

JERSEY / JUDGMENT

The Attorney General v Joao Pedro Vieira ([2021] JRC 293 (19 November 2021))

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JUDGMENT

THE DEPUTY BAILIFF: 1. On 8 th November 2021 we sentenced the Defendant in this case to a total of six years imprisonment. We reserved our reasons for so doing and now provide those reasons. 2. The Defendant faced three indictments and this judgment is principally concerned with the first indictment which charged the Defendant with an offence of rape committed on 30 th August 2020. The facts of the offence 3. The Defendant and the victim were known to each other as friends and work colleagues. At the time of the offence the Defendant was 25 and the victim was 30. On 29 th August 2020, the victim, the Defendant and another went for drinks in St Helier and, at the end of the evening, the victim invited the Defendant to come to her home address where she resides with her mother and young son. They had come back to watch television. The victim changed into her night clothes with her underwear underneath. She permitted the Defendant to watch television with her in her bedroom. They ate a meal together. The victim fell asleep whilst watching television and woke up at some point in the night to find the Defendant raping her, he having removed her pyjama bottoms and underwear. She pulled herself away from the Defendant and pretended she was still asleep. The Defendant was not, she thought, wearing a condom and she did not think that he had ejaculated. At the time, the Defendant had been, as he told the police subsequently, drinking heavily and had drunk 12 Jägerbombs and 12 beers. 4. When morning came, the victim told the Defendant to leave as she needed to get ready for work. Over the subsequent days there were exchanges of messages using a social media platform. Initially, the Defendant appeared to have denied intercourse in those exchanges, indeed he said " I swear for my sister's kids I haven't done nothing nasty ". 5. On 1 st September 2020 the victim told a friend that she had been raped. That friend contacted the police who then contacted the victim. 6. On 2 nd September 2020, there was a further exchange of messages between the victim and the Defendant in which the victim expressed her anger at what the Defendant had done. She said " I can't get of my mind that you can't even be honest with me, I woke up to you with your dick in me. You didn't even have the decency to say I'm sorry I fucked up ". 7. In a subsequent exchange she expressly said that she had been raped by the Defendant. He replied " Fuck man. Do whatever you need to ... I deser it ". The victim said " I trusted you, you know how upset I was about [a third party was named] and you thought I know she's upset so I will pretend to be there for her then rape her why she's sleeping ". 8. On 6 th September 2020, the

Defendant presented himself to Police Headquarters to say that he wanted to report a rape and identifying himself as the person responsible. In interview, he said that although he only went to the victim's address to watch television, while she was asleep he had removed her underwear and "I did what I did ... and then I realised, stop it". He said the rape lasted about three minutes. He agreed that he had not been wearing a condom and accepted that the victim had not encouraged him in any way. Court process 9. When the Defendant appeared before the Magistrate's Court on 11 th March 2021 he did not enter a plea and jurisdiction was declined. When he was indicted on 21 st May 2021, which was his first opportunity in the Royal Court to plead guilty to the offence, the Defendant entered a not guilty plea to the allegation of rape. This plea was maintained at a plea and directions hearing on 23 rd June 2021 by which time the Defendant was unrepresented (he was represented when he entered a not guilty plea on indictment). On 23 rd July 2021 the Defendant, who by now had instructed a new firm of advocates, vacated his not guilty plea and entered a guilty plea. Accordingly, the trial date, fixed for 1 st November 2021, was vacated. On entering his plea, the Defendant was remanded in custody pending sentence. 10. A report prepared by the Probation Service indicated the Defendant was a moderate drinker, although he had a previous offence for alcohol related offending in 2017 and accepted experimenting with cannabis, LSD and MDMA in his teenage years, and more recently smoked cannabis. His only previous conviction was an offence of malicious damage in 2017 for which he was bound over. There were Parish Hall appearances in 2017 for drunk and disorderly and causing a breach of the peace by fighting. The Defendant had no similar previous convictions. The Probation Service report said that the Defendant felt intense guilt and shame for what he had done and wished to apologise to the victim. The Defendant elected to enter a not guilty plea in order to ensure that he was able to spend time with his mother who was visiting the Island at the time. The effect on the victim 11. The Court was assisted by a psychological report from a consultant clinical psychologist Dr Jamie Connor. Dr Connor says that the victim in this case has suffered severe psychological harm as a consequence of the offence. The victim trusted the Defendant. He had been to her home before to watch films. Her sleep and life at work have been affected. When assessed a year after the offence in late September 2021, she was found to be experiencing a high level of intrusion and avoidance symptoms and she continues to suffer from post-traumatic stress disorder symptomology. She does not have a previous history that pre-disposes her to a severe and enduring mental disorder. Psychological treatment to enable her to recover to sub-clinical levels is recommended and she is currently receiving therapy which she regards as effective and will continue. 12. In her personal statement, she said that since the incident she has experienced a range of emotions and it is "very difficult to convey exactly what this has been like". The Defendant was someone who was supposed to be a friend of hers and whom she had supported during difficult times of his own. The assault upon her was totally unexpected; "He raped me, and then he left me on my own to decide how to deal with this and even tried to make a joke of this, as if it never happened. I hate him for what he did". She was provided with some relief when she heard the Defendant had gone to the police station but she said "Everything changed again, because when he went to the Royal Court for the first time, he changed his plea to Not Guilty". This news left her "devastated". She lost confidence and believed that she was going to face a trial and did not know how to cope. Since then, she continued to struggle with what had

