

JERSEY / JUDGMENT

J -v- AG [2016] JCA 090 (29 April 2016)

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Court of Appeal 29 April 2016 Before : James McNeill, Q. C., President; George Bompas., Q. C., and; David Doyle, First Deemster & Clerk of the Rolls, Isle of Man. J -v- Her Majesty's Attorney General Advocate A. T. H. English for the Appellant. Crown Advocate C. M. M. Yates for the Respondent.

JUDGMENT

This is the judgment of the Court THE president:

Background

1. The Appellant applies for leave to appeal in respect of a total sentence of 6 years' imprisonment imposed by the Royal Court after guilty pleas were entered in respect of various offences of criminal sexual activity. Each of the offences took place within a period of some 8 months or so, between the Appellant and the same female victim ("A"), who at the time of the offence was aged between 13 and 14 years. The Appellant was between 23 and 24 years. At the time the Appellant was in a relationship with A's mother, with whom he had had two children who were then under the age of 5 years. To some extent the Appellant took the place of a parent of A. The Appellant was in a position of trust in respect of A. 2. We are persuaded that some of the proposed grounds of appeal are "seriously arguable" (Warren v Attorney General
- [2014] (1) JLR 383 at paragraph 37), and we grant leave to appeal. For the reasons which we shall give we have concluded that the total sentence of 6 years' imprisonment was manifestly excessive. We shall allow the appeal, substituting a total sentence of four years and six months' imprisonment. The chronology leading up to the guilty pleas 3. A reported the offences in May 2015. The Appellant was arrested on 13 May 2015 at his parents' address and appeared in the Magistrates' Court on 15 May 2015. An application for bail was refused and he was remanded in custody. He was committed to the Royal Court on 24 July 2015. On 28 August 2015 the Appellant was indicted, whereupon he entered not guilty pleas to all counts in the Indictment, which included certain charges of rape. Dates were set for a trial to take place on 27 October 2015 with the Appellant being remanded in custody in the interim. 4. On 1 October 2015, following discussion between the Crown and the Appellant's Advocate, the Indictment was amended and, on 2 October 2015, the Appellant pleaded guilty to Counts 1, 2A, 4, 5, 6, 7 and 8 of the amended Indictment and not guilty to

Count 2 (rape) and Count 3 (rape). Those pleas were acceptable to the Crown and no trial was required. The Appellant, therefore, may be treated as having pleaded guilty to Count 1 at the earliest possible time once all the charges against him had been clarified by the production of an amended Indictment. He had also pleaded guilty to the offence of unlawful sexual intercourse with a child between the ages of 13 and 14 under Count 2A at what should be accepted as the earliest possible opportunity, namely once the more serious charges under Counts 2 and 3 of rape of a child possibly under the age of 13, had, in effect, been withdrawn. The Appellant pleaded guilty to all the offences within a period of less than five months from the offences being reported. The offences 5. The offences in respect of which the Appellant pleaded guilty and was sentenced, together with a short explanation of the relevant circumstances, were:- Count 1 That the Appellant between 30 March 2014 and 13 May 2015 indecently assaulted A, a female child aged between the ages of 13 and 14, "by licking her vagina and digitally penetrating her vagina". Count 2A That the Appellant between 30 March 2014 and 13 May 2015 on the same occasion as Count 1, had unlawful sexual intercourse with A contrary to Article 4(1) of the Loi (1895) modifiant le droit criminel (the "1895 Loi"). The victim said that the Appellant had briefly inserted the tip of his penis into her vagina. The victim stated "it went in for a few seconds and it hurt". She described the pain as "instant". She said "he tried to push it in further but I didn't want to and like ... kind of said stop" after which the Appellant desisted. Count 4 That the Appellant between 1 September 2014 and 13 May 2015 procured the commission of acts of gross indecency by A "by masturbating him and performing oral sex on him". The Appellant had been at home, with friends in a downstairs room, and had sent the victim a message on her phone instructing her to meet him in the upstairs bathroom where the offence took place. Count 5 That the Appellant between 1 September 2014 and 13 May 2015 on a separate occasion to count 4 procured the commission of an act of gross indecency by A "by masturbating him". This offence took place in a private garage. Count 6 That the Appellant between 1 September 2014 and 13 May 2015 indecently assaulted A "by touching her naked breasts." This offence took place on the same occasion as Count 5. Count 7 That the Appellant between 1 January 2015 and 13 May 2015 indecently assaulted A "by licking her vagina." A had been in her bedroom watching a programme on her mobile telephone whilst lying on her bed. She had not been at school that day because she had been feeling unwell in the morning. The Appellant entered her bedroom at around 4pm and after a brief conversation the offence took place. Count 8 The particulars of the offence specified in Count 8 were that the Appellant on 7 May 2015 attempted to procure an act of gross indecency by A, a female child aged 14 years, "by masturbating him." 6. The maximum sentence of imprisonment in respect of Count 2A is 5 years. The offences comprised in Count 1 and Counts 4-8 are punishable at common law and the penalty is at large. The sentences 7. On 17 December 2015 the Royal Court imposed the following sentences:- (i) on Count 1: 3 years' imprisonment; (ii) on Count 2A: 3 years' imprisonment to run concurrently with the sentence imposed on Count 1; (iii) on Count 4: 3 years' imprisonment to run consecutively to the totality of Counts 1 and 2; (iv) on Count 5: 3 years' imprisonment to run concurrently with the sentence imposed on Count 4; (v) on

