

JERSEY / JUDGMENT

AG -v- E and F [2015] JRC 134 (22 June 2015)

[2015] JRC 134

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JUDGMENT

THE commissioner: 1. First some preliminary orders:- under Article 5(1) of the Sex Offenders (Jersey) Law 2010, the offences of which the defendants have been convicted qualifying them for orders under the Law, we order that the notification requirements in respect of each of the defendants, are as follows:- (i) In respect of the defendant E, the period will be 6 years from the date of his conviction. We make no order in his case under Article 10(4) of the 2010 Law, making him subject to any Restraining Order; (ii) In respect of the defendant F, the period will be 2 years from the date of his conviction and, again, in his case, we make no Restraining Order under Article 10. 2. Starting with the powers of the Court, which are not completely straightforward bearing in mind the age of the defendants at the time of their conviction, the approach to be followed in this situation where the defendants were young people at the time of the offences but are now adults, is to be found, in my judgment, (this is a matter of law for me) in the recent case in the Court of Appeal in England, of R-v-Hall and Others

[2011] EWCA Crim 2753 . In that case, the Court considered the difficult question of whether a court sentencing an adult many years later for offences committed when they were a young person, should be looking at what the sentence would have been at the time of committing the offence or shortly thereafter, or looking at the situation as it is at the actual date of sentence. 3. There were two strands of authorities taking different views and the Court of Appeal in Hall came to a clear view as follows from the judgment of the Court by the then Lord Chief Justice, Lord Judge:- "47 (a) Sentence will be imposed at the date of the sentencing hearing, on the basis of the legislative provisions then current....." The Learned Lord Chief Justice then goes on to deal with the correct approach thereafter:- "(b) Although sentence must be limited to the maximum sentence at the date when the offence was committed, it is wholly unrealistic to attempt an assessment of sentence by seeking to identify in 2011, [which was the date of sentencing in that case] what the sentence for the individual offence was likely to have been if the offence had come to light at or shortly after the date when it was committed. Similarly, if maximum sentences have been reduced, as in some instances, ...they have, the more severe attitude to the offence in earlier years, even if it could be established, should not apply.

- (c) As always, the particular circumstances in which the offence was committed and its seriousness must be the main focus. Due allowance for the passage of time may be appropriate. The date may have a considerable bearing on the offender's culpability. If, for example, the offender was very young and immature at the time when the case was committed, that remains a continuing feature of the sentencing decision. Similarly if the allegations had come to light many years earlier, and when confronted with them, the defendant had admitted them, but for whatever reason, the complaint had not been drawn to the attention of, or investigated by, the police, or had been investigated and not then pursued to trial, these too would be relevant features.
- (d) In some cases it may be safe to assume that the fact that, notwithstanding the passage of years, the victim has chosen spontaneously to report what happened to him or her in his or her childhood or younger years would be an indication of continuing inner turmoil. However the circumstances in which the facts come to light varies, and careful judgment of the harm done to the victim is always a critical feature of the sentencing decision. Simultaneously, equal care needs to be taken to assess the true extent of the defendant's criminality by reference to what he actually did and the circumstances in which he did it.
- (e) The passing of the years may demonstrate aggravating features if, for example, the defendant has continued to commit sexual crime or he represents a continuing risk to the public. On the other hand, mitigation may be found in an unblemished life over the years since the offences were committed, particularly if accompanied by evidence of positive good character.
- (g) Early admissions and a guilty plea are of particular importance in historic cases. Just because they relate to facts which are long passed, the defendant will inevitably be tempted to lie his way out of the allegations. It is greatly to his credit if he makes early admissions. Even more powerful mitigation is available to the offender who out of a sense of guilt and remorse reports himself to the authorities. Considerations like these provide the victim with vindication, often a feature of great importance to them." 4. That is the approach now taken in England and Wales and, in my judgment, it is the approach that should be taken here. I mention in passing that that is inconsistent with the case of AG-v-Aubin

[2009] JRC 123 to which the Crown Advocate has referred and which she has invited us to regard as no longer representing the correct approach in Jersey. The Court in that case followed the line of cases in England and Wales which had come to the opposite conclusion to that of the Court of Appeal in Hall that I have just quoted. 5. On that basis I turn to look at the power of the Court which is set out in the Criminal Justice (Young Offenders)(Jersey) Law 1994 Article 4 and Article 5. Under Article 4(2):- "(5)

- (2) A court shall not pass a sentence of youth detention unless it considers that no other method of dealing with the person is appropriate because it appears to the court that - (a) the person has a history of failure to respond to non-custodial penalties and is unable or unwilling to respond to them; (b) only a custodial sentence would be adequate to protect the public from

serious harm from the person; or (c) the offence or the totality of the offending is so serious that a non-custodial sentence cannot be justified, and the court shall state in open court its reasons for imposing a sentence of youth detention and shall explain to the person that on the person's release the person may be subject to a period of supervision in accordance with Article 10." Then in Article 5(4):- "(5)

