

Judgment 4/2012

**Filipe Nelson Burton v Law Officers of the
Crown – Court of Appeal Criminal File
No 425
- 6th February 2012**

Appeal against sentence – youth detention for life and life imprisonment – practical restrictions on the enforcement of sentence following restricted transfer of prisoner to England – determinate sentences – appeal allowed – sentence reduced to 12 years.

IN THE COURT OF APPEAL OF GUERNSEY

The 13th day of December, 2011 before Sir Geoffrey Robert Rowland, Bailiff, presiding, Dame Heather Steel, DBE, Sir de Vic Carey, Michael Scott Jones QC and Nigel Peter Pleming QC

FILIPE NELSON BURTON

(Appellant)

-v-

THE LAW OFFICERS OF THE CROWN

(Respondent)

In the matter of the appeal, with leave, by the Appellant against the sentence of youth detention for life and life imprisonment, imposed by the Royal Court on 26th day of May 2011.

THE COURT, having heard Advocate A Ayres for the Appellant and Advocate G D McKerrell for the Crown thereon, ALLOWED the appeal, and GAVE JUDGMENT in the attached terms.

J TORODE
Registrar of the Court of Appeal

IN THE COURT OF APPEAL OF GUERNSEY

12th – 14th December 2011

Before:

The Bailiff (President);
Dame Heather Steel D.B.E;
Sir de Vic Carey;
Michael Scott Jones Q.C., and;
Nigel Pleming Q.C.
Judges of Appeal

Between:

FILIPE NELSON BURTON

(Appellant)

v

LAW OFFICERS OF THE CROWN

Appeal from the sentences imposed by the Royal Court on 26th May, 2011 on the charges of:

1 count of: Rape

1 count of: Attempted Rape

1 count of: Attempted Rape

Judgment handed down: 6th February 2012

Advocate A J Ayres for the Appellant
Crown Advocate McKerrell

This is the Judgment of the Court

Authorities & Texts referred to: -

Millberry and Others v R [2003] 2 Cr App R (S) 31

R v Billam [1968] 8 Cr App R (S) 48

Law Officers of the Crown v Barnes CA 324 15th September 2004

R v Frost [2006] EWCA Crim 1798

R v Hawkins (1990) 12 Cr App R (S) 161

R v Cross [2008] EWCA Crim 1194

Van Troogenbroek v Belgium (1982) 4 EHRR 443

Weeks v UK (1988) 10 EHRR 293

Thyme, Wilson and Gunnell v UK (1991) 13 EHRR 666

Stafford v UK (2002) 35 EHRR 32

Von Burlow v UK (2004) 39 EHRR 16
R v Parole Board, ex parte MacNeil (The Times, April 18th 2001)
Oldham v UK [2002]Crim L R 1011
R (Spence) v Secretary of State for the Home Department (2003) 147 S.J. 660 CA
R v Wheaton [2005] 1 Cr App R (S) 425
R v Hobstaff (Anthony) (1993) 14 Cr App R (S) 632
R v Perks (James Benjamin) [2001] 1 Cr App R (S) 6
R v E, R v K and R v G A G's Refs nos 91, 119 and 120 of 2002
Law Officers of the Crown v Tilley 1973 (Criminal Appeal No 7)
Law Officers of the Crown v Heywood 1971 (Criminal Appeal No 6) and Tilley 1973 (Criminal Appeal No 7)
Law Officers of the Crown v Richards (18th April 2002 CA)
Law Officers of the Crown v Westmore (11th April 2002 RC 3rd July 2002 CA)

JUDGMENT

THE PRESIDENT:

This is the judgment of the Court

Introduction

1. On 17th March 2011 in the Royal Court the Appellant, who was aged 19 now 20, and was aged 18 at the time of the offences, pleaded guilty to an indictment containing the following three counts.

Count 1 Rape of Miss A on 17th July 2010;
Count 2 Attempted rape of Miss B on 31st July 2010;
Count 3 Attempted rape of Miss C on 28th August 2010.

2. On 26th May he was sentenced by the Royal Court, Judge Finch and nine Jurats, to Youth Detention for life/life imprisonment on each count concurrently.
3. He appealed against that sentence by leave of the single judge.
4. On 14th December 2011 we allowed the appeal against sentence, quashed the life sentences, and imposed a determinate Extended Sentence of Youth Detention/imprisonment on each count concurrently. The custodial term of that sentence is to be twelve years with an Extended Sentence Licence for a period of six years. In this judgment we give our reasons for that decision.

The Facts

Count One

5. Miss A, a final year student in London, was resident in Guernsey. On the evening of Friday 16th July 2010, after a meal at home to celebrate a birthday with family and friends, she left her home at about 11pm with two friends to walk the short distance into town to meet a group of friends. She left the Folies D'Amour Nightclub in St Peter Port with friends shortly after 2am on Saturday 17th July. She described her condition as happily tipsy, steady on her feet and fully aware of what was going on around her. She refused a lift from her friends, and said she would walk home alone as she usually did after a night out. Her route took her into the Pollet. She looked up Forest Lane, a public thoroughfare, and seeing that there was no one in

the lane decided to take a short cut and walk home that way.

6. As she approached the top of the lane, adjacent to the car park of the Christian Science Centre, she suddenly felt a hand over her mouth and an arm round her waist which pinned her arms against her sides so that she was unable to hit out or turn. She began to struggle and screamed against her attacker's hand. She was taken to the ground quite quickly and hard, onto her back and her legs were pushed apart. She screamed and shouted in terror and struggled violently. Her dress had ridden up and her attacker grabbed the side of her pants which he pulled and ripped off despite her attempts to prevent him. She screamed as loudly as she could and her head was forced to the right and into full contact with the road surface. She felt first a finger then what she described as a semi-erect penis inserted into her vagina. She was petrified and disgusted and to make him let her go she repeatedly screamed 'you've come now, get off me'. He then ran off. Her description of the attack included that he seemed to know what he was doing, and that she got the impression that he had done this before. She described the rape as 'all very slick', 'every move ensured that he could not be seen'.
7. She collected her belongings which were strewn around the area and walked down a few steps in an attempt to find her mobile phone and sought help in finding it from a witness to whom she complained that she had been raped. The witness described Miss A as appearing very distraught. Despite being encouraged to report the incident to the police Miss A wanted to go home, and the witness walked her home having obtained her name and put her number into Miss A's phone.
8. At home she went to bed and at about 10pm that evening she had a shower and noticed a number of grazes and aches to her body. Shortly afterwards, having packed ready to return to the UK the next day, she started to cry and told her father that she had been attacked. The matter was then reported to the police.
9. She was medically examined and a number of injuries noted.

Count Two

10. On the evening of Friday 30th July 2010, Miss B had attended a ball at the Beau Sejour Leisure Centre during which she had a three course meal and consumed three glasses of white wine. From there she went with friends to the Folies D'Amour Nightclub leaving shortly before 2am on 31st July. At the club she drank two Malibu and Cokes and, on leaving, she purchased some food from a fast food take-away. She walked alone along the North Plantation towards the Quay and followed a route which took her into Cambridge Park Road.
11. As she walked along Cambridge Park Road she became aware of a male walking nearby who made her feel uncomfortable and uneasy and as she continued to walk she became aware that he was following her. She turned and told him she did not like people following her. She entered a small public car park within the public recreation area of Beau Sejour heading for a surfaced pathway. He then walked past her and turned right into the trees. It was dark, the only light was moonlight, and Miss B was nervous so she telephoned her partner to ask him to come and pick her up. The call was made at 02.11am, and she continued to walk whilst speaking to her boyfriend. Suddenly the male came from her right side and took her to the ground. She described that as 'in a controlled manner so that it did not hurt when I landed'.

