

JERSEY / JUDGMENT

Jack Lennie v The Attorney General

COURT

Royal Court

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**Sexual touching - reasons - appeal against sentence dismissed -
restraining order set aside**

[2022]JRC204

Royal Court

(Samedi)

25 August 2022

Before :

J. A. Clyde-Smith O.B.E., Commissioner, and
Jurats Christensen and Le Cornu
Jack Lennie
-v-
The Attorney General
Advocate F. L. Pinel for the Appellant.
Advocate K. A. Ridley for the Respondent.

JUDGMENT

THE COMMISSIONER: 1. On 27th July 2022, the Court dismissed the appeal by the Appellant against a sentence of six weeks imprisonment imposed by Relief Magistrate Le Cornu for an offence under Article 7 of the Sexual Offences (Jersey) Law 2018 (“the 2018 Law”). The Court granted the Appellant’s appeal against the imposition of a restraining order. We now set out our reasons. 2. The offence took place on 17th April 2021. The Appellant (aged 56) and the victim (aged 19) had been seated at the same table at the Corner House. They did not know each other, but at some point, the Appellant commented that she looked good. The victim left the Corner House and outside the Appellant smacked her on the bottom and ran away. As he did so, he does not deny making the comment “That sounded like a good one”. 3. On 18th May 2021, the Appellant was interviewed and whilst accepting that he had been at the Corner House and that he had been drinking, he said he did not recall smacking the victim’s bottom outside the Corner House and he denied being near the victim when she was outside the Corner House. 4. On 15th September 2021, the victim attended for an identification parade where she identified the Appellant as being the man who had smacked her. On 3rd October 2021, the Appellant was interviewed for a second time when he again denied smacking her. The Appellant was charged on

2nd March 2022 and on his first appearance before the Magistrate's Court on 14th March 2022, he pleaded not guilty. On 3rd May 2022, the Appellant pleaded guilty on the following basis: "I Jack Lennie confirm that I plead Guilty to sexually touching a female without her consent on 17th April 2021 on the following basis:- · When we were at the same table, I commented that she looked good. · When I left the bar, and we were outside, I smacked [her] once on her bottom and ran away. · I did not say anything about having a leather fetish or about her leather trousers or wanting to take them off". 5. That basis of plea was not accepted by the prosecution, but the Assistant Magistrate ruled that as there would be no material difference in the sentence to be imposed, the Appellant would be sentenced on the basis put forward by him. 6. The Pre-Sentencing Report stated at paragraph 39 that the Appellant had not consented to undertake a period of community service as he believed this would negatively impact on the time he had available to care for his brother. At paragraph 43, it was again stated that he was reluctant to consent to community service, given his care responsibilities for his brother. 7. At the sentencing hearing, Advocate Pinel submitted that the offence was at the minor end of the scale and should be dealt with by a binding over order for one year. She said she could address the Court on the imposition of a fine, if the Court was considering that, but she did not address the Relief Magistrate on the possible imposition of a community service order or indicate that the Appellant had changed his position not to consent to community service. The Appellant had no previous sexual convictions and was effectively a man of good character, his last conviction being some seventeen years ago. She said he was embarrassed by his behaviour. 8. The Relief Magistrate said this on imposing sentence: "I don't agree that this offence is at the minor end of the scale. Women are entitled to walk down the street without being subjected to an assault in a sexual manner, and those who assault them can expect to receive an immediate custodial sentence. This is far too serious for a binding over order or a fine, in my view. You were not interested in even considering Community Service. You do not have the benefit of an early Guilty plea. You are therefore sentenced to six weeks in prison." 9. In his subsequent written reasons for imposing the sentence, the Relief Magistrate made reference to remarks that the Appellant had denied saying in his basis of plea, and confirmed that in his view, the custody threshold had been crossed. Those who carry out such an assault can expect to receive a custodial sentence. He again noted that the Appellant did not have the benefit of an early guilty plea and had refused to consent to community service. For these reasons, he imposed a sentence of six weeks. The Law

10. Sexual touching without consent is contrary to Article 7 of the 2018 Law: "Sexual touching without consent

(1) A person ("D") who intentionally touches another person ("C"), commits an offence if –

- (a) The touching is sexual;
- (b) C does not consent to the touching; and
- (c) D does not reasonably believe that C consents.

