

Judgment 40/2004

**Richard Peter Barnes – Court of Appeal
(Criminal Appeal 324) – 15 September, 2004**

Rape – applications for leave to appeal from conviction and sentence before the Royal Court – review of the requirements of a direction to a jury (or to Jurats) – no material misdirection – Jurats entitled to reach the conclusion which they did – no withholding by prosecution of any information which should have been disclosed to the defence at an earlier stage – application of the Millberry guidelines as to sentence – both applications dismissed.

IN THE COURT OF APPEAL OF GUERNSEY

The 15th day of September, 2004 before Peter David Smith, Esq. Q.C., presiding. Christopher Simon Courtenay Stephenson Clarke, Esq. Q.C. and Dame Heather Steel, D.B.E., Q.C.

THE LAW OFFICERS OF THE CROWN

V

RICHARD PETER BARNES

Appellant

In the matter of the applications by Richard Peter Barnes for leave to appeal from the conviction and sentence imposed on him by the Royal Court on 11th May 2004 and 8th June 2004;

THE COURT, having heard Advocates P T R Ferbrache and G D McKerrell for the Appellant and the Crown respectively, GAVE JUDGMENT in the terms attached hereto and DISMISSED both applications for leave to appeal;

AND THE COURT DIRECTED, for the purposes of the Proviso to Section 37(3) of the Court of Appeal (Guernsey) Law, 1961 that no part of the time during which the Appellant, when in custody, was specially treated as such, shall be disregarded in computing the sentence to which the Appellant is subject;

AND THE COURT FURTHER DIRECTED that no details be published by the media which might tend, directly or indirectly, to identify the Complainant.

K. H. TOUGH
Registrar of the Court of Appeal

WEDNESDAY 15TH SEPTEMBER 2004

COURT OF APPEAL

**RICHARD PETER BARNES
(CRIMINAL APPEAL 324)**

JUDGEMENTS DELIVERED BY SMITH, J. A.

On the applications for leave to appeal against

- 1) Conviction**
- 2) Sentence**

INTRODUCTION

1. The applicant seeks the leave of the Court of Appeal to appeal against his conviction by the Royal Court for the rape of the complainant.
2. The prosecution arose out of events which occurred on 30 and 31 May 2003. On the evening of 30 May the complainant, who lived at [premises in Guernsey known as] Cottage 1 with her fiancé, Mr. Y, went out for a meal at a restaurant in company with two friends. At the restaurant and when she returned to her home the complainant consumed alcohol to the extent that she became intoxicated. At about 1.30 a.m. on 31 May Mr. Y helped the complainant to go to bed in one of the two upstairs bedrooms. When she went to bed she was naked and lying on her right side. Mr. Y remained downstairs in the lounge.
3. The complainant's evidence at the trial was that she woke up some hours later when it was daylight lying on her back, with the applicant who she did not know on top of her and having sexual intercourse with her. According to the complainant, she asked him what the hell he was doing and pushed him off and she ran out of the room and downstairs.
4. The complainant went through the lounge in which Mr. Y was lying on the sofa and went into the bathroom, which was also on the ground floor. The evidence of the complainant and Mr. Y varied somewhat in relation to precisely what was said both before and after she went into the bathroom, but according to Mr. Y the upshot of what she said initially was that he intercepted the applicant who was on his way out of the cottage and asked him what he was doing in the cottage and whether he had had sex with what Mr. Y described as his wife. This the applicant did not deny.
5. Meanwhile the complainant, who was in the bathroom going to the toilet noticed, as she did so, the smell of semen. The police were sent for and the applicant was arrested later on the same day. Analysis of a vaginal swab taken subsequently indicated the presence of semen from the applicant.

