

JERSEY / JUDGMENT

LG -v- AG [2009] JRC 039 (04 March 2009)

[2009] JRC 039

Source: bailii.org · Research copy typeset by Esheria. Not court-issued or certified.

JUDGMENT

THE commissioner: 1. On 16 th February, 2009, the Superior Number of the Royal Court granted LG, the appellant, leave to appeal against her sentence but dismissed the appeal for reasons which we now give. The appeal raised issues as to the power of the Court to impose a sentence of youth detention on a young female offender. Summary of offending 2. On 10 th June, 2008, the appellant pleaded guilty before the Jersey Youth Court to grave and criminal assault (committed on 22 nd February, 2008,) and the purchase or consumption of intoxicating liquor on licensed premises by persons under the age of eighteen years (committed on 23 rd May, 2008,) for both of which offences she was placed on probation for six months. On 15 th July, 2008, the appellant pleaded guilty to being drunk and incapable (committed on 24 th June, 2008,) and of being in breach of the probation order imposed on 10 th June, 2008. That order was revoked and she was placed on probation again for six months. On 12 th December, 2008, the appellant pleaded guilty to grave and criminal assault (committed on 11 th August, 2008,) and to obstructing a police officer (committed on 29 th November, 2008, when the appellant was on bail). She was sentenced by the Inferior Number as follows:- (i) For the grave and criminal assault committed on 11 th August, 2008, to 9 months' youth detention; (ii) For obstructing a police officer on 29 th November, 2008, to 1 week's youth detention concurrent; (iii) For the breach of the probation order imposed on 15 th July, 2008, to 2 months' youth detention consecutive in relation to the grave and criminal assault committed on 22 nd February, 2008, and no separate penalty in relation to the purchase of intoxicating liquor or being drunk and incapable. Thus, the appellant was sentenced to a total of 11 months' youth detention, against which sentence she applied for leave to appeal. The appellant was 17 at the time of sentencing but 16 at the time of the earlier offences and thus the provisions of the Criminal Justice (Young Offenders)(Jersey) Law 1994 ("the Young Offenders Law") applied. 3. The grave and criminal assault on 11 th August, 2008, was captured on CCTV which was played both to the Inferior Number and to the Superior Number. The appellant was sitting on the stone circle bench at Snow Hill with her co-accused, Artois and Wright, standing talking together in front of her. The victim was sitting on the other side of the bench. The victim was then seen to get up, approach and start talking to Artois and Wright. Suddenly, without warning, Artois punched the victim hard in the face before grabbing him as he fell to the ground. Artois then kicked the victim hard to the back of the neck and punched him at least another 4 times. He then pinned him down and tried 3 times to slam his head against the street surface. At this point, Wright was seen approaching the victim and giving him a hard kick

directly to the face while the latter was being held down by Artois. Wright then casually walked round with his hands in his pockets before sitting back down on the bench. Before he sat down, the appellant also got up from where she had been watching and approached the victim. She too, with her hands in her pockets, gave the victim a firm kick to his face while he was being pinned down by Artois before returning to her seat. The victim did not suffer any significant injuries. 4. Giving the Judgment of the Inferior Number, the Deputy Bailiff said this:- "5. LG, when the victim was pinned to the ground by Artois you sauntered over with your hands in your pockets and gave the victim a single firm kick to his face. This is not your first offence of violence. In June 2008, you were placed on probation by the Youth Court for another offence of grave and criminal assault. You re-offended within two weeks of that probation order by being drunk and incapable, you were given a further chance, then you were in breach of that probation order for a second time by committing this offence. Not content with that you have also re-offended whilst on bail for this offence in relation to the obstruction of the Police; so you have on three occasions re-offended whilst on probation. Again you seem to have a real problem with alcohol. 6. In mitigation we take into account your guilty plea, your difficult background as set out in the report and the fact that the report urges probation in order to address your difficulties. We also, of course, take into account your youth, you were 16 at the time and you are now 17. The Court is always reluctant to send a young woman of your age to youth detention particularly given the inadequate facilities at La Moye and the fact that you will therefore mix with adult offenders. But the Court considers that you have indeed failed signally to respond to non-custodial measures and are unable or unwilling to respond to them. We note the point your counsel has made about the comparatively short time but that was entirely a matter of choice on your part. Probation orders are not an easy option and if people break their probation orders by re-offending they must accept the consequences. 7. In our judgement there is no alternative for an offence of this seriousness by a person who has failed to respond to non-custodial sentences in the circumstances of the case. Furthermore, in our judgement, 6 months is simply too low for an offence which involves kicking to the face or head." Grounds of appeal 5. The grounds of appeal were as follows:- (i) That the purported sentence of youth detention passed by the Inferior Number was in fact a sentence of imprisonment to be served in the adult women's wing of the prison and was therefore unlawful and ultra vires. (ii) That the provisions of Article 4(2) of the Young Offenders Law were not satisfied in that:- (a) The appellant could not be said to have "a history of failure to respond to non- custodial penalties"; Article 4(2)(a) of the Young Offenders Law; (b) it could not be said that "only a custodial sentence would be adequate to protect the public from serious harm"; Article 4(2)(b) of the Young Offenders Law; (c) it could not be said that "the offence or the totality of the offending were so serious that a non custodial sentence cannot be justified"; Article 4(2)(c) of the Young Offenders Law. Youth detention ultra vires 6. The appellant's contentions relate to the power of the Court under the Young Offenders Law. That Law abolished sentences of imprisonment for persons under 21:- "No court shall pass a sentence of imprisonment on a person under the age of twenty-one." (Article 3). 7. Under Article 4(1) the court may pass a sentence of detention of a person not less than 15 but under 21 in a young offender institution, defined in Article 1 as " youth detention ". Article 1 further defines a "young offender institution" as meaning a young offender institution provided by the Prison Board under