happened to her and was left feeling angry and depressed. The stress had caused her hair to start to fall out and the skin on her face had become sore and painful. The counselling that she had arranged through Jersey Action Against Rape had helped her and she is attending sessions on a weekly basis and says " Without this, I would be in a worse position ". 13. The victim said she has tried to carry on with her life as it was before the rape but has found it difficult. She said " I am so fed up hearing some people saying that I should move on and get on with things. They have no idea. They don't get it and it really isn't as simple as that. " 14. She is concerned about the amount of time that she has had to take off work owing to depression and panic attacks at work. This has affected her pay. She asked the Court to consider granting a restraining order against the Defendant due to the nature of the offence, the long-term effect on her and her family and for the need for her to feel as safe as possible in the future. Sentence - rape 15. There are no sentencing guidelines in Jersey for offences of rape or indeed other sexual offences although the Court has had regard to the 2002 decision of the English Court of Appeal in *Millberry -v- R*

[2002] EWCA Crim 2891 which has been " applied in Jersey from time to time in the past " (paragraph 19 of the judgment of the Royal Court in *AG -v- Dobrin and others*

[2019] JRC 097). 16. In this case, the Crown initially advanced conclusions by reference to *Millberry -v- R* . This case is no longer followed in England and Wales and indeed the decision in *Millberry* itself, as is clear from the first paragraph of the judgment, was a response to recommendations from the English Sentencing Advisory Panel and advice that had been given by that Panel. The Crown's conclusions indicated that the factors that might increase or reduce sentence according to the decision in *Millberry* are not consistent with the factors relevant to assessing culpability, harm, aggravation and mitigation as currently listed by the Sentencing Council Guidelines of England and Wales. These Guidelines, when considering such factors, have frequently been adopted by the Royal Court over the past five years or so. Accordingly, when this first came before the Court on 1 st November 2021, the Court expressed doubt about the utility of continuing reference to the case of *Millberry* , both because of its inconsistency with analysis of aggravating and mitigating factors and because reference to *Millberry* in respect of identifying starting points for the calculation of the sentence to be imposed is reflective of an approach to sentencing in England and Wales which has now been superseded. 17. As to the first consideration, the Court noted from the only recent Court of Appeal decision in this area, namely *K -v- AG and AG -v-F*