Count 6: 2 years' imprisonment to run concurrently with the sentence imposed on Count 4; (vi) on Count 7: 3 years' imprisonment to run concurrently with the sentence imposed on count 4; and (vii) on Count 8: 18 months' imprisonment to run concurrently with the sentence imposed on Count 4, making a total of 6 years' imprisonment. 8. The Royal Court also ordered that a period of ten years from the date of conviction should elapse before the Appellant was permitted to apply under Article 5(5) of the Sex Offenders (Jersey) Law 2010, to be no longer subject to the notification requirements of the Law. The Royal Court also made a restraining order pursuant to Article 10(4) of the Law for a period of nine years from the date of sentence. There is no application to appeal against those orders. The appeal notice 9. The appeal notice sets out the grounds of appeal as follows:- "The Court, in passing sentence, breached the totality principle in ordering that the sentences for certain counts should run consecutively, despite those counts being part of the same course of offending, despite the effect of that being to arrive at a sentence double the term passed for the most serious offence. The sentence of 6 years' imprisonment (on a guilty plea) was manifestly excessive when considered in the light of comparable and more serious cases: in particular those provided to the Court. Certain statements within the Crown's conclusions were misleading and prejudiced the Court against me. The Court took things into account which it should not have done in passing sentence and, conversely failed to take into account certain things which it should have done. The Crown's conclusions, which were provided to the Court, contained allegations which did not relate to any charges on the indictment and statements which should not have been put before the Court. The Court did not provide a reasoned judgment as to why it reached the conclusions it did and why it preferred the submissions of the Crown and rejected those of my Advocate. Reading the judgment it appears as if nothing said by the defence was taken into account at all. It is also concerning that before hearing from the defence the Court gave an indication that the sentence might be even higher than the Crown's conclusions thereby giving the impression it was already set against me. In the absence of reasoned decisions I am unable to understand why the Court rejected the submissions made on my behalf." The Appellant's submissions 10. Advocate English on behalf of the Appellant submitted that the sentence was manifestly excessive and wrong in principle. 11. He submitted that the sentencing court wrongly took into account:- (i) The Crown's allegation that the Appellant had ejaculated over the A's stomach and breasts (as this allegation did not form part of any charge); (ii) The Crown's allegation that A allowed incidents to happen because she was scared of what could happen if she said 'no'; (iii) The Crown's allegation that the Appellant's actions had sexualised A; (iv) The Crown's suggestion that the Appellant introduced A to pornography; (v) The Crown's comments on the Appellant's letter of remorse. The Respondent's submissions 12. Crown Advocate Yates on behalf of the Respondent submitted that in all the circumstances:- (i) the Appellant was not sentenced on a wrong factual basis; (ii) the Court did not take matters improperly into account, or fail to take into account matters that the court should have; and (iii) the sentence ordered was neither wrong in principle nor manifestly excessive. The basis of plea 13. It is important to note the basis upon which the Appellant entered his guilty pleas.

By email dated 28 September 2015 Advocate Baxter (the advocate then acting for the Appellant) indicated to Advocate Yates, for the Crown, that the Appellant:- "... has given us instructions that he wishes to plead guilty to all counts except rape. However, he has also indicated that he would plead guilty to a count of unlawful sexual intercourse contrary to Art. 4, Loi (1895) modifiant le droit criminel. His instructions are qualified in that he maintains: (i) all incidents took place at [address specified]. (ii) he did not sexualise [A] i.e. she already had a history of sexualised behaviour resulting in trouble with family and the police. (iii) in these matters she always at least appeared a willing participant." 14. By email dated 29 September 2015 Advocate Yates responded on behalf of the Crown as follows:- "I refer to our telephone conversation this morning. I confirm that I have checked with the Police and that they have no record of any complaints regarding [A's] behaviour. In any event, it seems to me that that point made at (ii) below is not one that should have a bearing on any basis of plea, and that it will be a matter for your client to decide whether that amounts to mitigation that he wishes to advance. The Crown is prepared to accept the pleas that are suggested, and notes the qualifications made at (i) and (iii) ..." The significance of the insertion of the changed address, as proposed in point (i) in Advocate Baxter's email of 28 September, was that any offending by the Appellant at that address could only have been when A was at least 13: with the address initially identified in the Indictment, the Crown's case was that the Appellant's first offences (Count 1, along with the rape charges) had been committed at a time when A may have been less than 13. The Crown's conclusions 15. Shortly before the sentencing hearing the Crown, in accordance with well-established authority (*Harrison v Attorney General*

[2004] JLR 111 at paragraph 34), filed its Conclusions along with a Statement of Facts. At paragraph 18 of the Conclusions, under the heading "Aggravating Factors", the Crown set out the following:- "At page 449 of Whelan (Divider 17) there is a list setting out particular aggravating features that have been identified within the case law, and the Crown contends that the majority of those aggravating factors are present in the instant case, specifically: a) Breach of a specific trust reposed in the offender: This was an appalling breach of trust in this case. The victim considered the Defendant a father figure, and the abuse took place in the family home where she lived with her mother. b) The length of the period covered by the indictment: The abuse took place over a period of eight months, and was continuing right up to the point that the victim made her disclosure. c) The frequency of offences within that period: The offending took place throughout that time. d) Actual coercion: It is clear from the text messages that have been recovered that the Defendant offered the Victim small cash bribes (sometimes taken from her mother's purse) in order to procure her submission to his demands. He also offered her cigarettes and allowed the Victim to stay out with her friends. Contrary to the comments he has made in the sentencing reports, there is no evidence that the Victim blackmailed him for the cash. e) The nature of the assaults, with a particularly condign view of the introduction to oral sex: One of the counts on the indictment covers the procurement of oral sex. The Victim was summoned to the bathroom in her house, at a time when the

Defendant's friends were downstairs, and she was coerced into performing oral sex on the Defendant, who ejaculated. In AG v U [2011 JLR 812] the Court said: "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." In the present case the Defendant's behaviour has been charged as both gross indecency and indecent assault. The Crown sees no reason why the same principles should not apply to both offences equally. Two other counts deal with the Defendant committing acts of oral sex on the victim. More generally, the Victim has also alleged that during the sexual activity the Defendant ejaculated over her tummy and breasts. f) The effects, physical and psychological on the victim ..." 16. Whelan on Aspects of Sentencing in the Superior Courts of Jersey (third edition) at page 449 states:- "The cases suggest that particular aggravating features may include breach of a specific trust reposed in the offender; a number of victims; the length of the period covered by the indictment; the frequency of offences within that period; the ignoring of protests, or actual coercion; the nature of the assault, with a particularly condign view of the introduction of oral sex ...; the effects, physical and psychological on the victim(s); see also observations as to taking advantage of the disinhibiting effects of alcohol on the victim in Dykes (13.7.99) ..." The sentencing hearing 17. At the sentencing hearing on 17 December 2015 (Le Cocq, DB, with Jurats Olsen, Blampied, Ramsden, Thomas and Rouge) Crown Advocate Yates appeared for Her Majesty's Attorney General and Advocate Baxter appeared for the Appellant. Included in the Crown's oral submissions during the sentencing hearing were the following statements:- "The Victim ... alleged that, on occasions, he had ejaculated on her tummy and breasts. She said that she had let him do these things because she was scared of what would happen if she said no ... The Crown contends that, whatever explanations he may have given to those preparing the sentencing report for the Court, the Defendant should be sentenced on the basis that he used coercion, that he used the payment of bribes and he used grooming over the period of his offending in order to condition this victim into becoming an object the he used for his own sexual gratification. He had conversations with her about sex. He introduced her to pornography. The Crown says that he stripped this child of her innocence in an appalling way ... In the circumstance of the case, the Crown has accepted the Defendant's plea to unlawful sexual intercourse on [the] basis that the Defendant may well have persuaded himself that she was allowing him to do what he did, but the Crown still maintain that that must be viewed in the overall context of the offending ... At page 503 of Whelan , it is stated that, in cases of USI that contain sinister aspects, such as marked disparity between the ages of the offender and the victim, inducement, oppression or breach of trust, that those are to be viewed more seriously. All of these "sinister aspects, as they are called, appear in this case today ... The Crown contends today that this is certainly a case when the victim was conditioned for the Defendant's sexual gratification. The text message recovered from the Defendant's mobile telephone, which comprises Count 8 on the indictment, is pertinent in this regard and shows that, by the end of the relevant period of offending, the Defendant treated the victim as being at his beck and

