

JERSEY / JUDGMENT

Nunes v AG [2024] JCA 160 (24 July 2024)

[2024] JCA 160

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

Court of Appeal 24 July 2024 Before : Ms Clare Montgomery KC; President Sir William Bailhache; JA and Sir Adrian Fulford JA Between Fabio Manuel De Jesus Nunes Applicant And HM Attorney General Respondent Advocate R. S. Tremoceiro for the Appellant Crown Advocate L. B. Hallam for the Respondent

judgment

bailhache ja: 1. This is the judgment of the Court to which we have all contributed. 2. On 9 April 2024, the Applicant was sentenced by the Superior Number of the Royal Court to a total term of nine years and six months imprisonment on a number of counts contained in three different indictments, with a recommendation for deportation on his release. The Court also made various ancillary orders under the Sex Offenders (Jersey) Law 2010 and for forfeiture of drugs found in his possession. The sentence was broken down as follows: (i) 9 years 6 months imprisonment on Count 1 of the first indictment, namely vaginal rape; (ii) 9 years 6 months imprisonment concurrent on Count 2 of the first indictment, namely oral rape; (iii) 4 years imprisonment concurrent on Count 3 of the first indictment, namely sexual touching without consent; (iv) 2 weeks imprisonment concurrent in respect of the third indictment, namely a count of malicious damage. 3. The Applicant seeks leave to appeal only in respect of the sentences of imprisonment of nine years and six months in respect of Counts 1 and 2 of the first indictment. 4. The offences indicted by Counts 1 and 2 were committed on 30 September 2023 in the circumstances detailed below. The Appellant was first charged on 1 October 2023 and successfully applied on 17 October 2023 to enter no plea at that time as significant evidence, namely the CCTV footage of the events, had not been disclosed by the prosecution at that time. A guilty plea was entered on the first appearance in the Royal Court on 1 December 2023 when the Applicant was remanded in custody for sentence before the Superior Number on 9 April 2024. The facts 5. The Superior Number proceeded on the facts outlined by the prosecution in its case summary as follows: "On Friday 29 September 2023, the victim saw the Defendant in St Helier and invited him back to her house ("the house"). Between 6.30pm and 9.30pm, the Defendant and the victim were at the house together drinking alcohol and talking. At around 10.15pm the victim's partner, Mr S, arrived at the house having finished work. He joined the victim and the Defendant.

5. Mr S and the victim invited the Defendant to stay the night as he had nowhere else to stay. At about midnight, the Defendant left the house to purchase some cannabis. Mr S went to bed as he was working in the morning. About two hours later, the Defendant called the victim as

he could not remember the way back to the house. The victim met the Defendant in St Helier at about 2.20 am, and they walked back to the house together. Mr S woke up when they arrived back and the three of them sat together in the house talking. Mr S fell asleep on the sofa after about half an hour.

6. Mr S woke up, still on the sofa, at around 5 am. The victim was asleep on a dining room chair and the Defendant was awake and having a coffee at the table. Mr S left for work at around 5.20 am.
7. At 6.42 am that morning the Defendant called Mr S. The call lasted for one minute. The Defendant claimed that the victim had kissed him when she met him in St Helier the previous evening and held his arm the whole way home. He said that once back at the house she kept winking at him. He told Mr S that when she was asleep, he moved her to the sofa and she started "cracking on" to him and that he was concerned that she would "call rape". Mr S ended the call.
8. [The case summary refers then to a number of screen shots taken from Mr S' telephone which showed that the Applicant continued to call and message Mr S that morning, to which there was one responding message from Mr S].
9. Concerned, as a result of the contact from the Defendant, Mr S left work and returned to the house at approximately 10.30 am, where he found the victim still asleep. He checked the footage from a camera installed in the house. The footage captured the sexual offending committed by the Defendant in the early hours of 30 September 2023, after Mr S had left for work that morning. The offences took place over a period of approximately 45 minutes. The Defendant appeared to notice the CCTV camera after the offences were complete and shortly thereafter left the address at 6.46 am....
13. The CCTV camera footage was seized...
14. At the beginning of the footage, the victim was sitting on a dining chair. Her eyes were shut, she was slumped forward with her head on her knees, and she was not moving. At about 5.28 am the Defendant approached her and lifted her head, propping it up against the radiator cover to her left. The Defendant then started to kiss her face, and continued to do so until [his conduct escalated into the offending charged in Counts 1 and 2 of the indictment]."
6. In the course of the oral and vaginal sex which followed, it was apparent from the CCTV footage that the victim did not respond in any way at all to the Defendant's activities. She was slumped and unconscious and he had to manhandle her in different positions from time to time. It was clear from a subsequent internal examination of the victim that the Applicant had ejaculated inside her, and had not been using a condom. The CCTV footage ended at 06.17 am, and during the entire assault, the victim was completely unresponsive and unconscious. The proceedings before the Superior Number 7. The Crown's approach in its conclusions was to follow the guidance of the Superior Number in the case of Attorney General v Vieira

[2021] JRC 293 and Attorney General v E

[2023] JRC 044 . Accordingly, the Crown adopted the structure of the English Sentencing Council guidelines (the "Guidelines") in order to assess the severity of the offences in the present case, and considered the level of harm to the victim, and then the Defendant's culpability. The Crown's conclusions indicated that the case would fall within harm category 1 and culpability level B of the Guidelines (albeit there was a basis to argue that culpability level A could apply). Accordingly, on the Crown's view, the Guidelines indicated that the single offence of rape could attract a sentencing starting point of twelve years imprisonment and a sentencing range of ten to fifteen years; and the conclusions were that a starting point of fourteen years should be taken to reflect both Counts 1 and 2 and that the sentencing range was not inappropriate. In accordance with Vieira , it was submitted that the Court might consider it helpful to note what the likely level of sentence in England and Wales would be in order to ensure that the sentence imposed in the present case was not materially lower. 8. In his speech of mitigation, Advocate Tremoceiro analysed the Applicant's conduct against the Guidelines. In particular he argued that the conduct fell within harm category 2 rather than harm category 1, and that of the eleven factors in the Guidelines in relation to culpability only one was present and the remaining ten were absent. It was also suggested that while the victim was particularly vulnerable due to her own personal circumstances, that was a factor that could take what was otherwise the case from category 3 to category 2. The Applicant had no previous convictions and entered a guilty plea at the first available opportunity following full disclosure, and should receive full credit for that plea. It was a valuable plea because it gave the victim reassurance at an early stage that there would not be a trial and she would not have to give evidence. Advocate Tremoceiro then compared the present case with the facts in Vieira , where the Crown's starting point was eight years and three months, nearly six years below the starting point recommended by the Crown in the present case, and he pointed out that in Vieira the Court had used a starting point of seven and a half years leading to a sentence of five years and three months. 9. In his sentencing remarks, the Bailiff referred to Vieira in these terms: " In the case of AG v Vieira

