

JERSEY / JUDGMENT

AG -v- T [2017] JRC 169 (17 October 2017)

[2017] JRC 169

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JUDGMENT

THE commissioner: 1. The Court sentenced the defendant to a total of 8 years' imprisonment for six counts of indecent assault and we now set out our reasons. 2. We take the background and summary of the offences from the Crown's summary of

facts.

Background

3. The defendant formed a relationship with A in late 2002/early 2003. 4. The relationship developed quickly and the defendant and A moved in together with A's two children, the complainant and her brother (aged around 8 and 5 respectively) on a permanent basis. 5. At that time, the girls shared a room together, sleeping in bunk-beds, with the complainant occupying the top bunk. Offences 6. After a short time in this property, the defendant began coming into the girls' room. It was located on the ground floor of the property and, at times, the complainant could hear the defendant coming downstairs from his upstairs bedroom. She recalls the sound of his bare feet on the wooden floor as he approached the bedroom. He made his way across to the bunk beds and touched her breast area both over and under her pyjamas (Count 1). 7. He would also put his hand up the complainant's pyjama shorts and touch and stroke her vaginal area (Count 2) and, sometimes, he would digitally penetrate her vagina (Counts 3 and 4). He used one and, sometimes, two fingers. His daughter was sometimes in the lower bunk when the abuse took place. 8. In order to deter the defendant, the complainant would sometimes cough or pretend to stir in her sleep which sometimes had the effect of putting him off. On other occasions she would pretend to be asleep whilst he abused her or awoke, but continued to pretend to be asleep, whilst the abuse was happening. This form of sexual abuse would take place several times each week. 9. Sexual abuse continued when the family moved to a new property in the form of the defendant touching and stroking the complainant's vagina under her pyjamas (Counts 5 and 6). The complainant gave evidence that digital penetration continued as well, but this was not the subject of any charge, and is therefore to be disregarded for sentencing purposes. By this time, the complainant was around 10 years old and had a bedroom of her own. Again, she would pretend to be asleep when the abuse took place. She testified that she did not want the defendant to know that she knew that he was abusing her and the abuse was never

talked about. 10. When she moved to a bedroom on the ground floor, the abuse began to become less frequent partly, as far as the complainant was concerned, because she was getting older. The complainant effectively took to locking herself in her bedroom by locking the door on the adjacent bathroom, there being no lock on her bedroom but the defendant was, nonetheless, able to gain access to her bedroom by using a coin to turn the lock. 11. The abuse stopped when the complainant was aged around 16 years. 12. The defendant pleaded not guilty to these offences and following an Assize trial was found guilty by the jury unanimously of all six counts. Key issue 13. The key issue for the sentencing court was whether and the extent to which it should take into account the guidelines issued in England by the Sentencing Council ("the Guidelines") in relation to sexual offences, introduced for the first time into sentencing for sexual offences before this Court in the case of AG v K

[2016] JRC 158 , or sentence the defendant within the range of sentences that the Court had applied previously. The former would lead to a material increase in the sentence imposed upon the defendant. 14. As noted in the prior case of AG v F

[2016] JRC 109A , it had long been recognised in Jersey that offences of this kind are not readily susceptible to a guidance approach (see *Brewster v AG* 2001/130 and *Whelan on Aspects of Sentencing in the Superior Court of Jersey* (rd edition) at pages 447-449). That case concerned digital penetration of the victim, a step daughter, who was aged between 3 and 7 years in her bedroom at night. The Court carried out a review of the previous cases and concluded that:- "...this exercise shows a wide band of potential starting points (which would have to be rounded up), ranging from at least 4 years and 6 months to at least 6 years and 9 months' imprisonment for indecent assaults involving digital penetration. This finishing points for the guilty pleas range from 3 years to 4 years 6 months". 15. Advocate Baker for the defendant had carried out a similar trawl of earlier cases, and submitted that the Court had imposed sentences for comparable cases of between 4 to 6 years. The defence argued that for consistency the Court should sentence the defendant within that same band. 16. The facts in AG v K were quite different. Quoting from paragraph 75 of the judgment of Sir Michael Birt, Commissioner:- "75 These are extremely serious offences. They involved blindfolding the young victim, placing her in the humiliating and helpless position of being on her knees with her hands tied behind her and secured to the sink and then forcibly assaulting her by penetrating her mouth with his penis, thrusting backwards and forwards to the point of ejaculation." 17. The Court had, in an earlier case of AG v T

