

JERSEY / JUDGMENT

AG -v- W [2018] JRC 061 (20 March 2018)

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JUDGMENT

THE DEPUTY BAILIFF: 1. The defendant in this case has been found guilty of eleven counts of sexual offences against two young girls aged between 9 and 15 years. Ten of the offences were against one young girl and 1 of the offences against another who was her friend. The offences ranged from indecent assault to procuring acts of gross indecency to one count of rape. Two of the counts of indecent assault related to sexual intercourse and were returned as alternative verdicts by the jury to further counts of rape with which the defendant was charged. 2. On 7 th December, 2017, the Court sentenced the defendant as follows:- (i) Indecent assault 10 years imprisonment (Count 1) (ii) Indecent assault (this was a specimen count) 10 years imprisonment (Count 2) (iii) Indecent assault (this was a specimen count) 10 years imprisonment (Count 3) (iv) Procuring act of gross indecency 9 years imprisonment (Count 4) (v) Procuring act of gross indecency (this was a specimen count) 9 years imprisonment (Count 5) (vi) Indecent assault 10 years imprisonment (Count 6) (vii) Indecent assault (this was a specimen count) 9 years imprisonment (Count 7) (viii) Indecent assault (this was a specimen count) 9 years imprisonment (Count 8) (ix) Rape 13 years imprisonment (Count 11) (x) Indecent assault (as an alternative to rape) 9 years (Count 12) (xi) Indecent assault (as an alternative to rape) 9 years (Count 13) All sentences to run concurrent making a total of 13 years imprisonment. Because of the lateness of the hour when sentence was handed down and the nature of some of the arguments advanced, the Court handed down sentence with reasons to follow. These are our reasons. 3. All of the offences, but one, were committed against Miss A between 1997 and 2003. The other was committed against one of Miss A's friends, Miss B, at some point between 1998 and 2001. The defendant pleaded not guilty and was convicted before a criminal assize in July 2017. Circumstances of offending 4. Miss A's first memory of the defendant when she was a child was that he was a funny person and was always making other people laugh. She enjoyed his company and felt comfortable around him. When Miss A was around 9 years of age she and her step-brother began spending the odd night at the weekend at the defendant's bedsit. Miss A's mother, who was looking after her and her step-brother single-handedly, welcomed the defendant's offer to take them off her hands. Miss A recalls being quite demanding as a child. 5. Miss A and her step-brother were taken out regularly by the defendant. They would receive treats and be shown a great deal of attention and they received attention that they did not get at home and Miss A liked the defendant for it. She recalls that the defendant " really spoiled us ". 6. The first incident covered by the Indictment occurred in the early days of staying over. At this point whilst her step-

brother would sleep on cushions on the floor, she would sleep "top to toe" with the defendant in his bed. She recalls being around 9 years old and was pre-pubescent. On the first occasion that an assault occurred she recalls being in bed with the defendant in her pyjamas she remembers lying with her back to him and being woken up by a sharp pain and something wriggling around inside her vagina. She did not understand what was going on but she pulled away from the defendant and felt his finger come out of her vagina when the pain then stopped. She laid still and soon afterwards she heard the defendant snoring. She tried to get her step-brother's attention but he did not wake up. The following morning the defendant behaved as if all was normal and Miss A just accepted what had happened the night before and said nothing about it. 7. As time passed Miss A began to stay with the defendant almost every weekend. She was dropped off by her mother, with her step-brother, on a Friday and collected on a Sunday. She said that she was touched indecently by the defendant every month and each time it followed a similar pattern. She would be asleep in the bed with the defendant and she would be woken by him penetrating her vagina with his finger. After a time he began to assault her in this way even when she was awake or when she was pretending to sleep. She said during the course of her trial in response to a challenge as to why she did not tell anyone "I wish I did tell, because the way you are putting it it seems like it was my fault coz I could of and it carried on". The facts set out above cover Counts 1, 2 and 3 on the Indictment Counts 2 and 3 being specimen counts. 8. The defendant's treatment of Miss A remained the same and again he would lavish her and her step-brother with attention, take them out and regularly buy them both gifts. They were allowed to stay up late and effectively had free use of his flat so she continued to enjoy going there. This, so the Crown put to us, was in effect the successful grooming of Miss A by the defendant to accept the abuse without challenge or question. 9. When Miss A was approximately 10 or 11 years old she recalls being at the bedsit when the defendant asked her step-brother to go out to the shop leaving him alone with her. Whilst her step-brother was at the shop the defendant told Miss A to sit on his knee which she did. She assumed he was going to digitally penetrate her as previously however that didn't happen. Instead he moved her hand around behind her, placing it on his penis and guided it up and down so that she in effect masturbated him. When her step-brother returned Miss A states the defendant quickly moved her off his knee and tucked his penis back into his pants. 10. As for the counts of indecent assault, this behaviour became a regular occurrence when Miss A's step-brother was not present. It is these facts that form the basis of Counts 4 and 5, the latter of which is a specimen Count. Miss A confirmed that she was never scared of the defendant and she still at that time liked him and thought he was "quite cool". She knew that what was happening to her was wrong but she did not tell anyone. This again was suggested to us to be evidence of grooming of Miss A by the defendant. 11. On occasion Miss A's best friend Miss B would come to stay when she visited the bedsit. Miss B would sleep in the same bed as Miss A and the defendant. On one occasion when Miss B was between 8 and 10 years of age she was with Miss A in the bedsit. The defendant had gone out and the two girls were in the double bed when he returned. Miss B remembers smelling alcohol on him. He climbed into bed fully clothed on the same side of the bed as Miss B. He then slid his hand down the front of whatever she was wearing at the time and over her vagina and his finger penetrated her. She, Miss B, could feel it moving in and out. She knew it was really wrong and she wriggled away and he stopped. Miss B asked Miss A to move