[2016] JCA 219 , *Bailhache JA*, giving the decision of the Court said, at paragraph 27: "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." 18. As to 27(ii), we agree that the Sentencing Council Guidelines do provide a convincing rationale for the assessment of seriousness of the offending which can be and has often been adopted in Jersey. Accordingly, reference to Millberry in this regard is unhelpful and unnecessary. In this case, the aggravating features, which are present in and identified by the Sentencing Council Guidelines, include that the offence took place in the victim's own home, the place where she was entitled to feel safe, and that the Defendant was intoxicated through alcohol. Neither matter is identified as aggravating features in Millberry . Furthermore, little weight to the psychological impact on the victim is given in Millberry which is perhaps a reflection, as the Defence Advocate observed in this case, of the fact that " the understanding of the psychological impact of these offences has clearly advanced since the decision was reached in Millberry ". 19. Further, as to paragraph 27(v) of the Court of Appeal's decision in K -v- AG and AG -v- F the Jurats in this case unanimously agreed that there was no reason in principle why it should be thought right for Jersey to impose lower sentences for an offence of this kind than would have been imposed in England and Wales. Accordingly, the decision in Millberry is, in our view, no longer of relevance to the Court in sentencing in sex cases and the Court is unlikely to derive assistance from reference to it. 20. As to sentences for sexual offences generally, in 2016 the Royal Court in AG -v- K
- [2016] JRC 158 , considered and accepted an application by the Attorney General, in the case of a child who was 7 and 9 years when she was subjected to extremely serious sexual assaults by the defendant, to impose a sentence that was higher than what might have been expected were the Court to apply the then existing level of sentence suggested by Jersey case law. Having reviewed the relevant authorities, the Court considered whether or not the Royal Court should adjust sentencing levels for sexual offences having regard to the current sentencing levels in England and Wales. Commissioner Birt said: "(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."
58. Advocate Haines also referred to the decision of the Privy Council in *Milton v The Queen*
- [2015] UK PC 42 where the Privy Council considered sentences imposed in the British Virgin Islands and the guidance that can be derived from the sentencing practices of other countries. The Privy Council said this at para 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."
59. Advocate Haines also referred to a comment from 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 sentencing 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."
60. We respectfully agree with the above passages. The courts of this Bailiwick are free to set their own sentencing levels; they are not bound by the sentencing levels of any other jurisdiction including England and Wales. It follows that they are not bound by any guidelines issued by the Sentencing Council of England and Wales. However, as the cases above also suggest, it is often helpful to look at sentencing practice in another jurisdiction, particularly a larger one where more cases are likely to arise. Having looked at the sentencing levels in an appropriate other jurisdiction, it is then for the courts of this Island to decide whether they find such sentencing levels helpful or not. Applying what the Guernsey Court of Appeal said in *Wicks*, where the elements of the offence in question are comparable in the two jurisdictions and the maximum sentence of the offence is also comparable, the courts of this Bailiwick 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.
61. In this case, the maximum sentence for indecent assault in Jersey and for rape of a child under 13 in England and Wales is the same, namely life imprisonment. In our judgment, the sentencing levels envisaged by the Guidelines for the conduct of the defendant in this case are also correct for this jurisdiction. We have no doubt that right-thinking members of the community in Jersey find such conduct abhorrent and would consider that young children are entitled to the protection of the courts, so that persons who commit such offences can expect condign punishment. We cannot think of a single reason as to why it should be thought right for Jersey to impose lower sentences for an offence of this nature than is imposed in England and Wales. It is the view of this Court that a sentence of 8 years (applying the *Milberry* guideline) would not adequately reflect the gravity of the offending in this case and we think that sentencing levels in England as derived from the Guidelines for the rape by oral penetration of a child under 13 better reflect such gravity.
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 *Milberry* guidelines. Such a case is not before us but

this Court is certainly of the view that rape is a serious offence and that, to the extent the Guidelines suggest a higher level of sentencing than Milberry, we would again think that the sentencing levels envisaged in the Guidelines are reflective of the gravity of rape offences and might be thought to assist in deciding upon the correct sentencing levels in this jurisdiction.