[2021] JRC 293 the Court recognised that there had been an upward review of sentencing levels to ensure that such levels in Jersey were not generally lower than those imposed for equivalent offending in England and Wales. The Court also confirmed that assistance can be drawn from the English Sentencing Guidelines but that the sentencing guidelines were not binding and the Court remains entirely free to take a more or less serious view of any particular kind of offending. " The Bailiff went on to refer to E in these terms: "8. In AG v E

[2023] JRC 044 the Court said this:- '3. The Court does not intend to set out at any length the principles of sentencing that we have applied as we believe they are clear. Firstly and importantly the Court has decided what is the appropriate sentence to fit the individual facts of this case. Every case of rape is different. Secondly we are entitled to and have taken into account the sentencing guidelines for England and Wales in the following ways.

We have paid attention to the structure of the guidelines. In this Court's view it provides a logical and structured way to approach any sentencing exercise, in particular we have adopted the separate consideration of harm and culpability and considered the aggravating and mitigating features of the three offences. Every case, as I have said, is different on its facts so no guideline can or intends to cover every possible permutation of aggravating and mitigating factors. 4. Where it comes to the suggested starting points and ranges of sentence in the guidelines, the Court has recognised that, in general, Jersey courts have regarded those ranges as being appropriate while not feeling bound by them. They have not adopted an unduly mathematical approach which can be the result of a rigid application of the guidelines. It is important that there should be some guidance as to the length of sentence to ensure there is consistency in sentencing. The Court has paid attention to the necessity when considering the guidelines, to avoid the possibility of double counting." 10. The Court then turned to the Court's assessment of the facts in the present case. It accepted that the offending had caused the victim both physical and severe psychological harm. It considered that it was difficult to identify a victim more vulnerable than a woman already suffering from post-traumatic stress disorder, of which the Applicant was aware, being sexually abused in her own home whilst completely unconscious and unable to defend herself and prevent it in any way. The Court considered the Applicant was fully aware of what he was doing and that there was something "chillingly deliberate" in the way that, over a protracted period, he physically manipulated a helpless woman for his own sexual gratification. The abuse of hospitality - the Applicant had been invited to stay overnight because he had nowhere else to stay - was an aggravating feature as was the evidence that he ejaculated inside the victim and did not use a condom. The Court considered that a starting point of twelve years would have been appropriate for either the oral or the vaginal offences alone, but in the light of both of those offences, it was appropriate to increase the starting point to fourteen years as the Crown had submitted. The Court agreed with the allowance for mitigation which the Crown had made and thus granted the Crown's conclusions. The contentions on appeal 11. In essence, the parties in this Court have advanced again the contentions which they put before the Royal Court. The rejection of the Applicant's submissions in the Royal Court was said to demonstrate that the sentences imposed on Counts 1 and 2 were not just excessive but manifestly so. There was too great a disparity between the case of the Applicant and the case of Vieira, even taking into account that there were multiple counts in the Applicant's case. Such aggravating features as there were in the present case did not, it was submitted, justify a difference of four years and three months between the Applicant's sentence for the sexual offences and those of Vieira. Furthermore, insufficient credit was given to the Applicant for his guilty plea and other mitigation. On the basis that he was entitled to full credit for the guilty plea at one-third of the starting point, even taking fourteen years as an appropriate starting point, the result would have been a reduction to nine years and four months. It followed that either the Court below had allowed no mitigation other than the guilty plea or it had not allowed the credit for the guilty plea which it ought to have done. 12. By contrast, the Crown resisted the application

for leave to appeal on the basis that the approach which it took before the Royal Court in its conclusions was appropriate. It followed that the sentences imposed were not manifestly excessive, that appropriate credit was given for the plea, and that the Superior Number properly took into account the available mitigation. Discussion 13. The summary in Archbold, Criminal Pleading, Evidence and Practice 2003 Ed., para 7-136 at page 966 was in these terms: "In broad terms, it is submitted that the Court will interfere: (a) where the sentence is not justified by law, in which case it will interfere not as a matter of discretion but of law; (b) where sentence has been passed on the wrong factual basis; (c) where some matter has been improperly taken into account or there is some fresh matter to be taken into account; or (d) where the sentence was wrong in principle or manifestly excessive." 14. This test was adopted by this Court in *Harrison v Attorney General*