call ..." 18. The Crown moved for the following sentences:- Count 1: 3 years' imprisonment; Count 2: 3 years' imprisonment concurrent with Count 1; Count 4: 3 years' imprisonment consecutive; Count 5: 3 years' imprisonment concurrent with Count 4; Count 6: 2 years' imprisonment concurrent with Count 4; Count 7: 3 years' imprisonment concurrent with Count 4; and Count 8: 18 months' imprisonment concurrent with Count 4, making a total of 6 years' imprisonment. 19. Advocate Baxter, having handed up a copy of a letter from his client, made it clear that the Crown's "summary and conclusions include matters which are not aspects of these charges or which cannot be relied upon for the purposes of sentencing". In respect of the ejaculation point to which we have already referred, Advocate Baxter stressed that none of the charges included "that behaviour". 20. Advocate Baxter also took issue with the Crown's comment that A allowed the incidents to happen "because she was scared of what would happen if she said no". Advocate Baxter submitted that "the evidence that there was early sexualisation has not been tested. The Defendant's pleas were entered on the express basis that this was not the case and that the victim was sexually experienced. Indeed, the victim's own interviews admit to sexual activity with other persons". 21. Advocate Baxter stated that:- "There is no evidence of conditioning or grooming in this case. The agreed summary of facts shows that the offending behaviour started abruptly and, indeed, seemingly with the most serious offence first. There was no escalation in offending. There are a relatively low number of incidents of such a case and the offending continued for a relatively short period of time". 22. Advocate Baxter stressed that there was "no evidence that the victim was introduced to pornography by the Defendant in this case. What there is, is a mention in the ABE interview that they would watch pornography, but certainly there is no allegation or evidence that the victim was introduced to pornography by the Defendant". 23. In respect of the mitigation, Advocate Baxter referred to the following:- (i) the victim appeared a willing participant; (ii) no force was involved; "no meaningful control of the victim and there was no violence or threats"; (iii) relatively few incidents (4) over a relatively short period of time (8 months); (iv) in respect of the unlawful sexual intercourse - "more or less a brief attempt lasting just a few seconds, which ... ended as soon as the victim said to stop"; (v) this is not a case of marked disparity of age; (vi) this is not a case of grooming or conditioning; (vii) full credit should be given for the guilty plea; (viii) residual youth at 24; (ix) the Defendant had no relevant previous convictions; (x) the Defendant had not been in prison before; (xi) it is accepted that the Defendant has shown little remorse; (xii) 6 years' custody is obviously excessive; (xiii) there would be a breach of totality principle; (xiv) it is inconsistent with previous comparable or worse cases; (xv) the Defendant is an immature young man with a skewed understanding of sexual relationships but he is not a sexual predator of children. The sentencing remarks 24. The learned Deputy Bailiff in his sentencing remarks stated:- "All of these offences were committed over an eight month period against the same child, aged then between 13 and 14 years. You gained access to that child because of your relationship with the girl's mother, and it is absolutely clear that you were in a position of trust that you breached. You encouraged her to perform these acts with you by financial and other inducements and significantly, by using parental authority, controlling when

she could go out and when she could not go out. You have expressed little remorse or empathy for your victim and you have sought to blame her. You are assessed as presenting a notable risk of reconviction. We have read the Personal Statement of the Victim in this case, and we readily accept the profound effect that your predatory behaviour has had both on her and her relationships. You used her, as the Crown has said, for your sexual gratification. You played a part in her sexualisation and you shared pornography with her. In part, you stole her childhood. The Crown has identified a number of aggravating features of this case. We agree with that assessment. We note the mitigation available to you, that you have no relevant previous convictions and that you have pleaded guilty, and that is significant, even though we do not think that you pleaded at the earliest possible opportunity ... We turn now to what we believe to be the appropriate sentence, having noted all of the matters to which I have referred. Going through the list of counts, we believe that, to a very great extent, the Crown has correctly identified the graveness of these offences in these circumstances and we do not propose to depart from the Crown's conclusions ... making a totality of six years' imprisonment." 25. Two other remarks should be noted. First, Advocate English expressed concern as to an observation from the bench, made before Advocate Baxter had commenced his address to the court. In our view, however, it was perfectly proper for the Deputy Bailiff to state:- "... before you start, it is appropriate that we warn you that the Court considers its sentencing options at large and you should not assume that the sentence will be no higher than that requested by the Crown ..." 26. Second, we note that, in respect of Count 4, the Deputy Bailiff, during the delivery of the court's sentencing remarks, stated:- "... we were minded that this should in fact attract a sentence of three and a half years' imprisonment, but we are remaining with the conclusion of the Crown in the light of the totality principle. Accordingly, three years imprisonment consecutive ..." Law 27. We now turn to consider the relevant law. 28. Article 26(3) of the Court of Appeal (Jersey) Law 1961 (the "1961 Law") states:- "On any appeal against sentence, the Court of Appeal shall, if it thinks that a different sentence should have been passed on the appellant in the proceedings from which the appeal is brought, quash the sentence and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as it thinks ought to have been passed, and in any other case shall dismiss the appeal." 29. It is well established (*Harrison v Attorney General*

[2004] JLR 111 , at paragraph 31) that this court will only consider interfering with a sentence if:- "(a) it was not justified by law; (b) it was passed on the wrong factual basis; (c) some matter had been improperly taken into account or some fresh matter needed consideration; or (d) the sentence was wrong in principle or manifestly excessive." 30. Given a number of the issues with which this appeal must cover, we consider it appropriate to recall some of the guidance set out by this court in *Harrison* . In doing so we also recollect what was stated by this court in *Lewis and others v AG*

