

JERSEY / JUDGMENT

# AG v Jordan [2019] JRC 081 (06 May 2019)

**[2019] JRC 081**

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## JUDGMENT

THE commissioner: 1. On 4<sup>th</sup> April, 2019, the Court sentenced the defendant to a total of seven years' imprisonment for one count of making indecent photographs of children, two counts of indecent assault and one account of attempting to pervert the course of justice. We now set out our reasons. 2. Taking first the indecent photographs of children, there were four images recovered at levels 3 and 4 of the Copine scale. Applying the guidelines in Attorney General v Godson and Crowley

[2013] (2) JLR 1, this is a category 4 case, which sets an initial figure of three years, and this on the basis of assumptions all of which applied, save that the sentencing was not following a contested trial. 3. None of the aggravating features canvassed in Attorney General v Godson and Crowley was present, but noting that this was a guideline case, which was not intended to provide "any sort of straitjacket" for the Court (see paragraph 52 of the Guernsey Court of Appeal case of Wicks v Law Officers [2011-12] GLR 482, quoted at paragraph 24 of Attorney General v Godson and Crowley ) the prosecution submitted that there were the following significant aggravating factors in respect of this offence:- (i) There is evidence of the use of a number of search terms indicating that the defendant was searching for material of the most extreme kind. (ii) The defendant's Dell laptop was found to contain extremely sophisticated encryption software and as a result, the HighTech Crime Unit at the States of Jersey Police had been unable to examine it for the presence of indecent images. Nonetheless it reported that the encrypted areas had been used for storage of paedophilic movie files. (iii) The use of the TOR network, which allows users to access the Internet and leaves no trace of search terms or websites accessed. It also allows users to access the "dark web", where illegal material can be accessed and downloaded. The prosecution regarded this as an attempt to conceal evidence. (iv) There was evidence that indecent images were downloaded and renamed to innocuous file names, which was highly suggestive of an attempt to avoid detection, and to organise and file the indecent images. 4. As a consequence of these aggravating features, the prosecution adjusted the initial figure upwards to four years' imprisonment, reduced to two years' imprisonment to take into account personal mitigation. 5. Advocate Hall, for the defendant, accepted that evidence of filing and organising indecent images and of concealment could constitute aggravating features, but submitted that the Court could not sentence the defendant on the basis of a suspicion that there were more indecent images

than the four found. The fact was that only four indecent images had been found, and it was for the making of those images that he was to be sentenced. In the view of the Court, there was some substance in the defence submission, and it did not therefore adjust the initial figure of three years upwards. It then reduced the sentence for this count to eighteen months' imprisonment, having taken into account personal mitigation. 6. Turning to the indecent assaults, in the case of the first victim she was 17 and the defendant 22. In the case of the second victim, she was 19 and the defendant 27. The Defendant was very controlling and abusive. In the case of the second victim, she was persuaded to take part in sadomasochistic activity. Both victims were subjected to harassment. 7. In the case of the first victim, following an argument, she found the defendant standing naked at the side of her bed, demanding oral sex with threats of violence. Under duress and scared, she gave the defendant oral sex, which was followed by the defendant threatening to overdose and then attempting to strangle her. 8. The indecent assault involving the second victim also took place after an argument, when the defendant demanded anal sex, to which the victim reluctantly consented. He stopped at her request, then demanded that she clean his penis, which had her faeces on it, with her mouth. She tried to pull her head away from the defendant's penis, as she did not want to do this, as it would make her sick. The defendant then forced his penis into her mouth. The victim, who is disabled, was unable to bend backwards in order to get away from his penis, and so the defendant was able to force his penis all the way into her mouth against her will. This incident took place some time between October 2011 and 31 st August, 2012. 9. Psychological reports have been prepared for both victims and both have made personal impact statements. They have both been diagnosed with autism, and in both cases, the psychologists expressed the opinion that the harm they had suffered from their relationships with the defendant fell within the extreme psychological harm category. 10. Crown Advocate Hollywood referred the Court to the case of Attorney General v Jalam