6. The applicant's version of events was that he had been drinking on the afternoon and evening of 30 May. At about 1.00 a.m. on 31 May he was dropped off by taxi [near] Cottage 1. There was a group of people who he did not know in the swimming pool and he joined them wearing his boxer shorts. They all got out of the pool and the applicant went with him into Cottage 2 in which a party was in progress. Subsequently he was asked to leave. The applicant walked to his home, which was not far away, and changed his clothes. He then went back to the Cottages with the intention of returning to the party.
7. According to the applicant he entered Cottage 1 believing it to be Cottage 2. The front door was open. He recalled the lounge door being partly open and that there was a light on in that room, which appeared to be empty. The applicant then proceeded upstairs and into one of the bedrooms which was in darkness. He removed his clothing, except for his boxer shorts, got into bed and fell asleep.
8. Some time later the applicant awakened and saw the complainant lying naked on the bed beside him. He was lying on his right side facing her and she was on her back. His left arm was lying over the complainant's lower torso.
9. According to the applicant intimate touching began, including the complainant touching his penis and the applicant inserting his fingers into her vagina. There was kissing from time to time and the applicant performed oral sex on the complainant. They then had full sexual intercourse which concluded with the applicant withdrawing his penis as he ejaculated. The sexual activity, in which the complainant was a willing participant, lasted about twenty minutes.
10. Shortly after the applicant ejaculated, the complainant left the room. Neither of them said anything to each other at any time. The applicant then went downstairs and on his way out he was confronted by Mr. Y. According to the applicant he told Mr. Y that he did not know that the complainant was his wife (as Mr. Y described his partner).
11. Medical examinations of the complainant and the applicant did not reveal any relevant injuries.

THE SUBSTANTIVE LAW

12. The Deputy Bailiff directed the Jurats that a man commits rape:
 - (a) if he has sexual intercourse with a woman who at the time of the intercourse does not consent to it; and
 - (b) at the time he either knows that the woman does not consent to the intercourse or he is reckless as to whether she consents to it.
13. As sexual intercourse was admitted the essential issue which the Jurats had to determine was that of consent. The Deputy Bailiff went on to tell the Jurats that for the applicant to be convicted the prosecution had to prove beyond reasonable doubt:
 - (i) That the complainant did not consent to sexual intercourse; and
 - (ii) That they were sure that the applicant knew that the complainant was not consenting.

The Deputy Bailiff further directed the Jurats that if the applicant may genuinely have believed that the complainant was consenting, although in such belief he may have been mistaken, he was not guilty of rape.

If they were not sure that the applicant knew that the complainant was not consenting, then they had to go on and consider whether he was reckless as to whether she had consented. The applicant would have been reckless if he did not believe that the complainant was consenting to intercourse and could not have cared less whether she was consenting or not but pressed on regardless.

14. The accuracy of the Deputy Bailiff's direction to the Jurats on the issue of consent was not challenged on behalf of the applicant either at the trial or before this Court.

THE PROCEDURAL LAW

15. The relevant powers of the Court of Appeal are set out in Section 25(1) of the Court of Appeal (Guernsey) Law, 1961 which is in the following terms:

"The Court of Appeal on any such appeal against conviction shall allow the appeal if it thinks that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:

PROVIDED that the Court of Appeal may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

16. The limitations on the extent of these powers were explained in the decision of this Court in *Ogier and Le Noury* (1989) No. 27 (Criminal). As the headnote puts it: "... a verdict would only be set aside in the rare cases where a verdict was obviously and palpably wrong." In the more recent decision of this Court in *Law Officers of the Crown -v- Guest* (2003) Criminal Appeal No. 290, dealing with an appeal from the Magistrate's Court, the view was expressed in relation to a verdict of the Jurats that "... if the summing up is sound, the Court [of Appeal] may well not be able to interfere unless the verdict is obviously wrong." (see paragraph 12). In both cases, it was emphasized that the test in this jurisdiction is not as wide as the "unsafe or unsatisfactory" test introduced in England in 1968.
17. It is clear that the grounds relied on by the applicant all comprise questions of mixed law and fact. Accordingly, by virtue of Section 24 of the Court of Appeal (Guernsey) Law 1961 leave to appeal is required.