[2013] (1) JLR 325. 31. The judgment of the five judge Court of Appeal in *Harrison* (Birt (DB), together with Southwell, Nutting, Smith and Vaughan JJA) was delivered by Nutting JA. It explains (at paragraphs 32 to 39) the functions of the Royal Court in sentencing, and draws particular attention both to the significant part played by the Crown in sentencing and also to the role of the Jurats, with their experience, responsibility and connection with the community. For present purposes we recall the emphasis placed on achieving a sentencing process with transparency and robustness. 32. The salient facts in *Harrison* were that the defendant had been sentenced for a grave and criminal assault to which he had pleaded not guilty, for committing a public nuisance to which had pleaded guilty, and for contempt of court by absconding from the island while on bail. The sentences imposed by the Royal Court were 3½ years' imprisonment for the assault, a week's imprisonment concurrent for the public nuisance, and (having regard to a period of 10 months' imprisonment while awaiting extradition from Spain) 12 months concurrent for the contempt of court. The Royal Court indicated that, but for the time spent in prison in Spain, the sentence for contempt would have been consecutive to the other sentences. 33. A particular thrust of the judgment of this court was to indicate that, whilst not seeking to dictate the procedure to be followed by the Royal Court, it was desirable for the Royal Court to consider the use of a two stage process in all cases, identifying starting points and providing clear reasons for imposing the sentences which were imposed. Procedural fairness in a sentencing context required the inclusion of a sufficient explanation of the basic reasons which led the court to impose the final sentence taking into account all the circumstances of the case (paragraph 23). 34. *Lewis* was a complex case dealing with a fraudulent investment scheme. The learned Commissioner (Pitchers) had issued an eleven page sentencing judgment on behalf of the Jurats which allowed this court to understand the approach of the Royal Court. Nutting JA, delivering the judgment of the court, stated:- "387 Picking our way through this appellant's grounds, the first relevant point is the assertion that the Royal Court failed, because the Crown had failed, to set a starting point for sentence. This was said to be contrary to the five-judge case of *Harrison v. Att. Gen.* (17). It is correct to say that *Harrison* encourages the Crown to define a starting point in its sentencing conclusions and suggests that it is desirable for the Royal Court to do so where possible. But the court concluded (2004 JLR 111 , at para. 100): "What we have said does not constitute a direction that the Royal Court must perform this function" and added (ibid., at para. 96): "We accept that the key to the effective operation of sentencing as between this court and the Royal Court is not for this court to impose a sentencing straitjacket which forces the Royal Court to determine sentences according to a fixed and immutable set of rules, but rather to ensure that, whatever route is chosen by the Royal Court, the journey is well mapped and signposted. Provided the reasoning of the Royal Court is clear, the necessary discretion which the lower court possesses in sentencing matters will not easily be questioned or overturned."" 35. Unfortunately, as we explain below, in the present case we have found the reasons given by the Royal Court too succinctly expressed to enable us to see clearly the route chosen on a number of important points.

Determination

36. We now turn to our determination of the appeal. In summary we conclude that the total sentence of 6 years' imprisonment in the present case was manifestly excessive and we must revisit it: Article 26(3) of the 1961 Law. For reasons which we explain, we consider that the Royal Court may have been persuaded to impose an excessive total sentence through a combination of (a) the difficulty of reconciling the need for proportionality in the total sentence with the need to recognise abhorrence for the individual offences, and (b) possible confusion as to the basis for the guilty pleas and the facts to be taken into account. Manifestly excessive 37. Our conclusion that the sentence was manifestly excessive is based upon the authorities which were put before us on this appeal, as well as before the Royal Court at the sentencing hearing. We recognise that "every case needs to be decided on its own facts and that comparisons with other sentencing decisions need to be treated with caution" (see *X v Attorney General*
- [2014] (2) JLR 384 at 85, per Sir Richard Collas, Bailiff of Guernsey). However, it is also important that there should be reasonable consistency in sentencing in the interests of justice and to maintain public confidence. 38. The Crown had referred to two particular cases at the sentencing hearing. The first, the case of *Attorney General v DS*
- [2009] JRC 213 was a decision handed down on 13 November 2009 involving counts of sexual grooming, indecent assault and the commission of an act of gross indecency over a 14 month period. In that case there had been a thirty year age gap between assailant and victim, the defendant blamed the victim and there had been a much greater number of incidents. The defendant pleaded guilty. Concurrent sentences were imposed, the longest being 4 years in respect of the third count which, it appears, was of a similar nature to that in Count 4 on the present matters. 39. The case of *Attorney General v G*
- [2009] JRC 148 was one in which there were two counts of relevance for the present issue: one serious indecent assault which bears some resemblance to Counts 1 and 2A in the present matter, and the procurement of an act of gross indecency which bears some resemblance to Count 4. The defendant pleaded guilty. Concurrent sentences of, respectively, 4 years and 3½ years were imposed. 40. In light of these two cases it was submitted on behalf of the Appellant that it was wrong of the Crown to categorise the present case as one involving a marked disparity of age and offending over a long period. Having regard to the available mitigation, including the guilty plea, the Appellant's relative youth, the absence of force and the psychological assessment, a sentence which was the equivalent to 9 years on a not guilty plea was inconsistent with the comparable cases. 41. For the Crown it was submitted that, unlike the present case, the accused in *DS* had clearly expressed remorse, and that certain of the elements of the present Counts 1 and 2A had not been present in the earlier cases. As regards the case of *G* there was, again, an expression of remorse and repugnance at the offending, and there had been no penetrative sex. 42. We understand the rationale of the argument that the sentence here should be treated as equivalent to a case of a total sentence 9 years with an appropriate deduction for a guilty plea. But it

seems to us that the matter is more complex. First, whilst there may some comparability of circumstances between those here and those of DS and G and certain of the resulting sentences imposed, it should be remembered that, here, there was actual sexual intercourse. Second, at least at one stage of the analysis, each of the two sets of concurrent sentences here may fall to be viewed separately, and therefore appropriate for consecutive treatment. 43. Further, it is appropriate to consider another case to which our attention was drawn by Crown Advocate Yates: *Attorney General v U*

[2011] JLR 812, a decision of the Royal Court in which the defendant was convicted on 12 counts of indecent assault and procuring acts of gross indecency over a period of 4 years. The offences included oral sex; and as to this the Royal Court (W. Bailhache (DB) with Jurats Le Cornu, Morgan, Kerley, Crill, Milner and Olsen) said:- "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 offending for the purposes of sentencing." 44. However, the gravity of the conduct in that case was significant in various respects besides the oral sex involved. One important feature was that the victim was aware that the defendant had filmed the offences committed with the victim and that these had been subsequently viewed by police officers, lawyers and the jury. The defendant had pleaded not guilty, and had showed no remorse. In sentencing the defendant in relation to these 12 counts the learned Deputy Bailiff commented that he had been able to see the stress that the victim (described as "now a vulnerable and damaged young man") had been subjected to while waiting to know if he was to be cross-examined on his Achieving Best Evidence ("ABE") interview; and he described this as having been "unnecessary and cruel". On these 12 counts various sentences of up to 5 years were imposed, the sentences to run concurrently. 45. The defendant was also convicted of making numerous indecent photographs of a child. There were 12 counts involved. It does not appear that these images were ones of the victim who was the subject of the indecent assaults. As to these counts the Royal Court imposed various concurrent sentences of up to 2 years, with sentences to run consecutively to those for the indecent assaults. The 2 year sentences were, it would appear, a reduction on what might otherwise have been ordered, the reduction being expressed to have been "on totality grounds". 46. As we understand it, this case was relied upon by the Crown in the present case as support for the undoubted proposition that the introduction of a child to oral sex is generally treated as deserving of condign punishment. We would observe, however, that the structuring of the sentences in the case was unremarkable, and not really of any assistance as a guide for the present case, in that the second 12 offences (those involving the making of indecent images) were readily capable of being regarded as forming a course of criminal behaviour distinct from that involved in the indecent assault offences with the victim of the first 12 offences. 47. On the other hand we consider that the case is instructive in a different respect. Comparing the total effective sentence of 5 years imposed on the defendant, a defendant who had not pleaded guilty, for the 12 indecent assault offences in that case, with the total sentence of 6 years imposed in the present case on a defendant who had pleaded guilty, does call in

