

JERSEY / JUDGMENT

AG v Kean 09-Aug-2019 [2019]

JRC 155 (09 August 2019)

[2019] JRC 155

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JUDGMENT

THE DEPUTY BAILIFF: 1. On 19 th June, 2019, the Defendant appeared before the Superior Number of this Court to be sentenced with regard to two counts of indecent assault and one count of rape (AG-v-Kean

[2019] JRC 115). On that occasion he was sentenced to 5 years imprisonment for an indecent assault (Count 1), 6 years imprisonment for an indecent assault (Count

2) and 7 years 6 months imprisonment for rape (Count 4) all concurrent. The Court also fixed a period of 10 years before which an application could be made to come off the Sex Offenders Register and a restraining order was granted in the terms then sought by the Crown for an indeterminate period. At the time of sentencing, we indicated that reasons would follow. These are those reasons. Circumstances of offending 2. The offending took place on 16 th July, 2016, on a single occasion. The Defendant was at that time 39 years of age and the victim was then 19 years of age. For a period leading up to the offences, both the Defendant and the victim had been residing separately at the same premises until the day before the offence. 3. The Defendant and the victim met for the first time at that hotel on or about 10 th July, 2016 and after an evening of conversation and drinks they had consensual sexual intercourse. Thereafter over the ensuing days, the Defendant insinuated himself into the victim's daily activities and bombarded her with calls and text messages and knocked persistently on the door of her room at the hotel after she had gone to bed. She had gone on to make it plain to the Defendant that she had wanted nothing more to do with him but so persistent were his activities that, on three occasions, she recorded their conversations through the door without his knowledge. The Court has had the benefit of seeing the transcript of those conversations which show the Defendant as a man who was not prepared to take no for an answer. The victim became increasingly worried about the situation, particularly when she was approached by a stranger in town who apparently had been told that she, the victim, was in a relationship with the Defendant. 4. As a result of this unwanted attention, and particularly in the light of the fact that a stranger had approached her, as mentioned above, the victim decided to confront the Defendant with the aim of persuading him to delete her number from his phone. In the early hours of 16 th July, 2016 she met with

the Defendant, at her request, at the hotel front door and an argument ensued. The victim asked the Defendant to delete her telephone number but he refused and said he would not agree to do so unless she invited him up to her room to discuss it. She reluctantly did so and the argument continued. 5. During the course of the argument the two were sitting on the bed and the Defendant then lay on top of the victim pinning her shoulder down before placing his right hand down the front of her leggings forcing two fingers inside her. This assault was Count 1 on the Indictment. The Defendant then pulled the victim's leggings and pants down around her knees and forced two fingers into her vagina making her flinch with pain. This is Count 2 on the Indictment. 6. The Defendant then proceeded to pull off her leggings and pants, removed his own lower clothing and then raped her. This is Count 4 on the Indictment. The victim had tried unsuccessfully to push him off and delivered one or two kicks to the abdomen but it made little difference. She repeatedly shouted to the Defendant to stop through the entire period of the rape. The Defendant did not ejaculate and eventually got off the victim and the victim said to him that she had repeatedly told him to stop. The Defendant then, according to the victim's evidence, responded with the words that "all girls say to stop but don't mean it. You only stop if they are screaming". At trial the victim gave evidence to the effect that she had told the Defendant to stop "upwards of 50 times".

Background

7. The Defendant has psychological difficulties. He was originally scheduled to face trial on 21st March 2017, however he was admitted to a secure unit in the UK because of the marked deterioration in his mental health having been diagnosed with a "psychotic disorder, other organic disorder and a possible case of anti-social and emotionally unstable personality disorder". In May of 2017 he was found by the Court to be unfit to plead and stand trial. He thereafter resided at Brockfield House a medium secure unit in the United Kingdom for a number of months before being transferred into prison in the United Kingdom where he remained for seven months until being returned to La Moye prison. He was reviewed again in October 2018 and was deemed to be fit to face trial and the trial took place in April 2019. 8. Whilst the Defendant's mental condition did not afford him any defence to the charges he faced, it seemed to the Court likely that it accounts to a significant extent for the harassing nature of his conduct and his presentation as a man with a sense of entitlement over the victim and as one who would not take no for an answer. 9. The Defendant has a significant criminal record including assault on a partner and assault and grave and criminal assault on prison officers as well as other assaults and offences. He was, indeed, subject to a binding over order at the time of the current offending, which had been imposed on 7th July, 2016 for being drunk and disorderly. 10. The Defendant pleaded not guilty and was convicted by a jury after a trial. He does not accordingly have the benefit of a guilty plea and the victim was, as a result, subject to cross-examination and had to relive the events, which were clearly traumatic for her. 11. In moving conclusions before us the Crown made reference to a number of sentencing decisions of the Court of Appeal and of this Court. Of those, several