Article 25A (now article 27) of the Prison (Jersey) Law 1957 ("the Prison law"). That Article provides:- "Power to provide young offender institutions and attendance centres (1) The Minister may provide - (a) young offender institutions where offenders aged not less than 15 but under 21, sentenced to a term of youth detention may be detained in conditions suitable to persons of their ages and descriptions; (b) attendance centres where male persons aged not less than 10 but under 21 may be ordered to attend in pursuance of an attendance centre order, and there be given appropriate occupation or instruction under supervision. (2) For the purposes of paragraph (1)(b), the Minister may make arrangements with any other Minister for the use of premises which that other Minister administers." 8. Whilst there is a young offender institution at the Prison, it currently has no facilities for female young offenders. In practice, the Prison Governor exercises powers under Article 17(1)(c) of the Young Offenders Law to move female young offenders to the adult female wing. Article 17 is in the following terms:- "Power of prison governor to transfer young offenders in certain circumstances

- (1) Without prejudice to any other power vested in the governor of the prison, the governor may instruct that a person under 21 who is remanded in custody to a young offender institution or serving a sentence of youth detention may be transferred -
 - (a) to a prison medical facility or to a hospital for medical treatment;
 - (b) to the prison, either for a fixed term or for the remaining part of the person's sentence or the period of the person's remand, if the governor is of the opinion that, by reason of that person's behaviour whilst detained it is not in the person's interests or the interests of other persons there detained to continue to detain the person in the young offender institution; or
 - (c) to the prison, either for a fixed term or for the remaining part of the person's sentence, or for the period of the person's remand, if the governor is of the opinion that no suitable facilities exist in the young offender institution for the detention of that person. (2) Where a person is transferred from a young offender institution under this Article, the person shall be in lawful custody during the period of the transfer and the period of transfer shall be treated for all purposes as a part of the person's sentence." 9. Miss Fogarty submitted that the legislation intended that greater weight be given to the prohibition on the imposition of sentences of imprisonment under Article 3 than on the administrative provisions of Article 17(1)(c), which she said cannot be construed as providing the Minister with a 15 year authorisation to dispense with the provisions of facilities for female young offenders. 10. Given the principal purposes of the Young Offenders Law and the words of that Law, she argued that the effect of imposing a purported sentence of youth detention on the appellant was in fact to impose a sentence of imprisonment to be served in the adult women's wing at the prison and was thus both unlawful and ultra vires . She reminded the Court of the maxim :- "Quando aliquid prohibetur fieri, prohibetur ex directo et per obliquum" (What is prohibited is prohibited whether done directly or indirectly) Imprisonment is expressly prohibited under Article 3 of the Young Offenders Law and cannot be justified by calling it youth detention or by reference to the powers of the Prison Governor under Article 17(1)(c) of the Young Offenders Law. 11. Providing segregated facilities for young female offenders in