onto the floor with her so that she could get away from the defendant (although she did not explain this reason to Miss A at the time). They moved to the floor and within a few minutes the defendant joined them lying next to Miss B again. He tried to touch her but he was not successful as she moved to prevent it. Miss B asked Miss A to switch places with her which Miss A did without hesitation. Miss B told no-one about the incident. At trial she told the jury that she did not think anyone would believe her. Miss B disclosed what had happened to Miss A whilst they were at secondary school and says that Miss A did not seem to be surprised by it although at that time Miss B was unaware of what had happened to Miss A at the hands of the defendant. It is this action that formed the basis of count 6 on the Indictment. 12. Although Miss B continued to go to the bedsit at Miss A's request she was cautious and guarded around the defendant and nothing further happened between them. She kept going because of Miss A but also because the defendant spoiled them, giving them money, sweets and treats that they did not normally get when they were at home. 13. When Miss A was approximately 12 years of age the defendant moved home and went to live with a male friend. They occupied a flat. During that time Miss A and her step-brother would continue to visit the defendant but Miss A says that no sexual abuse took place at those premises. Apparently the male friend's niece and nephew were also often there. She nonetheless continued to receive treats from the defendant. 14. When Miss A was approximately 13 years of age the defendant and his friend moved to another property, larger than the first, in St Helier. Miss A and her step-brother visited the defendant. The defendant got a dog and would pay Miss A's step-brother to walk the dog for long periods. Whilst her step-brother was out the defendant began abusing Miss A again. He came into her bedroom on more than one occasion and, as she said, "fingered" her as she lay in bed and these facts are covered by specimen counts 7 and 8 on the Indictment. 15. The abuse escalated. The defendant was aware that Miss A had been prescribed contraceptive medication because of painful periods. The abuse progressed to rape. Miss A describes the first occasion which occurred when she was sleeping at the defendant's home in a separate room, how the defendant entered the room, removed his underwear, pulled back the bedcover and removed her pants. He climbed on top of her and raped her. Miss A said she just lay there, she did not really appreciate what was happening. He ejaculated inside her and afterwards got up and left the room. This rape is covered by count 11. Miss A describes how she just lay in the bed and cried. She stated to the Court that the abuse had been going on for so long she just accepted the rape and submitted to the defendant. 16. The defendant's apparent generosity increased and he had bought both Miss A and her step-brother mobile phones and scooters and Miss A's step-brother was given a PlayStation. They continued to receive money from him. She would continue to visit him and during this period her behaviour deteriorated as did her relationship with her mother as a result. The Children's Service became involved. 17. After the initial rape Miss A stated that further instances of intercourse took place. In respect of those instances of intercourse, which were charged on the Indictment as rape, the jury returned verdicts of indecent assault having been directed by the trial judge that, as there was no alternative count of unlawful sexual intercourse on the Indictment, they were able to return verdicts of indecent assault if they were unsure about the issue of consent (which was a requisite consideration for a charge of rape). This is covered by Count 12. 18. By the time Miss A was 15 years of age she would sometimes go to the defendant's place of work, a garage, to help