related to sentences imposed where the offending took place against children and to that extent those cases were of no assistance to the Court in dealing with the instant matter. However, what those cases did demonstrate is that whilst this Court may have reference to the factors contained in the guidelines issued by the Sentencing Council for England and Wales as distinguishing some offences from others in terms of seriousness, the Court does not in any way follow either the starting points nor the anticipated finishing points set out in those guidelines. Rather, it applies, as it has always done, an independent approach to the assessment of sentence. Sentencing is, in our judgment, an art rather than a science and unless there is what is acknowledged to be a guideline authority from the courts of Jersey, the Court will reach its own conclusion as to the eventual sentence based on a consideration of the circumstances in the round. It is entirely understandable that the sentences in a large jurisdiction which are to be imposed by judges in different parts of the country may, in order to achieve consistency, need to be the subject of guidance but in this jurisdiction, with a limited number of courts, that is not a requirement and the Court is entirely at liberty to give what weight it feels just to the specific factors in each of the cases before it whilst paying regard to the sentencing ranges identified from other cases. 12. We were referred to the case of AG-v-Dobrin and Ors

[2019] JRC 097 in which a number of defendants were sentenced for a gang rape of a single victim. The defendants were aged between 18 to 24 years and the victim 19 years of age. This case was on its facts significantly more serious than the case before us but the Court said this:- "The guideline sentencing decisions in this court and the Court of Appeal have consistently indicated that the analysis of what are relevant factors of harm and culpability, or aggravation or mitigation, as set out in the guidelines are frequently very useful indicators of the relevant factors to be taken into account by the sentencing court. However, that is as far as it goes." 13. The Court also referred to the decision of the Court of Appeal of England and Wales of R -v- Millberry

[2003] 1 Cr App R 25 which is a guideline decision setting starting points for rape and has been applied by the courts in this jurisdiction for a significant period. The Crown expressed the view in its sentencing conclusions in the instant case that Millberry is of little assistance as it is " derived from English Court of Appeal decisions which are no longer followed in England and Wales and was based on advice of an English sentencing panel which is no longer followed ." We do not agree. In our judgment, the relevance of Millberry lies not in the fact that it is based upon decisions no longer followed or upon the recommendations of a panel which are equally no longer followed but rather that its principles have been adopted by the courts of Jersey as applicable within this jurisdiction. That is not to say that Millberry is any longer to be applied on a formulaic basis, if indeed it ever was, and we note that this Court in Dobrin and others did not follow the starting points in Millberry . In fact, in considering Millberry the court on that occasion said:- "32. Before leaving Millberry, we should note the Court of Appeal's comments on the role of guidelines:- "34. Before concluding our general guidance with regard to sentencing on rape and turning to the cases of the individual appellants, we would emphasise that guidelines such as we

have set out above can produce sentences which are inappropriately high or inappropriately low if sentencers merely adopt a mechanistic approach to the guidelines. It is essential that having taken the guidelines into account, sentencers should stand back and look at the circumstances as a whole and impose the sentence which is appropriate having regard to all the circumstances. Double counting must be avoided and can be a result of guidelines if they are applied indiscriminately. Guideline judgments are intended to assist the judge arrive at the correct sentence. They do not purport to identify the correct sentence. Doing so is the task of the trial judge."