[2004] JLR 111 at paragraph 31, and *Bhojwani v Attorney General*

[2011] JLR 249 at paragraph 201. We adopt the same test. 15. We deal first with the Applicant's contention that the circumstances of his case are not so different from those of *Vieira* as to justify such a disparity in the sentence imposed in the two cases. 16. First of all, although it is unnecessary for the reasons we will come to, we remind ourselves of the facts in *Vieira* which were these. The defendant in that case faced three indictments, the most serious of which was the first which charged him with the offence of rape. On the evening in question, the defendant, who was twenty-five, went out for drinks with the victim aged thirty, and with another person. At the end of the evening, the victim invited the defendant to come to her home address to watch television. She changed into her nightclothes with her underwear on underneath and permitted the defendant to watch television with her in her bedroom. They ate a meal together, and the victim fell asleep while watching television, waking up later in the night to find the defendant raping her, he having removed her pyjama bottoms and underwear. She pulled herself away from him, pretending still to be asleep. She thought the defendant was not wearing a condom, but she thought he had not ejaculated. There was a subsequent exchange of messages between the victim and the defendant when she berated him for his conduct, but she did not make a complaint to the police. Indeed, four days later, the defendant presented himself to police headquarters to report a rape, identifying himself as the person responsible. He said the rape had lasted about three minutes and he accepted the victim had not encouraged him in any way. Despite the ready admission at police headquarters, the defendant did not enter a plea when he appeared before the Magistrate's Court and on indictment in the Royal Court he pleaded not guilty. That was maintained at a plea and directions hearing and it was only approximately four months after his initial appearance that he vacated the not guilty plea and entered a guilty plea. This had an impact on the victim for obvious reasons. 17. It cannot be said too often that no two cases are identical. There may be similar features which appear in both cases but neither this Court nor the Royal Court will engage in a process of comparing the facts in each case and seeking to arrive at a just conclusion in the case under examination upon the basis of what it thinks it knows of the facts in the other case. In *Wood v AG*

[1994] JLR Notes 15a and 1994/032, Le Quesne JA said this: "It is necessary to refer to earlier cases when dealing with appeals against sentence in order to ensure, as far as possible, that the right degree of consistency is achieved between one case and another. Indeed, it is for this purpose that both this court and the Royal Court have, on occasion, when passing sentence, not only dealt with the particular offender before them, but have also laid down guidelines to be followed in subsequent cases. It is necessary and important, however, to remember that reference to earlier cases is made in order to see the principles and guidelines which have been laid down there and to follow them. The purpose of referring to earlier cases is not to analyse the exact sentence which was then passed and the precise reasons why the court arrived at it. This would be an impossible undertaking since sentencing is a discretionary exercise in every case and the reports do not include every feature which influenced the court in exercising its discretion on earlier occasions. We notice a tendency, particularly in appeals against sentence in drug-related cases, to try to calculate the exact effect given by the court in earlier cases to each factor and then to say that those effects must be reproduced in the case at hand. This is a misleading exercise since, as I have said, it is impossible from the reports to discover every consideration which influenced the court. It is also an exercise which, if it could be achieved, would be inconsistent with the discretionary nature of the sentencing function. That discretion, like all discretions, has to be exercised on proper grounds and with due regard to relevant principles, but the important fact remains that in deciding upon the sentence in every case, the court is exercising its discretion upon the facts of that case." 18. These comments were specifically endorsed in *Dykes v Attorney General*

[1999] JLR 146 at 153 where Nutting JA said this: "Those remarks are as pertinent to cases involving indecent assaults as they are to the offence of supplying a class A drug.... This reminder to us of the importance of those principles would deter us making any exhaustive comparison between the facts and sentences in the cases to which we have referred and the instant case, and we do not therefore propose to lengthen this judgment with such an analysis." 19. Clearly there are cases, usually in this Court but conceivably in the Superior Number of the Royal Court, where guidelines for sentencing particular offences may be set. *Vieira* is not a guideline case, although there are features of the sentencing remarks in that case to which we will turn later in this

judgment.

We limit ourselves to saying that the nature of the rape and sexual assault in *Vieira* was substantially and significantly less serious than that which occurred in the instant case, and that of itself is sufficient to dispose of that ground of appeal. 20. We turn next to the submission that the sentence was manifestly excessive because the Royal Court either did not allow a full one-third discount against the starting point for a guilty plea or, if it did, did not give any credit for the Applicant's other mitigation, thus resulting in a sentence overall which was manifestly excessive. In advancing this ground for the application before us, the Applicant contended that under the Guidelines, the case should have been put into harm category 2 with a starting point of eight

years rather than harm category 1. In that submission, the case of Vieira was again prayed in aid

- as the only useful comparator to the present case, it is said that the starting point there of seven and a half years would have been an appropriate starting point in the present case. 21. In our view, these contentions raise again the use of the Guidelines, not least because not only the Crown but also the defence seem to have approached the case upon the basis that the Guidelines would be useful in establishing the appropriate starting point. When asked about this by the Court, Crown Advocate Hallam helpfully addressed us on how the Attorney General approached the formulation of the Crown's conclusions in cases such as these. She explained that the Crown, having Vieira in mind would assess the culpability and harm factors and reach a view as to what the appropriate starting point should be. In doing so, regard would be had to which category of culpability and harm applied. There would then be a cross check against the Guidelines and if the preliminary view about the starting point was seen to be lower than the figure which would be reached on the application of the Guidelines, that view would be amended on the basis that there was no reason why the sentence should be any lower here than in England. 22. Both in *K v Attorney General*

[2016] JCA 219 and in *W v Attorney General*

- [2022] JCA 117, this Court has been clear about the approach which ought to be taken to the use of the Guidelines. The approach is summarised at paragraph 27 of the Court's judgment in *K* where this was said: "We now turn to the issue of the Guidelines on which many of the submissions to us were focussed. At paragraph 49 in the sentencing remarks in relation to *K*, the Royal Court commenced a helpfully comprehensive review of the current approach to rape sentencing in England and Wales and the extent to which the courts in Jersey should adjust sentencing levels by having regard to sentencing in England. The conclusions reached may be summarised in these propositions:- (i) Jersey is a separate jurisdiction and the courts are entitled to fix its own sentencing levels. The Royal Court is not in any sense bound by the Guidelines. (ii) The analysis of aggravating and mitigating factors which is frequently set out in the Guidelines often, perhaps even usually, provides a convincing rationale for the assessment of the seriousness of the offending which can conveniently be adopted in Jersey. (iii) The Court would be influenced by the sentencing levels envisaged by the Guidelines when considering the conduct of *K* because it considered the sentencing levels to be correct for that conduct. (iv) The Court should decide on the appropriate sentence for the offence before it in every case, and it did not follow that because the Guidelines were helpful in the case of *K*, they would always be helpful to enable the Court to arrive at the correct level of sentence for that particular offence in the jurisdiction of Jersey. (v) There was no reason in principle why it should be thought right for Jersey to impose lower sentences for an offence as committed by *K* than would have been imposed in England and Wales." (emphasis added) 23. Emphasis has been added to (iii) and (v) above because it is to be noted that the conduct involved in that case was particularly serious and distressing. The increased levels of sentence introduced by the Guidelines were absolutely appropriate for that conduct. But these paragraphs did

not import any statement that the sentences envisaged by the Guidelines would always be appropriate. 24. The reference to the helpful analysis of Sir Michael Birt, Commissioner was to this passage in his judgment at first instance

[2016] JRC 158 where he said this: "(iv) Can and should this Court adjust sentencing levels for offences of this nature having regard to current sentencing levels in England and Wales?