Jersey raises a number of issues. Miss Fogarty referred us to a letter from the Prison Governor dated 26 th January, 2009, which was in the following terms:- "THE CUSTODY OF FEMALE YOUNG OFFENDERS AT LA MOYE PRISON No suitable facilities exist for female young offenders at La Moye Prison and they are housed in the adult, female wing. This is permissible under Article 17 of the Criminal Justice (Young Offenders)(Jersey) law, 1994 which provides that the Prison Governor may transfer to the prison, a person under 21 who is remanded in custody to a young offender institution or serving a sentence of youth detention, either for a fixed term or for the remaining part of the person's sentence, or for the period of the person's remand, if he is of the opinion that no suitable facilities exist in the young offender institution for the detention of that person. There are very few female juvenile or young offender detainees and often there is only one such individual in custody at any point in time. It would take intensive resources to offer a reasonable quality of life and regime for such small numbers in entirely segregated accommodation. Clearly, the detention of a single female young offender on her own could be said to amount to solitary confinement and, if this continued for any extended period, to cruel and inhuman treatment contrary to Article 3 of the Convention on Human Rights. The accommodation for female prisoners detained in La Moye has been radically improved in recent years. They reside in single cell accommodation with en-suite sanitary facilities in one of the newest blocks at the Prison. The custodial arrangements for young offenders generally are currently being reviewed with both the Education, Sport and Culture Department and the Health and Social Services Department to see if greater use could be made of the secure unit at Greenfields. In so doing, the findings of the recently published Williamson Report into the care of children and the report by the Howard League for Penal Reform will be taken fully into account. W Millar Governor 26/1/09" 12. The Court was concerned to ascertain precisely what the Minister and before him the Prison Board had provided pursuant to Article 27 of the Prison Law and received an affidavit sworn by the Minister for Home Affairs dated 16 th February, 2009. The Minister confirmed that following the approval of the Young Offenders Law, the Prison Board made provision for a young offender institution at HM La Moye replacing the former Young Offenders Centre at the same location. The same young offender institution remains in operation today, although as at today's date no suitable facilities for female young offenders exist in it. The entire population of the Young Offenders Centre therefore comprises young male offenders. 13. The Minister went on helpfully to explain the background by reference to historic Acts of both the Prison Board and the Legislation Committee, which show that the accommodation of young female offenders was considered during the consultation process for the Young Offenders Law and the Prison (Amendment No. 3)(Jersey) Law 1994 which were approved at the same time. The Act of the Prison Board of 4 th December 1992 concluded:- "that it would wish to make it quite clear that, given the number of female prisoners detained throughout the year (an average of between 1 and 3) the cost of providing a purpose built unit, to separate the adult females from the juveniles, together with the requirement for additional staff and training facilities to man the separate unit, meant that an unnecessary and prohibitive financial burden would be placed on the Board which it considered could not be justified." 14. The possibility of young female

offenders serving their youth detention in the United Kingdom was explored. On 24 th September, 1993, the Prison Board considered correspondence between the then Attorney General and the Home Office, from which it noted that:- "in England and Wales, female juvenile offenders were held in institutions which also held adult female prisoners, and it was felt that the presence of older inmates had a beneficial effect on the behaviour of female young offenders." 15. That view was also reflected in a consultation paper published by the Home Office at that time in relation to community prisons. Thus a proposed transfer of female young offenders from Jersey to the United Kingdom in order to avoid them mixing with adult females at HM La Moye was shown to be ineffective and unnecessary. 16. Given this position, the Prison Board concluded that subject to certain amendments being made to the draft legislation, female young offenders would on an ad hoc basis serve any period of youth detention in the adult female wing of HM La Moye. Those alterations included the removal of "male and female" from in front of the word "offenders" from the draft amendment to paragraph 1(a) of Article 27 of the Prison Law and the removal of the period of six months envisaged for the transfers effected by the Prison Governor in the draft Article 17(1)(c) of the Young Offenders Law. 17. The Minister was of the opinion, as were his predecessors, that it would be wholly unsatisfactory if there was only one young female offender in youth detention at any one given time, a concern echoed by the Prison Governor, in his letter cited above. 18. We agree with the submission of the Crown that it is necessary to distinguish between the judicial function of the Court and the administrative functions of the Minister and the Prison Governor. The Minister has the responsibility under Article 3 of the Prison Law for the general administration and superintendence of the prison (and any Young Offenders Institution). The Prison Governor has legal custody of any prisoner under Article 9 of the Prison Law from the moment sentence is passed. It is the Prison Governor who transfers young female offenders to the adult wing of the prison, exercising his powers under Article 17(1)(c) of the Young Offenders Law. Thus the function of the Court is to pass sentence, the Minister to provide the facilities and the prison Governor to oversee where that sentence is served. 19. There is no question that on the face of Article 4 of the Young Offenders Law the Inferior Number had the power, subject to the proviso set out in that article, to impose a sentence of youth detention on the appellant. There was a Young Offenders Institution in existence at HM La Moye at the time such sentence was passed. The question is whether lack of facilities at that Institution at the time the sentence was passed to take Young Female Offenders rendered the passing of the sentence unlawful. 20. In our view the legal power of the Court to pass sentence is not dependent on or affected by the way the Minister and the Prison Governor may exercise or fail to exercise their quite separate administrative powers. The ability of the Court to exercise its judicial function would be rendered wholly uncertain if it were to be otherwise. In the same way, the power of the Court to pass a sentence of imprisonment upon an adult offender is not dependent on whether the Minister has provided facilities for that offender at HM La Moye or elsewhere or where the offender might, under the legal custody of the Prison Governor, serve that sentence. 21. The underlying policy of the Young Offenders Law may have been to separate young offenders from adult offenders, but it is not a requirement of that Law that they