question the justification for the sentence imposed in the present case. Further, without in any way seeking to diminish the gravity of what was done by the Appellant in the present case (and, as to this, we draw particular attention both to the fact of actual intercourse and to his disregard for the effects of his actions on a child to whom he was in effect in the position of step-father), the callous brutality of the offending in the U case was at a striking level. 48. The Crown also informed us of the recent decision of the Royal Court (Clyde-Smith, Commissioner, with Jurats Fisher, Nicolle, Marett-Crosby, Olsen, Grime and Thomas) in *Attorney General v T*

[2016] JRC 001 , which had not been available to the Court below. In that case the defendant had been sentenced to a total of 6 years' imprisonment on two counts of indecent assault. Each instance related to the same victim, who was aged 8 and 10 on the two separate occasions. Each occasion involved forced oral sex, with a limited amount of penetration and with ejaculation. The Court determined that the assaults should be regarded as being in the same category as rape, noted aggravating features and that, in such serious cases, any mitigation through personal circumstances had to take second place behind the duty to protect victims. The sentences of 5 years and 6 years were made concurrent. 49. In addressing us, Crown Advocate Yates realistically conceded, when pressed in argument, that the offending in T was of a much more serious character than in the present case, making it difficult to support the imposition here of a total sentence of 6 years; and he acknowledged that the total sentence in the present case was "at the high end of the scale". 50. We were reminded by Crown Advocate Yates that it is not the function of the Court of Appeal to tinker with sentences which were within the range open to the sentencing court simply because we might ourselves have fixed a lower level of imprisonment. For this he cited the well-known statement of principle in *Morgan v AG*

[2001] JLR 225 . That statement has already been endorsed by this court in *Harrison* at paragraph 30. But in our judgment, for reasons which we shall explain below, having regard to the overall sentences imposed by the Royal Court in U and T , taken together with those in DS and G , the overall sentence here exceeded the range open to the Royal Court. 51. Before proceeding to consider the sentence which, in our judgment, ought to have been imposed on the Appellant for the offences of which he was convicted, it is appropriate to indicate that we find ourselves in some sympathy with the Royal Court as it was confronted with a sentencing exercise which was not straightforward. The offences here were, individually, serious; and, so considered, the individual sentences imposed by the Royal Court were not obviously excessive. Further, and in agreement with the Royal Court's actual decision, we consider that the present is a case in which consecutive sentences could be imposed for certain of the offences. This we explain below. However it is always necessary to keep firmly in mind that the overall length of imprisonment imposed must be proportionate to the criminality of the conduct; and it is upon that consideration that we have concluded that the overall length of the sentence was manifestly excessive. We discuss this below under the heading *Totality* . 52. To borrow and supplement the language of *Nutting J A in Dykes v AG*

[1999] JLR 146 at page 151, in the end the court has to perform what is often a most anxious balancing exercise between the competing interests of, on the one hand, the expression of public revulsion at the abuse of young children by those older than them, the aggravating factors, the need to deter others who might be tempted to behave in the same way, the need for punishment and the need for the protection of the public, and, on the other, the requirement to reflect the need for rehabilitation and those aspects of the case which mitigated the offences and which should properly influence the court to a measure of mercy. The reasoning of the court below 53. In the determination below, for which the reasoning was given during the concluding part of the sentencing hearing, the Royal Court reached the same final determination as that in the conclusions of the Crown; but it did not accept all of the Crown's reasoning or characterisation of salient issues. Importantly, it seems to us, the Royal Court considered that the accused had played only a part in the sexualisation of the victim and that the two had shared pornography rather than the accused having introduced her to it. 54. The fact that there were these distinctions from the case presented by the Crown, coupled with the apparent approach of the Royal Court not to identify a starting point for sentence, prevents us from seeing how the court had arrived at the same determination as that put forward by the Crown. As this court has stated before, where the Royal Court differs from the conclusions of the Crown as to the appropriate sentence to be passed on an offender, the court should make it clear whether it disagrees with the Crown's recommended starting point for the length of the sentence, or with its view of the effects of mitigation; and if it is unclear from the judgment which is the case, the sentence may be considered afresh on appeal: *Galante v AG* [1997] JLR N-14b. By parity of approach, where, as here, the Royal Court differs from the Crown on elements of aggravation or mitigation, the effect of those differences on the reasoning of the Royal Court should be identified. 55. Further, it seems to us that there are two important matters upon which the determination below is at least opaque if not silent: the first is how the principal sentences of 3 years were arrived at, the second is how proper regard was had to the totality principle. Separate, but logically part of the first, is the silence as to how the Royal Court may have resolved the issues between Crown and defence which we have set out above. 56. As to how the sentences were arrived at, the submission from Advocate English was that, without an identified starting point it, was impossible to tell how gravely the court viewed the criminal conduct or what credit was given to the Defendant for his previous clean record and for his guilty plea, notwithstanding the remark made by the Royal Court that the "mitigation available to you [was] significant". For example, the sentence on Count 2A, an offence with a statutory maximum of 5 years, was 3 years. If the Defendant were to be taken to be entitled to a full one-third discount for his guilty plea on the particular charge, that sentence would imply that the offence was viewed by the Royal Court as being almost as grave a case of unlawful sexual intercourse contrary to Article 4 of the 1895 Loi as could be expected to be encountered: that is, deserving a sentence of some 4 and half years, not far short of the 5 year maximum. However, given that the Defendant had desisted when the victim said she was hurting and asked him to, such a grave view of the offence was not necessarily the one

which should have been taken. Neither the Crown's Summary of Facts nor the written Conclusions to the Royal Court in terms invited the Royal Court to view the offence as deserving in principle a sentence at almost the maximum permissible, or suggested an explanation as to why the Royal Court should take that view. As for the oral submissions for the Crown, while drawing attention to "sinister aspects", as it was put, - namely aggravating features such as "marked disparity" of age, inducement, oppression or breach of trust, as leading to the offence being "viewed more seriously"