She was on the grass and he was on top of her. She described shouting and screaming at him to get off her but he did not. His head was stuck into her stomach so that she could not see his face and she dropped her mobile phone.

12. Using both his hands he pulled up her dress. She was fighting and screaming at him to get off her. He said nothing and used his right hand to pull violently at her pants. She fought as hard as she could, screaming uncontrollably and punching out at him, fearing that if she did not he would rape her. He then lifted his head from her stomach and bit her left ear. He was still grabbing at her pants, then he suddenly got up and ran towards Mont Arrive. She ran towards Beau Sejour leaving her bag and shoes on the floor. She was distressed and hysterical and reconnected a call to her boyfriend. As she ran she was stopped by a police officer and told him what had happened.
13. She was found to have sustained a quarter inch cut to her left ear and a small scratch to her inner thigh together with a few grazes to her arms and legs.
14. She described her attacker as best she could, as it had been dark and he had not spoken. Witnesses had heard the screams and notified the police. A gentleman had shouted 'get off her' from his bedroom window.

Count Three

15. At about 9.40 pm on Friday 27th August 2010 Miss C went into St. Peter Port to meet a group of friends. They went to the Laska Cocktail Bar then on to the Folies D'Amour Nightclub at about 12.45 am on Saturday 28th August. She was, by her own admission, quite tipsy when she left at approximately 2.15 am. She walked alone along the North Plantation towards Le Tourgand, and was recorded on CCTV as she walked towards Forest Lane at approximately 2.23 am.
16. As she approached the top of Forest Lane her arms were folded and she felt someone take hold of her right upper arm. She pulled back and swore at him and a struggle ensued as she tried to pull away. He responded by swearing in what she recalls as a foreign accent. She recalled standing in the grounds of the Christian Science Centre with her attacker in front of her, still holding her arm. He then punched her in the face with force and she remembers being on the ground on her back with her attacker on top of her. He pulled down her jeans to the top of her thighs. She was aware of his penis being exposed, but she then passed out. She next recalled crawling around in the car park, crying, with her trousers round her ankles and fearing her attacker would return.
17. Two male witnesses walking up Forest Lane heard a female screaming and were then passed by a male running down towards them. They found Miss C in the car park, sitting on the ground with her arms round her knees which were up to her chest. Her trousers were round her knees, and her belongings scattered around her. She was crying and visibly shaking. She said she had been attacked but rejected their offer to contact the police. She asked to be left alone.
18. At 2.41am she phoned her boyfriend, said she had been attacked, and asked him to come and get her. She then phoned a friend to say that she had been attacked. Further calls were made

and in one she said that she was scared, 'I don't know if he is still here'. She was found by her friend and boyfriend in the same state as the witnesses had left her. She was taken to the police station.

19. At 7.30 am the same morning she was medically examined and various injuries recorded. The scene was examined and a silver neck chain recovered. A stain suspected to be semen was discovered.

The Appellant

20. A major police enquiry was launched and CCTV footage examined. At 2.45pm on 31st August 2010 the Appellant, then aged 18, was arrested at a building site in St. Peter Port on suspicion of rape and was cautioned, to which he made no reply. The Appellant was medically examined and a DNA buccal swab was obtained. A large quantity of clothing was recovered from his home including a yellow tee shirt identified from the CCTV coverage.
21. The Appellant was interviewed in relation to Count 3. He denied the allegation, agreed that the silver chain could be his and that the yellow tee shirt was his. When shown CCTV footage of Miss C he said he did not recognise her. He identified three males shown walking towards Forest Lane at 2.25am on 28th August as his cousin, his uncle and himself. He did not think it was he who was photographed running from the direction of Forest Lane.
22. He denied both the rape of Miss A and the attempted rape of Miss B.
23. Forensic evidence showed that a high vaginal swab from Miss A was matched to the Appellant's DNA and contact blood staining from Miss B's shoulder and dress were matched and found to be attributable to the Appellant. Blood on Miss B's stocking indicated contact with wet blood attributable to the Appellant. The DNA from Miss B's ear swab indicated the presence of saliva as would be expected if the appellant had bitten her ear, and cellular material from Miss B's dress and knickers was what would be expected if the Appellant had had contact with these areas. Semen found on the clothing of Miss C and at the scene of the incident matched the profile of the Appellant. Blood staining on the Appellant's jeans and tee shirt matched the DNA profile of Miss C indicating that the Appellant had been in contact with her after she had begun to bleed.
24. The Appellant has been in custody since his arrest.

The course of the proceedings

25. The Appellant was committed to the Royal Court on 1st December 2010.
26. On 17th March 2011, the Appellant appeared before the Royal Court and pleaded guilty to all 3 counts.
27. The sentencing hearing was fixed for 26th May 2011 when the Court considered a Social Enquiry Report dated 20th May 2011 prepared by Gemma Greening Probation Officer, a

Psychological Report from David J Briggs, Chartered Forensic Psychologist dated 16th May 2011 and was addressed in mitigation by Advocate Paul Lockwood (then representing the Appellant). We have noted the point made by Mr Lockwood that the reason the Appellant had not pleaded guilty before that date was because there were concerns as to his fitness to plead.

The sentencing process in Guernsey

28. This is the first time in this Court's history where the composition has included two members with extensive experience of sitting as judges of the Royal Court. In those circumstances, an opportunity has been provided to describe the constitution and composition of the Royal Court when sitting to try cases committed to it on indictment. This will be familiar territory to some, but may not be to other readers of this judgment.
29. The Court is composed of the Bailiff, or his Deputy or one of his Lieutenants (including the Judge of the Royal Court), and between seven and twelve Jurats. Since the coming into force of section 6(2)(a) of the Royal Court (Miscellaneous Reform Provisions) Law 1950, which provided that thenceforth the Bailiff should be sole judge of Law, the procedure of the Royal Court following a plea of not guilty is that the presiding judge has the duty to direct the Jurats on the law and summarise the evidence they have heard in a similar manner to that adopted when directing a jury in England and Wales. The presiding judge must also ensure that Jurats are not exposed to evidence or legal submissions which the Jurats, as judges of fact, should not be hearing. [See decisions of this Court in *Heywood 1971 (Criminal Appeal No 6)* and *Tilley 1973 (Criminal Appeal No 7)*]
30. Once the Jurats have delivered their verdict, their role changes dramatically. Their continued involvement is governed by section 8(1) of the same Law, which reads:

“Where a verdict of guilty is recorded against any person, the Bailiff and Jurats of the Royal Court shall, unless the punishment for the offence is fixed by law, confer in private as to the punishment to be imposed and thereafter the Bailiff shall announce the sentence of the Court and shall sentence the accused accordingly.”