should be so separated for the duration of their sentences. Indeed, Article 17 expressly provides to the contrary. No doubt the current lack of facilities for young female offenders and the fact that they are likely to mix with adult female offenders is something the Court may take into account in passing a sentence of Youth Detention and it is clear from the extract of the Judgment of the Deputy Bailiff quoted above that the Inferior Number did take this into account. However we were not concerned here with the merits of the decision to pass a sentence of Youth Detention but whether the Inferior Number had the power in law to do so. 22. Thus we concluded that the lack of facilities for young female offenders at the Young Offenders institution at the time the appellant was sentenced to Youth Detention did not render that sentence ultra vires or unlawful. Whilst the appellant may be mixing with adult female offenders, the sentence she is serving remains one of youth detention and not imprisonment. 23. Any concerns the appellant may have as to the facilities at the prison and the decisions taken by the Prison Governor are matters to be addressed and any remedies available pursued separately, but they do not impact upon or detract from the power of the Court to pass the sentence of youth detention. 24. At the hearing Miss Fogarty made a further oral submission in response to the concerns expressed by the Prison Governor, namely that detention of a single female young offender on her own could be said to amount to solitary confinement and, if this continued for any extended period, to cruel and inhuman treatment contrary to Article 3 of the European Convention on Human Rights . Miss Fogarty argued that securing her detention in the adult women's wing of the prison was a breach of Article 14 of the Convention which is in the following terms:- "Article Prohibition of discrimination The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." 25. Article 14 relates to the enjoyment of rights and freedoms set out in the Convention and therefore has to be read in relation to such rights and freedoms. Miss Fogarty asserted that the relevant right was that contained in Article 5(1) (a) which is in the following terms:- "Right to liberty and security 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law - (a) the lawful detention of a person after conviction by a competent court;" or possibly Article 5(1)(d):- "(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority" 26. No case law was cited by Miss Fogarty in support of this submission. The Crown wanted further time to consider this submission should leave to appeal be granted but in our view it is without merit. The appellant entered a plea of guilty to the indictment on 31 st November, 2008, and was granted conditional bail. In imposing a sentence of youth detention on 12 th December, 2008, the Court was acting lawfully, as we have found, and no issue of discrimination arose in that judicial process. If such an issue does arise, and we make no observation on that, it relates to the provision of facilities by the Minister and /or the exercise by the Prison Governor of his powers under Article 17 of the Young Offenders Law. Remaining grounds of appeal 27. The remaining grounds of appeal relate to Article 4(2) of the Young Offenders Law