THE APPLICANT'S CASE

18. Advocate P. T. R. Ferbrache, who appeared for the applicant, pursued three lines of argument on his behalf. First, that the Jurats were misdirected by the Deputy Bailiff; secondly, that the verdict reached by the Jurats was such that no properly and reasonably directed tribunal could arrive at or arrive at safely; and, thirdly, that the prosecution did not make adequate or fair disclosure. We deal with each in turn.

MISDIRECTION

19. Mr. Ferbrache helpfully reminded us of the general statement of the requirements of a direction to a jury (which we accept is equally applicable to a direction to Jurats) made by Lord Hailsham L.C. in *R. -v- Lawrence* [1982] AC 510 and which is in the following terms (at p. 519):

"The purpose of a direction to a jury is not best achieved by a disquisition on jurisprudence or philosophy or a universally applicable circular tour round the area of law affected by the case. The search for universally applicable definitions is often productive of more obscurity than light. A direction is seldom improved and may be considerably damaged by copious recitations from the total content of a judge's note book. A direction to a jury should be custom built to make the jury understand their task in relation to a particular case. Of course it must include reference to the burden of proof and the respective roles of jury and judge. But it should also include a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides, and a correct statement of the inferences which the jury are entitled to draw from their particular conclusions about the primary facts."

20. Mr. Ferbrache developed his arguments under this heading by listing a number of criticisms of the Deputy Bailiff's direction to the Jurats which we summarise as follows:

- (a) The summing up was too long;
- (b) It was not a succinct summary of the facts;
- (c) The Deputy Bailiff failed to point out material inconsistencies in the prosecution case;
- (d) The Deputy Bailiff failed to correct appropriately a mistake he made in stating that two police officers had formed the view that the complainant had been involved in what they referred to as a sexual assault;
- (e) The Deputy Bailiff failed to sum up adequately the evidence that could have amounted to a belief on the part of the applicant of consent on the part of the complainant;
- (f) It might have been appropriate for the Deputy Bailiff to have put specific questions to the Jurats on each material component of the charge of rape;
- (g) The Jurats ought to have been asked to consider the evidence in the light of the inconsistencies in the prosecution case and the lack of any independent evidence supporting the complainant's allegation that she did not consent.

21. As to (a) and (b) we think we should point out that Lord Hailsham's remarks are not to be read as if they are comprised in legislation or as laying down a rigid template for the direction of Jurats in criminal cases. Rather they give guidance as to the objectives the trial judge must seek to achieve, leaving it to the trial judge's discretion as to how best to achieve them in the circumstances of the particular case. In the instant case it is true that

the summing up was quite long but, although inevitably there were references to what might be called subsidiary evidence, nevertheless the overwhelming bulk of the charge to the Jurats consisted of a very fair statement of the evidence pertaining to the charge of rape and the inferences that could be drawn from it. We do not consider that this necessary length of detail could even begin to amount to a miscarriage of justice. In this context, to amount to such a miscarriage there would have to be, for example, reason to believe that because of its length or prolixity the direction had somehow so confused or wearied the Jurats that their verdict could not be relied on. There is absolutely no basis whatsoever for any such suggestion in this case.