him. She described making tea, being shown how to fill cars with petrol and help him to lock up. On occasion the defendant was on duty alone at the garage. On one occasion he asked her to make the tea and followed her towards the kitchen. He sat in the corridor by the kitchen and asked her to sit with him. She knew what he wanted. They began kissing and she described having quick sexual intercourse on the dirty carpet in the corridor. Afterwards he went back to work and told her that she could go. 19. Once again the jury returned a verdict of guilty of indecent assault as an alternative to rape for the reasons mentioned above. This is Count 13. 20. Miss A began self-harming. She told the jury at trial that she always felt dirty and bad after sex with the defendant and did not like herself. She self-harmed as "punishment". She made a number of false allegations as cries for help. When she was about 16 years of age she wanted the abuse to stop and after a further episode left the family home and took a bottle which she used to cut her arms. The wound was deep and she ended up in the accident and emergency department. She wanted to talk about the abuse she had suffered but didn't know how to. She apparently made some reference to the possibility of being abused in 2007 to her GP and when she was older she told her sister. It was only, however, in late 2015, after her own daughter was born that Miss A decided it was essential for her to speak out about the abuse and make a complaint to the police. She told the jury that she needed to stand up for herself, otherwise how could she as a mother ever stand up for her child? The defendant was arrested and was interviewed. He claimed to be "gobsmacked" by the allegations and claimed that the children, Miss A and her step-brother, were mischievous and manipulative. He said that he only bought them treats and gifts because they asked him for them first and that included his purchase of the dog. He claimed that Miss A would "swing me round her little finger". He agreed that he would ask the step-brother to take out the dog a lot but he denied that anything of a sexual nature had occurred. He claimed that sexual intercourse could not have taken place in the garage because it was far too busy and was full of cameras. On the question of cameras that assertion on the part of the defendant was later contradicted by evidence at trial. 21. The defendant stood trial before the criminal assizes in July 2017. Both complainants gave evidence against him, together with various members of the family. The defendant did not give evidence. The defendant was convicted in the manner that we have set out above and was remanded into custody pending sentence. In the intervening period he appealed against his conviction on a point of law and this was dismissed by the Court of Appeal on 22 nd November 2017. 22. We have had the opportunity of reviewing the victim impact statements of both Miss A and Miss B. Miss A has suffered a number of difficulties which are referred to in the various reports and information before us and this has been attributed by the expert involved Dr Carritt Baker to what she suffered at the hands of the defendant. Dr Carritt Baker finds that the difficulties that Miss A subsequently experienced include post-traumatic stress disorder which describes "the more widespread problems experienced by people who have been victims of multiple abuse traumas in childhood. It is different from ordinary PTSD because of the developmental stage at which the trauma occurs and because it generally involved repeated victimisation by a caregiver". Miss B's personal statement demonstrates that although she suffered but a single act of abuse this had a considerable effect on her as did the experience of giving evidence at trial. 23. We note the contents of the defendant's social enquiry report and we note that he is assessed at being at a low risk using the standard assessment tools. However, it

is clear that he has continued to deny the offences which means that we do not feel able to assume any remorse on his part. Case Law 24. We start from the position that a substantial custodial sentence is inevitable. Indeed with regard to sexual abuse in general, the Court said, in AG-v- Brewster

- [2001] JRC3 that:- "The removal of a child's innocence and the corruption of the trust which children naturally feel for adults is so serious that, other than in exceptional circumstances, they must be punished with imprisonment." 25. The Crown has put to us that cases before the Court have shown that this Court is moving in the direction of having regard to the guidelines issued in England and Wales by the Sentencing Council. In AG -v- S
- [2017] JRC 194A the Superior Number stated, at paragraph 11:- "...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." 26. That is not to say, of course, that the Sentencing Council guidelines in the United Kingdom are of any direct application to our consideration of the appropriate sentence, certainly as to the level of sentence imposed. However in K-v-AG and AG-v-F
- [2016] JCA 219 the Court of Appeal at paragraph 33 stated:- "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." 27. In K-v-AG and AG-v-F the court at paragraph 34 said this: "In reaching our conclusions on the instant appeal, this court has considered the guidelines accordingly, but we have not applied them insofar as the levels of sentence or starting points are concerned." 28. Indeed in P v AG
- [2012] JCA 070 the Court of Appeal said this at paragraph 15: "15. Furthermore, whilst recognising the truth and importance of what was said in De La Haye, it is equally true and important to recognise that in a relatively small jurisdiction with its own cultural and legal heritage, with its separate constitutional existence from that of the United Kingdom, with its own unique sentencing procedures (including a recommendation from the Attorney General in the participation of the Jurats in fixing the sentence), and with its own social issues and own criminal landscape, the courts here are fully entitled to develop their own sentencing jurisprudence, without necessarily having to import the same starting point as apply in England - a country with its own separate constitutional status, its own distinct cultural and legal heritage, its own sentencing procedures and its own social issues and criminal landscape, all of which have some similarities to, but also significant differences from, those in Jersey. This has been the consistent approach to the courts here, as was recently illustrated in AG v U