- they did not advance a case that in principle almost a maximum sentence was appropriate. 57. We have also been persuaded that Advocate English was correct in his submission that certain of the statements made by the Crown during the sentencing hearing, statements to which Advocate Baxter for the Appellant had objected, appear wrongly to have been taken into account by the Royal Court when passing sentence. 58. The Royal Court indicated that it agreed with the assessment of the Crown in its identification of a number of aggravating factors. But we cannot see what basis there was upon which to agree with the Crown's suggestion that there was an aggravating feature of physical coercion. There was no physical force used by the Appellant. There was no ignoring of protests. On the contrary, as soon as the Appellant was requested to stop the unlawful sexual intercourse within a few seconds after limited penetration, he had stopped. 59. With respect to the Crown allegation of ejaculation, Crown Advocate Yates, when pressed during the hearing of the appeal, conceded that the ejaculation allegation did not form part of any of the offences to which the Appellant had pleaded guilty. We remind ourselves that the counts in the Indictment were not specimen counts. The ejaculation allegation should not have been relied upon as an aggravating factor and the Royal Court was wrong to have regard to it in the circumstances of this case. 60. Further, the defence had also objected to the suggestion that all of the incidents may have involved fear on the part of the victim. Without express reasoning, it is not clear to what extent the Royal Court had relied on this suggestion which, as it appears to us, had at most a limited basis on the information before the Royal Court. 61. In its sentencing remarks the Royal Court should specify the aggravating and mitigating features. In cases where there are competing submissions from the Crown and the Defence as to aggravating or mitigating features it would be helpful if the Royal Court were to state brief reasons as to its conclusions as to the aggravating and mitigating features it finds to be present. We refer to our remarks in paragraph 54 above. 62. As to the totality principle, Advocate English's submission was that once the sentences for the later offences of indecent assault were made to run consecutively to, rather than concurrently with, the sentence for Count 2A, what remained was an aggregate term of imprisonment for a manifestly excessive period, without any explanation for the length of the period by reference to the other decided cases to which we have referred. The Royal Court was aware of the totality principle, as it was indicated in the sentencing remarks that the sentence imposed for Count 4 would have been longer but for that principle. Nevertheless, it is not clear from the Royal Court's remarks why the resultant total of 6 years was considered appropriate when compared with the other cases to which the Royal Court had been referred. 63. As we have

indicated, taking into account the sentences imposed in AG v DS

[2009] JRC 213 , AG v DS

[2009] JRC 213 , AG v U

[2011] JLR 812 and AG v T

[2016] JRC 001 , our own judgment is that the total sentence of 6 years' imprisonment was manifestly excessive. For the reasons which we have just given the approach of the Royal Court is insufficiently detailed to permit us to understand why it considered that the sentences, individually and cumulatively, were justified. As we have also said, we are concerned that the Royal Court may have inappropriately accepted all the Crown's suggested aggravating features. 64. We therefore quash the sentences imposed, in exercise of the power in Article 26(3) of the 1961 Law. It is then our responsibility to consider the appropriate sentences to be passed in this case. The appropriate starting points in this case 65. In our judgment taking into account the maximum sentences available, the sentences imposed in the other cases to which we have referred, and all other relevant matters (including the need for overall proportionality), the appropriate starting points are as follows. 66. Count 1 (indecent assault of a female child, aged between the ages of 13 and 14, by licking her vagina and digitally penetrating her vagina). We identify 3 years as the appropriate starting point. These two assaults were each of material depravity. They were invasive and deeply offensive and can only be viewed as a most serious intrusion of the person of a young female short of sexual penetration. 67. Count 2A (unlawful sexual intercourse with a female child, aged between the ages of 13 and 14). On this matter we are of the view that the starting point should be 4 years. Whilst the Appellant was a grown man

- albeit not particularly mature - the disparity in age between him and his victim was not as great as in other cases. But his victim was at the minimum age for the offence to fall within the 5 year maximum rather than life; and the combination of gross breach of trust and offending while also the active parent of two infant children marks out the circumstances of this offending as abhorrent and deserving significant disapproval. 68. As to Count (procuring the commission of acts of gross indecency by a female child in masturbating the Appellant and performing oral sex on him), this was a serious assault on a child, not only by its inherently abhorrent nature, but by the callous attitude of the Appellant, at home, with friends in a downstairs room, and sending the victim a message on her phone instructing her to meet him in the upstairs bathroom where the offence took place. In our view a starting point of 3½ years is appropriate. 69. Counts 5 to 8 . In respect of each of these individual counts we consider it correct to make individual assessments: AG v Sampson

- [1965] JJ 495 . Consistent with the starting points which we have just identified, we consider that the appropriate starting points are 3 years for Count 5, 2 years for Count 6, 3 years for Count 7 and 18 months for Count 8. There is no doubt that the Appellant engaged in the serious sexual abuse of his victim and we are conscious of the remarks of Newman, J in *R v JW*
- [2000] 1 Cr App R (S) 234, at 235:- "It has to be remembered, in our judgment, that in cases such as this a mere recital of the indecency recounts but the crimes, but the circumstances of such persistent abuse as this mean that a young girl is forced to live, day in night out, for years to suffer the stress, anxiety, shame and confusion being the consequences to which these offences give rise. Day after day this victim must have returned to school carrying the burden of hurt, shame and humiliation and suffered in silence. Inevitably childhood years are ruined. From crimes such as these there is no escape, no means to prevent them being committed at the time, and generally no support or counseling (sic) between times to alleviate the shame and fear they generate." 70. In respect of the selection of these starting points we have weighed up the aggravating factors of the offences: breach of trust in that A regarded the Appellant as a father figure; the fact that offending took place in what should have been a place of safety for A, her home; the difference in the age between A and the Appellant; the inducements offered to A in the form of small amounts of money, cigarettes, and granting permission for A to stay out with friends; the instructions A to delete messages; the treatment of A as at his beck and call for sexual favours; and the adverse impact of the offending behaviour on A. We have also had regard to the factors which reduce gravity: the relatively short period of time within which the offending behaviour was committed, measured in months rather than, as in some of the other cases, in years; the specific and limited number of incidents of short duration; the fact that the counts were not specimen counts; the fact that no further attempts were made at unlawful sexual intercourse, and the absence of any physical force. 71. But we emphasise that nothing which we say in this judgment should be taken as in any way detracting from the adverse impact of the Appellant's serious offending behaviour on A which is apparent from, amongst other matters, the letter from the victim which was before the Royal Court. 72. As appears from the discussion which follows, we have concluded that there should be consecutive sentences, falling into two tranches: these will comprise (a) Counts 1 and 2A, and (b) the remaining Counts. Looking at the two tranches individually, the starting point is 4 years on Counts 1 and 2A and 3½ years on Counts 4 to 8. Consecutive or concurrent sentences 73. For the reasons which we now explain, in our judgment the sentences on Counts 1 and 2A should be concurrent and the sentences on Counts 4 to 8 inclusive should be concurrent with each other but consecutive to those on Counts 1 and 2A. In this we agree with the approach taken by the Royal Court. 74. On consecutive sentences there is an English authority (Attorney General's Reference No 127 of 2004 (David Michael Briggs) [2005] 2 Cr App R (S) 74) to the effect that where there is a single victim involved in a sexual relationship with an offender, and there is a series of sexual offences on the victim, "in general terms that results in the concurrent sentences".