63. Reverting to the particular case before us, we think that most right-thinking members of the community in Jersey would not consider a sentence of 8 years (by application of the Milberry guidelines) as adequately reflecting the gravity of the offences and we agree. It follows that, if it is open to us, we would wish to impose a greater sentence than one of eight years and not to follow exactly the Milberry guidelines. The Attorney General argues that it is open to us to sentence at the level which we would wish, whereas Advocate Haines submits that we must loyally follow the Milberry guidelines (if, contrary to his primary submission, we can have regard to sentencing levels for rape).
64. Advocate Haines submits that we are bound by the decision of the Court of Appeal in *Da Graca* to apply the Milberry guidelines; only the Court of Appeal could change that approach. We do not accept that submission. *Da Graca* was not a guideline case (cf *Rimmer*) where the Court of Appeal specifically laid down guidelines which the Royal Court must follow. The Court of Appeal in *Da Graca* said simply this at paragraph 3:- "The sentencing policy of the Royal Court in cases of rape is based on that adopted by the Court of Appeal in England which is currently set out in the decisions in *R -v- Billam ...* and *R -v- Milberry...*" [Emphasis added]
65. In our judgment, the Court of Appeal was simply observing that in cases of rape, the sentencing policy of the Royal Court was based on that adopted in England. The policy in England happened at that time to be based on Milberry but has since changed and is now based upon the Guidelines. In our judgment, there is nothing in *Da Graca* which prevents this Court from amending its sentencing policy to reflect changes in the English sentencing policy if that is what this Court wishes to do. Indeed, we would go further. The comment was merely a statement of the sentencing policy of the Royal Court and would not prevent the Royal Court from deciding that it no longer wished to base its rape sentencing policy on that adopted in England. Accordingly, if sentencing practice in England has changed (as it has), it is in our judgment open to this Court to have regard to the new English sentencing policy and follow it (or not) as it wishes.
66. For these reasons, we conclude that it is open to this Court to pass sentence at a level which exceeds that which would be imposed under the Milberry guidelines and which has close regard to the sentencing levels which would result from application of the Guidelines in England and Wales. We emphasise that this is not a case of the Court deciding that it must in some way follow English sentencing practice; it is a case of this Court deciding upon the level of sentence which it thinks appropriate for the Bailiwick and, in doing so, deriving assistance from English practice as currently expressed in the Guidelines. It is an application of the practice described in the last sentence of paragraph 18 of the judgment in

Wicks quoted at para 54 above.

67. We would add that even if, contrary to our view, Da Graca is to be treated as a guideline case, it would, in our respectful view, be open to the Superior Number to suggest new guidelines if satisfied that there had been a compelling change of circumstance. In *State of Qatar v Al Thani*

[1999] JLR 118 at 126, the Court considered the doctrine of precedent in this jurisdiction and held that the doctrine of stare decisis as expounded by the English courts was not part of the law of Jersey. However it went on to say:- "A hierarchical structure of courts requires that deference be accorded by lower courts to higher courts. Even in France judges of lower courts will in practice follow the decision of higher courts in most cases. This court is generally bound by the decisions of the Court of Appeal and of course, as it always has been, by the decisions of the Judicial Committee of the Privy Council sitting on appeal from the courts of this jurisdiction. We qualify the proposition only because, in our judgment, it is open to the Royal Court, as it would be to a Scottish court, to decline to follow a decision which has been invalidated by subsequent legislation or some such compelling change of circumstance." As the Court of Appeal said in *Styles v AG*

[2006] JLR 210 at para 80, the determination of sentences in serious criminal cases rests primarily with the Jurats. They form a wide spectrum of local opinion and, as the Privy Council indicated in the passage from *Milton* cited at para 58 above, are in the best position to assess the appropriate tariff for Jersey. In our judgment, in the rare case where this Court is satisfied that there has been some compelling change of circumstance, it is open to the Court to adjust a guideline laid down by the Court of Appeal if satisfied that this is required; indeed the Attorney General indicated that he considered it was this Court's duty to do so. The difficulty with leaving it to the Court of Appeal would be that it might be some time before a suitable case was brought by an appellant who considered he had been sentenced to too severe a sentence and the alternative of leaving the Attorney General to refer a sentence which he considered unduly lenient to the Court of Appeal would be equally unsatisfactory and uncertain. We emphasise however, that should such an event occur and should the Court of Appeal subsequently reject this Court's view and reaffirm the original guideline, this Court would thereafter be duty bound to follow the reiterated view of the Court of Appeal. In our judgment, the fact that the sentencing policy in England for offences of rape (upon which the current Jersey sentencing policy is based) has changed is a 'compelling change of circumstance' such as to make it appropriate for this court to depart from the decision of *Da Graca* (if, contrary to our view, that decision is regarded as laying down a guideline).