33. We do not comment on the Millberry starting points nor do we think it is appropriate in the present case to apply them. As was suggested in the passage set out above, we have taken a step back and looked at the circumstances as a whole." 14. This to our mind justifies the continuing reference to Millberry before this Court but also emphasises that the Court retains flexibility to dis-apply it in appropriate circumstances and to reach a sentence which it feels to be justified in the round taking all of the relevant factors into account. Assessment of sentence 15. In the instant case, we note the report of the consultant psychiatrist which deals with the psychological effect of the rape and indecent assaults on the victim. Whilst she suffered from pre-existing challenges, the consultant psychologist concludes that it is the assaults and rape have caused her to suffer " severe psychological harm " and the symptoms of post-traumatic stress disorder. 16. The Crown sought to characterise the assaults and rape as containing additional elements of degradation in the light of what the Defendant said to the victim after the event but also because, by reason of the fact the hotel front door was locked, the victim needed to accompany the Defendant to the front door to let him out of the building. We do not think that this latter factor was an added degradation perpetrated by the Defendant on the victim - it was an unfortunate but ordinary consequence of the Defendant being afforded access to the hotel and her room in the first place. Similarly, we do not view the Defendant's remarks as an aggravating feature - they demonstrate, so it seems, a completely dysfunctional and delusional view of reality but we do not consider them to be additional degradation. 17. We note that the Defendant's record is a bad one although he has no previous convictions for offences of the nature currently under consideration. Similarly, he has shown no remorse and indeed in pleading not guilty he has caused the victim to relive in open court the traumatic nature of the attacks upon her and to be subject to cross-examination in that regard. 18. We also note that the Defendant has significant mental challenges and was diagnosed in 2017 with a " psychotic mental disorder, the most likely being paranoid Schizophrenia ". The reporting doctor on that occasion also indicated certain complicating factors in connection with the Defendant's mental condition which include:- "... History of organic mood disorder, temporal lobe epilepsy, traits of emotionally unstable and anti-social personality disorder, and polysubstance misuse (heroin, alcohol and amphetamines). He also has documented evidence of organic brain damage in the temporal and frontal lobes, confirmed through brain imaging and a history of being treated for epilepsy since he was 10 years old." 19. It is clear that the Defendant remains in denial about his culpability in the instant case. 20. These

were serious sexual offences committed by this Defendant against the victim. Although there had been a single instance of consensual sexual intercourse on an earlier occasion, it should have, and must have been, palpably clear to the Defendant that the victim did not wish to continue any form of relationship with him. A simple review of the transcripts of his conversations with the victim when he came to hammer on her bedroom door at night or the context of his barrage of text messages to her made it plain that she wanted nothing more to do with him. She often expressed herself in the clearest of terms. 21. In its conclusions the Crown moved, with regard to Count 1, for a period of 6 years' imprisonment, with regard to Count 2 also 6 years' imprisonment and with regard to Count 4 a period of 8 years' imprisonment, all concurrent. 22. Whilst clearly the Defendant's mental problems provided no defence to the charges against him they were, in our judgment, nonetheless a factor what went some way to explaining some of the more strange elements of his behaviour and something that we should take into account when sentencing. 23. In the judgment of the Court, the facts of Count 2 as set out above meant that it was rather more serious than Count 1, but that taking all of the aggravating and mitigating factors into account, the sentence of the Court should be one of 7½ years' imprisonment with regard to Count 4. The Court paid particular mind to the sentences imposed in Dobrin and Ors which was, as we have said, a much more serious case on the facts than the instant case. 24. For those reasons we impose the sentences set out at paragraph 1 above. 25. In reaching the above sentence, we took into account the cases placed before us including, specifically, Millberry and Dobrin and Ors and stepped back to view the sentence as a whole. 26. The imposition of a restraining order in principle was not opposed by the defence and in our judgment it was appropriate to impose it for an indeterminate period given the effect of this offending on the victim. Similarly, in our judgment, a period of 10 years was the appropriate period before the Defendant could apply to come off the Sex Offenders Register. Authorities AG-v-Kean [2019] JRC 115 AG-v-Dobrin and Ors

[2019] JRC 097. R -v- Millberry

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