By this stage the Jurats will have heard all relevant background information concerning the offender, and the offending, necessary to assist the Court in determining the appropriate sentence. The prosecuting counsel will have identified the Court's sentencing options and counsel for the accused will draw attention to previous sentencing decisions in Guernsey and elsewhere, which are deemed appropriate for the Court's consideration.

31. Sentencing is a collegiate exercise and the members of the court will endeavour to reach a conclusion acceptable to all those sitting, albeit that unbeknown to anyone outside, the differences in the views of the individual Jurats may not have been reconcilable in which case the decision announced will, without its being identified as such, represent only the views of the majority. This procedure contrasts with the situation where guilt is in issue. There, whilst the Jurats confer (and sometimes confer for some time) there is no obligation to seek unanimity and the senior Jurat will announce the collective decisions of the Jurats as to guilt or otherwise, recording the number of Jurats voting in each direction. In sentencing matters, as the statute says, the members of the court confer in private and so there is no entitlement to

expect, save in an exceptional case, that there will be any formal directions on sentence from the presiding judge in open court. But that does not mean that counsel will not be making full submissions on sentencing options particularly where, as is clearly the position here, the Court is faced with the novel situation of the possible imposition of a life sentence.

32. In view of the collegiate nature of the sentencing process individual Jurats are free to ask questions (preferably through the presiding judge) on any point that they feel requires clarification. Although under section 8(2) of the same law the Law Officers were relieved of their duty to offer “conclusions” as to punishment there is still a duty on counsel for the Crown to assist the Court when asked as to issues of sentence and procedures for processing prisoners after sentence.
33. As a result of the way in which the criminal jurisdiction of the Royal Court has evolved there is perhaps a greater community involvement in the sentencing process than in other jurisdictions. The Jurats are elected by the States of Election for their independence of character and their disinterestedness. The people of Guernsey are rightly jealous of this independence.

The Constitutional Position

34. The degree of autonomy enjoyed by Guernsey as a Crown Dependency not forming part of the United Kingdom is well recognised. Subject to the approval of Her Majesty in Council the States of Guernsey can legislate as it deems appropriate in matters of criminal law and procedure provided such proposals do not infringe treaty obligations that Her Majesty’s Government has undertaken on its behalf. In recent years the close relationship that has developed between the Islands and the United Kingdom has led to much of the modern insular legislation in criminal matters mirroring that passed at Westminster. The States has legislated as it has felt appropriate to meet the needs of Guernsey taking particular account of the very small size of the jurisdiction. There has been no presumption in favour of following England and Wales. A recent example of the Island looking elsewhere for guidance is to be seen in the establishment of the system of Children’s Hearings on the lines of those that have developed in Scotland over the last 40 years (see the Children (Guernsey and Alderney) Law 2008).
35. In the same way the Royal Court can rightly claim that in matters of criminal sentencing it is not bound by English sentencing decisions and that it exercises its own discretion in determining an appropriate disposal in criminal matters coming before it. One frequently reads in the sentencing remarks of the Royal Court, as one does in this case, words to that effect. In other cases one sees the Royal Court adopting English sentencing practice without apparent demur. This can create a tension at the level of the the appellate court. If the Royal Court is intending to establish its own sentencing policy for a particular pattern of offending it must clearly state what that policy is and ideally identify bands for sentences and what it will regard as aggravating and mitigating features that it will take into account. As the only court having jurisdiction to impose sentences in excess of two years imprisonment the Royal Court is in a special position as a court of first instance to develop the level of sentences that it considers appropriate for offending in this Island. It is important that the Royal Court expresses its reasoning clearly in a way that whatever it concludes is comprehensible to the public at large and seen to be fair and appropriate by this Court when reviewing its decisions on appeal.
36. The Royal Court has done this successfully in the case of drug offences, although it took some years before the stance of that Court had been clarified as it was in *Westmore* (11th April 2002 RC 3rd July 2002 CA) to the extent that this Court in *Richards* (18th April 2002 CA) was able

subject to a few modifications to endorse it. We also acknowledge that the Royal Court will set itself no easy task if it wishes to act in isolation of thinking elsewhere particularly having regard the relative infrequency of certain categories of offending.

37. We come back to concluding that in many areas the Royal Court will after reflection wish to continue to pay high regard to guidance that has been developed in England and Wales. We acknowledge the detailed work that has been put into sentencing matters in England and Wales since the establishment of the Sentencing Guidelines Council and the promulgation of guidelines that have been refined in judgments of the Court of Criminal Appeal. As will become apparent from what we say later our view is that notwithstanding our recognition of the Royal Court's autonomous position this is a case where the Royal Court should have found itself considerably assisted by the English experience as did the Royal Court in *Law Officers v Barnes* (15th September 2004).

Grounds of Appeal and Discussion

38. Advocate Ayres took over representation of the Appellant from Advocate Lockwood and produced a very full and helpful skeleton. His main contention was that the life sentence was wrong in principle and/or manifestly excessive. There are twelve grounds of Appeal, which are now separately set out and considered.

Ground One

39. The Appellant submits that the sentence of Youth Detention for life/life imprisonment for offences of rape/attempted rape involving multiple victims was not commensurate with that set out in the English Sentencing Guidelines Council Definitive Guidelines and, accordingly was wrong in principle and/or manifestly excessive. The Crown, in opening, had informed the Royal Court that the offence of rape carries a maximum penalty of life imprisonment, as does the offence of attempted rape and that the offences are all ones that fall within the provisions of the Criminal Justice (Supervision of Offenders) (Bailiwick of Guernsey) Law 2004, for sentencing purposes.

40. Judge Finch, in sentencing stated;

"This type of offence is mercifully rare in Guernsey. We look to the English Sentencing Guidelines and leading court decisions there. We need to point out straight away that they are not binding on us, Guernsey is a separate jurisdiction. We extract from them what assistance, and if necessary, guidance, we think is appropriate here for this court. It is for Guernsey courts to set sentences justly and in accordance with local considerations. We must also very clearly stress that the complex English legislation does not apply in Guernsey and we comply with Guernsey law. Each case, of course, is unique and must be dealt with on its own facts and not as some sort of mathematical exercise."

41. Mr Ayres in his skeleton accepts that the Sentencing Council guidelines are not binding on the Guernsey courts. The maximum sentence for rape/attempted rape in England under the Criminal Justice Act 2003 is the same as that pursuant to the common law of Guernsey, namely life imprisonment. The English Sentencing Guidelines (Sexual Offences Act 2003) recommend a starting point of 15 years custody (with a sentencing range of 13 - 19 years) in relation to 'repeated rape of the same victim over a course of time or rape involving multiple victims'. This starting point was confirmed by the Lord Chief Justice in paragraph 22 of the English Court of Appeal guideline case of Millberry and Others v R [2003] 2 Cr App R (S) 31, [2002] EWCA (Crim) 239, *Millberry*.
42. We have noted that Judge Finch went on to refer to the probation report and the psychological report, and to *Millberry*, and quoted from paragraph 8 in which the Court accepted the proposals of the Sentencing Advisory Panel that;

“There are broadly three dimensions to consider in assessing the gravity of an individual offence of rape. The first is the degree of harm to the victim, the second is the level of culpability of the offender and the third is the level of risk posed by the offender to society.”