68. Advocate Haines submitted that it would be inappropriate and potentially confusing to have regard to the Guidelines for one particular offence (rape of a child under 13) but not to have regard to the Guidelines concerning other sexual offences. We do not agree. The Court must decide on the appropriate sentence for the offences before us and, for the reasons given, we consider that the Guidelines help us to arrive at the correct level of sentence for those

offences in this jurisdiction. It would be for consideration in future when the point arises as to whether the guidelines will also be of assistance in other sexual offences. We have not been referred to other aspects of the Guidelines and do not know whether sentencing levels for other offences of indecent assault on a child or procuring acts of gross indecency by a child would result in a higher sentence under the Guidelines than is currently the case in this jurisdiction. If that were to be so, we can well understand an argument that there would be no good reason for sentencing levels in Jersey not to be increased correspondingly but that would be a matter for the Court hearing the particular case where the point arises.

69. Advocate Haines further submitted that it was not open to this Court to change sentencing policy in respect of an offence committed before announcement of that change. Again, we cannot accept that argument. It is of note that the Guidelines are expressed to apply to any sentence imposed after 1st April, 2014, regardless of when the offence in question was committed. We would refer also to the leading decision of the English Court of Appeal in *R v H* and others

[2012] 1 WLR 1416, which considered sentencing practice in respect of historic offences and held that, whilst the sentence imposed could not exceed the maximum sentence which could be imposed by law at the time of the offence, the defendant must otherwise be sentenced in accordance with the sentencing regime applicable at the date of sentence." 21. We agree with and adopt the approach of the Royal Court in *AG -v- K*. This approach was reviewed by the Court of Appeal in *K -v- AG* and *AG -v- F*. We have already considered paragraph 27 of the judgment of the Court of Appeal at paragraph 16 above. In the Court of Appeal in *K -v- AG* Bailhache JA said at paragraph 32: "Similarly, although the Royal Court in the *K* case was encouraged to take the approach that there is no reason why sentencing levels in Jersey for these offences should be markedly lower in Jersey than in England and Wales, it appears to us that such an approach misses the point that this Island has a separate sentencing jurisdiction; and, as emphasised in *Wicks* and in many other cases in this Island, it is for the Jurats to settle upon the sentencing policy they consider to be right. They may wish to have regard to sentencing levels in England and Wales but there is no presumption that these should be followed in Jersey for all the reasons set out at paragraph 28 above and if the Court chooses not to adopt such sentencing levels, there is no obligation to justify why it has not done so. The Court does not start from the premise that the Guidelines provide a *prima facie* correct level of starting points or sentencing ranges and indeed the rigidity of the Guidelines, with a direct consequence in some cases of what appear to be surprisingly severe sentences, demonstrates why in this jurisdiction that is not appropriate." 22. The Court of Appeal went on to say at paragraph 39: "It was common ground before us that the Royal Court imposed in the present case a higher sentence than perhaps might have been expected on the basis of *T* or indeed previous cases. It has been recognised in the Royal Court previously that there is today a greater awareness of the damage which is done to the victims of indecent assault and rape than has hitherto been the case, and the psychological report in the case of the victim of *K* shows how applicable that general statement is on the facts of this case. This emphasises

that the Royal Court was entitled to consider the approach taken in England and Wales, as set out by the Guidelines for the purposes of considering what would be the appropriate starting point in Jersey for these particular offences." 23. We adopt and agree with this observation of the Court of Appeal. Finally, there were two other references in the judgment of the Court of Appeal which are appropriate to recite for the purpose of this judgment as they are relevant to the Court's decision. First, in respect of the contention (repeated on behalf of the Defendant in this case) that he had an expectation (albeit for a brief period after he received the Crown's conclusions) that he might be sentenced to a shorter sentence than that which the Court ultimately imposed, the Court in *K -v- AG* said this: "The Appellant K contends that his plea of guilty was entered on the expectation that he would be sentenced in accordance with the existing sentencing policy of the Royal Court for the offences charged. No case has been shown to us which is comparable on the facts, or which establishes a sentencing policy such as to justify this contention. However, even if there had been such a sentencing policy, we consider the Royal Court was right to apply the decision of the English Court of Appeal in *R v H* and others