[2015] JRC 169 . In that case, the defendant carried the victim, who he had only met that evening, into a small open private car park, hit her on the head four times in rapid succession, causing her to fall to the ground, and then forced his penis into her mouth repeatedly forcing her to perform oral sex on him. The incident lasted a full 20 minutes, and only came to an end when a passer-by heard her cries, and called the police. The starting point in that case was six years, reduced for personal mitigation to a sentence of 4½ years' imprisonment. 11. Advocate Hollywood submitted, in our view correctly, that the sentencing landscape had changed since the Court of Appeal decision in Attorney General v K and F

[2016] JCA 219 , in which the Court of Appeal upheld a sentence of ten years imposed upon the defendant K, from a starting point of fifteen years, for repeated indecent assaults committed on his step-daughter, who was aged seven, assaults which involved her being blindfolded, placed in a humiliating and helpless position and then forcibly assaulted by the penetration of her mouth with the defendant's penis, thrusting forwards and backwards to the point of ejaculation. The Court of Appeal approved the sentencing court

seeking guidance from the guidelines issued in England by the Sentencing Council ("the English Guidelines") to offer guidance on harm, culpability and aggravating and mitigating features. The Court of Appeal summarised at paragraph 27 the extent to which the courts in Jersey should adjust sentencing levels by having regard to sentencing in England in this way:- "(i) Jersey is a separate jurisdiction and the courts are entitled to fix their own sentencing levels. The Royal Court is not in any sense bound by the Guidelines. (ii) The analysis of aggravating and mitigating factors which is frequently set out in the Guidelines often, perhaps even usually, provides a convincing rationale for the assessment of the seriousness of the offending which can conveniently be adopted in Jersey. (iii) The Court would be influenced by the sentencing levels envisaged by the Guidelines when considering the conduct of K because it considered the sentencing levels to be correct for that conduct (iv) The Court should decide on the appropriate sentence for the offence before it in every case, and it did not follow that because the Guidelines were helpful in the case of K, they would always be helpful to enable the Court to arrive at the correct level of sentence for that particular offence in the jurisdiction of Jersey. (v) There was no reason in principle why it should be thought right for Jersey to impose lower sentences for an offence as committed by K than would have been imposed in England and Wales." 12. The Court of Appeal emphasised at paragraph 28 that the sentencing levels set by the Guidelines do not apply in Jersey, but in relation to the last point, added this at paragraph 32:- "32 Similarly, although the Royal Court in the K case was encouraged to take the approach that there is no reason why sentencing levels in Jersey for these offences should be markedly lower in Jersey than in England and Wales, it appears to us that such an approach misses the point that this Island has a separate sentencing jurisdiction; and, as emphasised in Wicks and in many other cases in this Island, it is for the Jurats to settle upon the sentencing policy they consider to be right. They may wish to have regard to sentencing levels in England and Wales but there is no presumption that these should be followed in Jersey for all the reasons set out at paragraph 28 above and if the Court chooses not to adopt such sentencing levels, there is no obligation to justify why it has not done so. The Court does not start from the premise that the Guidelines provide a prima facie correct level of starting points or sentencing ranges and indeed the rigidity of the Guidelines, with a direct consequence in some cases of what appear to be surprisingly severe sentences, demonstrates why in this jurisdiction that is not appropriate." 13. The Court of Appeal also cited with approval the case of Attorney General v T

[2016] JRC 001 saying at paragraph 29:- "the Court in T referred to the fact that previous authorities had indicated that the Court took a particularly condign view of the introduction of oral sex and also referred to the fact that, under Section 1(1) of the Sexual Offences Act 2003 of England and Wales, rape had been redefined so as to include penetration of the mouth by a man's penis without consent. The Court then said at paragraph 10:- 'Whilst that statutory change of definition has not occurred in Jersey, the Court considers that assaults of this kind, namely when a penis is forced into a bodily orifice of a vulnerable and clearly unwilling complainant, using force and threats, should

