

JERSEY / JUDGMENT

AG -v- U [2011] JRC 219 (14 November 2011)

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JUDGMENT

THE DEPUTY BAILIFF: 1. Can I just say to the media that you have been rightly warned by the Crown about not identifying the victim, mention has also been made of the address where some of these offences took place, you obviously must be careful not to mention the address either because that will assist in identifying him. 2. The defendant is to be sentenced on two Indictments; the First Indictment contains 12 counts of indecent assault and procuring acts of gross indecency. He pleaded not guilty and was convicted after a trial. The Second Indictment contains a number of charges of making indecent photographs, contrary to the Protection of Children (Jersey) Law 1994 . The Crown has moved for sentences to run concurrently on the 12 counts of the First Indictment and concurrently on the counts of the Second Indictment but the sentences on the two Indictments to run consecutively and the conclusions are 6 years on the First Indictment in all and 2 years on the Second Indictment. 3. I take the First Indictment. This charged acts of gross indecency and procuring acts of gross indecency with a boy aged 12 to 15 over the period from 2005/6 to 2009. The acts involved sucking the child's penis, touching it, placing the defendant's own penis between the child's buttocks, and placing a finger in the child's anus. The offences of procuring acts of gross indecency involved inducing the child to suck the defendant's own penis. The introduction of young people to oral sex has always been regarded by this Court as placing counts of gross indecency or procuring acts of gross indecency at the higher level of the offence for the purposes of sentencing. 4. These particular offences were aggravated by the breach of trust. Some of the offences were committed whilst the defendant was a guest in the family home into which he had been welcomed by the child's adopted parents and also aggravated by what appears to us to be likely to be the grooming of the child which took place. As the boyfriend of the child's adopted sister, the defendant was in a special position in that household and he abused it dreadfully. 5. The offences were also aggravated by the filming of the sexual activity that took place between the defendant and his victim. The victim is aware of the fact that his humiliation was recorded and subsequently viewed by police officers, by lawyers and by a jury. I have mentioned that the defendant pleaded not guilty. He was entitled to do that but that plea has its consequences. The not guilty plea, despite video evidence of the assaults, which in two cases meant that a conviction was inevitable, required the victim, now a vulnerable and damaged young man, to sit around in a room in this building with police officers as victim

support, waiting for the best part of a day to find out whether he was to face cross examination on his ABE interview which was put before the jury. Mr Blakeley rightly points out that it could have been worse. He could have been cross examined. But I add that I was able to watch that room as the trial judge and able to watch the victim during that process and to see the stress and anguish which the process put him through. In the course of Mr Blakeley's mitigation I described it as unnecessary and cruel. 6. The background reports which are before the Court indicate that U continues to exhibit some conditionality in his thinking. At paragraph 32 of the social enquiry report the officer reports "As I have stated earlier in the report, he repeatedly told me that if he has committed these offences then the Court should 'lock him up and throw away the key' ". There is no doubt that the defendant did commit them and if he is to have any hope for the future he will have to recognise the offences for the terrible things that they were and use constructively the remorse which that recognition should bring. What we are left with for the time being is a circumstance where there is no exhibited remorse. 7. We have to sentence the defendant for offences which have caused great harm to a young boy and indeed have put at risk chances that he might otherwise have of life long feelings of self worth and happiness. 8. At one level it is hard to see what mitigation there is. As mentioned, there has been no guilty plea; there is no mitigation for youth; the defendant is not a man of good character because he has previous convictions, but it is true that there are no previous convictions for sexual offences which we have taken into account and we have noted everything which is in the social enquiry report and in the psychological report. We have listened carefully to everything that has been said by Advocate Blakeley and we have noted the reference which has been supplied. We agree that this was not a case where there was any violence or threat of violence. We do not agree that there was any consent to be implied on the child's part given the length of time over which these offences were committed and his young age when they started. 9. Having regard to all the material which is before the Court in those circumstances therefore, we are going to reduce slightly the conclusions of the Crown on the First Indictment and the sentence will be 5 years' imprisonment on all those counts where 6 years is moved for by the Crown; 4 years' imprisonment on Count 9 and Count 10 and 3 years on Count 2, to run concurrently with each other; and in relation to the First Indictment therefore, there will be a sentence of 5 years' imprisonment. 10. I come now to the child pornography offences, in breach of the Protection of Children (Jersey) Law 1994 . 11. We have been referred to a recent Guernsey Court of Appeal case, Gunter-v-Law Officers of the Crown , that decision being handed down on 15 th July, 2011, and we have been requested to give an indication as to whether we would wish to formalise the use in Jersey of guidelines of the Sentencing Guidelines Council in England. Gunter was an appeal against a sentence imposed for seven offences of possessing illegal images of children. The Guernsey Court of Appeal said this:- "5. Decisions of the Court of Appeal in England on sentencing practice are not as such binding in Guernsey. But the Guernsey courts will normally look to them as persuasive authority in a case where the (i) elements of the offence are comparable in the two jurisdictions, (ii) the statutory maximum sentence of the offence is comparable, and (iii) there are no significant differences between social or other conditions in Guernsey and those in England which justify a different approach. 6. In practice, the five-level classification in the Oliver guidelines has commonly been used in sentencing by the Royal Court in Guernsey. The guidelines themselves have also been