[2012] 1 WLR 1416, when it was held that while a sentence imposed could not exceed the maximum sentence which could have been imposed by law at the time the offence was committed, the defendant should otherwise be sentenced in accordance with the sentencing regime applicable at the date of sentence and not at the date of the offence. Such a conclusion is right in principle, not least because, having regard to the need for consistency, the Court would otherwise be driven to an analysis of sentencing policy at different times when considering different cases put before it, and would have to do so in every case. That is neither right in principle nor is it practicable." 24. In the final paragraph of the judgment, the Court said: "The comments which we have made in this judgment (refusing the Attorney General's application for leave to refer a particular sentence as unduly lenient for the Court of Appeal) suggest that the Royal Court may wish to review upwards sentences for indecent assaults involving digital penetration of children in future cases." 25. The decision of *K* at first instance and the subsequent signal of the Court of Appeal in the same case was accepted by the courts of Jersey as an indication that in respect of sexual offences committed against children (i.e. persons who were under 16 at the time of the offence) there should be an upward review of sentences imposed. This has occurred and it is now been recognised that reference to cases decided prior to 2016 involving offences committed against children are now of little utility to this Court when passing sentence. In *AG -v- Jordan*

[2019] JRC 081 Commissioner Clyde-Smith, giving the judgment of the Royal Court accepted that "The sentencing landscape has changed since the Court of Appeal decision in *AG -v- K* and *F ...*" 26. At paragraph 17 the Commissioner said this: "In *Attorney General v Jalam* the Court had, by implication, sentenced on the basis that the indecent assault in that case was as serious as rape, guidance being sought from the English authorities on rape. Those authorities have now been superseded by the English Guidelines, and we accept that sentences for this kind of offence have now increased in Jersey. A higher starting point

would therefore be justified, but we bore in mind that Jalam involved abduction by someone who was essentially a stranger to the victim and violence. ...

19. It was appropriate for the prosecution to refer the Court to the Court of Appeal decision in *Attorney General v K and F* as that case gives guidance as to the extent to which the Court in Jersey can have regard to the English Guidelines and it marked a change in the sentencing landscape for sexual offences, but the Court was careful to bear in mind that both cases under review by the Court of Appeal involved children, whereas this Court was concerned with two indecent assaults involving two adults, which took place when they were in an individual relationship with the defendant." 27. Notwithstanding the new landscape for sentencing offenders who have committed sexual offences against children, there have been decisions involving sexual offences against adults where the Court has been persuaded that it is appropriate to consider the approach in *Millberry*. *Millberry* has been referred to as of assistance in a number of cases including: *AG -v- C*