[2016] JRC 001 , found that forcing a penis into the mouth of a clearly unwilling complainant, using force and threats, should be regarded as being in the same category of seriousness as rape involving vaginal penetration and therefore applied the guidelines described in the English case of *R v Milberry*

[2003] 1 Cr App R 25 , which the Court in Jersey had looked to for guidance when sentencing for the offence of rape. The Crown in AG v K submitted that the Court should have reference instead to the Guidelines for that kind of sexual offence. It would have fallen within category 2A of the Guidelines, giving rise to a starting point of 13 years, which the Crown

argued should be adjusted upwards to a starting point of 18 years. The Court, taking the Guidelines into account, determined that 15 years was the correct starting point for that kind of offence in Jersey and after allowing for a discount of one-third for the guilty plea, imposed a sentence of 10 years' imprisonment. It follows that on a not guilty plea for that kind of offence, the sentence imposed would be 15 years or close thereto, a very substantial increase on the sentence that would have been applied under the Milberry guidelines which had hitherto guided the Court. 18. That sentence was upheld by the Court of Appeal in *K v AG AG v F*

[2016] JCA 219 . The judgment of the Court helpfully summarised the conclusions reached by Sir Michael Birt, Commissioner, on the extent to which the courts in Jersey should adjust sentencing levels in Jersey having regard to the Guidelines at paragraph 27:- "... The conclusions reached may be summarised in these propositions: - (1) 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. (2) 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. (3) 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. (4) 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. (5) 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." 19. The Court of Appeal said it was correct to emphasise that the sentencing levels set by the Guidelines do not apply in Jersey, but in relation to the last point listed above, 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." 20. The Court of Appeal finally concluded at paragraph 33: - "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." 21. The use of opinions from English counsel was further discouraged in *AG v Pereira*

[2016] JRC 218B , where the Deputy Bailiff said that the Court did not expect to see the opinions of English counsel contained in the bundles submitted by Crown on a future occasion. 22. Consistent with the conclusions reached by the Court of Appeal in *K v AG*; *AG v F* , the Crown in its written conclusions said that it did not propose to rely on the Guidelines as to quantum of sentence, but had remained mindful of the category ranges set out in those Guidelines when considering its conclusions. Seeking concurrent sentences, but applying a Valler uplift (*Valler v AG*

[2002] JLR 383) for the most serious offences (Counts 3 and 4), the Crown sought a total sentence of 10 years. 23. Notwithstanding what was said in *F v AG*; *AG v F* and *AG v Pereira* , the Crown in the case before us did provide an opinion from English counsel, because in the view of the Crown the advice of English counsel would assist if the Court were to carry out the exercise approved by the Court of Appeal at paragraph 27 (cited above) and were to clearly understand the effect of the Guidelines. English counsel advised that Counts 3 and 4 came within category 2A of the Guidelines (under the section headed "Assault of a child under 13 by penetration"), which would indicate a starting point of 11 years, increased to reflect the seriously aggravating factor of the other indecent assaults to 15 years. As Advocate Baker pointed out, that would potentially result in a sentence three times over the band that the Court had previously applied, illustrating perhaps the point made by the Court of Appeal that the rigidity of the Guidelines could result in what would appear to be surprisingly severe sentences. 24. The point can be illustrated on the facts of this case. Under the Guidelines for "Sexual assaults on a child under 13 by penetration", the lowest category of "Harm", category 3, in a case involving abuse of trust, gives rise to a starting point of 6 years' imprisonment. However, the existence of any one of the factors listed in category 2 has the effect of nearly doubling the starting point to 11 years. 25. One of those factors relied upon by the Crown is "severe psychological ... harm". The Crown had obtained a psychiatric report on the complainant from Dr Tanya Engelbrecht dated 28 th September, 2017. She diagnosed the complainant as suffering with symptoms of post-traumatic stress disorder (PTSD). She also found that the complainant had symptoms of complex PTSD. She said that PTSD is thought to be more severe if: - (i) the traumatic events happened early in life; (ii) the trauma was caused by a parent or carer; (iii) the