54. Advocate Haines very properly reminded us of the many cases in which the courts of this island have explained that Jersey is a separate jurisdiction and does not have to follow the sentencing principles and levels established by the courts of England and Wales. We think the position is conveniently summarised in the judgment of the seven judge Guernsey Court of Appeal in *Wicks v Law Officers* [2011-2] GLR 482. That Court was constituted with seven judges because of concern about observations of the Guernsey Court of Appeal in the earlier case of *Gunter v Law Officers* [2011-2] GLR 147, which seemed to indicate that Guernsey was obliged to follow the sentencing levels established in England and Wales in certain cases. The Court in *Wicks* emphatically disagreed with that proposition and reaffirmed the independence of Guernsey in sentencing matters as follows at paragraphs 17-18:- "17. The difficulty with the observation in *Gunter*.... is that it appears to suggest that, when the elements of the offence in question and the statutory maximum sentences are the same in Guernsey as in England and Wales, the Guernsey courts may only depart from English sentencing levels if there is a significant difference in social or other conditions between Guernsey on the one hand and England and Wales on the other. We must respectfully disagree. Such an approach is wholly inconsistent with Guernsey's position as a separate jurisdiction. Naturally, where the elements of the offence in question are comparable in the two jurisdictions and the statutory maximum sentence for the offence is also comparable, the Guernsey courts may well derive considerable assistance from the sentencing practice applied in England because of its larger size and the greater number of cases which will come before the courts of that jurisdiction. A recent example of this court's choosing of its own volition to apply English sentencing levels is the decision in *Burton*..... itself (which concerned an offence of rape).

18. But there is no need for there to be a significant difference in social or other conditions for the Guernsey courts to take a different approach from England and Wales and adopt a different level of sentencing. The Guernsey courts may simply consider that the sentencing levels in England are either too high or too low and should not be followed. They are perfectly free to do so. It is wrong to start from the position that sentencing levels in England are correct and that there must be some specific reason to depart from them. Rather, the position from which it is right to start is that the Guernsey courts must determine the appropriate sentencing levels for offences committed in Guernsey and that, in doing so, they may or may not derive assistance from what is done in England and Wales or in any other jurisdiction."

55. This Court held in *AG v Godson*

- [2013] (2) JLR 1 at para 23 that those observations were equally applicable to Jersey. Observations to like effect can be found in many cases, including the Court of Appeal in *P v AG*
- [2012] JCA 070 at paras 14-18 and the five judge Court of Appeal in *Campbell v AG*
- [1995] JLR 136 where the Court said at 141: "The Island cannot be impervious to outside influences but there are nevertheless important differences between the sentencing process in Jersey and that which obtains in England.... As we have already stated, Jersey is a separate jurisdiction and entitled to fix its own proper sentencing levels..."
56. In relation to the use of sentencing guidelines issued by the Sentencing Council in England and Wales, we would refer to two dicta, with both of which we respectfully agree. In *AG v Barbosa*
- [2013] JRC 165, having referred to the observations in *Campbell* mentioned above, William Bailhache, Deputy Bailiff went on to say this at para 7:- "But of course, we are not impervious to outside influences; nonetheless these considerations go also to a view as to how we should treat the sentencing guidelines as issued by the Sentencing Guidelines Council. It is clear to us that the rationale which lies behind the guidelines which have been issued is a rationale to which we can pay the greatest attention. We agree that there are specific aggravating factors and specific mitigating factors as set out in these guidelines. We agree that there is a distinction between the sort of conduct which amounts to planned attempts to kill and other spontaneous attempts to kill. But we also do not think that it is right to endorse formally the starting points or sentencing ranges which are adopted by the Sentencing Guidelines Council and we therefore have approached the matter in a way which is consistent with our own sentencing policy."
57. In *AG v Sutton and McDermott*
- [2015] JRC 144, William Bailhache, Bailiff said this:- "These are reasons why reference to the English sentencing guidelines are generally not regarded as helpful in this Court because the guidelines themselves take into account comparators between different offences committed in the United Kingdom for which sentence is passed in accordance with a different legislative structure. It follows that the sentencing guidelines themselves are not necessarily going to be helpful in Jersey; that is not to say that they are not of interest, of course they are, but they are not necessarily going to be regarded as being in any sense conclusive of the way in which the Royal Court should approach a sentencing issue. "62. We emphasise that this is not to say that the Court is obliged to follow the Guidelines or that the Guidelines are applicable in this jurisdiction; it is simply to say that in relation to an offence of this specific nature, we find the Guidelines helpful and think that reference to them helps us to formulate the correct sentence for Jersey in this case. We accept that if we are correct, by necessary inference, sentencing levels for rape generally in this jurisdiction may increase to the extent that the Guidelines point to a higher sentence than would be imposed by direct application of the Millberry guidelines. Such a case is not before us but this Court is certainly of the view that rape is a serious offence and that, to

the extent the Guidelines suggest a higher level of sentencing than Millberry, we would again think that the sentencing levels envisaged in the Guidelines are reflective of the gravity of rape offences and might be thought to assist in deciding upon the correct sentencing levels in this jurisdiction." 25. In W, this Court said: "34. It has been clear at least since the guidance given by this Court in K v Attorney General