22. As to (d) it seems that technically there was a misdirection in that the Deputy Bailiff did indeed tell the Jurats that in statements submitted in evidence to police officers had stated that at about 6.50 a.m. on the morning of the alleged rape the complainant appeared to have been involved in what they referred to as a sexual assault whereas it appears that, unknown to the Deputy Bailiff, this comment had been edited out of the versions of the statements before the court. However, the mistake was immediately drawn to the Deputy Bailiff's attention by Mr. Ferbrache and corrected by him. He told the Jurats that they must rely on the version of each statement that they had before them. The mistake could not possibly have prejudiced the applicant significantly and could not conceivably have led to a miscarriage of justice.
23. As to (f), we note that in the course of consulting the advocates for the parties as to the terms of his charge, the Deputy Bailiff made explicit reference to posing questions to the Jurats, indicating that he did not propose to take this course. This passed without protest or comment from Mr. Ferbrache. In our judgment there was absolutely no reason why that procedure should have been adopted in the instant case. The Deputy Bailiff not only carefully explained the elements, including alternatives, of the offence of rape to the Jurats but also furnished them at the end of his charge with a written statement of the same which he had previously shown to counsel, and neither had demurred. In our opinion, specific questions would only have served to confuse rather than illuminate and the Deputy Bailiff was right to reject this option.
24. We deal with (c), (e) and (f) together as they all touch on the issue at the core of this case, that of consent. Mr. Ferbrache drew attention to facts and factors which, he argued, were either indicative of consent or could have engendered in the applicant the belief that the complainant was consenting to intercourse with the applicant and to inconsistencies in the prosecution evidence which were to the same effect. He contended that in his summing up the Deputy Bailiff did not refer adequately to these matters.
25. Insofar as Mr. Ferbrache's argument related to matters asserted by the applicant we do not accept that the Deputy Bailiff's charge was in any manner inadequate. It is true that the method of reference chosen by the Deputy Bailiff was to draw the Jurats' attention to what was put in cross-examination on the applicant's behalf, his statements to the police in interview, his answers given in the witness box and the terms of Mr. Ferbrache's closing speech to the Jurats. But we do not regard this as an unfair or deficient approach in this particular case. The important thing is that the applicant's case was laid in full before the Jurats by the Deputy Bailiff. Mr. Ferbrache complained that the Deputy Bailiff's summing up of the applicant's evidence was unduly brief. But we are satisfied that further elaboration was unnecessary and could only have involved the repetition of points already made. Mr. Ferbrache also complained of the Deputy Bailiff referring to the applicant as gate crashing and to his "curious, bizarre or outrageous conduct." But those observations were entirely fair comment on behaviour to which the applicant had

admitted and were made in the context of reminding the Jurats that that was not the conduct for which the applicant was on trial.

26. Mr. Ferbrache singled out two factors which, he suggested, ought to have been the subject of direction from the Deputy Bailiff at the point in the summing up at which the definition of rape was (as he put it) "still clear in their minds." These factors were the comments that the complainant's partner, Mr. Y, alleged were made by her to him shortly after the alleged rape and were to the effect that "I thought it was you" and "Initially he was spooning me."
27. In cross-examination the complainant explained that she had "I thought it was you" because when she initially awoke and felt somebody on top of her she thought it was her partner, Mr. Y - as she put it "There was nobody else it would have been." In his closing speech to the Jurats Mr. Ferbrache challenged this assertion. He pointed out that there was evidence from Mr. Y that he had never had sex with the complainant when she was asleep, that he would have wakened her up first and that the couple very rarely had sex in the morning and, if it did take place, it would have been when Mr. Y had just finished a night shift usually between 8.30 and 9.00 in the morning.
28. The Deputy Bailiff referred to this point in his summing up in the context of reiterating the defence case as outlined by Mr. Ferbrache in his closing speech. He did not expressly link it to the definition of rape. However, the major part of what the Deputy Bailiff said to the Jurats related, directly or indirectly, to that definition which the Deputy Bailiff not only outlined carefully to the Jurats in the course of his charge but also incorporated it in the document furnished to them to which we have already referred. In our judgment, the significance and relevance of the point was dealt with more than adequately.
29. As to the allegation by Mr. Y that the complainant told him shortly after the alleged rape that the applicant had been spooning her we should first explain what the expression "spooning" meant to the complainant and her partner. According to them, spooning meant both of them lying on their same side one behind the other and cuddling. Although, as we have already stated, Mr. Y asserted in evidence that the complainant had told him this had happened and, indeed, that in another brief conversation at about the same time that the applicant had been cuddling her, she denied not only that there had been any spooning or cuddling but also that she had ever said that there was. The complainant did say in the witness box that she had a vague memory of somebody lying behind her in the bed, but her admission did not go any further than that.
30. The significance of the spooning and/or cuddling was that, if there had been any such activity, for intercourse to have taken place subsequently, it was arguable that the complainant would have to have made a conscious movement so extensive that she would inevitably have registered that the person in bed with her was not her partner.
31. Once again, the Deputy Bailiff did not expressly refer to the definition of rape when dealing with the spooning/cuddling allegations. But, once again, we do not consider that the summing up can be criticised in this respect. The defence arguments on the point were put in detail to the Jurats by the Deputy Bailiff. Those arguments were clearly referable to the consent components of the definition of rape which, as we have said, were the subject of both careful oral and written directions. It was open to the Jurats to prefer the complainant's evidence on this point particularly as the applicant, who described the alleged sexual activity between himself and the complainant in a fair amount of detail, at no time specifically alleged that spooning or even cuddling had ever occurred.