person experienced the trauma for a long time; (iv) the person was alone during the trauma; and (v) there is still contact with the person responsible for the trauma. All of the above applied to the complainant and Dr Engelbrecht said it may take years for the symptoms of complex PTSD to be recognised. 26. Advocate Baker did not seek a debate on the extent to which the complainant had suffered psychologically, but he made the point that if "ticking the box" of "severe psychological harm" resulted in the starting point doubling, then the defence might well wish to instruct its own psychiatrist. He informed the Court that the defence had only received a copy of Dr Engelbrecht's report one working day before sentencing. 27. The same point can be made with the other factor listed in category 2, which the Crown said applied, namely "a child is particularly vulnerable due to extreme youth". Does the age of 8 qualify as "extreme youth"? Again, if that box is ticked, the starting point doubles. 28. In our view, the opinion of English counsel was not required to enable the Court to carry out the exercise set out in paragraph 28 of the Court of Appeal judgment in *K v AG; AG v F*. On the contrary, the Court of Appeal was clear that it did not endorse the starting points or anticipated range of finishing points for particular offences. What it held was appropriate was for the Court to have regard to the factors set out in the Guidelines, which would assist in categorising the seriousness of the offence. 29. Quite independently of that, it was unfair to present the defence with an opinion of English counsel one day before the sentencing hearing and then to suggest to the Court, as the Crown did, that the Court might wish to impose a longer sentence than the Crown was seeking by strict application of the Guidelines. Without any disrespect to the English counsel concerned, it is only an opinion, and the defence would be entitled, as a matter of fairness, to instruct its own English counsel, who might well reach a different

conclusion.

The Court would then find itself grappling in a sentencing hearing with contradictory opinions of English counsel as to how an English court would apply the Guidelines to the facts of the case before the Jersey Court. That would be a most unwelcome and unhelpful development. 30. The second case under appeal in *K v AG; AG v F* was a reference by the Attorney General under Article 45A of the Court of Appeal (Jersey) Law 1961 on the basis that the sentence imposed by the Court on F of 4½ years for the offences of digital penetration was unduly lenient. The Attorney General wished to advance the argument, not put to the Royal Court, that there was a significant disparity between the approach to sentence adopted by the Royal Court and that which would be imposed in England under the Guidelines. Leave was refused on the grounds that the matters raised could and should have been raised in the Royal Court, and there were no circumstances that justified the grant of leave to allow them to be raised for the first time on appeal. The Court of Appeal, however, made this observation at paragraph 54: "54 Notwithstanding that we have not granted leave to the Attorney General under Article 45A for the reasons given, we would like to add this. The comments which we have made in this judgment suggest that the Royal Court may wish to review upwards sentences for indecent assaults involving digital penetration of children in future cases. If we had been looking at an application by the Attorney General for leave to