[2019] JRC 074; *AG -v- Dobrin*

[2019] JRC 097 (where *Millberry* was not followed); *AG -v- Kean*

[2019] JRC 155 ; *AG -v- B*

[2020] JRC 110 and *AG -v- Fernandes*

- [2021] JRC 049 . 28. In our view there is no reason why the sentencing policy that the Royal Court has adopted in cases where a child is a victim of a sexual offence should not extend to adults. Indeed, logically the same approach should apply to all cases where the defendant is convicted of a sexual offence. In our view, those sentences should not be significantly lower than those imposed in England and Wales. 29. This does not mean that adoption of the English guidelines as a whole would be appropriate. Indeed, in respect of offences against child victims, the Jersey courts have already begun to build up a body of case law which makes reference to the English guidelines in terms of the sentence that would actually be imposed in England and Wales unnecessary in many cases. However, 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. 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. 33. The Crown identified the appropriate sentence under the Guidelines as 8 years and 3 months imprisonment taking into account aggravating and mitigating factors but not the guilty plea. The defence said that the appropriate sentence suggested by the Guidelines ought also to reflect the Defendant's absence of relevant convictions (a factor to which we hold that little weight should be given) and, more importantly, his remorse. It was argued that those factors when taken into account suggest a sentence, under the Guidelines, of 7½ years imprisonment. Both Crown and defence agreed that owing to the Defendant's failure to enter a guilty plea at the first opportunity, the reduction in sentence for a guilty plea should be 25% in this case. We agree. The Crown say that an application of the English guidelines in these circumstances would lead to a sentence of 6 years and 2 months imprisonment. (If the starting points in *Millberry -v- R* were adopted, then the Crown say the appropriate sentence would be 4 years imprisonment.) The defence submit that application of the Guidelines, depending upon the extent of the mitigation allowed for a defendant's guilty plea, results in a sentence of between 5 and 5½ years imprisonment. 34. We have considered the appropriate sentence for this case, having regard to the circumstances of this offence as set out above. We have had regard to the Sentencing Council Guidelines as we regard it proper to do so on the facts of this case. The starting point is 7½ years imprisonment. 35. The discount for guilty plea of 25% reduces the sentence to 5 years 7½ months imprisonment. We were impressed by what we regarded as a genuine expression of remorse by the Defendant in a letter that was read to the Court and noted by the probation officer. This is the principal aspect of personal mitigation although we also took into account the contents of the psychiatric report and the other letters that were provided to us. In those circumstances, the sentence imposed for the offence of rape is 5 years and 3 months imprisonment. Concluding remarks on sentence 36. In conclusion, the Jurats decided that there was no discernible or cogent reason to review upwards sentences for sexual offences committed against children (which began in 2016) but not to do the same in the case of sexual offences committed against adults. We could identify no reason why the offence of rape should attract a materially lower sentence in Jersey than it would attract in England and Wales, notwithstanding the different sentencing regimes in both jurisdictions. Nor could the

Court identify any reason why the severe psychological harm suffered by the victim in this case would have less significance in assessing the appropriate sentence in Jersey than it would in England. 37. The English guidelines have no direct application in Jersey and the Court's task must always be to settle on the sentence which is appropriate, but there is and can be no objection in principle to having regard to the contents of the Guidelines in terms of their effect on sentence. 38. Indeed, Millberry (which was often regarded as relevant hitherto) was no more than an English guideline authority for a particular period. It is certainly open to the Court to have regard to a sentencing regime for sexual offences in England on a comparative basis. That is not to say that there may not be other regimes to which the courts of Jersey could not have regard. But the Sexual Offences (Jersey) Law which was adopted and implemented subsequent to many of the cases referred to above being decided is, in many respects, particularly in terms of criminal offences created thereby, very similar to and draws upon aspects of the legislation enacted in England and Wales in 2003 and Scotland in 2009 and it would be natural for those to be the jurisdictions to which the Court would pay closest regard. The other indictments 39. There were two other indictments before the Court, the circumstances of which can be taken shortly. The second indictment 40. Whilst on bail for the offence of rape in January 2021, the Defendant and his brother had a fight in a public place (Count 1), with the Defendant punching his brother and then the two fighting in the street, with a member of the public attempting to separate them but to no avail. When the police arrived, the Defendant fled the scene on a motorbike for which he was uninsured and had no driving licence. The motorbike was in a poor state of repair. In interview, the Defendant made full admissions in relation to the driving offences but made no comment in relation to the breach of the peace. The third indictment 41. As to the third indictment in June 2021, again whilst on bail, the Defendant moved into his brother's address in breach of his bail conditions. Owing to his behaviour he was asked to leave his brother's home. In fact, the Defendant broke into his brother's property with intent to commit a crime and therein did malicious damage. He punched a hole in his brother's television screen; cut his brother's trainers; put his brother's computer into a sink and ran the tap and also damaged his gaming equipment by soaking it with water. The total cost of damage was £1,250. The Defendant's brother reported him to the police. He was arrested and admitted the offence and spoke of his brother in very aggressive terms. He pleaded guilty to all these offences at the first opportunity in the Royal Court. The Crown's conclusions were not challenged by the defence, but in one respect were reduced by the Court on the grounds of totality. The sentences imposed were as follows: First indictment Count 1 (rape) years, 3 months' imprisonment Second indictment Count 1 (breach of the peace by fighting) month imprisonment Count 2 (no driving licence) No separate penalty Count 3 (no insurance) month imprisonment consecutive Count 4 (defective breaks) No separate penalty Count 5 (defective bodywork) No separate penalty Count 6 (defective lights) No separate penalty Total on Second Indictment: 2 months imprisonment consecutive to first indictment; Third indictment Count 1 (breaking and entering with intent to commit a crime) months imprisonment consecutive (reduced from the Crown's conclusions of months