43. The learned Judge then specifically referred to the judgment of McKay J in the English case of R v Frost [2006] EWCA Crim 1798, *Frost*, at paragraph 11 where the test for a life sentence is succinctly set out;

“The offences, of course must be sufficiently serious to support a long sentence of imprisonment and secondly the defendant must be shown to be of such an unstable character as to render it not possible to say with any reliability when he would no longer pose a significant risk of serious harm to the public from further offending.”

44. The sentence was pronounced that;

“For these despicable offences, with the protection of the public in mind, we sentence you on each count concurrently to Youth Detention for life which will be converted to imprisonment on your attaining the appropriate age. The grounds under the youth Detention Law are seriousness and to ensure the prevention of crime.”

We will revert to our detailed conclusions on the appropriateness of a life sentence later in this judgment.

Ground Two

45. It is submitted that the learned judge erred in law in failing to inform the Appellant's Advocate that the Court was minded to impose a life sentence, nor did he give the Appellant's Advocate the opportunity to address the Court on that issue before sentence was passed.
46. We were referred to R v Hawkins (1990) 12 Cr App R. (S) 161, *Hawkins*, at page 164 where Watkins L.J. stated;

"In the opinion which he expressed for the benefit of this Court Mr Robinson referred to Morgan (1987) 9 Cr App R (S) 201. That was a case in which I gave the judgment of the Court and, in doing so, I stated: ' It is, we think unfortunate that (no doubt due to an oversight) the judge, as should be done in all cases where it is the intention to impose a sentence of life imprisonment, did not inform counsel for the defendant what he had in mind so that he could hear the submissions of counsel upon it. There are many occasions, and this is in our view one of them - where counsel's assistance can be invaluable, indispensable perhaps, to a judge in such difficult circumstances.

The imposition of a discretionary life sentence is a serious step to take. It must never be taken unless the court is persuaded upon the evidence and bearing in mind the right principles and as I have said, the submissions of counsel for the defendant, that passing a determinate as opposed to a discretionary life sentence would be clearly wrong.

We have thought it necessary to refer to that so that once again judges can be reminded it is essential that, when considering whether or not to impose a life sentence, they give counsel the opportunity of addressing the court upon such a vital matter. Had in this case the Recorder made known to Mr Robinson that he had such a thing in mind, we do not doubt that Mr Robinson would have been able to assist him, not only by reminding him of the criteria for the imposition of a life sentence but also of the facts as peculiar to this case which could be said to affect those criteria."

47. This matter was recently revisited by the English Court of Appeal in R v Cross [2008] EWCA Crim 1194, *Cross*, a case which, on the facts, involved either a sentence of imprisonment for public protection or a discretionary life sentence. These were the only two types of sentence open to the judge. The Appellant complained that the judge did not warn counsel that he was contemplating a life sentence before passing such a sentence. Paragraph 8 of the judgment records "... .. it is in our view desirable, unless there are particular reasons for not doing so, for a judge contemplating a discretionary life sentence to alert counsel to the fact that it is at least a sentencing option that he is considering. That will give counsel the opportunity, in particular, to raise any matters of law concerning the approach to such sentence. That said, the lack of a warning could not, in our view, of itself be a reason for allowing an appeal."
48. We accept that the Court fell into error in failing to inform the Appellant's Advocate that a life sentence was a possibility and to invite submissions. As in *Cross* this cannot be a ground in itself for allowing the appeal, but, as in *Cross*, this omission led to other grounds of appeal.

The invitation could have happened either before the court adjourned to consider sentence or even during deliberation, when a life sentence became a real possibility and the court could have reassembled for that purpose. In the present case an adjournment might have been required for the Advocates to research the implications. We take into account that a discretionary life sentence is rarely passed in Guernsey and the established English practice was clearly, and perhaps understandably, overlooked by the Court. We can see no reason why the Royal court should not follow the English practice in such a fundamental matter as this.

Ground Three

49. The Court erred in fact and/or law in stating that the Appellant could be released on licence having had an indeterminate sentence imposed upon him.

50. In sentencing the learned Judge stated;

"It may be that the lengthy sex offender programme as suggested may do something for you however we are of the opinion that only the type of sentence we are passing where any release would be on licence by the appropriate authority then see to (sic) (?seized of) the matter will protect the public. You should only be released when you are no longer a danger to the public and if so, even then, will remain on licence for the rest of your life and subject to supervision."

51. We have been referred to Section 1 of the Parole Review Committee Ordinance 1991, (as amended) which provides;

"Powers of the Parole Review Committee

1 (1) The Parole Review Committee (the Committee) shall have the power to release on licence persons serving sentences of imprisonment on the Island of Guernsey for criminal offences ("prisoners"), whose cases have been referred to it by the States (Home Department) in accordance with section 2 of the Parole Review Committee (Guernsey) Law 1989 ("the Law of 1989") [or section 5 (2) of the Criminal Justice (Supervision of Offenders) (Bailiwick of Guernsey) Law 2004].

(2) The States [Home Department] shall not refer to the Committee any prisoner sentenced to a period of less than 15 months imprisonment or to an indeterminate period" – emphasis added.

The Appellant submitted that when passing this sentence of indeterminate length the Court failed to take into account section 1(2) which expressly excludes the referral by the States of Guernsey Home Department to the Parole Review Committee for consideration of release on parole licence.

52. We accept that the Court appears to have overlooked these provisions, which prevent any application for early release for so long he serves a life sentence in Guernsey.

Ground Four

53. The Appellant submits that the Court erred in fact and/or in law in stating that he could be released on licence having had an indeterminate sentence passed upon him and, thereby, failed to take into account Section 11(2)(a) of the Transfer of Prisoners (Restricted Transfers) (Channel Islands and the Isle of Man) Order 1998 which provides as follows:

"11(2) Where a person's transfer under paragraph 1(2)(b), 2(2) (b) or 3 (2)(b) of the Schedule from Guernsey to England and Wales is a restricted transfer-

- (a) Section 3(5) of the Prison Administration (Guernsey) Law 1949 ("the 1949 Law") (as substituted by section 1 of the Prison Administration (Amendment) (Guernsey) Law 1957), and the Schedule to the 1949 Law, sections 2,3 and 4 of the Parole Review Committee (Guernsey) Law 1989, section 4 of the Criminal Justice (Youth Detention) (Bailiwick of Guernsey) Law 1990 (the 1990 Law), the Parole Review Committee Ordinance 1991 (the 1991 Ordinance), (as amended by the Parole Review Committee (Amendment) Ordinance 1993) (but not section 6 of the 1991 Ordinance) and section 22 of the Prison Administration (Guernsey) Ordinance 1998 shall apply to him in place of the corresponding provisions of the law of England and Wales; but*
- (b) Subject to that, to sub paragraph 3 below and to any conditions to which the transfer is subject, he shall be treated for the relevant purposes as if his sentence had been an equivalent sentence passed by a Court in England and Wales."*

The effect of section 11(2)(a) is that the Appellant, who will serve his sentence in England, shall do so subject to the provisions of the Parole Review Committee Ordinance 1991, as amended and, consequently will not be eligible for release on parole licence in accordance with the statutory provisions in force in England and Wales.