bring a reference in relation to the sentence imposed on F measured against the Crown's conclusions, we would have considered the sentence to be lenient but not so unduly lenient to justify an increase of it. That is not to say that sentences at this level will necessarily be appropriate for similar cases in the future. That will be a matter for the Royal Court to consider in the first instance, should such cases arise." Notice was therefore given by the Court of Appeal that sentences at that level will not necessarily be appropriate for similar cases in the future. 31. Advocate Baker, for the defendant, argued that it would be unfair for this Court to review upwards the sentence for this kind of offence without any prior warning. The defendant should be sentenced in accordance with the band applicable prior to AG v K and the Court should issue a warning as to its future policy. 32. Advocate Baker cited R v Clifford [2015] 1 Cr. App. R. (S) 32 as being helpful in identifying arguments which the defendant could not profitably deploy and also for suggesting a fair approach to the question now before the Court. That decision made it clear that there is no human rights argument to be had, as the sentence for these offences are at large. The sentence argued for by the Crown is, and always has been, notionally available. Furthermore, the defendant cannot argue that he would not have offended had he known that the Court would be reviewing sentences for such offences upwards; that is unrealistic. What the defendant could argue, he said, was that he is entitled to be sentenced in accordance with the sentencing regime applicable at the date of sentence and not according to novel practices. He relied on this passage from the judgment in Clifford (at paragraph 30): - "What is required is that sentencing should reflect modern attitudes, (a proposition fully accepted by Mr Horwell), in the course of which the court may take account of the modern guidelines. The way in which the matter is dealt with R v Hall and ors

[2011] EWCA Crim 2752 (now 2012 1 WLR 1416] at [45(a)] pithily sums up the position: 'Sentence will be imposed at the date of sentencing hearing, on the basis of the legislative provisions then current, and by measured reference to any definitive guidelines relevant to the situation revealed by the established facts.'" 33. There are, however, no definitive guidelines in this jurisdiction and there were no "novel" practices that the Court had embarked upon. Advocate Baker suggested that AG v F and the Court of Appeal decision in J v AG

[2016] JCA 090 have the status of guidelines, but they are clearly decisions in their own facts. (See paragraph 38 of K v AG; AG v F and paragraph 34 of AG v K). 34. We accept the need for consistency in sentencing but the difficulty for Advocate Baker was that the arguments he was advancing had already been put to the Court in AG v K and rejected by that Court and by the Court of Appeal (paragraph 40). The fact is that the Guidelines were referred to the courts in Jersey in AG v K for the first time, and influenced upwards the sentence imposed by the Court. That sentence was upheld by the Court of Appeal. The Court in AG v K considered whether the Guidelines might be extended to other sexual offences at paragraph 68: "68 Advocate Haines submitted that it would be inappropriate and potentially confusing to have regard to the Guidelines for one particular offence (rape of a child under 13) but not to have regard to the Guidelines concerning other sexual offences. We do not agree. The Court must decide on the appropriate sentence for the offences

before us and, for the reasons given, we consider that the Guidelines help us to arrive at the correct level of sentence for those offences in this jurisdiction. It would be for consideration in future when the point arises as to whether the Guidelines will also be of assistance in other sexual offences. We have not been referred to other aspects of the Guidelines and do not know whether sentencing levels for other offences of indecent assault on a child or procuring acts of gross indecency by a child would result in a higher sentence under the Guidelines than is currently the case in this jurisdiction. If that were to be so, we can well understand an argument that there would be no good reason for sentencing levels in Jersey not to be increased correspondingly but that would be a matter for the Court hearing the particular case where the point arises." 35. The position now is that the Court has started a process of review of sentencing levels imposed for sexual offences by reference to the Guidelines. They were found to be of assistance in AG v K and we found them of assistance in this case. We have not considered the Guidelines for other kinds of sexual offence, but if they are found to be of assistance, then defendants can expect to be sentenced accordingly. It should not be open to defendants in future cases involving sexual offences to advance the kind of arguments advanced in AG v K and in this case. 36. We found the Guidelines helpful in terms of assessing harm, culpability, aggravating features and mitigating features. These are serious offences in which the victim was sexually assaulted in her home over a long period at a young age by her step father who was in a position of trust which he gravely abused. We set out this extract from her statement: - "I would go to bed and wonder whether or not it would happen that night. I then felt overwhelmingly panicked when I could hear him leave his room and I knew it was about to happen, I knew he was on his way to my room. When I was younger I just let it happen, it was only as I got older that I tried to stop him by distracting him. The best words I could use to describe how I felt are frozen and paralysed. It was a relief every time he stopped and left the room because at least that night it wasn't likely to happen again and I was safe until the morning." There was no force used by the defendant, or additional degradation or humiliation beyond that inherent in the assaults themselves, but not only did the victim have to endure those assaults on a regular basis, but every night she would lie in bed wondering whether or not it would happen again. Not surprisingly, she has suffered psychologically, and as Dr Engelbrecht made clear, the effects may last for years. 37. Eschewing the rigid approach to calculating the sentence set out in the Guidelines, the Court determined that 8 years was the appropriate starting point, before mitigation, for Counts 3 and 4 (including a Valler uplift). In our view right thinking members of the community in Jersey would not now regard a starting point within the range previously applied by the Court as adequately reflecting the gravity of these offences and their effect on the victim. 38. 8 years was the starting and finishing point. The defendant had pleaded not guilty, causing the victim to give evidence before the jury and be subjected to cross-examination. In terms of his good character, we noted the observation in AG v T