[2016] JCA 219 ("K") that in a case such as the present the sentencing court may, should it think it appropriate, consider and take account of the various factors identified in the English Guidelines as relevant to sentencing approach: that is, as indicators of degree of harm, culpability and mitigation. 35. On the other hand it has been argued that a sentencing court in Jersey should not take any account of the sentencing levels set out in the English Guidelines, being guidance established for sentencing by the courts of England and Wales for offences there. As to this, the English Guidelines state a set of sentence starting points and ranges for sentence to be found by applying the indicators, once identified, to a table of sentencing values. The question on this appeal is whether a sentencing court may pay any further attention to anything in the English Guidelines, beyond the factors mentioned in the previous paragraph of this judgment, and in particular whether it would be a mistake as a matter of law for the sentencing court to use the sentencing levels indicated in the English Guidelines as a reference point. 36. In the present case, this question arises because the Royal Court when sentencing the Appellant explained in the careful and detailed judgment given by the Commissioner that the Court had considered the English Guidelines, and that while they did not apply them "in so far as the levels of sentence or starting points were concerned," they had nevertheless had regard to those factors "merely as a useful cross check". In other words, the sentencing court had made use of the English Guidelines beyond simply looking at the various factors identified as relevant to harm, culpability and mitigation, and must have done so to see whether the sentences being contemplated were within a reasonable range of what might have been arrived at by an application of the formulae and principles set out in the English Guidelines. [The Court went on to refer to paragraphs 30 to 34 of the judgment in K, emphasising that nothing said in W was intended to depart from or qualify the judgment in K] 48. We affirm once again that Jersey courts are under no obligation to have regard to the starting points or sentencing ranges set out in the English Guidelines. Not only are these not binding: there is no presumption that they should be followed or even consulted. There are however cases in which reference to English practice can provide useful guidance or reassurance. 49. In our judgment the current case presents just such an example. Sentencing in Jersey for the relevant offences is unrestricted by law; the most similar recent Jersey cases differed greatly in their facts (as was remarked in the sentencing judgment:

[2021] JRC 329 at [10]); and no express guidance was available as to the practical implications of the encouragement that had been given in K and subsequent cases to increase the level of sentence for some types of indecent assault on a child. In such circumstances, we can well understand why the Jurats might have wished to seek guidance or to check their own views against the English Guidelines, in full knowledge of the fact that there was no

obligation or expectation on them to follow or even to have regard to them. 50. We would add that even where the English Guidelines are not followed in relation to the absolute length of a sentence, there may be value in comparing the English sentencing levels for different categories of an offence, so as to inform, test or confirm the opinions of Jurats as to the relative seriousness of those different types. Once again, there is no obligation to conform to English practice: a point well understood by the Royal Court, which imposed a 3-year sentence on Count 2 in the knowledge that this exceeded the sentencing range in the English guidelines for kissing a child under 13 on the mouth (

[2021] JRC 329 at [8] and [11]). Nonetheless, the exercise may be of assistance when seeking to assess the comparative seriousness of different categories of offence, or simply in the Royal Court's phrase as a cross check. We find a degree of artificiality in drawing a rigid distinction between having regard to aggravating and mitigating factors on the one hand and sentencing levels on the other, and we decline to do so. We make no criticism of the Royal Court for considering the English Guidelines in the manner and for the purpose described in its sentencing judgment, which seems to us consistent with the law as declared in *K.* " 26. We note also, in the context of what is the correct approach to the use of the Guidelines, the comments of the Court of Appeal in Guernsey in the case of *Law Officers of the Crown v Trenchard*

[2024] GCA 025 where Crow JA said this: "13. Having said that, it is entirely appropriate to consider at least the principles that have been applied in the English case-law and guidelines in order to assess the gravity of the offending, and the nature of any relevant aggravating or mitigating circumstances. In that context, our attention has been drawn to the decision of the English Court of Appeal in *Millberry* and the Sentencing Guidelines to which the Royal Court referred. The Sentencing Guidelines are more detailed and more prescriptive than *Millberry*, but in broad terms their overall structure is similar. There are essentially two stages, the first being an assessment of gravity. That involves taking account of three criteria: (i) the degree of harm to the victim; (ii) the level of culpability of the offender; and (iii) the level of risk posed by the offender to society. That leads to the selection of a starting point for the sentence, which is then increased or decreased at stage two by reference to aggravating and mitigating factors. 14. In broad terms, we consider that the sentencing court is entitled to use such materials from England & Wales, whether case-law or published guidelines or other sources, to the extent that it considers appropriate, not because they are binding or correct, but rather because they may provide a useful reference point for the development of local practice. That much was also common ground in this case. 15. We do not consider that it is either necessary or appropriate, at least at this stage, to lay down a fixed list of starting points for different categories of sexual offending. We would only add (as Lord Lane CJ did in *A-G's Reference (No 4 of 1989)* [1990] 1 WLR 41, at p. 46B - C) that it must always be remembered that sentencing is an art, rather than a science; that the trial court is particularly well placed to assess the weight to be given to various competing considerations; and that leniency is not in itself a vice. " 27. In that case, the Court applied the principles of *Millberry v R*

- [2002] EWCA Crim 2891 , as indeed had the court below. 28. In *Vieira* , the Royal Court considered that sentences for sexual offences should not be significantly lower than those imposed in England and Wales. It was said that this did not mean that the adoption of the English guidelines as a whole would be appropriate; but the conclusion was that in order for the Courts of Jersey to understand the extent to which, on particular facts, a sentence proposed may differ from that which would be passed in England and Wales, it will inevitably be necessary to have regard to the sentence applicable in England and Wales in accordance with the guidelines. 29. The Court went on: "30. That is not a difficult task or an inappropriate one as such a sentence will not be binding upon the Jurats but will, particularly in the case of rape, be a matter which they are likely to take into account when determining the appropriate starting point. Indeed, from time to time, it will be necessary to do so bearing in mind that we have determined that it would not be appropriate for sentences for sexual offences to generally be lower than those that are imposed in England and Wales. 31. Naturally, there may be particular reasons warranting the court adopting sentences for a particular sort of case which are lower or higher than those imposed in England and Wales. An example of this is that, following the case of *AG - v- Godson and Crowley*
- [2019] JRC 091 , sentences imposed in Jersey for offences involving indecent images of children are significantly higher than those imposed for equivalent offences in England and Wales in most cases. 32. Accordingly, we invited the parties to provide submissions as to the sentence that would be suggested by an application of the Sentencing Council Guidelines for rape. Both parties were agreed that in view of the harm caused to the victim in this case, namely "severe psychological harm" this was a category 2B case, which implies a range of sentences of between 7 and 9 years with a starting point of 8 years imprisonment, prior to considering aggravating factors and any mitigating factors. In respect of aggravating factors, the Crown identified three. First, the specific targeting of a particularly vulnerable victim - the victim vulnerable because she was asleep. Secondly, the location of the offence - the victim's home where she was entitled to feel safe. Thirdly, the fact that the Defendant committed the offence whilst under the influence of alcohol - he was very drunk." 30. It is apparent from a number of cases in the Royal Court following *Vieira* , - see *Coelho*
- [2020] 2 JLR 367 , *AG v F*
- [2023] JRC 58 , *AG v Moody*
- [2023] JRC 154, *AG v Lloyd*
- [2023] JRC 190 and *AG v Dumitrache*
- [2024] JRC 22 that the developing practice in the Royal Court has been for the Crown to identify the harm and culpability categories in the case by reference to the Guidelines and move conclusions by having regard to what sentence would have been appropriate if the Guidelines had been applied. It appears this approach may well have resulted from the

