

JERSEY / JUDGMENT

AG -v- S [2017] JRC 194A (14 November 2017)

[2017] JRC 194A

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JUDGMENT

THE commissioner: 1. At the hearing, the Court imposed a total sentence of 11 years' imprisonment for various sexual offences committed by the defendant on the complainant. As the Attorney General has continued his policy of inviting the Court to review upwards the level of sentencing for such offences, the Court said it would give written reasons for its decision at a later stage. What follows constitutes those reasons. The factual background 2. The complainant is the defendant's daughter. Her parents never lived together. However, from an early age, she began having contact with the defendant. In due course this occurred twice a week, once at the weekend and once during the week. 3. At the weekend, the defendant would often take the complainant to a public swimming pool. They would change in the family changing room. Both at the weekend and on the weekday visit, they would usually go to the defendant's flat. 4. In November 2015, such contact came to an end for reasons unrelated to this case. There has been no contact since then. In November 2016 the complainant said to her mother that she may have 'accidentally' touched the defendant's penis when in the changing room at the swimming pool. The mother informed the police and three ABE interviews subsequently took place with the complainant. Her evidence came out in stages but at the conclusion of the three interviews, she was alleging as follows:- (i) In the shower at the swimming pool after swimming, she would touch the defendant's penis with her hand. He would also touch her vagina. (ii) Similar events happened at the flat. Whilst they were on the sofa watching television, he would tell her to take her trousers and pants down. He would then touch her vagina although she could not say whether it was on the inside or outside of her vagina. He would also on occasions pull his trousers and pants down and she would take hold of his penis. She demonstrated in the ABE interview the manner in which she would hold it. (iii) Finally, she went on to say that on occasions when they were on the sofa in the flat, he asked her to suck his penis to 'make it happy'. She did this. She said she did not like doing it and did not understand why he was asking her to do it. She described that on one occasion a lot of white liquid came out as a result of her sucking his penis. On other occasions a very small amount came out. He told her that this liquid 'helped people to have babies'. 5. She was unable to say how often these events occurred but they were more than once. She could not say if it happened every time they went swimming. 6. In due course the defendant was charged with ten counts, six of procuring an act of gross indecency and

four of indecent assault. The complainant had been unable to say exactly when these occurred and accordingly the counts covered the period from when she was 3 to when she was 7, which was the period during which she had unsupervised contact with the defendant. Counts 1 and 2 charged procuring an act of gross indecency and related to procuring her to place her hand on his penis in the changing room at the swimming pool. Counts 3 and 4 related to the same conduct in the defendant's flat i.e. making her place her hand on his naked penis. Counts 5 and 6 are the most serious and related to the procuring of oral sex in his flat whereby the complainant sucked his penis with her mouth. Counts 7 and 8 were offences of indecent assault and related to the touching of her vagina at the defendant's flat and Counts 9 and 10 were offences of indecent assault relating to his touching her vagina in the changing room at the swimming pool. 7. The defendant denied all the counts but was convicted following an assize trial. The jury were told that the counts were in five pairs and that the second count in each case was to reflect that it happened on more than one occasion. Accordingly if the jury thought that any particular type of conduct only occurred once they should convict of only one count whereas if they were sure that it happened more than once they should convict on both counts. In due course the jury by majority convicted of all ten counts. The complainant gave evidence in chief by means of the ABE interviews but was then cross-examined through a live television link. However, following a ground rules hearing, limits were placed on the type of questions which Advocate Dale could ask. Sentence 8. This case follows the decision of the Court of Appeal in K-v-AG

[2016] JCA 219 (the decision in the Royal Court being at AG-v-K

[2016] JRC 158). In K , the Attorney General submitted that sentencing levels for sexual offences against children should be increased and referred to the sentencing levels for such offences in England and Wales by reference to the Definitive Guidelines ("the Guidelines") issued by the Sentencing Counsel in that jurisdiction. The Royal Court agreed that the sentencing levels for the particular conduct before it should be increased and noted the sentencing levels indicated by the Guidelines. However the Royal Court made clear that it was not bound by the Guidelines as Jersey was a separate jurisdiction. It indicated that the starting point for the offending in that case was one of 15 years and imposed a sentence of 10 years after allowing a discount for the guilty plea. 9. On appeal, the Court of Appeal emphasised the fact that Jersey is a separate jurisdiction free to pass sentence at the level which the Court considers appropriate. However it indicated that reference to the Guidelines could be useful in terms of typical aggravating and mitigating factors. The Court of Appeal summarised the position as follows:- "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 in 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 the direct consequence in some cases of what appear to be surprisingly severe sentences, demonstrates why in this jurisdiction that is not appropriate. 33. In the case of K, the Royal Court received opinions from experienced English counsel instructed by the Crown and the defence as to what the sentence would have been, had the case been dealt with in England. We think this was an unhelpful exercise and was at risk of leading the Royal Court astray because of the implied suggestion that the Guidelines had a force or status which they do not in fact have. However, as has been said on other occasions, the Guidelines helpfully set out factors which are properly regarded as distinguishing some offences from others in terms of seriousness. While we do not endorse the starting points or anticipated range of finishing points for particular offences, we think it is entirely appropriate for the Royal Court to have regard to the factors which, according to the Guidelines, would assist an English court to categorise the seriousness of the offence." 10. In the linked case of AG-v-F

