubts as to whether any professed change of heart was genuine or was simply expressed in order to improve his chances of succeeding in an Article 5(5) application. Furthermore, the argument that a shorter period is justified in order to provide an incentive to the respondent to change his attitude produces the perverse result that a defendant who refuses to accept that he has done wrong can benefit by receiving a reduction in the period, as an incentive to change his ways, while a defendant who accepts wrongdoing would need no such incentive and would thus receive no such reduction. If anything, the respondent's attitude meant he posed more, not less, of a risk than someone who accepts guilt and welcomes help to change his behaviour. While the right to make an application is no guarantee of success of that application, a defendant who had evinced the change of heart requested by the Magistrate's Court could have a legitimate expectation of favourable treatment by the Court upon his application. 19. Whilst the offending was not at the most serious scale of sexual offending, the Relief Magistrate had in his statement of case downplayed the importance of the names of the files referred to in the attempt charges, which indicate an interest in serious sexual abuse. 20. As for proportionality, the burden of the notification requirements is not onerous and the interference in the respondent's life is minimal in comparison to the seriousness of the imperative to protect the public from any risk of sexual harm. Respondent's submissions 21. Mr Begg submitted that there had been no substantial miscarriage of justice and the Royal Court should not interfere with the Relief Magistrate's decision. It could not be said that no reasonable judge could have reached the same conclusion. The Relief Magistrate was entitled to come to the decision which he did - and make the minimum notification period 1 year. 22. Mr Begg accepted that in AG-v-M

- [2011] JRC 174 the Court adopted a different approach. In that case (which involved an application under Article 13 of the Sex Offenders Law for no notification requirements to be imposed in respect of an offence of indecent assault committed before the Sex Offenders Law came into force) the Court did not reduce the period of 5 years, partly because of the nature of the offending and partly because of a concern as to the state of denial of the defendant. The Court noted that the longer period would not work against the defendant because it would have the advantage that he would be able to point to a longer track record if he comes to make an application on the expiry of the 5 years to have the notification requirements lifted. In Mr Begg's submission, the purpose and effect of the decision in AG-v-M and of the Relief Magistrate in this case were the same. By imposing a shorter notice period, the Relief Magistrate was encouraging the respondent to engage with the Probation Service sooner because if he did so there would be a prospect that, within a year, he could be off the Sex Offenders' Register. However, if he did not engage with the authorities, then clearly any application by him to be removed from the Sex Offenders' Register would be deferred. Had the defendant been placed on the Sex Offenders' Register for 5 years, he may have taken the view that there would be no point in him engaging with Probation and the other agencies until much more time, say 4 years, had elapsed. The theory therefore would be that if he were, indeed, a risk to the public, the risk would be extended the longer he continued without having any incentive for engaging with the relevant agencies. Test on Appeal 23. Article 18(1) of the Sex Offenders Law provides that an appeal shall be by way of a review. 24. In civil cases, the test on an appeal by way of review is that the appeal Court will only interfere in three situations:- (i) Where the judge has misdirected himself with regard to the principles in accordance with which his discretion has been exercised. (ii) Where the judge, in exercising his discretion, has taken into account matters which he ought not to have done or has failed to take into account matters which he ought to have done; or (iii) Where his decision is plainly wrong, (see UCC-v-Bender
- [2006] JLR 269). 25. In addition to these three principles in Hadmore Prods Limited-v-Hamilton
- (1983) 1 AC 191, a further supplementary ground is added, namely that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. 26. Notwithstanding that these notification requirements are regarded as a civil matter, Article 18(3) requires us on any appeal to apply the criminal law. We agree with Mr Baker that the standard test on an appeal against sentence, namely whether the decision was wrong in principle or manifestly excessive (see AG-v-Samson
- (1965) JJ 495) has no application because this is not an appeal against sentence. As made clear in Velosa , the legislation is concerned with the protection of potential victims and does not intend the fixing of the period to be part of the sentence. 27. The appropriate test on an appeal by way of review in criminal proceedings is that applied on appeals to the Royal Court from decisions on bail made by the Magistrate's Court. That approach is set out in the case of AG-v-Skinner 1994/127 (applied in AG-v-Godel