(2) A person guilty of an offence under paragraph

- (1) is liable to imprisonment for 10 years and to a fine.”
11. Article 1(2) provides that: “For the purposes of this Law an act (including penetration, touching or communication) is sexual if a reasonable person would, in all the circumstances of the case, consider it to be sexual.” In this case by pleading guilty, the appellant had accepted that his touching of the victim had been sexual, that the victim had not consented to being touched and he did not reasonably believe that she consented.
12. The test on appeal is well established, and was summarised in this way in the case of *Loureiro v AG* [2015] JRC 154 in which the Court said at paragraph 9: “It is well established that the Court will not interfere with the sentence imposed by the Magistrate unless it was one which is not justified by law, or the sentence was passed on the wrong factual basis or some matter has been improperly taken into or left out of account, or there was some fresh matter which ought to have been taken into account or whether the sentence was wrong in principle or manifestly excessive. In particular, it is not the function of the Royal court to tinker with sentences which are within the range open to the sentencing court simply because it might itself have fixed a lower term of imprisonment.” The appeal
13. The appeal was brought on the basis that the imposition of an immediate custodial sentence was wrong in principle and that the sentence of six weeks’ imprisonment was manifestly excessive for the following reasons: “i) It was not the case that the offending in this case was so serious that a bind over or a fine could not be imposed. ii) It was not the case that Mr Lennie ‘was not even interested in considering community service’. Probation Officer Sarah Barrowcliffe has confirmed that Mr Lennie is considered suitable for Community Service. The report stated that he was reluctant to consent to it believing it would negatively impact on the time he is available to care for his brother. iii) Mr Lennie appears not to have been sentenced on the basis of plea given the facts set out in the Magistrate’s sentencing remarks. iv) It is respectfully submitted that sufficient weight was not given to the available mitigation.”
14. At the appeal hearing, Advocate Pinel made the following submissions: (i) In his written reasons, the Relief Magistrate referred to comments denied by the Appellant, which did not form part of the basis of his plea on which he was to be sentenced, which must mean that the Relief Magistrate improperly took these comments into account when sentencing the Appellant. (ii) Whilst the offence was not inconsequential, it must be considered in proportion to other offending. This was a one-off touching of a stranger at the very lowest end of the scale. She pointed out that under the Magistrate’s Court Sentencing Guidelines an assault (non-sexual) with a low degree of force, involving little or no injury, had a starting point of a fine of £1,200 and a range from £500 to £2,000 and this for a first-time offender pleading guilty. Such an assault would not attract a custodial sentence under those guidelines. (iii) There had been a considerable unexplained delay from the Appellant being identified on 15th September 2021 and his first appearance before the Magistrate’s Court on 14th March 2022. (iv) The Relief Magistrate had disregarded much of the mitigation available to the Appellant, referring only to his late guilty plea.

- (v) Too much weight had been placed by the Relief Magistrate on the victim's personal statement. In that statement, she said she had sought medical help for anxiety and panic attacks, neither of which were verified by an expert. (vi) The Appellant did now consent to doing community service and the Probation Service confirmed that he had been assessed as suitable to engage with the scheme. (vii) The age difference between the Appellant and the victim was not an aggravating factor, and irrelevant to the offence.
15. In response, Advocate Ridley submitted that a custodial sentence was well within the appropriate range for this offence. A common assault (non-sexual) has a tariff of up to 12 months' imprisonment (see Whelan on Aspects of Sentencing, third edition at page 412) the maximum sentence that the Magistrate's Court can impose, whereas the maximum sentence for an offence under Article 7(1) of the 2018 Law is 10 years. A touching which has a sexual element is therefore more serious. This was a very deliberate sexual act by a man 37 years older than the victim.
16. The basis of plea sets out what the Appellant accepts and does not accept and that has to be read in conjunction with the prosecution case. It is clear that the Appellant did not accept making comments about leather to the victim, but he was silent about other comments he was alleged by the victim to have made. He did not deny saying to the victim "That sounded like a good one". As to the Relief Magistrate referring in his written reasons to remarks that the Appellant had denied making, it is not known whether this was an error on the part of the Relief Magistrate, but the Assistant Magistrate had earlier found that for the purpose of sentencing the difference between the prosecution case and the defence case was immaterial, and so these comments, to which the Relief Magistrate made no mention at the sentencing hearing, did not make any difference to the sentence imposed by the Relief Magistrate.
17. Advocate Ridley accepted that there had been a delay in charging the Appellant. Whilst he had been identified on 15th September 2021, he denied the offence, requiring further investigation by the police and the obtaining of legal advice. Accordingly, some of the delay is attributable to the Appellant. His conduct could not be characterised as being cooperative with the police; it was neutral at best.
18. Whilst the victim's personal statement was not supported by an expert report, she was able to explain the impact upon her, even if the offence was not the sole factor contributing to her anxiety and panic attacks.
19. Section 3 of the Sexual Offences Act 2003 was in identical terms to Article 7(1) of the 2018 Law, and under the English Sentencing Guidelines, such an offence would have a starting point of a high-level community order with a range from a medium community order to 26 weeks' imprisonment.