54. We are grateful to Advocate McKerrell for his researches into this complex situation. We summarize his conclusions as to the possible practical outcomes and scenarios applicable to the Appellant had the life sentence been upheld.

If he were to be transferred to England on a restricted basis, he falls into a vacuum as there is no authority in Guernsey that could consider his sentence at any stage and the English authorities have no ability to do so either;

If he were to be transferred to England on an unrestricted basis there is no authority in Guernsey that could consider his sentence at any stage (as he would be, in effect, an English prisoner);

If he were to be transferred on an unrestricted basis it is unclear at what point he could make application for early release in England;

55. We considered together the meaning of section 18 of the draft *Projet de Loi* entitled “The Criminal Justice (Minimum Terms for Sentences of Life Imprisonment) (Bailiwick of Guernsey) Law 2011” and possible action by the Home Department. The situation remains unclear.

56. As we have already indicated, we regret that the matter was not investigated by the Court and relevant submissions made at the time the life sentence was under consideration. If both Advocates had been given the opportunity to research the position at that stage and had the Court been fully informed of the applicable legislation, it is likely that this lacuna would have been discovered.

Ground Five

57. The Appellant submits that by reason of the matters set out in Grounds Three and Four the Appellant would be prevented from applying for release on parole and, accordingly, prevented from challenging the lawfulness of his detention, speedily or at all, by a Court or other Statutory body in breach of Article 5 (4) of the European Convention for the Protection of Human rights and Fundamental Freedoms [“ECHR”] as set out in Schedule 1 of the Human Rights (Bailiwick of Guernsey) Law 2000 which provides that:

“Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

58. The Appellant has a right of appeal to the Court of Appeal, and to that extent, he does have access to a court to determine the initial lawfulness of his detention. But, the problem arises if

the Court of Appeal, in turn, either dismisses his appeal or itself imposes a sentence of life imprisonment when there is no power to impose a recommendation as to the minimum term to be served, and no right in Guernsey to challenge the continuing lawfulness of detention under the life sentence by application to the Parole Board for a review.

59. Crown Advocate McKerrell helpfully drew our attention to extracts from “*Human Rights and Criminal Justice*” (2nd Edition), by Emmerson & Ashworth, and accepted that life sentences (for dangerous offenders) are compatible with Article 5(4) “provided that a review mechanism is built in”. This conclusion is supported by decisions of the ECtHR such as Van Troogenbroeck v Belgium (1982) 4 EHRR 443, at paragraphs 48-49, Weeks v UK (1988) 10 EHRR 293, at para 58, and Thyme, Wilson and Gunnell v UK (1991) 13 EHRR 666, at paragraph 76, including the following:

“[T]he discretionary life sentence [is] composed of a punitive element and subsequently of a security element designed to confer on the Secretary of State the responsibility for determining when the public interest permits the prisoner’s release. [T]he factors of mental instability and dangerousness are susceptible to change over the passage of time and new issues of lawfulness may thus arise in the course of detention. It follows that at this phase in the execution of their sentences the applicants are entitled under Article 5(4) to take proceedings to have the lawfulness of their continued detention decided by a court at reasonable intervals.”

60. See also “*The Law of Human Rights*”, by Clayton and Tomlinson (2nd Ed), paragraph 10.240, and following, and *Archbold Criminal Pleading Evidence & Practice 2012 Ed*, at paragraphs 16-56. Stafford v UK (2002) 35 EHRR 32 (applied in Von Burlow v UK (2004) 39 EHRR 16 and subsequent cases) deals with mandatory and discretionary life sentences, but provides a useful overview at paragraph 80:

“Once the punishment element of the sentence (as reflected in the tariff) has been satisfied, the grounds for the continued detention, as in discretionary life and juvenile murderer cases, must be considerations of risk and dangerousness. Reference has been made by Secretaries of State to a third element—public acceptability of release—yet this has never in fact been relied upon. As Simon Brown L.J. forcefully commented in the case of Anderson and Taylor, it is not apparent how public confidence in the system of criminal justice could legitimately require the continued incarceration of a prisoner who had served the term required for punishment for the offence and was no longer a risk to the public. It may also be noted that recent reforms in Scotland and Northern Ireland equate the position of mandatory life prisoners in those jurisdictions to that of discretionary life prisoners in England and Wales in respect of whom continued detention after expiry of tariff is solely based on assessment of risk of harm to the public from future violent or sexual offending.”

61. Decisions, in the ECtHR, and in the Courts of England and Wales have also confirmed that a “reasonable interval” between reviews should not exceed two years (R v Parole Board, ex parte MacNeil (The Times, April 18th 2001)), but a shorter period may be appropriate depending on the circumstances (Oldham v UK [2000] Crim LR 1011, and R. (Spence) v.

[Secretary of State for the Home Department \(2003\) 147 S.J. 660, CA](#)).

62. The English statutory provisions have been revised over the years to take account of the impact of the Human Rights Act 1998, and the Article 5(4) case-law, and the Powers of the Criminal Court (Sentencing) Act 2000, section 82A now provides a mechanism for a parole board review to be made after a specified period – explained in R. v Wheaton [2005] 1 Cr App R (S) 425.
63. Crown Advocate McKerrell submitted that if the Appellant were to be transferred to an English prison on an unrestricted basis under the Crime (Sentences) Act 1997 section 41, Schedule 1 (Part 1, paragraph 1(2)), then the Article 5(4) protections that exist in England would be activated so that, in those circumstances, for so long as the Appellant remains in England he will fall to be considered by the English parole system and not that of Guernsey.
64. It is unnecessary to resolve the issues arising under this ground of appeal as we have determined that this is not a case where it would be appropriate to impose a sentence of life imprisonment. Further, the risk of non-compliance with the requirements of Article 5(4) is likely to be removed with the commencement of the Criminal Justice (Minimum Terms for Sentences of Life Imprisonment) (Bailiwick of Guernsey) Law, 2011.

Ground Six

65. The Appellant submits that the Royal Court erred in law and/or was wrong in principle in passing a sentence of indeterminate length when there was no statutory mechanism by which it could set a minimum sentence or tariff and, a fortiori, where there was no mechanism by which the appellant could apply for release on parole licence.
66. Following the Appellant's sentence on 26th May 2011, on 19th August 2011 a Billet d' Etat was issued for the meeting of the States of Deliberation on 28th September 2011. The second item in the Billet d' Etat submitted for debate was a Projet de Loi entitled 'The Criminal Justice (Minimum Terms for sentences of Life Imprisonment) (Bailiwick of Guernsey) Law 2011.

Section 14(1) of the Projet de Loi provides;

"Where a court sentences an offender to a discretionary sentence of life imprisonment for an offence, it shall set in relation to the offender a minimum term of imprisonment in respect of that offence."

67. We regret that the attention of the Royal Court was not drawn to this imminent or at least proposed important and relevant legislation when the life sentence was under consideration.

68. As, for reasons we are to explain, we were persuaded that the life sentence should not be upheld, it is not necessary for us to reach a definitive conclusion on what the consequences of that sentence would have been for the appellant either under the existing legislation in England if he were to be transferred to serve his sentence there or under present or future Guernsey legislation if he remains here. However it is unfortunate that the Royal Court was not guided to consider the four issues raised in grounds 3, 4, 5 and 6 and as a consequence fell into error.