which is in the following terms:- "Article 4(2) A court shall not pass a sentence of youth detention unless it considers that no other method of dealing with him is appropriate because it appears to the court that - (a) he has a history of failure to respond to non-custodial penalties and is unable or unwilling to respond to them; or (b) only a custodial sentence would be adequate to protect the public from serious harm from him; or (c) the offence or the totality of the offending is so serious that a non custodial sentence cannot be justified." 28. Miss Fogarty accepted that these three sub-paragraphs of Article 4(2) were disjunctive and that the Court could impose a sentence of youth detention if any one of them applied. The Crown did not contend before the Inferior Number or before this Court that sub-paragraph (b) applied but did contend both before the Inferior Number and before this Court that sub-paragraphs (a) and (c) applied. 29. Miss Fogarty argued that the appellant was unknown to the criminal justice system until she was sixteen years old. It was apparent from her record, the probation report and the alcohol and drugs report that the commencement of her offending coincided with the escalation of her drinking in association with an older group of friends. Indeed, the offence committed on 11 th August, 2008, followed the same pattern, in that she had been drinking and was with older individuals. Given her age, and the short period of time in which the offending for which she was sentenced occurred, probation supervision could be said, and indeed was said at the sentencing, " to have had relatively little time to bite ". It was clear from the probation report that her engagement with the Probation Service, if not impeccable, was good and that the Service considered in all the circumstances that a further period of probation (i.e. a third probation order) would be most appropriate in her case. 30. It had assessed her as suitable for community service as an alternative to custody, but did not recommend this course at that time, because the appellant had failed to consent, owing to her forgetfulness which made her fear failure. Her consent was, however, obtained on the morning of sentencing " with considerable trepidation ". Miss Fogarty contended that the Inferior Number did not address the question of community service as an alternative to custody at all and that as the appellant had never received a sentence of community service, it could not be said that she had failed to respond to it. Her willingness to respond to such a sentence as an alternative to custody remained untested. 31. It is clear from paragraph 6 of the Judgment of the Deputy Bailiff (referred to above) that the Court addressed very fully the appellant's failure signally to respond to non custodial measures. She breached the first probation order within some two weeks of it being imposed and then breached the second probation order some four weeks after that had been imposed. As the Deputy Bailiff pointed out at the hearing, she had been on probation some two months in all before the grave and criminal assault committed at the end of August 2008. Furthermore, she then went and committed a further offence whilst on bail. 32. It is not a requirement of Article 4(2)(a) that there has to be a history of a failure to respond to every type of non custodial penalty before youth detention can be imposed and the Inferior Number had more than sufficient grounds for concluding that the appellant had a history of failure to respond to non custodial penalties and was unable or unwilling to respond to them. The Court was no doubt influenced by the very negative opinion and conclusion of the Alcohol and Drugs Service. 33. We endorse the Deputy Bailiff's comment

that Probation orders are not an easy option. We do not endorse Miss Fogarty's submission that breaches of the kind committed here should be tolerated by the Courts until such time as the supervision has had "time to bite". It is a matter of choice and if people breach such orders they must accept the consequences. 34. As to the totality of offending under Article 4(2)(c), we accept that it is not entirely clear from paragraph 7 of the judgment whether the Inferior Number concluded that youth detention was justified on this ground as well, but in our view it did so conclude and had more than ample grounds to do so. The appellant's co-accused Wright in the grave and criminal assault committed on 11 th August, 2008, received a non custodial sentence (community service of 115 hours) so clearly the Court did not regard that offence on its own as being so serious that a non custodial sentence cannot be justified. Wright however had no previous convictions and exemplary references. In contrast, the appellant's offending included 2 counts of grave and criminal assaults, 1 count of obstruction, 1 count of purchasing intoxicating liquor and 1 count of being drunk and incapable. 35. We concluded therefore that in imposing a sentence of youth detention the Inferior Number had satisfied the requirements of Article 4(2) (a) and (c) of the Young Offenders Law. 36. However, we went on to consider at some length whether taking all the circumstances of the appellant and her offending into account, including her age and the requirements of Article 4(2) of the Young Offenders Law, the sentence imposed was manifestly excessive, conscious that as an Appeal Court our task was not to substitute our own views for those of the Inferior Number or to alter the sentence merely because we might have passed a different sentence. We concluded that we had no grounds to interfere. 37. In light of the point of law raised by the first ground of appeal, we granted leave to appeal but for the reasons set out above, dismissed the appeal. Authorities Criminal Justice (Young Offenders)(Jersey) Law 1994. AG v Artois, Wright and LG

[2008] JRC 215. Prison (Jersey) Law 1957. Prison (Amendment No. 3)(Jersey) Law 1994. European Convention on Human Rights 2000. Page Last Updated: 14 Feb 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bailii.org/je/cases/UR/2009/>

CASE PAGE <https://chat.esheria.ai/case-law/jersey/lg-v-ag-2009-jrc-039-04-march-2009>

Prepared on 25 October 2026 · Esheria