[2009] JRC 249) where the then Bailiff said this:- "Before this court can interfere with the refusal by the Magistrate to grant bail, we have to be satisfied either that the Magistrate positively misdirected himself, or the proceedings were irregular, or that he gave a decision which no reasonable Magistrate could properly have given." 28. Both Counsel submitted that there is little difference between the first two heads under the civil and criminal tests but recognise that there may be a distinction under the third head, namely whether a decision was "plainly wrong" (civil) or was "a decision no reasonable Magistrate could have reached" (criminal). Insofar as this third limb of the criminal test placed a higher burden upon the prosecution, it was content to assume it. 29. Constrained as we are by Article 18(3) of the Sex Offenders Law, we have therefore applied the criminal test on appeal by way of review as set out in the case of *Skinner* . 30. A further point arises in relation to Article 5(5) of the Sex Offenders Law and the requirement for there to be exceptional reasons for reducing the period below 5 years, best explained by quoting from the report to the draft Sex Offenders (Amendment)(Jersey) Law 2011 :- "It is accepted that notification requirements do amount to an interference with the right to family life (Article 8 of the ECHR). Therefore, the period for which a person is so subject must be necessary and proportionate. Article 4(1) of the Human Rights (Jersey) Law 2000, states that:- 'So far as it is possible to do so, principal legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights.' The Ministry of Justice felt that by using the phrase "exceptional reason" in paragraph (4) of Article 5 of the Sex Offenders Law, there was a risk that the "exceptional reason" test may suggest that there was a higher threshold which should apply; and they were concerned that this may not be ECHR compliant. The word 'exceptional' has therefore been removed and the wording in Article 5(4) altered to read: "...there is a reason..." In deciding the period for which a person should be subject to notification requirements, Article 5(4)(b) states that the court should take into consideration the seriousness of the offence committed by the person. The Ministry of Justice was concerned that this suggests that the scheme is punitive, rather than preventative; and because under the Law the court is able to apply the scheme retrospectively to those who committed relevant offences before the Law came into force, this would be in breach of Article 7 of the ECHR (No punishment without law). The terms of the test that should apply have therefore been amended in Article 5(4) by removing the present reference to the seriousness of the past offence, but adding a reference to the risk of sexual harm to the public, or persons, that the relevant person poses by virtue of the likelihood of reoffending." 31. When the amendment comes into force, Article 5(4) will therefore read as follows:- "(4) Unless the court is satisfied that there is a reason why a shorter period would be appropriate, the period specified under paragraph (1), (2) or (3) must be a period of at least 5 years, being a period that the court is satisfied takes into account the risk of sexual harm to the public, or to any particular person or persons, that the person subject to the notification requirements of this Law poses by virtue of the likelihood of re-offending." 32. At the time of sentencing, the Relief Magistrate and the advocates appearing before him were not aware of this advice from the Ministry of Justice but Mr Baker for the Prosecution accepted that in the light of this advice parts of the Sex

Offenders Law may not be compatible with the European Convention on Human Rights and that pending the amendment coming into force, Article 5(4) should be read down. Two parts are affected:- (i) The phrase "exceptional reasons" should be read down such that the Court should consider whether there is a "reason" to make the period shorter, the test being whether it is necessary and proportionate for the purpose of the prevention of crime for the person to subject to the notification requirements for a particular period. (ii) The reference to the seriousness of the offence should be treated as follows: while the seriousness of the offence might be an indication of the likelihood of re-offending, it is not necessarily so and the correct approach is that the seriousness of the offence should be used only as one element in assessing the risk of re-offending posed by the offender, not as an indication, of itself, that a particular period of notification is justified. 33. In considering this appeal, we have read down Article 5(4) accordingly, applying the above approach. Nevertheless, the Prosecution maintains that even if the sentencing hearing had proceeded in this manner, it would still have been wrong, in the circumstances of the case, for the Relief Magistrate to have imposed a period of 1 year for the reasons put forward by him. Decision 34. We accept the arguments put forward by the Prosecution and agree that the Relief Magistrate erred in specifying a period of 1 year for the reasons put forward by him. The principles underlying and justifying the notification requirements are analysed by Kerr J in *Re Gallagher's application for judicial review* (2003) NIQV 26 where he says this:- "[23] It is inevitable that a scheme which applies to sex offenders generally will bear more heavily on some individuals than others. But to be viable the scheme must contain general provisions that will be universally applied to all who come within its purview. The proportionality of the reporting requirements must be examined principally in relation to its general effect. The particular impact that it has on individuals must be of secondary importance. [24] The gravity of sex offences and the serious harm that is caused to those who suffer sexual abuse must weigh heavily in favour of a scheme designed to protect potential victims of such crimes. It is important, of course, that one should not allow revulsion to colour one's attitude to the measures necessary to curtail such criminal behaviour. A scheme that interferes with an individual's right to respect for his private and family life must be capable of justification in the sense that it can be shown that such interference will achieve the aim that it aspires to and will not simply act as a penalty on the offender. [25] The automatic nature of the notification requirements is in my judgment a necessary and reasonable element of the scheme. Its purpose is to ensure that the police are aware of the whereabouts of all serious sex offenders. This knowledge is of obvious assistance in the detection of offenders and the prevention of crime. If individual offenders were able to obtain exemption from the notification requirements this could - at least potentially - compromise the efficacy of the scheme. [26] By the same token the fact that the notification requirements persist indefinitely does not render the scheme disproportionate. While this is unquestionably an inconvenience for those who must make the report, that inconvenience must be set against the substantial benefit that it will achieve of keeping the police informed of where offenders are living and of their travel plans so that further offending may be forestalled

