

JERSEY / JUDGMENT

AG v Figueira [2004] JRC 058 (29 March 2004)

[2004] JRC 058

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JUDGMENT

THE COMMISSIONER: 1. Joao Carlos Rodrigues Figueira you are aged 44. After a trial lasting 6 days in December, you were convicted by a jury on five counts of indecent assault. You were acquitted on three other counts. 2. The offences were committed by you against women patients or clients whose ages ranged from the mid-twenties to mid-thirties who came to you for treatment in your professional capacity as a masseur. The offences took place over a period of 2 years or more, from about the middle of the year 2000 until October, 2002. The Court recognises that they did not take place continually over that period. 3. By their verdicts of guilty the jury clearly rejected the suggestions made to each of the complainants by your counsel, though not supported by any evidence from you, that what you did was part of the therapy which you were carrying out, that the victims consented to it, and that in any event you genuinely believed that they were consenting to it. The jury were clearly satisfied, as was obviously the case, that you performed these indecent acts not as part of any therapy but for purposes of your own sexual gratification. 4. These women trusted you. You took advantage of them and abused that trust. This is not a case where the victims' lack of consent was overcome by force or violence. You carried out these indecent assaults by fraud and guile, by deceiving your patients as to the nature of their ailments, and as to the treatment necessary to cure them, and by betraying the confidence which they had in you as a professional man. 5. The effect which the assaults have had on the victims is in many cases serious and has been detailed in a psychologist's reports on four of them. 6. The next and important point which the Court has to consider is whether the Court should identify a starting point for sentence, and if so, what starting point should the Court adopt? The Court is aware of the fact that the maximum sentence for these offences in England is 10 years' imprisonment, though there is no maximum sentence in the jurisdiction of Jersey. 7. Crown Counsel Mr Gollop, suggests a starting point before mitigation of 6 years. This is apparently the first case of its kind to come to be sentenced in Jersey. However, we have been referred to and have read reports of a number of somewhat similar cases in England. They are R - v- Pike [1996] 1 Cr. App. R.(S) 4, the case of a hypnotherapist where the sentence was 4 years' imprisonment. The case of R -v- Prokop

- [1995] 16 Cr. App. R.(S) 598, the case of a herbalist where again the sentence was 4 years' imprisonment. The case of R -v- Ghosh
- [1999] 1 CR. App. R.(S) 225, the case of a general practitioner where a sentence of 3 years was reduced as an act of mercy to one of 2 years. Attorney General's Reference No.6 of 1999
- [2002] 2 Cr. App. R. (S) 67, the case of an osteopath, a decision to which I was a party, where twelve months' imprisonment suspended was increased on the Attorney General's Reference to a term of 18 months' imprisonment, the Court saying that it would have expected a sentence at first instance of at least 30 months; and the case of the Attorney General's Reference No. 62
- [1998] 2000 2 Cr. App. R. (S) 286 where the accused had pretended to be a doctor, the sentence was upheld at 5 years though the Court of Appeal Criminal Division expressed the view that it should at first instance have been 7 years' imprisonment . 8. The Court reminds itself that those were the sentences actually imposed or which were suggested as appropriate sentences after consideration of any mitigating features. The Court notes that in all cases the sentences followed convictions and, therefore, there was no element of discount for a plea of guilty. 9. The Court, of course, has the greatest respect for the decision of the Court of Appeal of Jersey in the case of Harrison -v- Attorney General [2004]JCA046 and is bound by it. However, despite comments to the contrary effect in that case, it is the experience of this Court that in England judges at first instance do not customarily identify or announce a starting point for their sentence. We say that simply to express the view that we find, therefore, that the English cases are of no real assistance in identifying a starting point; because in examining the English cases we would have to speculate and it comes to no more, what the notional starting point might have been had the English judge thought of adopting one. 10. As we have said there is no precedent in Jersey for setting a starting point in cases such as this. In cases of indecent assault the factors and circumstances are so variable that it is difficult if not impossible to arrive at a starting point which would be of any assistance in future cases. Each case depends upon the seriousness and frequency of the offending, the status of the offender, the number of victims involved and the impact on each individual victim, both at the time and in the long term. 11. As we have made plain we have read the judgment in Harrison with great care and we acknowledge that we are bound by it. Nevertheless, the Court has regard to what was said in the judgment of Sir John Nutting, QC at paragraph 138 and I quote: "We emphasise, therefore, that we regard it as desirable for the Royal Court to identify starting points; but what we have said does not constitute a direction that the Royal Court must perform this function." 12. As both Counsel have expressly agreed the Court of Appeal in that passage expressed it as being desirable though not incumbent upon the Royal Court to identify a starting point. Crown Counsel, Mr Gollop, conceded that it is within the Court's remit and discretion not to announce a starting point. Defence counsel assured us that the Court would not be criticised if it did not utilise a starting point. 13. In our discretion and for the reasons we have set out we decline to adopt a starting point in this case. So we