If, however, the subsequent criminal behaviour had its own additional damaging and corrupting effect on the child, it is clear that consecutive sentences may be appropriate. 75. We consider that the subsequent criminal behaviour covered by Counts 4 to 8 had its own additional damaging and corrupting effect on A. Count 4 concerns an offence whereby the Appellant procured A to perform oral sex on him. In *AG v U W. Bailhache DB* stressed that the introduction of young people to oral sex has always been regarded by the courts as a serious factor for the purposes of sentencing. We note that Count 1 involved an act of oral sex on A, but Count 4 (procuring A to perform oral sex on the Appellant) was an additional and quite separate abuse of A. 76. There are further features of the offending which was charged in Counts 4 to 8 which differ from that in Count 2A, quite apart from the absence of sexual intercourse. Whilst the charges are individual rather than specimen, they do indicate a course of conduct over a period of months during which it appears that the Appellant abused A by treating her as little more than a sex toy, available at his beck and call, to provide him sexual satisfaction. Whatever may have been her previous sexual experience or understanding before the Appellant first engaged in sexual activity with her, he abused her at a time when he should have been supporting her in her childhood development; instead, he was teaching her to use, and to provide her body for use, in return for money and similar favours, for another person's sexual gratification in ways which should have been unimaginable for someone of her years. The Appellant may not have instigated the sexualisation of A; and he may not have introduced her to pornography which he invited her to look at. Nevertheless, she was to be available on occasions at his whim, albeit on one occasion she felt able to decline the offer from the Appellant of a trip to the cinema and a suggested meal thereafter. 77. The instances of offending which formed the subject of Counts 4 to 8 do not bear the hallmark of opportunism: they were calculated. This appears from the materials put before the Royal Court in the Attorney General's summary of facts when describing what was found on the Appellant's mobile telephone after his arrest. These formed the subject of Count 8. There were two deleted text messages recovered, one reading "Hand job give you £10", and another saying "I've got it here ". Facebook messages were found on A's phone sent by the Appellant at around the same time as the messages on his phone. They were to similar effect, but with the Appellant also reminding A to delete the messages. 78. The further tranche of offending which formed the subject of Counts 4-8 had a profound and devastating effect on the victim, as can be seen from her undated letter (which appeared at divider 12 of the bundle) and the ABE interviews with A (which appeared at divider 17 of the bundle). In her letter, A comments:- "I get uncomfortable around people, even my family ... I don't even like living in the house anymore, I find it disturbing and uncomfortable now it's left its footprints in there ... I really want to just pack up and leave and start fresh, forget everything. I do miss myself, the way I was and how I acted ... I remember I would spend most my younger times before we knew him, loving my mum and spending time together. Now that looks like a dream. I want to be back to normal but it's not that easy." 79. In respect of the second tranche of offending covered by Counts 4-8, A's ABE interviews contain details in brief terms of the damaging impact it has had on

her:- "I think it's whenever he feels like it ... I've told him I don't like it and and [he] probably doesn't believe me ... 80. A said that she did not tell her mother what happened because:- "I don't want her to get hurt and like, like feel it's her fault ... for not knowing ... I wouldn't like to imagine ... telling her ... I think things have been more pushing on ... I'm like worrying about my sisters and like his parents cause they've been through a lot as well and I don't know ... I just don't want my Mum to worry about things and I just don't want her to worry about more things ..." 81. These matters and their effect were serious. The Appellant had desisted from the type of action considered in Count 2A. He could have kept his distance from the victim; but, for whatever reason, he determined upon a different course of conduct for his own sexual gratification. In our judgment this approach readily justifies an exception to the normal rule and the imposition of consecutive sentences. Guilty Pleas and Mitigation 82. We consider that it is important to recognise that the guilty plea to the unlawful sexual intercourse charge was made at the first available opportunity once the Crown had indicated it would accept a guilty plea to unlawful sexual intercourse and it would not proceed with the two rape charges. The same is the case with the charge in Count 1, in respect of which there was an amendment which accepted an increased age on the part of A. It is correct, as canvassed in our exchanges with Advocate English, that the Appellant could have pleaded guilty to the other charges earlier; but he did enter guilty pleas to all charges before the trial, once the position in respect of the rape charges had been determined and the Indictment read for the second time. 83. In *Norris v AG*

[2014] (1) JLR Note 23 this court referred to it being well-established in this jurisdiction that some discount should be given for a guilty plea and stated that the full discount of one-third would often be appropriate. Nutting JA in *Harrison v Attorney General*

[2004] JLR 111 , at paragraph 91) referred to the reduction in sentence for a guilty plea in England, adding:- "However, in a jurisdiction such as Jersey, where resources are finite and the disruptive effect of a large number of contested trials can be substantial, we think a slightly greater discount could usefully be applied."" 84. In the particular circumstances of this case we are satisfied that a reduction of one third for the guilty pleas should be made. In addition, we are satisfied that a further reduction should be made for the personal mitigation available to the Appellant, which in our view comprises there being no previous convictions, the consequent fact of a first custodial sentence together with relative youth and immaturity. The appropriate total discount will be 40%. 85. In our view, however, it seems clear that the Appellant has evidenced little, if any, genuine remorse. Before us there was an issue as to the weight to be given to a letter from the Appellant which, so it was submitted by the Respondent, appeared cribbed or standard, perhaps indicating that those assisting accused persons to write such letters used what might be termed as boiler-plated paragraphs. Such concerns may well be justified. There is no doubt that for weight to be attached to such a letter it should be, clearly, an expression of the defendant's own views. In our judgment, even where individuals need help in the production of a letter, much can be gleaned from sections of such letters which bear the

hallmark of personal expression. Here, there was text which gave the clear impression that it had originated with the Appellant:-this text, far from being helpful for the Appellant, failed to convey any sense of understanding of the enormity of what he had done, far less any genuine sense of remorse or concern for his victim. 86. For the reasons which we have now given, the total sentence would proceed from a starting point of 4 years on Counts 1 and 2A and a starting point of 3½ years on Counts 4 to 8 consecutive. Accordingly the unified starting point would be 7½ years. After a reduction of 40%, the total sentence would be 4½ years. Totality 87. Notwithstanding that, on the particular facts of this case, consecutive sentences were, and are, justified, we must have regard to totality. As the point was expressed in *AG v McIntyre* (CA unreported, 21 January 1999) in a passage quoted by Clarke JA giving the judgment of this court in *Harris v AG*