- [2011] JRC 219 , at paragraphs 12-13 (citing earlier authority to similar effect). We also note that the Guernsey Court of Appeal, sitting with a panel of seven, has now revisited in Gunter in its recent judgment in Wicks, Sharp and Towers v Law Officers of the Crown CA 22 nd March 2012." 29. In the case of the AG v T
- [2017] JRC 169 , the Royal Court in sentencing the defendant for six counts of indecent assault (in respect of which he received a total of eight years imprisonment) said this, at paragraphs 36 and 37: "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 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 Englebrecht made clear, the effects may last for many years. 37. Eschewing the rigid approach to calculating the sentence set out in the guidelines, the court determined that eight 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." 30. The most serious of the counts in respect of which the defendant is to be sentenced is clearly that of rape. The Royal Court has in the past looked to the English case of R -v- Milberry
- [2003] 1 CR App R 25 for guidance. This guidance provided, in general terms, for a starting point for a single offence of rape of a child as one of 8 years. We have been shown the superseded Sentencing Council guidelines as set out in Whelan's Aspects of Sentencing that are based upon the approach in Milberry and it appears that a starting point of 10 years was recommended in cases involving the rape of a child between the ages of 13 and 16 in circumstances where there was a breach of trust. A starting point of 15 years was recommended for repeat offences over a period of time. 31. In the case of AG -v- Donnelly

- [2009] JRC 170 an offender in breach of trust was found guilty of an offence of rape of a female child between the ages of 12 and 13 and four offences of rape with a different female child of around the same age. A starting point of 15 years was taken for the repeated rape and after taking various factors into account the 15 year sentence resulted with a concurrent 8 year sentence for the single rape. 32. In the local case of AG -v- X
- [2010] JRC 111 there are some similarities with the present case in that there were two victims and the offending in relation to the first started with digital penetration and eventually led to a rape and the offending in relation to the second consisted of digital penetration over a period of time. The accused, as in this case, was convicted after trial. The sentence was for a total of 12 years imprisonment. 33. In K-v-AG and AG-v-F (cited above) the Court of Appeal considered the Royal Court's approach to treating offending, although not specifically charged as rape, as falling within a similar degree of seriousness and, at paragraph 23, said:- "Such conclusion was eminently within the range of reasonable conclusions for the Royal Court to reach. In Jersey, sentences for offences of rape and indecent assault are at large - in other words, both offences carry a maximum sentence of life imprisonment. It is not at all wrong in principle to compare conduct which amounts in law to rape with conduct, which, although not rape, is considered by the court to fall into a similar degree of seriousness." 34. The Crown referred us to the first instance decision of the Royal Court in AG -v- K
- [2016] JRC 158 where Commissioner Birt at paragraph 62, stated:- "We emphasise that this is not to say that the Court is obliged to follow the guidelines or that the guidelines are applicable in this jurisdiction; it is simply to say that in relation to an offence of this specific nature, we find the guidelines helpful and think that reference to them helps us to formulate the correct sentence for Jersey in this case. We accept that if we are correct, by necessary inference, sentencing levels for rape generally in this jurisdiction may increase to the extent that the guidelines point to a higher sentence than would be imposed by direct application of the Milberry guidelines. Such a case is not before us but this Court is certainly of the view that rape is a serious offence and that, to the extent the guidelines suggest a higher level of sentence than in Milberry, we would again think that the sentencing levels envisaged in the guidelines are reflective of the gravity of rape offences and might be thought to assist in deciding upon the correct sentencing levels in this jurisdiction." 35. In the final paragraph of K-v-AG and AG-v-F (cited above) the Court of Appeal noted: "The comments which we have made in this judgment suggest that the Royal Court may wish to review upwards sentences of indecent assaults involving digital penetration of children in future cases." 36. In the light of the principles set out above we have had regard to the Sentencing Council Guidelines put before us by the Crown. We do not in any sense regard them as a strait jacket and have felt free to take the factors that they have identified into account whilst giving weight to the individual levels set out in those Guidelines as we have seen fit. We have nonetheless found reference to the guidance on harm, culpability and aggravating and mitigating features to be of assistance. 37. Insofar as Miss A is concerned the Crown's case was to the effect that the defendant had