be regarded (and would be regarded by right thinking members of society today) as being in the same category of seriousness as rapes involving vaginal penetration. It seems to this Court that penetration of the mouth constitutes an intensely intimate and degrading act, which can involve a severe degree of emotional and psychological trauma." 14. Advocate Hollywood then referred the Court to the section of the English Guidelines headed "Assault by penetration" submitting that these offences would come within category 1, because of the existence of the following factors, namely, severe psychological harm, additional degradation/humiliation and victims who are particularly vulnerable, due to their personal circumstances. None of the factors listed under category A for culpability applied, and she noted that the starting point in England for a category 1B case would be 12 years' imprisonment. 15. In terms of harm, forced oral sex is both degrading and humiliating, and the circumstances of the oral sex committed on the second victim were particularly degrading and humiliating. There was a need for an element of caution, however, in relation to the diagnosis of severe psychological harm in that, as Advocate Hollywood accepted, this was based upon the impact on the victims of what were clearly controlling and abusive relationships with the defendant as a whole, relationships which lasted some two years each, of which these two incidents formed part. In terms of vulnerability, Advocate Hall pointed out that the diagnoses of autism were recent, and were not known to the defendant (or presumably the victims) at the time that he was in a relationship with the victims. They came as a surprise to him; the first victim had, for example, qualified in a profession. He was aware of the second victim's cerebral palsy, which Advocate Hall pointed out was a physical disability; even so he took advantage of her physical disability when committing this indecent assault upon her. 16. The prosecution did not suggest that the Court should follow the starting point indicated in the English Guidelines, but submitted instead that the starting point should be nine years for the incident involving the first victim, and ten years for the incident involving the second victim. When asked what had guided the prosecution to those starting points, Advocate Hollywood said it was the starting points in the case of *Attorney General v Jalam* increased to take into account the higher sentences now being imposed for this kind of offence. From those starting points, the prosecution sought four years' imprisonment for the first incident and five years for the second incident, consecutive to each other, having taken into account personal mitigation. 17. In *Attorney General v Jalam* the Court had, by implication, sentenced on the basis that the indecent assault in that case was as serious as rape, guidance being sought from the English authorities on rape. Those authorities have now been superseded by the English Guidelines, and we accept that sentences for this kind of offence have now increased in Jersey. A higher starting point would therefore be justified, but we bore in mind that *Jalam* involved abduction by someone who was essentially a stranger to the victim and violence. 18. Similarly, the defendant in *Attorney General v T* was sentenced for two indecent assaults on the basis that they were as serious as rape, and by reference to the English authorities on rape. That case involved two incidents of forced oral sex, including ejaculation, on a girl in the defendant's care when she was aged eight and ten, the second incident involving an element of abduction and

entrapment. The starting points were 8½ years and 9½ years respectively for the two indecent assaults, with concurrent sentences of six years in total being imposed after personal mitigation. 19. It was appropriate for the prosecution to refer the Court to the Court of Appeal decision in *Attorney General v K and F* as that case gives guidance as to the extent to which the Court in Jersey can have regard to the English Guidelines and it marked a change in the sentencing landscape for sexual offences, but the Court was careful to bear in mind that both cases under review by the Court of Appeal involved children, whereas this Court was concerned with two indecent assaults involving two adults, which took place when they were in an individual relationship with the defendant. Whilst not in any way wishing to diminish the seriousness of such assaults, and exercising its best judgment, the Court determined that a starting point of seven years for the first incident and eight years for the second year were the correct starting points, reduced to three years' imprisonment and four years' imprisonment consecutive to each other, after taking into account personal mitigation. 20. The final offence, of attempting to pervert the course of justice, involved the defendant pressurising his wife over phone calls made from the prison to delete material from his "Cloud" account, to prevent the police from viewing it. It was not deleted, and the police did get to view it. As we understood the position, the information viewed did not lead to any charges against the defendant. The prosecution moved for a sentence of twelve months for this offence, a sentence the Court considered correct. 21. In terms of mitigation, the defendant had pleaded guilty to the possession of the indecent images, and to perverting the course of justice when first charged. In relation to the indecent assaults, he entered pleas on the basis accepted by the prosecution a few weeks before the trial, but in the Court's view, it was a valuable plea as it saved the victims from having to give evidence. Such pleas are to be encouraged. 22. The defendant has no previous convictions, and a good work record. These offences took place in 2010 and 2012 respectively, and he is now settled and married. He describes his relationship with his wife as one of equals, with no sadomasochism or violence of any kind. He expressed what we accept as genuine remorse for his actions. We had a very supportive letter from his wife and from his brother and father, the latter having travelled from his home in France to attend the hearing. 23. The Crown moved the four and five year sentences of imprisonment it sought for the indecent assaults to be consecutive to each other, but concurrent to the two years' imprisonment it sought for the indecent images, and for of twelve months' imprisonment it sought for the offence of perverting the course of justice to be consecutive, giving rise to a total sentence of imprisonment of ten years. The members of the Court were unanimously of the view that this total sentence was excessive. It equated to the sentence imposed upon the defendant in *Attorney General v K*