[2001] JLR 362 at paragraph 25):- "The [totality] principle is no more than a statement of the obvious common sense proposition that the sentencer has a duty to look at the totality of the consecutive sentences and be satisfied that the cumulative effect of those sentences is not excessive in relation to the conduct of the accused or his particular circumstances ..." 88. We were referred to Archbold, *Criminal Pleading Evidence and Practice* (2016 edition) at 5-592 which reminds a sentencing court that it should review the aggregate of a number of consecutive sentences in order to consider whether the aggregate is just and appropriate taking the offences as a whole:- "The principle appears to be recognised in three situations in particular - where the offender has committed a series of offences of moderate gravity and has received an aggregate sentence equivalent to the sentence which would have been imposed for an offence of a much more serious nature ...; where the offender is relatively young and has not previously served a custodial sentence ...; and where an offender who is sentenced to a long term of imprisonment for a grave crime is also liable to be sentenced to a much shorter term for some other matter..." 89. The case before us could readily be regarded as falling within either of the first or second of the situations mentioned in this passage from Archbold . The second speaks for itself, and we have already taken it into account under mitigation. As to the first, we have already given our observations on comparisons with the sentences imposed in T and in U ; but we would add this. Where, as here, there is statutory maximum for an individual offence, namely 5 years for that charged in Count 2A (unlawful sexual intercourse with a child), we consider that proper justification is required before determining upon an aggregate sentence which exceeds that maximum even where there is to be a discount for a guilty plea or other mitigation. We do not suggest that there cannot be justification or that justification is likely to be found only in rare cases. But we are of the view that any such result should be approached with caution. 90. In the present circumstances we have determined that Counts 1 and 2A should be concurrent, as should counts 4 to 8, but that the second set should be consecutive to the first. In arriving at our conclusions on sentence we have had in mind the totality principle, but there is no further need to reduce the overall sentence by reason of the principle. Overall Conclusion 91. In our judgment a total sentence of 4½ years' imprisonment is the appropriate sentence to reflect the gravity of the Appellant's

offending, the guilty pleas and the mitigation available in this case. When making comparisons between decided cases, as this court indicated in *H v AG*

[2013] (1) JLR 210 at paragraph 74, it will be the total sentence which matters in the final analysis. If it is helpful for present purposes to look at each count, the resulting sentences are:- Count 1: 21 months' imprisonment; Count 2: 2 years 5 month's imprisonment concurrent with Count 1; Count 4: 2 years 1 month's imprisonment consecutive to Counts 1 and 2A; Count 5: 21 months' imprisonment concurrent with Count 4; Count 6: 14 months' imprisonment concurrent with Count 4; Count 7: 21 months' imprisonment concurrent with Count 4; and Count 8: 11 months' imprisonment concurrent with Count 4. Addendum 92. We would add a further observation in respect of a separate submission put before us. For the Appellant it had been submitted that A may to some extent have been an instigator or at least a willing participant: a matter which might mitigate the gravity of the Appellant's offences. Such a factor, in our view, is not one which should normally lead a court to consider mitigation of a sentence: rather it may be viewed on occasion as an aggravation. We bear in mind what has been stated by Lord Thomas, C. J. in Attorney General's Reference (No. 53 of 2013) (*R. v Wilson*) [2014] 2 Cr. App. R. (S.) 1 :- "[19] On this issue the Attorney General is unarguably right. It has been clear since at least the Offences Against the Person Act 1861, and subsequent nineteenth century legislation, that the purpose of Parliament in passing legislation to make it a crime punishable with imprisonment to have sexual relations with those under 16 was to protect those under 16. Indeed the Criminal Law Amendments Act 1885 makes it expressly clear that that was the purpose of the legislation. That can be seen from the preamble to the Act and was made clear by this court in *R. v Tyrrell*

[1894] 1 QB 710 . [20] That long-standing principle is well-known. The reduction of punishment on the basis that the person who needed protection encouraged the commission of an offence is therefore simply wrong. We agree with the submission of the Attorney General that an underage person who encourages sexual relations with her needs more protection, not less. Accepting that as the basis for sentencing for the reasons we have explained, the fact that the offender took advantage of what he asserted the victim did aggravated the offence. The Attorney General is therefore right to say that the victim's vulnerability was an aggravating rather than a mitigating feature." 93. We have no doubt that that principle is equally to be borne in mind in this jurisdiction. We note that the principle is referred to in "Aspects of Sentencing in the Superior Courts of Jersey", 3rd edn , by C. E. Whelan on page 493, where it is commented that "the fact that the victim was sexually precocious is not actually of mitigating effect. The accused, and the Courts, have a duty to 'protect such people from themselves'. The most that can be said of such cases is that they might be regarded as marginally less serious than those in which the victim has been corrupted, or subjected to some sort of oppression". In the present case, as we have explained, our view is that A was subject to oppression in the form of bribery and misused quasi -parental authority, and was also the victim of corrupting behaviour. Authorities *Warren v Attorney General*

- [2014] (1) JLR 383. Loi (1895) modifiant le droit criminel. Sex Offenders (Jersey) Law 2010.
Harrison v Attorney General
- [2004] JLR 111 . Whelan on Aspects of Sentencing in the Superior Courts of Jersey (third edition).
Court of Appeal (Jersey) Law 1961. Lewis and others v AG
- [2013] (1) JLR 325. X v Attorney General
- [2014] (2) JLR 384. Attorney General v DS
- [2009] JRC 213 . Attorney General v G
- [2009] JRC 148 . Attorney General v U
- [2011] JLR 812 . Attorney General v T
- [2016] JRC 001 . Morgan v AG
- [2001] JLR 225 . Dykes v AG
- [1999] JLR 146 . Galante v AG
- [1997] JLR N-14b. AG v Sampson
- [1965] JJ 495 . R v JW [2000] 1 Cr App R (S) 234. AG 's Reference No 127 of 2004 (David Michael Briggs) [2005] 2 Cr App R (S) 74. Norris v AG
- [2014] (1) JLR Note 23. AG v McIntyre 1999/11. Harris v AG
- [2001] JLR 362 . Archbold, Criminal Pleading Evidence and Practice (2016 edition). H v AG
- [2013] (1) JLR 210. Attorney General's Reference (No. 53 of 2013) (R. v Wilson) [2014] 2 Cr. App. R. (S.) 1. Page Last Updated: 29 Apr 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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