imprisonment) Count 2 (malicious damage) months imprisonment consecutive Total on Third Indictment: 7 months imprisonment consecutive to first and second indictment. Total sentence: 6 years imprisonment Notification requirements 42. As a result of his conviction, the Defendant became subject to notification requirements under the Sex Offenders (Jersey) Law 2010 . The Court ordered that the minimum period of 7 years elapse before which the Defendant may seek to have the notification requirements discharged. Restraining order 43. The Court considered its powers to make restraining orders against the Defendant under Article 5 of the Crime (Disorderly Conduct and Harassment) (Jersey) Law 2008 and ordered that the Defendant be restrained indefinitely from approaching or contacting the complainant directly or indirectly (including via social media) or going in or near to her place of work. Deportation 44. Finally, we needed to consider the question of deportation in this case. 45. The Defendant falls within the provisions of Section 3(6) of the Immigration Act 1961, extended to Jersey by virtue of the Immigration (Jersey) Order 1983 in that he is not a British citizen, he has attained the age of 17 and has been convicted of an offence punishable by imprisonment. 46. The two-part test applied by the Court when considering whether to recommend is set out in *Camacho - v- AG*

[2007] JLR 462 . There were two questions for the Court to determine: (i) Is the Defendant's continued presence detrimental to the community? All the Jurats were satisfied that the first part of the test was satisfied. The Defendant has committed a very serious sexual offence and committed further offences whilst on both police and Royal Court bail. (ii) Will the effect of deportation on the human rights of innocent persons connected with the Defendant and of the Defendant himself outweigh the fact of his detrimental presence? In other words, are the effects of deportation disproportionate having regard to the human rights of the Defendant and those connected to him? The Crown submitted that the second limb of the test was also met. The Defendant has no partner or children in the Island. He came to live here in 2015 as an adult aged 19. He is currently unemployed. Although his two brothers and sister and his grandparents live in Jersey, his parents live in Madeira. Two of the Jurats were satisfied that in those circumstances the Court should recommend deportation. However, three of the Jurats were, by a very narrow margin in the case of each Jurat, satisfied that the effect of deportation would be disproportionate and accordingly by three votes to two the Jurats decided not to make a recommendation for the Defendant's deportation. Those Jurats in favour of recommendation for deportation felt that the severity of the offence committed by the Defendant could not be outweighed by consideration of the Defendant's convention rights and those of his family. In other words, deportation would not be disproportionate. The three Jurats who felt that it would be disproportionate had regard to the Defendant's work record and the fact that we were told that his parents were shortly to move from Madeira to Jersey, in which circumstance the Defendant's entire family would be living in the Island. Authorities *Millberry -v- R*

[2002] EWCA Crim 2891 . AG -v- Dobrin and others

[2019] JRC 097. K -v- AG and AG -v-F

[2016] JCA 219 . AG -v- K

[2016] JRC 158 . AG -v- Jordan

[2019] JRC 081 . AG -v- C

[2019] JRC 074. AG -v- Kean

[2019] JRC 155 . AG -v- B

[2020] JRC 110 . AG -v- Fernandes

[2021] JRC 049 . AG -v- Godson and Crowley

[2019] JRC 091 . Sexual Offences (Jersey) Law 2018 Sex Offenders (Jersey) Law 2010 Crime (Disorderly Conduct and Harassment) (Jersey) Law 2008. Immigration (Jersey) Order 1983. Camacho -v- AG

[2007] JLR 462 . Page Last Updated: 08 Dec 2021 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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