[2016] JCA 219 (heard at the same time as K-v-AG

[2016] JCA 219), the Court of Appeal indicated at para 54 of its judgment that the Royal Court might wish to review upwards sentences for indecent assaults involving digital penetration of children (being the type of conduct in issue in the F case). 11. The Court of Appeal upheld the sentence imposed by the Royal Court in K which was at a higher level than might have been expected under the previous sentencing policy of the Court. Although the Court was concerned only with the particular type of conduct in issue in that case, we think the time has come to recognise that, following the K case, sentences for sexual offending against children are likely to attract higher sentences than would previously have been the case. 12. Turning to the facts of this case, Crown Advocate Pedley referred us to the Guidelines for the offence (in England and Wales) of rape of a child under 13 contrary to Section 5 of the Sexual Offences Act 2003 . We agree that the elements of that offence (namely the penetration of the mouth of a child under 13 by a man's penis regardless of consent) are akin to the offending in Counts 5 and 6 of procuring an act of gross indecency by persuading the complainant to suck the defendant's penis. As with all offences, the Guidelines in relation to this offence list various matters under 'harm' and various factors under 'culpability', which can lead to the offending falling into a higher category for sentencing purposes. Thus in relation to 'harm', the fact that a child is particularly vulnerable due to extreme youth moves the offending to category 2; and in relation to 'culpability' the existence of an abuse of trust means that it falls within category A. Where offending falls within category 2A, the Guidelines give a starting point of 13 years' imprisonment with a final sentencing range of between 11 and 17 years' imprisonment. All these figures are on a not guilty plea. 13. We agree that the complainant in this case was particularly vulnerable due to extreme youth and indeed Advocate Dale did not dissent from that view. She was somewhere between 3 and 7 at the time of the offending. As to culpability, Advocate Dale did not dispute the existence of an abuse of

trust and indeed it was a gross breach of trust given the relationship between the complainant and the defendant. Crown Advocate Pedley submitted there were other culpability factors present namely a significant degree of planning, grooming behaviour used against the victim and the deliberate isolation of the victim. We agree that grooming behaviour was present in that the defendant gradually introduced the complainant to more serious types of offending but we do not agree that the other factors mentioned were also present or, if they were present, that they aggravate the offending. Crown Advocate Pedley indicated there were other aggravating features, namely ejaculation, the location of the offence and exploiting contact arrangements with a child to commit an offence. These are all factors listed in the Guidelines. We agree that ejaculation was present (certainly on at least one occasion) and we agree that the defendant was as a matter of fact exploiting contact arrangements, although we do not see that this adds to the breach of trust resulting from the fact that he was the complainant's father. Nor do we think that the location of the offence adds very much. In summary, we consider overall that the features of this offending which increases its seriousness are the youth of the complainant, the gross breach of trust, the element of grooming and the fact that there was ejaculation. 14. In assessing the starting point, we have had regard to the cases of K and of AG-v-T

[2017] JRC 161 and

[2017] JRC 169 . In K the offending involved the defendant on two occasions blindfolding the 7 (and later 9) year old female victim and tying her to the sink in his bedroom by putting her hands behind her back around the pedestal of the sink so that she was bound to the sink with her hands behind her and on her knees. He then put his penis in her mouth and thrust it backwards and forwards repeatedly until ejaculation in her mouth. Notwithstanding that it only occurred on two occasions, we regard that conduct as even more serious than that in the present case. The Royal Court held that the appropriate starting point was 15 years which resulted in a sentence of 10 years after allowance for the guilty plea. 15. The Crown Advocate informed us that the recent case of T (the judgment was not yet available at the date of the hearing) involved regular touching of the vagina of the female victim between the ages of 8 and 14 whilst the victim was feigning sleep. On some occasions it involved digital penetration which were the most serious counts but there was no oral sex. The sentence imposed in that case following a not guilty plea was 8 years' imprisonment. 16. In our judgment, the offending in this case was more serious than that in T but not as serious as that in K . The Crown Advocate suggested a starting point of 14 years. We agree with Advocate Dale that that is too high and we think the correct starting point is 12 years. In reaching this figure on the most serious counts, we have taken into account the existence of the other offences. 17. The Crown allowed one year for mitigation resulting in conclusions of 13 years' imprisonment for the two most serious counts. The only material mitigation is that, although he has previous convictions for dishonesty and possession of drugs, the defendant has no previous convictions for sexual offences or offending against children. He also suffers from multiple sclerosis although this appears to be in remission at present. 18. We agree that a deduction of one

year for the available mitigation is sufficient and accordingly we conclude that a sentence of 11 years' imprisonment on Counts 5 and 6 is appropriate. 19. In relation to Counts 7 -10, which are offences of indecent assault relating to the touching of the complainant's vagina, the complainant was unable to say that he touched the inside of her vagina and accordingly we sentence on the basis that there was no digital penetration. We think the Crown's conclusions were correct on all the other counts and accordingly the sentences are as follows: Count 1; 6 years' imprisonment, Count 2; 6 years' imprisonment, Count 3; 6 years' imprisonment, Count 4; 6 years' imprisonment, Count 5; 11 years' imprisonment, Count 6; 11 years' imprisonment, Count 7; 6 years' imprisonment, Count 8; 6 years' imprisonment, Count 9; 6 years' imprisonment, Count 10; 6 years' imprisonment, all of these to be concurrent making a total of 11 years' imprisonment. 20. The Court also made the restraining order as requested by the Crown for a period of 10 years and imposed a period of 10 years before the defendant could apply to be removed from the notification requirements. Authorities K-v-AG and AG-v-F

[2016] JCA 219 . AG-v-K

[2016] JRC 158 . Sexual Offences Act 2003. AG-v-T

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