20. As to community service, the issue of the Appellant's consent is entirely within his control. He had had three opportunities to address his willingness to do community service, firstly with the Probation Officer in his interview, secondly when the pre-sentencing report was read to him by the Probation Officer and thirdly at the sentencing hearing.
21. Advocate Ridley pointed to paragraphs 4, 6, 28 and 43 of the Pre-Sentencing Report, illustrating the attitude of the Defendant to this offence and said that in determining the appropriate sentence, all of the circumstances of the offence, together with its aggravating and mitigating factors, and the personal mitigation available to the Appellant had to be taken into account. As the Pre-Sentencing Report acknowledged at paragraph 43, the Appellant's refusal to consent to community service limited the options available to the Magistrate, but a binding over order or fine would have been inadequate for this offence. A sentence of imprisonment was not wrong in principle and a sentence of six weeks was not manifestly excessive in the circumstances of the case. Decision
22. In our view, Article 7(1) of the 2018 Law creates an offence which was intended to be and is more serious than a common assault (without any sexual element), and the Magistrate's Court Guidelines for common assaults are not apposite. The Relief Magistrate was entirely right to say that women are entitled to walk down the street without being subjected to an assault in a sexual manner, and those who assault them in this way can expect to receive an immediate custodial sentence.
23. It was of value for the Court to have regard to the English Sentencing Guidelines for the equivalent offence, so as to inform and test the relative seriousness of this offence and those guidelines supported the view taken by the Relief Magistrate and by this Court (see paragraph 50 of the Court of Appeal decision in *W v AG* [2022] JCA 117).
24. Community service presupposes that the custody threshold has been passed. Article 2(1) of the Criminal Justice (Community Service Orders) (Jersey) Law 2001 provides at Article 2(3): "A community service order may be made only where the Court is considering passing a sentence of imprisonment or youth detention."
25. Article 3(4) goes on to provide that: "Where a community service order is made it shall be made instead of passing a sentence of imprisonment or youth detention"
26. Article 3(5) provides that: "When making a community service order, the court shall –
 - (a) state in the order the sentence of imprisonment or youth detention which it was considering passing..."
27. It may well be that the Relief Magistrate would have given consideration to imposing a community service order instead of six weeks' imprisonment, but that option was removed from him by the Appellant refusing to consent to community service, a matter entirely within his control. He had ample opportunity to provide that consent and chose not to, leaving the Relief Magistrate with no option but to impose a sentence of imprisonment for an offence for which we agree a binding over order or a fine would have been inadequate to

mark the seriousness of the offence.

28. We do not regard the Relief Magistrate's reference to comments denied by the Appellant as being material to the sentence that was imposed, nor do we accept that the Relief Magistrate did not have regard to the mitigation available to the Appellant or placed too much emphasis on the victim's personal statement.
29. This was a case in which a sentence of imprisonment was right in principle and six weeks was not manifestly excessive. We therefore dismissed that part of the appeal.
30. The Relief Magistrate also imposed a restraining order of two years under the Crime (Disorderly Conduct and Harassment) (Jersey) Law 2008, which is in the following terms:
"Article 5 Restraining Orders
 - (1) If a court convicts a person of an offence, a person presenting or prosecuting the case against the convicted person may apply to the court to make a restraining order against the convicted person.
 - (2) A court to which an application is made under paragraph (1) may, in addition to any other order or penalty that the court may make or impose, make a restraining order against the person to whom the application relates if the court is satisfied on the balance of probabilities that it is appropriate to do so for the purpose of protecting the victim of the offence, or any other person named in the order, from conduct by the person against whom the order is made, which would, if carried out –
 - (a) Amount to harassment of the victim or other person named in the order; or
 - (b) Be likely to cause the victim or such other person to be in fear of violence against them.
 - (3) A restraining order shall prohibit the person against whom it is made from engaging in conduct of the kind specified in the order."
31. When passing sentence, the Relief Magistrate gave no reasons for the imposition of the restraining order and his written reasons for sentencing simply stated that he imposed the restraining order having considered the victim's personal statement.
32. Advocate Ridley accepted that the legal test for imposing a restraining order had not been met and agreed that this part of the appeal should be allowed. The Appellant and the victim were unknown to each other and there had been no contact between them either before or after the offence. There is no evidence of a course of conduct on the part of the Appellant amounting to harassment or which would cause the victim to be in fear of violence against her.

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33. In these circumstances, the Court allowed this part of the appeal and set aside the restraining order. Authorities Sexual Offences (Jersey) Law 2018. Loureiro v AG [2015] JRC 154. Whelan on Aspects of Sentencing, third edition. W v AG [2022] JCA 117. Criminal Justice (Community Service Orders) (Jersey) Law 2001. Crime (Disorderly Conduct and Harassment) (Jersey) Law 2008.
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