groomed her over a protracted period by all of the treats that he had bestowed upon her and had subjected her to sexual assaults of escalating seriousness. We think that there was a significant element of grooming with regard to Miss A and in addition to that the treats were used as a means of encouraging her to continue to visit him. The jury returned verdicts of indecent assault with regard to two counts involving sexual intercourse which were charged as rape. The only basis upon which the jury could have returned such verdicts was on the basis that they were not satisfied that, with regard to the subsequent instances of sexual intercourse, Miss A did not in fact consent. Whether or not it might be said that grooming of this intensity in effect removes consent or whether the fact that the consent came about as a result of the grooming are not matters for us today. We are entitled, however, to take into account the fact that in our view the only reason why Miss A consented to the subsequent acts of sexual intercourse was the long and developing history of sexual abuse between the defendant and her and the prolonged period of grooming which to our mind clearly took place. Accordingly we would view the indecent assaults involving sexual intercourse not as directly equivalent to the first offence of rape but nonetheless as having a similar level of seriousness which should be reflected in our sentence. 38. The Crown has urged upon us that we should apply what is termed a "Valler uplift" to deal with the fact that there are a number of different types of sexual offending identified in the Indictment and for which the defendant falls to be sentenced (see *Valler - v- AG*

[2002] JLR 383). The Crown has urged upon us starting points ranging from 10 years with regard to the procuring of acts of gross indecency and the two indecent assaults as an alternative to rape, 12 years for the indecent assaults on Miss A, 11 years for that on Miss B and 16 years for the single count of rape against Miss A. Miss A was at that time between 13 and 15 years of age. The starting point of 16 years was explained to us to be an actual starting point of 14 years with a Valler uplift of 2 years. We note that by way of mitigation the defendant has no relevant prior convictions although as the Court has said in the past in serious cases of indecent assault mitigation through personal circumstances should take a second place behind the duty to protect victims. 39. This defendant does not of course have the benefit of a guilty plea or any real suggestion of remorse. Indeed, in denying the offences he put the victims through the ordeal of giving evidence at trial and of course cross-examination during the course of that evidence. This was clearly traumatic for them both. 40. The defence put before us a schedule prepared for the purpose of this hearing in which a comparison was made between the sentencing levels in England and Wales and Jersey against the time that a defendant would actually serve. For example if a defendant were to serve 12 years imprisonment according to the schedule prepared by the defence he or she would need to receive a sentence in England of 24 years but only 18 years in Jersey. 41. We viewed this schedule as being of some interest but at the end of the day we did not find a direct comparison between starting points to be particularly relevant. In our view we do not need to and do not propose to impose a sentence which in our view is directly referable to a sentence which might be imposed in the United Kingdom. We use

the Sentencing Council guidelines in the way that we have set out above, as guidance to the general factors, but we have regard to the practice of this Court and the general trend mentioned in the above cases in identifying the appropriate sentence. 42. We note that we should take into account by way of personal mitigation that the defendant has mobility problems and that consequently there will be an element of additional hardship upon him in serving a lengthy prison sentence. We take this into account to the extent that we believe appropriate. 43. In our view, taking all of the factors both aggravating and mitigating into account it is the view of this Court that the Crown has assessed the starting points as slightly too high and accordingly is somewhat high in its overall conclusions. Allowing for mitigation as we have said and applying a valler uplift to the rape charge we assessed the appropriate sentence as that set out in the second paragraph of this judgment. 44. We were also asked to impose restrictive orders under the provisions of the Sex Offenders (Jersey) Law 2010 . In our view, by nature of the offences that he has committed we think that there is on the balance of probability a serious threat of sexual harm posed by the defendant and that it would be appropriate to impose a restrictive order in the terms moved for by the Crown. We think that the restrictive order that the Crown seeks and which we impose meets the test of necessity and clarity and is proportional. We do not, however, think that it is appropriate to impose those orders for the period moved for by the Crown, namely 15 years, and in our view a period of 10 years is more appropriate. Accordingly we impose the restrictive orders moved for by the Crown for a period of 10 years from today's date and also set the period within which the defendant may apply to have the notification requirements dis-applied as that of 10 years, both periods to run from the date of sentence. Authorities AG-v- Brewster

[2001] JRC3. AG -v- S

[2017] JRC 194A . K-v-AG and AG-v-F

[2016] JCA 219 . P v AG

[2012] JCA 070 . AG v T

[2017] JRC 169 . R -v- Milberry

[2003] 1 CR App R 25 . AG -v- Donnelly

[2009] JRC 170. AG -v- X

[2010] JRC 111 . AG -v- K

[2016] JRC 158 . Valler -v- AG

[2002] JLR 383 . Sex Offenders (Jersey) Law 2010 Page Last Updated: 03 May 2018 BAILII:
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