32. Turning to inconsistencies, Mr. Ferbrache sought to contrast Mr. Y's statement, to which we have already referred, to the effect that he had never had sex with the complainant when she was asleep and that he would have wakened her up first, together with the complainant's statement that "I thought it was you", with evidence given by Dr. Catherine Margaret Patterson, a consultant in Community Gynaecology and Reproductive Health Care, who was called as an expert witness on behalf of the prosecution. Her evidence was to the effect that if a woman was moving from sleep to sexual intercourse she might not really register what was happening in an environment in which it would be assumed that the other participant was the woman's partner. Mr. Ferbrache sought to argue that this could not have happened in the instant case as Mr. Y had said he never had sex with the complainant when she was asleep and, therefore, that when sexual activity started she would not have assumed that he was the other participant.
33. Insofar as there was any inconsistency between the evidence of Dr. Patterson and Mr. Y and the complainant, it was placed before the Jurats and, clearly, they did not consider that it, whether by itself or taken with anything else, gave rise to reasonable doubt as to the applicant's guilt. This was very much an issue for the Jurats as the tribunal of fact. As to the Deputy Bailiff's direction, it is true that he dealt separately with the evidence of Dr. Patterson and what he called the conflict between the complainant's evidence that she thought the person on top of her was her partner and her partner's evidence that sex in the morning was exceptional. However, in our judgment the point made by Mr. Ferbrache must have been obvious to the Jurats and accordingly we do not consider that the way in which the Deputy Bailiff handled this evidence amounted to a misdirection.
34. As to the lack of independent evidence supporting the prosecution case, we record that the Deputy Bailiff gave the Jurats a specific and clear warning as to the need for special caution before acting on the unsupported evidence of the complainant.
35. It follows from the above that we are of the clear opinion that there was no material misdirection of the Jurats by the Deputy Bailiff in the instant case.

UNREASONABLE VERDICT

36. Mr. Ferbrache argued that the verdict of the Jurats was so unreasonable that it would be unsafe for the same to be upheld. In our judgment, this is not the test. We have already referred, above, to the cases of *Ogier and Le Noury and Guest*. The test, as articulated in the judgments in those cases, is whether the verdict was obviously wrong.
37. Against this background we turn to the points made by Mr. Ferbrache under this heading. He began by referring to the alleged inconsistencies with which we have already dealt above and went on to list a number of other matters. These included further alleged inconsistencies and discrepancies between and within the evidence of the complainant and Mr. Y; the consistency of the applicant's evidence with his police interviews which took place shortly after the alleged rape; the view of Mr. Robert Henry Haskins, a Consultant Gynaecologist called to give expert evidence on behalf of the defence, that the intercourse alleged was more likely than not to have been consensual; and the delay in the trial caused by the engagement of Dr. Patterson by the prosecution in response to the disclosure by the defence of Mr. Haskins' report.
38. As to the inconsistencies and discrepancies to which Mr. Ferbrache referred us we do not consider it necessary for us to deal with them in detail. Inconsistencies and

discrepancies in the evidence adduced in support of a prosecution are commonplace. If an appeal against conviction had to be allowed in every case in which there were inconsistencies and discrepancies precious few offenders would remain convicted. Clearly, there can be cases in which the prosecution evidence is so riddled with inconsistencies and discrepancies that the appellate court feels compelled to intervene. But that is not the situation here. All of the matters raised by Mr. Ferbrache were put before the Jurats for their consideration and they were given an adequate direction by the Deputy Bailiff. It is apparent that neither individually nor cumulatively were they sufficient to raise a reasonable doubt. This was a conclusion the Jurats were well entitled to reach and there is no basis on which this Court could contemplate repudiating it.