used, but less consistently. In our judgment the time has come formally to adopt the sentencing practice in England for offences corresponding to those created by Sections 3 and 3A of the Protection of Children (Bailiwick of Guernsey) Law 1985 . There is a number of reasons for this. In the first place, justice requires that those convicted of these offences in Guernsey should be sentenced on a reasonably consistent basis. This is difficult to achieve with the relatively small volume of case-law generated within the bailiwick. The volume and variety of case-law in England covers a far wider range of situations. Second, the social values of this community and those of England in the sensitive area of child protection and abuse are very similar and, subject to two reservations (to which we shall come), the relevant social conditions are broadly comparable. Third, the law is substantially the same. The Guernsey Law has directly adopted the elements of the offences from English statute law. In both England and Guernsey, the exploitation of children by making, possession or accessing child pornography has been perceived as a problem of growing significance, and the maximum sentence available in Guernsey has been increased in line with England law. Fourth, the Oliver guidelines were based on the considerable experience of the English courts of sentencing in this kind of case, and on expert advice on the different categories of child pornography. Fifth and last, but certainly not least, the Oliver guidelines, as the judgment of the English Court of Appeal shows, are not a straightjacket. They are guidelines, which are intended to be sufficiently flexible to accommodate exceptional cases in which it will be right to depart from the proposed sentencing ranges, in either direction. 7. The two reservations which we have mentioned both reflect the fact that Guernsey is a much smaller and in some respects a closer-knit and more homogeneous community than England. 8. The first is that for some offences deterrence may be a more or less important factor in Guernsey than it would be in England. If a particular kind of offence is on the increase locally, or if it is becoming a serious social problem, a severe deterrent sentence may have a salutary effect in modifying criminal behaviour. It may also satisfy legitimate feelings of abhorrence which are likely to resonate more strongly in a small community such as Guernsey. In our judgment, however, this is not a consideration which warrants a different approach to sentencing for these particular offences in Guernsey by comparison to England. This is because a significant element of deterrence is already incorporated in the sentencing principles applied in both jurisdictions, which is reflected in the progressive increases in the statutory maximum sentences for these offences. Offences involving child pornography, even of the most serious kind, which two decades ago would have tried summarily or punished by a fine or a modest sentence of imprisonment, are now regularly visited by substantial custodial sentences. There is no reason to believe that a further element of deterrence, on top of that adopted relatively recently by the legislature, is necessary in order to deal with such behaviour. While this kind of offending undoubtedly generates strong feelings, it is important that the Royal Court should not for that reason alone feel under pressure to over-sentence. 9. The second reservation is that the small size of the Guernsey community may significantly aggravate the impact of the offence on the victim where the victim is here. This was the major consideration in *Forno-v-AG*