Royal Court's comments in Vieira to the effect that there is no reason why sentences for sexual offences generally should be any lower than they are in England and its invitation to assess what the sentence would have been in England on the application of the Guidelines. In the light of the Court's questions to Crown Advocate Hallam on this approach, which she had not anticipated, we thought it right to adjourn briefly in order that she could consult the Law Officers in case there were any additional submissions to be made as to its correctness. On her return, we were informed that the Solicitor General took the view that Vieira was the path the Royal Court had chosen to take, and several people had been sentenced on that basis. There was no significant reason to depart from that approach and this court should not depart from it without ascertaining the views of the Royal Court as to how sentencing policy has developed. 31. We have considered these submissions but we do not feel we can accept them. If we reached the conclusion, which, as is clear below, we have, that the approach taken by the Royal Court in Vieira was wrong, then we are obliged to say so and the fact that the Royal Court has sentenced others on that basis in the interval is not to the point. Nor is it clear that this Court can assess what the Royal Court's approach to the right level of sentences can have been if not based upon the Guidelines, because the cases do not make that clear. 32. The Vieira approach appears to have been taken both by the Crown and by the defence in this case in the Royal Court. We consider that this approach involved a misreading of what this Court set out in K and W, and is not the correct approach. The Vieira methodology seems to involve this reasoning: (i) The Court is entitled to have regard to the factors relevant under the Guidelines to assessing harm and culpability when sentencing in Jersey; (ii) There is no reason why sentences for sexual offences in Jersey should be any lower than sentences in England and Wales; (iii) Therefore it follows that the right approach is to assess what the sentence in England and Wales would be, on the application of the Guidelines, in order to reach the right sentence in Jersey. 33. This methodology is not consistent with what we said in K. It means that lip service only is being paid to the frequent statements made by the Royal Court and this Court that the Royal Court has its own sentencing jurisdiction and is not obliged to follow the sentencing approach taken in England and Wales. It is one thing to say that the Royal Court may in an appropriate case, particularly in the absence of any local guidelines or cases from which a pattern of sentences can be ascertained, decide to have regard to what sentences might be passed elsewhere. It is quite another routinely to look to what the sentence would be on the application of the Guidelines and then reach conclusions or pass sentence on that basis. Indeed, it is no more rational to say that there is no reason to hold that sentences in Jersey for sexual offences should be any lower than is the case in England than to hold that they should not be higher either. That is in effect to apply the Guidelines. As we said in K, the analysis of aggravating and mitigating factors set out in the Guidelines will often provide a convincing rationale for the assessment of the seriousness of the offending to be sentenced, and that analysis can conveniently be adopted in Jersey. We emphasise that the fact that in K and in other cases the Court may have considered the sentencing levels envisaged by the Guidelines to be correct for the conduct which was involved in those cases does not mean that those sentencing levels are

appropriate in every case. Inevitably, therefore, a wide statement that there is no reason for sentencing levels for sexual offences generally to be at a lower level in the island than is appropriate under the Guidelines is to concede the Royal Court's jurisdiction to decide its own sentencing levels in respect of the offences which are charged and to do so would be wrong in principle. 34. In our view, it is unhelpful therefore for the Crown, the defence or the Court to seek to categorise the conduct of a defendant, when it comes to sentence, by placing it in one or other Guideline category; adopting that categorisation approach will almost inevitably lead to a direct application of the Guidelines, which are not set by any Court of this island, nor by an institution or body which accountable to the people of this island, and which are drawn up by having regard inter alia to the comparative sentences for other offences where the sentencing options may also be different from those which apply here. It may also be desirable in a larger jurisdiction such as England and Wales to have guidelines of this nature better to ensure consistency of sentencing across the country, but again that is a consideration which is not relevant in Jersey where sentencing for the more serious offences will always take place in a Court drawn from the same relatively small cohort of Jurats. There would be nothing objectionable in having regard to the factors which are mentioned in the Guidelines, but the ascertainment of sentence for sexual offences in this jurisdiction is not a mechanical tick box exercise. 35. We also think that the Royal Court went wrong in *Vieira* in its assumption that there was no reason why sentencing levels for sexual offences in Jersey should not be any different from those in England and in subsequently encouraging the Crown to calculate, using the categories of culpability and harm under the Guidelines, what the sentence would have been in England and, in effect, move conclusions accordingly. The Royal Court should set its own sentencing levels subject to guidance from this court. The consequence of exercising its own jurisdiction is inevitably that the sentences may be lower, higher or the same as those which might be imposed for a similar offence in England. 36. Although we do not endorse the reference to a cross check with the English Sentencing Guidelines - because that is possibly to suggest by implication that the level of sentencing pursuant to them is necessarily correct - the emphasis on protecting the jurisdiction of the Royal Court can be supported by reference also to the Scottish case of *Sutherland v Her Majesty's Advocate*