39. As to the applicant's consistency we must make the obvious point that consistency of itself does not necessarily entitle an accused person to an acquittal. The consistency of what the applicant said in court with what he had told the police was obvious to the Jurats yet, clearly, they did not consider it sufficient, whether by itself or in conjunction with anything else, to raise a reasonable doubt.
40. As to Mr. Haskin's opinion, it is clear that he was sceptical as to how, even on the complainant's version of events, sexual intercourse could have taken place without her waking at an earlier stage than that to which she admitted and realising at that earlier stage that the person in bed with her was not her partner. Dr. Patterson, on the other hand, thought that the complainant's awakening in a setting in which she would have assumed initially that the person in bed with her was her partner was not inconsistent with her not consenting to intercourse with the applicant. This difference of view was put fairly and squarely before the Jurats and it was open to them to have preferred the view of Dr. Patterson.
41. As to the delay occasioned by the prosecution commissioning a report from Dr. Patterson, Mr. Ferbrache argued that although Mr. Haskins' report was only made available to the prosecution on 15 January 2004, its contents ought to have been anticipated by the prosecution (they had been informed in October 2003 that the defence were seeking expert evidence) and Dr. Patterson, or an equivalent expert, engaged sufficiently early for the trial originally fixed for 9 February 2004 to have taken place. The adjournment sought and granted to the prosecution resulted in a delay which was prejudicial to the defence. The case depended crucially on the recollection of witnesses and the delay until May 2004 must have impaired their capacity to remember events which took place at the end of May 2003.
42. In our judgment, the Law Officers are not to be criticised for waiting to see what, if anything, was produced by way of expert evidence on behalf of the defence. Furthermore, given the terms of Mr. Haskins' evidence it was entirely proper for the prosecution to have sought its own expert evidence once Mr. Haskins' report had been received. The cause of the delay, therefore, was not any failure on the part of the prosecution but rather the delivery of Mr. Haskins' report so close in time to the proposed date of trial that an adjournment was an inevitable consequence.
43. Obviously, it is desirable that criminal cases, particularly those in which the recollection of witnesses is important, are brought to trial as quickly as possible. However, there is absolutely no indication in this case that the adjournment from February to May 2004 had any material prejudicial effect on the applicant's defence. Specifically, he did not protest that he had any significant additional difficulty in remembering the events on the night in question caused by the delay and Mr. Ferbrache made no submission to the Deputy Bailiff in relation to any such prejudice in the course of the trial.

44. In our opinion, there is absolutely no question of the adjournment of the trial having resulted in a miscarriage of justice.

DISCLOSURE

45. Mr. Ferbrache complained that he had only been informed of certain information emanating from Mr. Y, the complainant's partner, after the evidence had been completed. He contended that this evidence (to the effect that Mr. Y would wake the complainant up if she was asleep if he wanted to have intercourse and that they would rarely have had sex in the morning and, if it did take place, it would be when he had just finished a night shift usually between 8.30 and 9.00 a.m.) reflected on the complainant's credibility (i.e., her allegation that she initially thought that the man on top of her was Mr. Y).
46. Crown Advocate G. D. McKerrell, who appeared for the Law Officers, explained to us in some detail how this information came to be incorporated in a statement made by Mr. Y in the course of the trial and after he had left the witness box and which was admitted in evidence by agreement between the parties. It is quite clear that there was no withholding by the prosecution of any information which ought to have been disclosed to the defence at an earlier stage. However, more importantly, it is equally clear that the production and introduction into evidence of the statement was in no way prejudicial to the defence. Indeed, not only was it put in evidence with Mr. Ferbrache's consent but it patently comprised material which could only have been helpful to the defence case. In our judgment what happened has no relevance whatsoever to the function of this Court as set out in Section 25(1) of the Court of Appeal Law.