- [2011] JCA 22 , where the Jersey Court of Appeal had to deal with a particularly extreme case of making and inciting the making of indecent photographs of children, involving a high degree of planning, deception and manipulation, the targeting of a number of young girls in Jersey and the infliction of considerable distress upon them and their families. The Court dismissed an appeal against sentences which were substantially more severe than those which would have been warranted by the Oliver guidelines in the generality of child pornography cases. The Court added an observation which in a comparable case would have been equally applicable to Guernsey:- We would only add a brief observation about the relationship between sentencing guidelines in Jersey and those applied in England. Where the relevant social conditions and the policy considerations appear to be the same in both jurisdictions, it will usually be right for the sentencing court in Jersey to have regard to English sentencing practice even though not bound by it. The volume of case law generated by English criminal appeals is large and varied, and in practice it has been found of value by sentencers in this jurisdiction. There are, however, some offences where the conditions in this bailiwick call for a different approach. A well-established example is drug importation, which has for many years been visited with much heavier sentences in this jurisdiction than in England. Sexual offences of this kind, involving the perversion of children, are another case in point. The corrosive feelings of shame, self-reproach and alienation suffered by the child are significantly greater and more persistent in a small and relatively close-knit community than there are in the more anonymous environment of a highly urbanised country of more than 60 million inhabitants such as the United Kingdom. It follows that while the English categorisation of the different kinds of offence involving the sexualisation of children is undoubtedly helpful, in a particularly serious case such as this one, a sentencing court is entitled to take the view that a different and greater order of severity is called for." 12. It is interesting to observe that this approach to the use of English sentencing decisions has not generally been followed in Jersey. In *Lynch-v-AG*
- [1994] JLR N13, it was held by the Court of Appeal that increasing prevalence justified the Royal Court in increasing the sentencing severity. In *Whyte-v-AG*
- [1999] JLR 79 , the Court of Appeal held that there was no need to harmonise Jersey and English sentencing guidelines and indeed that a citation of English sentencing decisions was unhelpful and a practice to be discouraged. In *Styles-v-AG*
- [2006] JLR 210 the Court of Appeal held that it would rarely review sentencing guidelines without the support of the Attorney General or the Royal Court. The members of the Court of Appeal, other than the Bailiff and Deputy Bailiff, are not resident in Jersey and would therefore, the Court of Appeal held, be less familiar with domestic social and penological issues. 13. There is much other authority both in the Royal Court and in the Court of Appeal which is consistent with the general proposition that Jersey has its own sentencing jurisdiction. In *Campbell-v-AG*

[1995] JLR 136 at p141 the five judge Court of Appeal said:- "The Island cannot be impervious to outside influences but there are nevertheless important differences between the sentencing process in Jersey and that which obtains in England... As we have already stated, Jersey is a separate jurisdiction and entitled to fix its own sentencing levels." 14. The important differences in sentencing process to which reference was made in Campbell include the fact that the Attorney General, who occupies a crucial role at the heart of the Island's administration, moves conclusions as to the appropriate sentence; and particularly that the sentence is assessed by two or more Jurats who are rooted in our community, people whose status reflects the trust reposed in them by an electoral college of States members and practising lawyers. 15. We also observe that there exists in England and Wales a much wider variety of sentence than is available in Jersey. This variety arises from legislative policy that is undoubtedly influenced by a great many factors amongst which is generally counted budgetary pressures on the prison service. The variety of sentencing options is bound to lead to differences in approach, quite apart from the additional factors that the Court of Appeal in Gunter rightly identified, namely the small and close knit size of our community and the possibility that deterrence may be seen to be of more importance here in particular areas. 16. All these factors go to support the established policy that the Royal Court exercises its own jurisdiction and sets its own sentencing levels. 17. As was said in Campbell, the Island is not impervious to outside influences. Furthermore, it has long been the practice of the Royal Court to have regard to decisions of the English courts on the criminal law, and to consider carefully and frequently to adopt the rationale underlying the approach to sentencing in criminal cases. Such decisions are always of interest and often persuasive. They require the Royal Court to consider whether the sentencing rationale does indeed fit the social values of this community, and in particular where such offences sit relatively within the range of criminal activity with which the court has regularly to deal. 18. Similarly, the assessment of the extent to which a deterrent sentence is called for involves a measurement of deterrence relative to that which is involved in sentencing in the other cases coming before the Court. 19. This Court is not strictly bound by the decisions of the Court of Appeal in Guernsey, but it is nonetheless with a good deal of hesitation that we express the view that the passage in its judgment in Gunter, which we have cited above, in the respects we have mentioned, goes beyond what has previously been said in the Court of Appeal on appeal from Jersey as to the correct approach to the use of English sentencing decisions, and unless required to do so, we would not endorse them. 20. The Oliver guidelines have previously been considered by this Court and have been found to be helpful. While we do not formally adopt English sentencing practice, because that would be inappropriate for the reasons given, we do apply the same general structure as was advanced in Oliver, in particular the classification of offences of child pornography using the Copine scale; but we do not consider ourselves bound by the levels or type of sentence which the Court of Appeal set out. Indeed, such is the prevalence of the offences coming before this Court that it may be appropriate at some future date for the Superior Number to review the levels of sentence in this area. 21. In this case there were some 620