[2016] JRC 001 that in serious cases of indecent assault, such as this, any mitigation through personal circumstances had to take second place behind the duty to protect victims. We also took into account this passage from the Guidelines, under the heading of Mitigating Factors : - "In the context of this offence, previous good character/exemplary conduct should not normally be given any significant weight and will not normally justify a reduction in what would otherwise be the appropriate sentence." 39. Although not the subject of discussion at the sentencing hearing and the Guidelines under "Sexual assault of a child under 13" appear to draw no such distinction, the Court took the view that touching a young victim's vagina is more serious than touching her breasts. Therefore the Court imposed a sentence of 4 years' imprisonment for Count 1, (indecent assault by touching her breasts) and 6 years' imprisonment for Counts 2, 5 and 6 (indecent assault by touching her vagina), all to be served concurrently with the 8 years' imprisonment imposed concurrently for Counts 3 and 4, making a total of 8 years' imprisonment. 40. A compensation order for £50,000 was sought by the Crown on behalf of the victim (whose civil right to claim compensation from the defendant is now prescribed) was not opposed by the defendant and therefore the Court made an order in that amount in her favour. The defendant did not oppose the Crown's application for costs in an amount to be agreed and if not agreed, to be taxed. 41. In terms of the Sex Offenders (Jersey) Law , the Court imposed a period of 10 years from the date of sentence before the defendant could apply to have the notification requirements lifted. The Court also imposed restraining orders for 13 years from the date of sentence, being satisfied that the test under Article 10(4) was met. Advocate Baker, however, opposed the following two, the Court believes standard, orders: "i. That the Defendant produce to a Police Officer forthwith on request for examination, at any time, any computer or device which may access the internet, or any device which can store images electronically, which belongs to him or is in his possession, it being noted that such a request may be made anywhere, including by the Police attending at the Defendant's place of residence. ii. That the Defendant is prohibited from owning or having in his possession or having access to any device capable of accessing the internet unless: a) It has the capacity to retain and display the history of internet use. b) The Defendant ensures that such history is not deleted." 42. Advocate Baker pointed out that the police had seized a great quantity of computer equipment from the defendant and had found nothing illegal on it, but we are dealing here with managing a threat of future harm, and in the Court's view, both orders were both necessary and proportionate. Authorities AG v K

[2016] JRC 158 . AG v F

[2016] JRC 109A . Brewster v AG 2001/130. Whelan on Aspects of Sentencing in the Superior Court of Jersey (3rd edition). AG v T

[2016] JRC 001 . R v Milberry

[2003] 1 Cr App R 25 . K-v-AG and AG v F

[2016] JCA 219 . AG v Pereira

[2016] JRC 218B . Valler v AG

[2002] JLR 383 . Court of Appeal (Jersey) Law 1961. R v Clifford [2015] 1 Cr. App. R. (S) 32. J v AG

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