CONCLUSION

47. Leave to appeal against conviction is refused.

RICHARD PETER BARNES -v- LAW OFFICERS OF THE CROWN

1. This is an application for leave to appeal against a sentence of six years imprisonment imposed on the applicant in respect of his conviction on one count of rape.
2. The circumstances surrounding the rape are set out in the judgment of this Court on the applicant's unsuccessful application for leave to appeal against his conviction. Suffice to say that he entered the home of the complainant uninvited in the early hours of the morning, entered her upstairs bedroom, undressed to his boxer shorts, climbed into the bed in which the complainant was sleeping and unknown to her (she having gone to bed perhaps an hour earlier because of her intoxicated condition leaving her fiancé, who shared her home, downstairs) and some hours later raped the complainant when she lay sleeping.
3. In reaching the figure of six years the Royal Court noted the decision of the English Court of Appeal in *Millberry and Others -v- R* [2003] 2 Cr App R (S) 31, in which that Court promulgated revised guidelines for sentencing in rape cases in the light of advice furnished to it by the Sentencing Advisory Panel. In explaining the sentence, the Deputy Bailiff stated that the Royal Court had derived considerable assistance from the *Millberry* guidelines. It concluded when an offender gains uninvited access to a victim's home, proceeds to the victim's bedroom and there commits the act of rape, such conduct is to be regarded as an aggravating factor, particularly where the victim has had no previous relationship with the offender who was a complete stranger. Accordingly, a starting point of seven years was selected, reduced by one year for mitigation.
4. Advocate P. T. R. Ferbrache, who appeared for the applicant, and to whom we are indebted for his clear and concise arguments, contended that the starting point, derived from *Millberry*, ought to have been five years and the sentence four years imprisonment after allowing one year for mitigation.
5. Mr. Ferbrache sought to show that the two factors mentioned by the Deputy Bailiff - uninvited access to the complainant's home and the offender being a stranger - were not factors justifying a higher starting point. He conceded that in *Millberry* one of the aggravating factors justifying a starting point of higher than five years is that "... the offender has broken into or otherwise gained access to the place where the victim is living (mentioned in [*R. -v- Billam* [1986] 8 Cr App R (S) 48] as a factor attracting the eight year starting point)". But he argued that it is implicit in *Millberry* that the entry must be coupled with an intent to commit rape or an intent to commit an offence.
6. While we accept that the applicant fell to be sentenced on the basis that he had no intention of committing a crime of any sort when he entered the complainant's home, we do not accept that his uninvited entry should not be taken into account in determining the starting point. The position, as far as the complainant is concerned, is that the security of her home was violated and a grave offence was committed against her by an intruder into her own bedroom, in which she would have been accustomed to feel and was entitled to continue to feel safe, particularly when she slept. Thus, in the circumstances of this case and as far as the complainant was and is concerned it matters relatively little that the applicant did not have to break a lock to gain access.
7. The significance of this issue is reinforced when one looks at the Victim Impact Assessment on the complainant. Since the rape, she has changed her bedroom. When

her partner is working nightshifts she finds it difficult to sleep and keeps all the lights on. She feels scared of men generally and, because of this, has changed her job to one having less contact with men and which is less well paid. The complainant's sex life with her partner has been impaired and her relationship with him has been affected.

8. In our opinion the factors to which we have adverted would themselves have justified a seven year starting point. As to Mr. Ferbrache's point that according to *Millberry* the fact that the applicant was a stranger is not an aggravating factor, we interpret the position the other way round - that the perpetrator of "relationship rape" or "acquaintance rape" is, generally speaking, to be treated no more leniently than a stranger. However, in the circumstances of this case the fact that the perpetrator was a stranger was clearly a relevant factor to be taken into account. This is because rape in the same circumstances by an acquaintance or someone in a relationship with the complainant may not have involved the significant intrusive element which continues to affect the complainant in, in particular, the enjoyment of her home.
9. Leave to appeal against sentence is refused.