[2016] JRC 158 which we have briefly described in paragraph 11 above, indecent assaults upon a seven year old girl in breach of trust and in circumstances that can only be described as harrowing in the extreme. 24. *Prima facie*, the offences involving the indecent images, perverting the course of justice and the two indecent assaults on different victims should attract consecutive sentences. The sentences which the Court determined were

appropriate, namely eighteen months for the indecent images, three years for the first indecent assault, four years for the second indecent assault and twelve months for perverting the course of justice, would themselves result in a total sentence of nine years six months if imposed consecutively, which again, the Court regarded as excessive. 25. In the unanimous view of the Court, the total sentence to be imposed on the defendant to reflect the totality of his criminality was seven years. When, as here, the totality principle applies, the Court can reduce the sentences in a number of ways. In this case, the Court resolved to do so by making the sentence for the indecent images and the sentence for perverting the course of justice concurrent with each other and concurrent with the sentences for the indecent assaults, which were to be consecutive with each other, giving rise to a total sentence of seven years' imprisonment. 26. Turning finally to the Sex Offenders (Jersey) Law 2010, the Court imposed a period ten years from the date of sentence before the defendant can apply to have the notification requirements lifted, and granted the restraining orders sought by the prosecution save in one respect. The prosecution sought an order that the defendant be prohibited from approaching or contacting directly or indirectly the two victims for an indeterminate period. Such an order had been made by the Court in *Attorney General v D* [2018] JRC 158 unopposed. The Court was concerned as to whether it had the power to make an indeterminate order under Article 10 of the Sex Offenders (Jersey) Law 2010, which provides at sub-paragraph (9):- "(9) An order under paragraph (4) or an interim order under paragraph (5) shall have effect during the period specified in it or, if that period is subsequently amended, during the amended period." Sub-paragraph (12) goes on to say that such an order may be extended or shortened. 27. Advocate Hollywood did not press the point in relation to the Sex Offenders (Jersey) Law 2010, but suggested that the Court could make an indeterminate order under Article 5 of the Crime (Disorderly Conduct and Harassment) (Jersey) Law 2008. Article 5(1) provides:- "(1) If a court convicts a person of an offence, a person presenting or prosecuting the case against the convicted person may apply to the court to make a restraining order against the convicted person." Article 5(5) provides:- "(5) A restraining order shall specify the period for which it is to remain in force (which period may be specified to be of an indeterminate period)." 28. Advocate Hollywood submitted that the reference to an "offence" in article 5(1) is not limited to an offence under that Law, but to offences at large. The Court was not persuaded that this was the case, but the matter was not the subject of full argument. The Court therefore imposed the order sought, but for a period of ten years from the date of sentence, giving liberty to the Attorney General to apply for an order that was indeterminate, when the matter could be the subject of full argument. *Authorities AG v Godson and Crowley*

[2013] (2) JLR 1. *Wicks v Law Officers* [2011-12] GLR AG v Jalam

[2015] JRC 169 AG v K and F

[2016] JCA 219 AG v T

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[2016] JRC 001 English Guidelines AG v K

[2016] JRC 158 Sex Offenders (Jersey) Law 2010 AG v D

[2018] JRC 158 Crime (Disorderly Conduct and Harassment) (Jersey) Law 2008 Page Last Updated:  
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Prepared on 22 October 2026 · Esheria