come to examine what the actual sentence must be. We have read the Social Enquiry Report. We have read no fewer than 28 testimonials presented on your behalf expressing the admiration of many people who know you and who have been treated by you. The Court bears in mind that at your trial no fewer than 7 witnesses gave evidence to like effect. Nevertheless, the Court must have regard to factors which both aggravate and mitigate these offences. The aggravating features appear to be these: (i) You were a professional man and these offences represented a breach of your professional duty and an abuse of trust which your clients placed in you. (ii) Your victims were vulnerable, most of them were unwell, and some of them were groomed by you in order that you could carry out your desires. (iii) There was not one, but five of these victims. (iv) These offences were committed over, though as the Court has said, not continuously over, a period of 2 years and finally, (v) The impact on the victims as set out in the Reports upon 4 of them.

14. The Court then looks to see what mitigating factors there are and first and foremost is the fact that you are a man of previous good character now aged 44. We emphasize again that that is borne out by witnesses who gave evidence at your trial and by the many testimonials that have been produced since.

15. The Court can also bear in mind the fact that your career as a masseur has been ruined by these convictions. The Court bears all those matters in mind. The sentences on each count will be the same and will be concurrent. We make no distinction between the different offences. Clearly a non custodial sentence would not be justified and is not suggested on your behalf.

16. The Crown have concluded that a sentence of 4 years' imprisonment would be appropriate. That has not been vigorously dissented from by Defence counsel, though Miss Gilbert did draw the attention of the Court to the sentence of 3 years reduced to 2 in the case of Ghosh to which reference has already been made and she referred to Pike but Miss Gilbert did not present the Court with any cogent argument as to why the Crown's conclusions were inappropriate.

17. The Court is not bound by any conclusions presented by the Crown. The Court has examined both individually and collectively what the appropriate sentence in this case should be and in particular what it should be so as to reflect the total criminality having regard to the features both of aggravation and mitigation.

18. The conclusion that the Crown reaches is that the sentence on each count concurrent is 4 years' imprisonment.

19. The Court has considered an application made on behalf of the Crown for a recommendation for deportation. That question has given rise to considerable discussion. One strong view was that these were serious offences which would justify such a recommendation. However, the majority felt that as a first offender and having regard to the excellent testimonials which have been presented to the Court it is not necessary to recommend your deportation. However, the Court wishes to make it plain and issues this warning that if there were to be any further offences deportation or a recommendation for it would almost inevitably follow. That is the sentence of the Court.

Authorities Whelan: Aspects of Sentencing in the Superior Courts of Jersey (2nd Ed'n): pp. 331-337; 344-408. Attorney General's Reference No. 6 of 1999 (R -v- Midda) [2002] 2 Cr. App. R.(S) 67. R -v- Tabassum [2000] 2 Cr. App. R. S 328; (26th May, 2000) The Times. A. G. -v- Fenn and others [2003] JRC105. R -v- Pike [1996] 1 Cr. App. R.(S) 4. R -v- Prokop [1995] 16 Cr. App. R. (S) 598.

R -v- Ghosh [1999] 1 Cr. App. R. (S) 225. Attorney General's Reference No. 62 of 1996 (R. -v- Onyibogu) [2002] 2 Cr. App. R. (S) 286. R -v- Healy [2003] Cr. App. R. (S). Immigration Act 1971 as extended to Jersey by the Immigration (Jersey) Order 1993; Section 6(2) entitled Notice as regards liability to deportation. R -v- Nazari, R -v- Dissanayake, R -v- Anyanwu and R -v- Fernandez and Another [1980] 1 WLR 1366. Jersey Law Review (Oct 1998) - The Rights of European Citizens in Jersey (Richard Plender, Q. C.). A. G. -v- Dias [2003]JRC189. A. G. -v- Figueira [2003]JRC178. Jersey Law Review (Oct 1997) - Deportation from Jersey, Roque -v- Lieutenant Governor of Jersey [Michael Birt, Q. C.]. A. G. -v- de Sousa [2003]JRC196. Monteiro -v- A. G. (7 th August, 2001) Jersey Unreported; [2001/177]. R -v- Nazir [1980] 3 All ER 880. Harrison -v- A. G . [2004]JCA046. Page Last Updated: 24 Mar 2017
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