Ground Seven

69. It is submitted that the Royal Court erred in taking into account irrelevant factors and/or gave undue weight to the matters disclosed in the Victim Impact Statements.
70. In sentencing the learned Judge stated;

"We take careful note of the three victim impact statements submitted by these women. Our approach is to pass what we deem to be the appropriate sentence having regard to all the circumstances taking account so far as we consider it appropriate, the circumstances of the victims,

The consequences to the three victims are uppermost in our mind when we conduct the sentencing exercise. We have looked at their statements in detail. We have taken on board everything in these statements, they amply demonstrate the lasting and deeply unpleasant consequences to these women of your attacks upon them. They will have to live with this all their lives and be affected adversely for a long time hence one of our main considerations is to protect other potential victims and also punish and repudiate your behaviour."

71. The Appellant referred the Court to the English Practice Direction (Crime: Victim Impact Statements) (Sup Ct) [2001] 1 WLR paragraph 1 which states;

"This practice direction draws attention to a scheme, which started on 1 October 2001, to give victims a more formal opportunity to say how a crime has affected them. It may help to identify whether they have a particular need for information, support and protection. It will also enable the court to take the statement into account when determining sentence."

He submitted that there is no equivalent scheme, law, ordinance, custom practice direction, binding precedent or otherwise in Guernsey which has rendered victim impact statements relevant or appropriate in sentencing hearings.

72. In response the Crown accepts that there is no formal Victim/Personal Impact statement regime enshrined in Guernsey by means of formal legislation or Practice Direction. However, impact statements have been used for sentencing purposes for some time in Guernsey, having been initially requested by the Court in appropriate cases (typically sexual offences cases) and are now viewed as a routine characteristic of sentencing procedure in this jurisdiction. In *Barnes*, the Court requested such a statement. In our view, such statements can be of great assistance to sentencing courts in assessing the seriousness of violent or sexual offences and the impact of such offences upon the victim, or sometimes to assist the offender.
73. In this case the impact statements were part of the agreed bundle before the Court and no objection to their inclusion was made at any time.
74. We were referred to the English case of *R v Hobstaff (Anthony)* (1993) 14 Cr App R (S) 632, and to the guidelines laid down by the English Court of appeal in *R v Perks (James Benjamin)* [2001] 1 Cr App R (S) 6:
- 1) *"a sentencer must not make assumptions, unsupported by evidence, about the effect of an offence upon the victim;*
 - 2) *if an offence has had a particularly damaging or distressing effect upon the victim this should be known to and taken into account by the court when passing sentence;*
 - 3) *evidence of the effects of an offence on the victim must be in proper form, and a witness statement, an expert report or otherwise, duly served upon the defendant or his representatives prior to sentence;*
 - 4) *evidence of the victim alone should be approached with care, the more so if it is related to matters which the defence could not realistically be expected to investigate;*
 - 5) *the opinion of the victim and the victim's close relatives on the appropriate level of sentence should not be taken into account. The court must pass what it judges to be the appropriate sentence having regard to the circumstances of the offence and of the offender, subject to two exceptions;*
 - a) *where the sentence passed on the offender was aggravating the victim's distress, the sentence might be moderated to some degree and*
 - b) *where the victim's forgiveness or unwillingness to press charges provided evidence that his or her psychological or mental suffering must be very much less than would normally be the case."*

75. The Consolidated Criminal Practice Direction (2004) broadly reflects the 2001 Practice Direction and the Perks guidelines. The Crown submits that nothing in the instant case

infringes the English guidance which is set out in a practice direction rather than legislation. The Royal Court may wish to consider the issue of a Practice Direction for Guernsey which could formalise the use of Victim Impact Statements in similar terms to those applicable in England and Wales.

76. It is clear that some care may need to be exercised when considering the views of victims of crime, but in this case the statements were carefully and moderately stated, and we do not consider that the Court erred in taking the Victim Impact Statements into account.

Grounds Eight and Nine

77. The Appellant submits that the allegedly aggravating factors of these offences as set out by the Court did not, in fact, amount to aggravating factors in accordance with those set out by the Sentencing Council Guidelines (Sexual Offences Act 2003) or at all, and should not have been treated as aggravating factors such as would render the offences more serious. Rather those factors were relevant to determining the starting point for sentence.

78. The aggravating features identified by the court were:

- (1) *"Multiple victims who were strangers to you*
- (2) *Violent assaults as described for all three offences*
- (3) *The attempt offences were towards the top of the scale."*

79. Additional aggravating features as set out by the Sentencing Council Guidelines, specific to rape are:

- (1) *"The offender ejaculated, or caused the victim to ejaculate*
- (2) *Background of intimidation or coercion*
- (3) *Use of drugs, alcohol or other substance to facilitate the offence*
- (4) *Threats to prevent the victim reporting the incident*
- (5) *Abduction or detention*
- (6) *Offender aware that he is suffering from a sexually transmitted infection*
- (7) *Pregnancy or infection results"*

Of these, only (1) applies to Count 1 and that does not of itself impact on the seriousness of that offence.

We have also considered the nine aggravating features set out in paragraph 32 of *Millberry*, none of which apply to the facts of this case.

The aggravating features identified by the Court were here properly relevant only to the starting point for sentence.

Grounds Ten and Eleven

80. The Appellant submits that the Royal Court erred in the way in which it applied the guidance to be found in *Millberry* and *R v Billam* [1986] 8 Cr App R (S) 48, *Billam*, to the facts of the case and in particular to the report of Dr Briggs which did not contain evidence that the Appellant had perverted or psychopathic tendencies or that the offences contained such aggravating features that would make the imposition of a life sentence appropriate.

81. The Court in sentencing referred to the Opinion in Dr Briggs' report of 16th May 2011 in which he stated;

"The indicators above are sufficient, to my mind to suggest that you present with a highly significant risk of repeat sexual offending towards adult female strangers in this, your untreated state."

but erred in failing to take into account the sections in which he stated;

"Notwithstanding risk, there are positives to this situation. I did not find Mr Burton to be generally hostile to women. He has the support of friends and some family members. He understands the harmful nature of his actions and some of the likely short and long term consequences of his behaviour for his victims. Setting aside the issue of the index offence here, Mr Burton does not appear to be generally delinquent/antisocial or impulsive. His is not a history of long standing mental difficulties.

On the assumption that Mr Burton is likely to receive a significant custodial sentence I would propose that in the early stages of his sentence particular attention should be given to continuing the assessment of this man's sexual pathology and the development of his offending behaviour. I believe he is motivated to engage in work with the probation service. He appears remorseful at this point in time and willing to use those emotions to good effect in seeking appropriate counselling/intervention. Once a full and credible formulation is made of his offending behaviour it is likely that he will benefit from a comprehensive sex offender treatment programme."

82. As we have already indicated we were not persuaded that the criteria for a discretionary life sentence were met, and find that the report by Dr Briggs does not contain evidence that the

Appellant had perverted or psychopathic tendencies nor that the facts of the offences display such aggravating features as would make the imposition of a life sentence appropriate.