- (4) Where a person under 17 years of age is convicted of any offence punishable in the case of a person aged 21 or over with imprisonment for 14 years or more, not being an offence for which the sentence is fixed by law, and the court is of the opinion that none of the other methods in which the case may legally be dealt with is suitable, the court may sentence the offender to be detained for such period, not exceeding the maximum term of imprisonment with which the offender is punishable in the case of a person aged 21 or over, as may be specified in the sentence and, where such a sentence has been passed, the person so sentenced shall be detained in such place and under such conditions as the Secretary of State may direct." 6. Putting those provisions into the context of the present case it means this - so far as the defendant E is concerned, the Court has the power to send him to prison provided that it is satisfied that one of the three pre-conditions is met. I say at once that the Court is satisfied in the case of E that the offence or the totality of the offending is so serious that a non-custodial sentence cannot be justified and for that reason the Court will in due course be imposing a custodial sentence in respect of him. 7. In the case of the defendant F, because of his age that provision would not be available even if the Court were to wish to avail itself of it. In his case there is no provision which would make it lawful to impose a custodial sentence on him even if, as I say, the Court were minded to regard that as the appropriate sentence. 8. I turn now to the offences themselves. I address both of you but this is primarily directed in at you E. This conduct towards your sister may have started as childish sexual play but it developed into something very, very much more serious. It went much, much further than could possibly be described in that way. It escalated from indecent assault through to occasions of oral sex in which you ejaculated in her mouth and on occasions, as the Jury found, you attempted to have full sexual intercourse with her, which would, of course, have been incest because of your relationship. Having seen both of you give evidence in the trial, I have no doubt at all that you, E, were much the dominant character present on those occasions, dominant not only in respect of your sister but also dominant in respect of your co-accused, F. You subjected her to an appalling series of regular sexual abuse; it is true that you were not in the relationship of trust that would have been the case if you had been her father, but you were her older brother and that is a relationship which brings aspects of trust with it. As I say, not simply indecent assaults, but oral sex against her will, culminating your ejaculating in her mouth and also attempting to have full sexual intercourse with her. 9. The consequences for her have been extremely serious. We have seen reports setting out clearly the difficulties she has had in her adult life. Of course the Court must be careful not to attribute every difficulty that a victim of childhood abuse has in later life, to that abuse but it is absolutely clear on the evidence of Dr Briggs and what she said herself in her evidence and in her victim statement that what you

did to her has had the gravest consequences for her in later life. 10. In mitigation, so far as you are concerned E, you have no other relevant previous convictions and in many aspects of your life, you have done well. You have worked hard and many people have written to speak well of you and we have seen all of those references which show you, as I say, in a quite different light from that which you manifested when you were treating your sister in the disgraceful way that you did but, as I have already indicated, the Jurats are absolutely satisfied that the only way of dealing with you is by way of a custodial sentence. So far as the length of that sentence is concerned, it is the judgment of the Court that the 6 years asked for by the Attorney General is somewhat too high but it still requires a serious custodial sentence. 11. The total sentence on you is one of 4½ years' imprisonment. It will be made up in the following way:-the offences of indecent assault - the prison sentences asked for by the Attorney General in her conclusions are accepted, making a total of 15 months for those counts on the Indictment. So far as the gross indecency is concerned there will be sentences of 2 years' imprisonment, concurrent with each other and with the sentences for indecent assault. So far as the sentences of attempted incest are concerned, there will be sentences of 2 years and 6 months', concurrent with each other but consecutive to the other sentences, so that gives a total of 4½ years' imprisonment. I have already indicated the subsequent orders which the Court makes in respect of notification under the appropriate Law. 12. F, your situation is quite different. You did have an involvement in the sexual abuse of the victim but your role was much, much less and it is absolutely clear that you were under the domination of E at the time and, although you knew what you were doing was wrong, it is clear to the Court that you would not have done that had he not been there and encouraging you. So far as the Second Indictment is concerned, it is highly unlikely that would ever have been prosecuted had you not happened to have been convicted also of these other offences. It should be made absolutely clear, this is not in any way the case sadly all too common nowadays of somebody downloading child pornography from the internet. These were absolutely consensual photographs taken by your girlfriend, as she then was, you were both of you youngsters at that time, on her camera, printed by her and posted to you in a Valentine card. Had it been anything other than that, of course, we would have taken a different view of your involvement. 13. You have the mitigation and a powerful one, as I have just indicated the Court of Appeal in England has said, a powerful mitigation of a plea of guilty in a case where many men would have sought to brazen it out and tell lies in their own defence. You did not, you also came and told the truth when you gave evidence in the case of E. Those, as I say, are powerful mitigations and the Court accepts the conclusions of the Attorney General in relation to outcome. 14. In the three counts of indecent assault to which you pleaded guilty, there will be a Probation Order for 12 months; that means that during the next 12 months you will see the probation officer when he or she asks to see you, notify them of any change of address and carry out any work that they indicate you should. If, after that time, you have been in no further trouble, then that will be the end of it. So far as the possession of indecent photographs is concerned, because of the exceptional nature of the facts in that case, there will simply be a Binding over Order for 12 months which means if at the end of 12 months there has been no further offending, that will be the end of it. 15. We

order the forfeiture and destruction of the photographs. Authorities Sex Offenders (Jersey) Law 2010. R-v-Hall and Others

[2011] EWCA Crim 2753 . AG-v-Aubin

[2009] JRC 123. Criminal Justice (Young Offenders)(Jersey) Law 1994. AG v Godson and Crowley

[2013] (2) JLR 1. AG v Z

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[2012] JCA 070 . AG v GB

[2008] JRC 122 . AG v Abbott

[2007] JRC 094. AG v Foster

[2007] JRC 201. AG v Hamon

[2006] JRC 160. AG v Noel

[2003] JRC 027 . R v Billam and Others [1986] 1 WLR 349. R v Fowler [2002] EWCA Crim 620. R v Hall & Others

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