- [2015] HCJAC 115 at [20] where it was stated: "Definitive guidelines from the sentencing council of England and Wales often provide a useful cross-check for sentences in Scotland especially where the offences are regulated, as here, by a UK statute and there are identical maxima. They should not, however, be applied in Scotland in a rigid or mechanistic fashion, given the differences in sentencing purposes, practices and regimes, between the two jurisdictions. Suffice it to say, in this case, had the appellant been sentenced in England, it would appear that he would have received a much longer custodial term." 37. This approach is also consistent with the decision of the Privy Council in *Milton v The Queen*

- [2015] UKPC 42 , where the Privy Council was considering sentences imposed in the British Virgin Islands and the guidance that could be delivered from the sentencing practices of other countries. The Privy Council said this at paragraph 33: "The Courts [of the BVI] are entitled to look for guidance to sentencing practices in other countries, but the board would not recommend that they bind themselves too closely to the regime of the particular country, including the United Kingdom. Local judges are in the best position to assess the appropriate tariff in their jurisdiction, subject to their own statutory provisions." 38. In the case of E , the Royal Court summarised at paragraphs 3 and 4 its approach to the use of the Guidelines. In our judgment, there is no criticism to be made of what is said at [3], which accurately reflects our decision in K . We do not, however, endorse without qualification the statement in [4] that Jersey courts have regarded the ranges of starting points and sentences in the Guidelines to be appropriate. 39. In relation to the offence of adult rape, the principles and sentencing ranges in the English Court of Appeal case of Millberry were routinely applied here for many years - see AG v C
- [2019] JRC 074 and AG v Kean
- [2019] JRC 155 at [13] to [14]. More recently the Royal Court has not been entirely consistent in this respect. Whereas the offending in AG v Dobrin
- [2019] JRC 087 was so serious that the Millberry principles were considered but a higher starting point than eight years was taken, in Vieira , the Court concluded at [18] and [19] that the Millberry decision was no longer relevant to identify proper brackets of sentence for that offence in Jersey. Vieira has been followed in AG v Moody
- [2023] JRC 154, AG v Lloyd
- [2023] JRC 190 and AG v Dumitrache
- [2024] JRC 22 . However, other relatively recent cases have applied Millberry as though it were still the guideline case (see, among others, AG v C and AG v Kean [supra] AG v B
- [2020] JRC 110 and AG v Mark Fernandes
- [2021] JRC 049). As we have indicated, the conclusion in Vieira that there is no reason why sentences for sexual offences should not be lower than in England represented a misreading of what we said in K , but on the other hand, it is also clear that sentences for sexual offences against children in Jersey have increased in severity and there is no reason why, if the Royal Court - for proper reasons - thinks it appropriate, they should not be reviewed upwards for sexual offences against adults too. We add that while the Deputy Bailiff was in our view right in Vieira to accept the submission that there was a greater awareness now perhaps than in 2002 of the psychological impact which the offence of rape had on the victim, the principles established in Millberry are still absolutely in point today when the court comes to consider the appropriate sentence for a charge of rape. We consider the Royal Court took a wrong turn in Vieira by saying at [19] that the decision in Millberry was no longer relevant and the Court would obtain no benefit by reference to it.

The use of Millberry has been endorsed by this Court and the Royal Court on many occasions since 2002. Furthermore, as said by the Guernsey Court of Appeal in *Trenchard*, the principles of Millberry may be less detailed and prescriptive than the Guidelines, but the basic structure is the same. 40. It is perhaps better, given the need to distinguish the terminology of "starting point" used in drugs cases in this island from the same language used in Millberry, to describe the Millberry 5, 8 and 15 year starting points as initial points, before taking account of such aggravating features as there are in the particular case. Such features can lead to an increase in the initial point to reach what, by comparison with drugs cases would be described as the starting point i.e. before considering the effect of the mitigation which the defendant has. The result may or may not be a sentence which is the same as that which would be reached on the application of the Guidelines, because that is not the exercise which is being conducted. It does however permit an assessment of the elements of harm and culpability without the rigidity of having to assign those elements to a particular box in the Guidelines with all its prescriptive power. 41. We add that there is no reason why the Royal Court should not consider an upwards review of sentencing for rape and sexual assaults on adults if it thinks it is appropriate to do so, but the reasoning which appears to have led the Royal Court in that review to date seems to be based upon a misreading of *K*, the assumption without foundation that the sentence for these offences should not be lower than it would be in England, and consequently the application of the starting points and levels of sentencing in the Guidelines as though they were part of the sentencing process in Jersey. By contrast, the remarks in many of the cases referred to that sentencing is an art and not a science, and is not a mechanical exercise or tick box function have received no apparent attention, nor the very apt comment of Commissioner Sir John Saunders in *E* that "Firstly and importantly, the Court has decided what is the appropriate sentence to fit the individual facts of this case. Every case of rape is different." These comments may be thought to be at odds with the statutory requirement in England that the sentencing court must have very good reason to depart from the Guidelines. It is also to be noted that notwithstanding the Millberry guidance which if applied strictly might have resulted in an 8 year starting point in each case, the other appellants in that set of cases, *Morgan* and *Lackenby* received sentences of 9 and 10 years respectively on a plea. This demonstrates that there is a flexibility in Millberry that is missing from the strict application of the Guidelines, which in our judgment is desirable to ensure that justice is done in all cases. 42. Accordingly we emphasise the words of the Court of Appeal in Millberry where at [34] Lord Woolf, the Lord Chief Justice, said this: "Before concluding our general guidance with regard to sentencing on rape and turning to the cases of the individual appellants, we would emphasise that guidelines such as we have set out above can produce sentences which are inappropriately high or inappropriately low if sentencers merely adopt a mechanistic approach to the guidelines. It is essential that having taken the guidelines into account, sentencers stand back and look at the circumstances as a whole and impose the sentence which is appropriate having regard to all the circumstances. Double accounting must be avoided and can be a result of guidelines if they are applied indiscriminately."