Ground Twelve

83. The court failed to take into account its powers under s 3 of the Criminal Justice (Supervision of Offenders) (Bailiwick of Guernsey) Law 2004.

84. At the outset of the hearing the court had been reminded of the application of s 3 which provides for Extended Sentences for sexual and violent offenders; the section reads;

"3 (1) This section applies where a court which proposes to impose a sentence of imprisonment for a sexual or violent offence considers that the period (if any) for which the offender would, apart from this section, be subject to supervision under section 1 would not be adequate for the purpose of preventing the commission by him of further offences and securing his rehabilitation.

(2) Subject to subsections (3) to (5), the court may pass on the offender an extended sentence, that is to say, a sentence of imprisonment the term of which is equal to the aggregate of –

- a) the term of the sentence of imprisonment the court would have imposed if it had passed a sentence of imprisonment otherwise than under this section (the custodial term), and*
- b) a further period (the extension period) for which the offender is to be subject to a licence (an extended sentence licence) and which is of such length as the court considers necessary for the purpose mentioned in subsection (1)."*

The Probation Officer, Gemma Greening, had recommended such a sentence for the Appellant, and specified the two additional conditions which we imposed on 14th December (see paragraph 110 below).

We are satisfied that this sentence is appropriate for the Appellant, by reason of his age, the circumstances of his offending and his need for prolonged support on his release from custody.

Conclusion

Life sentences

85. On 14th December 2011, when the appellant was aged 19, we quashed the three Life sentences. We have touched on some of our reasons for so doing in our findings on the separate grounds of appeal, but now set out our main conclusions thereon.
86. There is no issue between the Crown and the Appellant in relation to the English Sentencing Council's Guideline, nor the application of Guernsey law and considerations to the facts of this case. In *Barnes*, the Royal Court stated that considerable assistance had been derived from the revised sentencing guidelines set out in the English Court of Appeal case of *Millberry*, in which reference was made to *Billam*. The judgment of the Lord Chief Justice in *Millberry* at paragraphs 27 and 28 sets out the approach to be adopted in relation to Mitigating Factors and Guilty Pleas, and at Paragraph 30 the approach to sentencing Young Offenders, for whom the sentence should be significantly shorter. Paragraph 32 identifies nine aggravating factors, paragraph 33 concerns extended sentences and paragraph 34 the role of guidelines. We also note the judgment of Mantell LJ in R v E, R v K and R v G, Attorney General's References (nos 91, 119, and 120 of 2002) in which, having recited from paragraph 8 of *Millberry* (as set out in paragraph 39 herein,) he continued to quote from the judgment of the Lord Chief Justice;

“We accept that courts should consider each of these dimensions whenever a sentence for rape is imposed. We endorse what was stated by Lord Lane in Billam, and repeated by the panel on its advice, while rape will always be a most serious offence, its gravity will depend very much upon the circumstances of the particular case and it will always be necessary to consider an individual case as a whole taking into account the three dimensions to which we have referred.”

Mantell LJ then went on to say in Paragraph 8 of his judgment that;

“In all classes of sexual offences, there will also be the need to deter others from acting in a similar fashion.”

87. We have already acknowledged the independence of the presiding Judge and Jurats of the Royal Court when considering sentencing. But, in an area such as here (multiple rapes) where there is little if any local experience of the issues arising, the Royal Court will in our view want to think long and hard before seeking to lower the threshold for imposing a life sentence (rather than a determinate sentence), from what has clearly been established over many years in the English jurisprudence. If the Guernsey Courts wish to depart from such guidelines, the question arises as to the grounds upon which the Court is seeking to set up an alternative base line.
88. In our opinion, when it comes to identifying the criteria for imposing an indeterminate sentence of life or a shorter period, the Courts here should not be seeking to widen the entry point from that which has been so helpfully and carefully set out in the English decisions to which the Court has been referred. There are two factors that support this view. First, as Mr McKerrell confirmed to us, prisoners with no ascertained release date invariably serve their

sentences in the United Kingdom separated from those sentenced to determinate periods of imprisonment. Second, quite apart from issues of cost to the Guernsey exchequer there are serious resource implications for the hard pressed UK prison service in holding and processing indeterminately sentenced prisoners, who would perhaps not be there were it not for the vagaries of the Guernsey criminal sentencing system. We accept that we may only be talking about one extra offender every twenty five years.

89. In this case the Royal Court was faced with an extremely difficult sentencing problem. Offences of this gravity are almost unknown in Guernsey and the protection of the public was of substantial local importance. The probation and psychological reports raised issues which properly concerned the Court. The Appellant was reminded that the psychological report read “*the indicators above are sufficient, to my mind, to present with a highly significant risk of repeat offending towards adult female strangers in this your untreated state.*” Although it is apparent from the sentencing remarks that the Court had carefully considered the guidelines and the judgment in *Millberry*, the criteria for a life sentence had not been spelled out to the Court, especially paragraph 23 of *Millberry*, as set out in paragraph 93 below. None of those criteria was satisfied on the evidence in this case. None of the nine aggravating circumstances set out in paragraph 32 was present in this case, nor any additional aggravating factor as set out in Part 2A of the Sentencing Council Guidelines save that the evidence demonstrates that the Appellant ejaculated in Count 1. The Appellant was 18 years old at the time of the offences and had expressed remorse to the Court through his Advocate who gave the particular message that “*I am very sorry for the hurt I have caused*”. Dr Briggs’ report indicates that the Appellant appears remorseful and willing to seek appropriate counselling intervention. He had pleaded guilty and spared the victims a court appearance for which some credit was due (see paragraph 28 of *Millberry*).
90. We are grateful to Advocate Ayres and Advocate McKerrell for their researches and helpful submissions. We fully appreciate and endorse the concern of the sentencing Court about the risk of future offending and the need to protect the public from any potential danger posed by the Appellant to young women in the future. It is to be regretted however, as we have already indicated, that when the Jurats were considering a life sentence the Advocates were not so informed and given the opportunity to address the Court, having researched the implications of such a sentence for this Appellant, and on the practical restrictions presented by the current legislation in the enforcement of the sentence, following the restricted transfer of prisoners to England and Wales, when, currently in Guernsey, there was no requirement for a minimum sentence, no recommendation was made and no parole was available for him in Guernsey on an indefinite sentence.
91. Also relevant to the decision of the Royal Court were the principles and restrictions applicable to the imposition of such a sentence as set out in the English Court of Appeal cases of *Millberry* and *Billam*, (stated to be of value in *Barnes*), and in the Sentencing Guidelines Council Definitive Guideline 2003.
92. In particular it is important to distinguish where the guidance given is intended to assist with identifying the starting point for a determinate sentence and where it is endeavouring to flag up those disturbing features which inevitably lead sentencers to consideration of an indeterminate disposal. The aggravating factors identified by the Court were, of course, important but they are essentially the ingredients of the offences lifting the possible determinate sentence into the 13 to 19 year bracket. They were not such as to convert a determinate sentence into an indeterminate life sentence. Paragraph 34 of *Millberry* warns that “double counting must be avoided”.
93. If the Appellant's Advocate had been informed that the Court was considering imposing a life sentence he would have had the opportunity to refer the Court to the Sentencing Council

definitive guidelines and to *Millberry*, paragraphs 22 and 23 in which the Lord Chief Justice of England and Wales stated;