photographs or video clips - 550 of them were at Copine Level 1; 50 of them at Level 2; 5 at Level 3 and 22 at Level 4. We think 22 Copine Level 4 is a significant number and shows that the defendant did not come across these images by accident. Given the sentences normally handed down by this Court for offending of this kind, we consider the right sentence would have been more than 2 years' imprisonment - but as these offences should be visited with consecutive sentences, we have reduced the sentence on the more serious of these counts, on totality grounds, to two years' imprisonment. 22. We also order the forfeiture and destruction of the computer and equipment. 23. We now come to the orders under the Sex Offenders legislation. There is no doubt from the material which has been put before us that the defendant is a man who is at medium risk of reconviction for sexual offences. In the circumstances the Court considers that the appropriate period which should elapse before he is permitted to apply under Article 5(5) of the Sex Offenders Law to be no longer subject to the notification requirements is 10 years from the release of custody. 24. We have also considered the question of restraining orders and we have regard to all that is said in the English case of *R-v-Hemsley*

[2010] All ER 965 and indeed the English case of *R-v- Smith and Others*

[2011] EWCA Crim 1772 to which the Crown referred in its conclusions. The *Hemsley* case has certainly been adopted with approval by the Royal Court on a number of occasions before now. In the circumstances we are going to make the order for the restraining orders as set out by the Crown in sub-paragraphs i), ii) and iii) of paragraph 73 of the Crown's conclusions and we do so with the alteration that the restraining orders should stay in place for a period of 10 years following the defendant's release from custody, save that in paragraph i) as the Crown conceded in argument, the prohibition relates to being alone with any person under the age of 16 years and not the age of 18 years. We have considered the question as to whether we should make special provision for the defendant's son. In our view it would be right to take account of the fact that there will be nothing preventing the defendant from seeing his son in the presence of others including his former partner, the child's mother, in the event that that should be what the son then desires, and in the circumstances we do not see the need to make any special change to the terms of the restraining order as the Crown has contended. 25. In the circumstances you are sentenced on the First Indictment on Counts 1, 3 4, 5, 6, 7, 8, 11 and 12 to 5 years' imprisonment on each count. On Counts 9 and 10 to 4 years' imprisonment on each count and on Count 2 to 3 years' imprisonment on each count; those will be served concurrently, making on that Indictment, a total of 5 years' imprisonment. On the Second Indictment you are sentenced on Counts 1, 2, 3 and 4 to 9 months' imprisonment, also 9 months on Count 10. On Counts 5, 6 and 7 to 18 months' imprisonment and on Counts 8, 9, 11 and 12 to 2 years' imprisonment; each of those on that Second Indictment will be served concurrently but they are to be served consecutively to the First Indictment, so that makes a total of 7 years' imprisonment. 26. As agreed by counsel the matter of costs is formally adjourned. Authorities Protection of Children (Jersey) Law 1994. Sex Offenders (Jersey) Law 2010. *Gunter-v-Law Officers of the Crown*, Guernsey Court of Appeal, Appeal Number 423.

Lynch-v-AG

[1994] JLR N13d. Whyte-v-AG

[1999] JLR 79 . Styles-v-AG

[2006] JLR 210 . Campbell-v-AG

[1995] JLR 136 . R-v-Hemsley [2010] All ER 965. R-v-Smith and Others

[2011] EWCA Crim 1772 . AG-v-Noel

[2003] JRC 027 . AG-v-Freeman

[2003] JRC 028 . AG-v-BR

[2006] JRC 155 . AG-v-Hamon

[2006] JRC 160. AG-v-Powell

[2007] JRC 046 . AG-v-G

[2009] JRC 148 . AG-v-AP

[2009] JRC 025 . AG-v-Foster

[2007] JRC 201. AG-v-Donnelly

[2009] JRC 170. AG-v-Y

[2010] JRC 110 . AG-v-Le Marquand

[2003] JRC 043 . Page Last Updated: 07 Feb 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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