Guideline judgments are intended to assist the judge arrive at the correct sentence. They do not purport to identify the correct sentence. Doing so is the task of the trial judge. " 43. The reference to "guidelines" in that case is of course a reference to guidance in the decision of that Court and not to the Guidelines. 44. In the present case, although it is apparent from the transcript that there was a passing reference from the learned Bailiff in an enquiry of defence counsel as to the category in which the latter would put the assessment of harm, he did not in his sentencing remarks indicate that the Guidelines were the basis on which the Court reached its decision on sentence. However, the Bailiff did refer to particular passages from the sentencing remarks of the Royal Court in E, which we consider reflect only in part the proper approach to our decision in K . Furthermore, if the Royal Court did not apply the Guidelines, it is unclear as to how the starting point of 14 years was reached. If it did apply the Guidelines by assigning the conduct to category 1, it was wrong to do so. For these reasons, while we do not consider it to be entirely clear that the Royal Court did adopt the methodology proposed by the Crown in its conclusions, we think it is likely that it did so. In those circumstances we give leave to appeal and take the application for leave as the substantive appeal. 45. We go back to the test which we are required to apply. We have to consider whether this sentence was manifestly excessive which, in the context of this case, requires us to consider the starting point and then the discount from the starting point which ought to be allowed for the mitigation which exists. 46. In the present case the Royal Court took a starting point of 14 years before taking the Applicant's mitigation into account. On the application of the Millberry initial points, we think that the Court could properly have taken an initial point of 8 years imprisonment given that the one attack included both oral and vaginal sex. That initial point could quite properly have been increased to a starting point of 10 years imprisonment in the light of the following aggravating factors (in no particular order): · The abuse of the trust shown the Applicant in offering him accommodation in the home of the victim and her partner · The obvious advantage taken of the victim's comatose state to commit these offences · The preparation of a contrived defence by the phone calls and messages to the victim's partner that she had encouraged the Applicant and might wrongly cry "rape" after the event · The post traumatic stress disorder from which the victim had already been suffering before the rape, which was seriously exacerbated by his offending · The "chilling deliberation" with which the Applicant went about his offending. 47. We consider that given that we have found that the Royal Court, in its reliance on Vieira made on the balance of probabilities an error of law, it is for us to sentence afresh. We have given full weight to and agree with the views of the Royal Court that this offending was particularly serious, notwithstanding that error of law, but we add that there would in our view be at least an argument that any higher starting point than 10 years would be manifestly excessive. 48. By way of mitigation, the Applicant has the advantage of a guilty plea, is of good character and has supplied a number of references which speak to his good character more generally. He has written a letter of remorse but we note the conclusion of the Pre-Sentencing report that he takes limited responsibility for his offending and minimises the effect of his actions. The good character mitigation does not

assist him much - see

- [29] of Millberry . 49. We need to add some words about the credit to be given for the guilty plea. The Royal Court in its sentencing remarks indicated that it had given "appropriate credit" for this plea. In fact, taking a starting point of 14 years and applying a one third discount for the plea would have resulted in a sentence of 9 years and 4 months if there had been no other mitigation, and yet the sentence actually passed was 2 months longer. It appears this must have been the view of the Royal Court that something less than a one third discount was appropriate, and we examine the process in that context. 50. Despite what is understood to be the outcome in Goncalves
- [2022] JRC 097 as to the immutable obligation to enter a plea at the first appearance, we consider that in a case where the Magistrate directs under Article 23(3) of the Criminal Procedure (Jersey) Law 2018 (as she did in this case without opposition from the Crown) that the defendant need not enter a plea, then full credit should be given to a defendant who enters a plea in compliance with the period of postponement set by the Magistrate. The obligation of the Magistrate to make an Article 23(3) direction only where it is necessary in the interests of justice will mean that this power will not lead to any unnecessary prolongation of proceedings. The alternative is that the order of the Court becomes a trap for the unwary and places the defendant in an invidious position, where the Magistrate determines that there is a good reason to delay putting the charge, but the sentencing court does not accept that. 51. In our judgment the appropriate sentence on Counts 1 and 2 respectively would be 6 years 8 months imprisonment concurrent, and we substitute that sentence for that imposed by the Royal Court. The other sentences and orders of the Royal Court remain undisturbed. The appeal is allowed accordingly. Authorities Sex Offenders (Jersey) Law 2010. AG v Vieira
- [2021] JRC 293 . AG v E
- [2023] JRC 044 . English Sentencing Council guidelines. Archbold, Criminal Pleading, Evidence and Practice 2003 Ed. Harrison v AG
- [2004] JLR 111 . Bhojwani v AG
- [2011] JLR 249 . Wood v AG
- [1994] JLR Notes 15a. Wood v AG 1994/032. Dykes v AG
- [1999] JLR 146 . K v AG
- [2016] JCA 219 . W v AG
- [2022] JCA 117 . AG v K
- [2016] JRC 158 . Law Officers of the Crown v Trenchard
- [2024] GCA 025. Millberry v R

[2002] EWCA Crim 2891 . Coelho v AG

[2020] 2 JLR 367 . AG v F

[2023] JRC 058 . AG v Moody

[2023] JRC 154. AG v Lloyd

[2023] JRC 190. AG v Dumitrache

[2024] JRC022. Sutherland v Her Majesty's Advocate

[2015] HCJAC 115 . Privy Council in Milton v The Queen

[2015] UKPC 42 . AG v C

[2019] JRC 074. AG v Kean

[2019] JRC 155 . AG v Dobrin

[2019] JRC 087. AG v Moody

[2023] JRC 154. AG v Lloyd

[2023] JRC 190. AG v Dumitrache

[2024] JRC 022 . AG v B

[2020] JRC 110 . AG v Fernandes

[2021] JRC 049 . AG v Goncalves

[2022] JRC 097 . Criminal Procedure (Jersey) Law 2018. Page Last Updated: 30 Jul 2024 Back to top
About JLIB Accessibility Contacts Copyright Disclaimer Feedback Privacy policy Site map
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/2024/>

CASE PAGE <https://chat.esheria.ai/case-law/jersey/nunes-v-ag-2024-jca-160-24-july-2024>

Prepared on 22 October 2026 · Esheria