"22. *The Panel confirms the 15 years upwards starting point for a campaign of rape. This is recommended where the offender has repeatedly raped the same victim over a course of time as well as for those cases involving multiple victims.*

23. *The Panel also agrees with this court in Billam ([1986] 8 Cr App R (S) 8) that a life sentence will not be 'inappropriate' where the offender 'has manifested perverted or psychopathic tendencies or gross personality disorder, and where he is likely, if at large, to remain a danger to women for an indefinite time,'"*

94. The Appellant's Advocate was deprived of the opportunity to draw the attention of the Court to the fact that Mr. Briggs' report did not disclose that the Appellant suffered from perverted or psychopathic tendencies or gross personality disorder as referred to in *Millberry*.
95. If the procedure set out in *Hawkins* had been followed, the Advocates so informed, submissions made, and the Judge and Jurats had the benefit of the careful submissions of the quality of those made to us by Advocate Ayres, then we consider that it would have been extremely unlikely that a life sentence would have been imposed.
96. We were not persuaded that the criteria for the imposition of a life sentence, as set out in *Millberry* were satisfied for the Appellant, nor that the passing of a determinate sentence, as opposed to an indeterminate sentence would be 'clearly wrong' (*Hawkins*).
97. The report from Dr Briggs does not indicate that the Appellant suffers any gross personality disorder or that he has manifested perverted or psychopathic tendencies or that he is likely, if at large, to remain a danger to women for an indefinite time. Dr Briggs noted the positives to the situation as set out in paragraph 81 herein.
98. The Jurats were not given all the information necessary for their decision, and we concluded that the sentence passed was accordingly both wrong in principle and manifestly excessive.

Determinate sentences

99. Having quashed the three concurrent life sentences for these offences, we turn to consider the appropriate determinate sentences that should be imposed in their place.
100. Quite apart from the fact that as we have said Guernsey is an independent jurisdiction a number of further features can be identified which support on occasion a different approach to sentencing by the Royal Court from that which is adopted by Courts in England and Wales.

1. The Island has a purpose built modern prison which, following the introduction of more community based sentences, has the capacity to take those whom the courts deem merit condign punishment. We do not however wish to suggest that with the kind of offending we are dealing with here, courts in other parts of the British Islands will not be awarding appropriate punishment, but there will be situations with other types of offending where courts in other jurisdictions will be persuaded or encouraged to reduce sentence lengths or keep offenders out of prison because of overcrowding.
2. The statutory framework relating to sentencing generally is different and more appropriate for a small jurisdiction. In the atmosphere of keeping offenders out of prison if at all possible, Parliament at Westminster appears to have endeavoured to ensure that certain types of offender and offending continue to be dealt with in ways that assuage perceived anxieties of the community at large. None of these special provisions has any relevance here.
3. The parole system is different. In Guernsey prisoners sentenced to more than fifteen months currently have the expectation that they can apply for parole at an earlier stage than they would if serving a similar sentence elsewhere.

101. Having decided that life sentences were not appropriate, as an appellate court we are charged with identifying appropriate determinate sentences *de novo*. The Appellant's offending had a severe impact on the well being of this small community until such time as he was caught. The serious view that the Jurats took of it is reflected in their willingness to impose life sentences, a disposal which for the reasons we have explained turns out to have been in our view flawed for reasons that were not of the Jurats' making.

102. The Royal Court has not in recent times had to deal with offending of this kind and so there is no local guideline. We have therefore looked at the guidance from England to which we have already referred. We cannot overemphasise the point that has been made by this Court time and again that with any sentencing exercise there must be proper consideration of the appropriate ceiling in the level of punishment for a particular offence, where there is no upper limit prescribed by statute on the Court's sentencing powers. In the case of rape aggravating features have been identified as has been touched on in our review of grounds 8 and 9 and most of them were not present here.

103. This Court's starting point for the determinate twelve year sentence for the three offences was sixteen years custody, which we decided was appropriate in accordance with the English Court of Appeal Judgments of *Billam* and *Millberry* and the English Sentencing Council Definitive Guidelines.

104. As noted above, we were conscious that Guernsey is an independent jurisdiction and not bound by English precedent or guidelines. However, while fully aware that guidelines are in no way intended to impose a sentencing straightjacket upon Courts, in this case we have found the English guidance helpful. We keep in mind the fact that Guernsey is a small island and the interests and concerns of local people have significant relevance to our approach to these offences and to the appropriate sentences.

105. We were particularly aware that, quite apart from the effect upon the three victims, these offences created terror in the local community. The offences took place within a few weeks. Two were committed within a few hundred yards of the police station, just off a public thoroughfare in the Town area of St Peter Port and the offences raised a large question over the safety of the Town area and the rest of the Island. The offences were committed against young women who were strangers to the Appellant, as if there was no prospect of him being

caught, and until his arrest, the local community was understandably in fear of further incidents.

106. All these matters were factored into the sixteen year starting point for these offences. This accommodates the aggravating features identified by the court but which do not come within the additional aggravating features identified by the English authorities and the Sentencing Council Guidelines. We took into account the effect of the offences upon the three young women victims. This is correctly described as a campaign of rape against multiple victims. We do not distinguish between the rape offence and the two successive attempted rape offences. Each attempt involved a degree of violence and was almost equally distressing for the victim. The starting point of sixteen years for this young Appellant includes a significant element of deterrence for others from acting in a similar fashion.

107. In mitigation, and in reducing the sentence to a sentence of twelve years from sixteen, we took into account the Appellant's youth, his effective good character, his 'complex cognitive deficits' and his pleas of guilty. We took into account that his pleas of guilty were tendered when the DNA/CCTV evidence made conviction almost inevitable, but note his representatives' concern about his learning deficit. The Royal Court had also taken into account his disturbed background as disclosed in the reports.

108. The Royal Court indicated that very little credit was due to the Appellant for his guilty pleas. We consider that, although not at the first opportunity, the Appellant does deserve significant credit for the fact that the three young women were spared the ordeal of giving evidence and reliving their experiences in a public Court. In a case of serious sexual offending such as this, the additional distress to the witnesses caused by their Court appearances should not be underestimated.

109. This is a disturbing and serious case, the three offences collectively and individually impacted substantially on both the victims and the local community. After careful and anxious consideration we conclude that the three concurrent sentences of twelve years' custody meet the justice of the case and the interests of the Island of Guernsey, and that the extended licence period is appropriate.

110. There will therefore be custodial sentences of twelve years youth detention/imprisonment concurrent on all three counts with an Extended Sentence Licence for a period of six years. In addition to the standard conditions of such a licence we included two further conditions addressed to the appellant:

1. "That you will not communicate directly or indirectly with any of the three victims named in the indictment without the prior approval of your supervising officer";
2. "That you will comply with any requirements specified by your supervising officer for the purpose of ensuring that you address your sexual offending behaviour problems".

111. The Appellant was further informed by the Court:

"If upon release you fail to comply with the conditions in the Extended Sentence Licence, or are convicted of a further imprisonable offence, the Court sentencing you or the Parole Review Committee, can revoke the licence, in which case you will be returned to custody for the remainder of the sentence."