both by rendering detection more easily and deterring those who might be tempted to repeat their offences." 35. These principles have been endorsed by the Court in AG-v-Roberts

[2011] JRC 050 . The legislation creates a scheme the purpose of which is to protect potential victims from sexual harm by setting out a period of at least 5 years for the notification requirements which will be the minimum period that will apply to all who come within its purview, unless the Court is satisfied that there is a reason why a shorter period would be appropriate, the test being whether it is necessary and proportionate for the purpose of the prevention of crime for the person to be subject to notification requirements for a particular period. 36. Bearing in mind the purpose of the scheme, the respondent's continued denial of his guilt and failure to engage with the Probation Services, cannot in our view be a reason for reducing the period of the notification requirements. If anything, it would constitute a reason for increasing the period. If such reasoning were to be applied more generally, we accept the danger that it would lead to the perverse results argued by the prosecution, thus potentially undermining the scheme's primary purpose. 37. In our view, the prosecution would succeed in the third limb of the test, namely that no reasonable Magistrate could have reached that decision for those reasons. There may of course be other reasons for reducing the period and we come to that later. 38. That being the case, we conclude that there are substantial grounds for granting the short extension of time for the filing of the notice of appeal to 6 th May, 2011, which we now do. For the reasons set out above, we allow the appeal and set aside the decision of the Relief Magistrate to specify a period of 1 year. 39. Article 18(2) of the Sex Offenders Law provides that on an appeal the Court may make any order it considers necessary to give effect to its determination of the appeal. 40. Mr Begg submitted that this appeal had been stressful for the respondent, which we accept, and invited us, should the appeal succeed, not to refer the matter back to the Magistrate's Court but to bring this matter to a close without any further delay by specifying the appropriate period under Article 5(4) of the Sex Offenders Law. We think it right to proceed in that manner. 41. We accept that the offending here was not at the most serious end of the scale of sexual offending covered by the Sex Offenders Law. Of concern is the respondent's denial of guilt and failure to engage with the Probation Services. 42. As against that the respondent is, bar one historic and unrelated conviction, a man of good character who has a stable family life and work record. The Children's Services have no concerns with regard to his relationship with his children. Significantly for the purposes of Article 5(4), the respondent is assessed at a low risk of general re-offending and at a low risk of further sexual offending. We are satisfied that these are reasons for specifying a shorter period than five years and we determine that three years is the appropriate period before which an application to lift the notification requirements can be brought. Authorities Sex Offenders (Jersey) Law 2010. Sex Offenders Law (Magistrate's Court Appeals) Rules 2010. Sex Offenders (Amendment)(Jersey) Law 2011. Magistrate's Court (Miscellaneous Provisions)(Jersey) Law 1949. Archbold 2011. Protection of Children (Jersey) Law 1994. AG-v-M

[2011] JRC 174 . AG-v-Velosa

[2011] JRC 026 . AG-v-Fossey

[1982] JJ 223. La Solitude Farm Limited [1985-86] JLR 1. R-v-Marsh 25 Cr. App. R. 49. UCC-v-Bender

[2006] JLR 269 . Hadmore Prods Limited-v-Hamilton

(1983) 1 AC 191. AG-v-Samson

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