

Judgment 12/2013

**José Marcelino Gouveia Pinto, Bruno Miguel Loreto, Ruben Filipe Capontes Almeida and The Law Officers of the Crown
Court of Appeal**

Application for leave to appeal against conviction and sentences for rape.

**Final Text
24.05.2013**

IN THE COURT OF APPEAL OF GUERNSEY

CRIMINAL DIVISION – APPEALS NO 441, 442 & 443

24th May 2013

Before: **Nigel Fleming QC Presiding
Clare Montgomery QC
Sir Hugh Bennett**

Between: **JOSÉ MARCELINO GOUVEIA PINTO
BRUNO MIGUEL LORETO
RUBEN FILIPE CAPONTES ALMEIDA**

Appellants

and

LAW OFFICERS OF THE CROWN

Respondents

**Advocate C A Tee represented the Appellant Pinto
Advocate A Ayres represented the Appellants Loreto and Almeida
Crown Advocate Perry for the Respondent**

JUDGMENT

Montgomery JA:

1. This is the judgment of the Court.
2. On 3 August 2012, the three Appellants were convicted of rape by the Royal Court (Finch J and Jurats). The offence was committed at Cleavancey, Rouge Huis Avenue, St Peter Port in the early hours of the morning on 14 August 2011. The primary defence of each of the Appellants at trial was that the Complainant had consented to sexual activity with each of them. The Complainant gave evidence that she had not consented to any sexual activity with the Appellants, she had not agreed to be taken by them to Cleavancey and once at Cleavancey she lapsed in and out of consciousness so that she was not to able to resist the offending behaviour or consent to it.

3. The Appellants were sentenced on 12 October 2012. Pinto was sentenced to 8 years imprisonment and 5 years extended sentence licence, Loreto and Almeida were sentenced to 10 years imprisonment. Each of the Appellants was recommended for deportation.
4. The Appellants, Loreto and Almeida, seek leave to appeal against their convictions and have applied for leave to appeal against their sentences. The Appellant Pinto who pleaded guilty to an offence of indecent assault in respect of the Complainant at trial does not appeal his conviction on the charge of rape but has applied for leave to appeal against his sentence. On 12 April 2013 these applications were referred to the Court of Appeal by the Bailiff.
5. The appeals against conviction raise two issues, both of which are concerned with the approach of the court below to the issue of the credibility of the Complainant, namely:
 - [1] the use of screens to screen the Complainant from the Appellants and the public;
and
 - [2] the rationality of the decision of the Jurats.
6. The appeals against sentence assert that the sentences imposed were manifestly excessive in the absence of any evidence that a date rape drug was administered so as to render the Complainant unconscious. The decision to order deportation in the case of the Appellant Almeida is said to be disproportionate and to infringe his right to a family life under Article 8 of the European Convention on Human Rights.
7. For the reasons we shall give, we grant leave to Loreto and Almeida to appeal their conviction and grant leave to each of the Appellants to appeal their sentences but dismiss each of those appeals.

The appeals against conviction

[1] The use of screens

8. The Appellants rely on the argument that, as a matter of common law, defendants in a criminal trial have a right to be physically present so that they may observe any accuser who may give evidence against them; that the use of screens to shield a witness from the view of a defendant is exceptional; and that screens should only be used where otherwise the witness would not give any evidence.
9. We consider that each step in this argument is flawed. There is no common law right to physical confrontation with a witness. The court may, in the exercise of its inherent jurisdiction, control its own processes by adopting procedures, such as the use of screens, whenever the interests of justice require it, provided that the right of cross examination is not impaired. There is no test of exceptionality or necessity. The power to order the use of screens is not limited to circumstances where the witness would otherwise decline to give evidence.
10. A common law right of confrontation? There is no equivalent in Guernsey to the Sixth Amendment right in the United States of America of an accused “to be confronted with the witnesses against him.”¹ Even in America the right to physical confrontation has been limited by the decision in *Maryland v Craig*,² in which the majority held that the Confrontation Clause merely embodied a “preference” for face-to-face, in person confrontation, and that this may yield in appropriate cases to other competing interests so as to permit the use of

¹ *Coy v Iowa*, 487 US 857 (1988)

² 497 US836 (1990)

procedural devices designed to shield a witness from the trauma of courtroom testimony.

11. Courts in Canada,³ Ireland,⁴ New Zealand,⁵ South Africa⁶ and in England⁷ have confirmed that there is no absolute right for a defendant in a criminal case to physically confront witnesses. Lord Bingham, giving the advice of the Board in *Grant v State* [2006] 1 AC 1 observed, at [20], that “the right to confrontation expressed in the sixth amendment to the US Constitution, for all its interest to legal antiquarians, is not matched by any corresponding requirement in English law.”
12. Nor does the absence of face-to-face, in person confrontation, offend against any principle established in the European Court of Human Rights. As the House of Lords pointed out in *R (oao D) v Camberwell Green Youth Court* [2005] 1 WLR 393, Article 6(3)(d) of the European Convention on Human Rights has not been interpreted as guaranteeing the accused a right to be in the same room as the witness giving evidence. What matters is that the defence should have a proper opportunity to challenge and question any witnesses against a criminal defendant, see *Kostovski v Netherlands* (1990) 12 EHRR 434. The decision of the European Commission of Human Rights in *Hols v Netherlands* App no 25206/94 (19 October 1996, unreported) and the judgment of the court in *SN v Sweden* [2002] ECHR 34209/96 confirm that the requirements of Article 6 can be satisfied even where, for good reason, the accused is not physically present at the questioning.
13. The common law courts have consistently held that the inherent jurisdiction of the courts to control their own procedure may be used to allow the protection of witnesses by screens (or some equivalent device) in any case where that is shown to be reasonably necessary and in the interests of justice. Indeed in some cases (see for example *R v Accused T4/88* [1989] 1 NZLR 660) the courts have emphasized that it may be a matter of public duty that courts modify their procedure so as to protect witnesses. Whilst the risk that a witness may not testify is often the main reason for a screening order, there are cases where other reasons, such as the trauma likely to be caused to the witness, have been held to justify an order.
14. For all these reasons we are not satisfied that there is under the laws of Guernsey any absolute right to face to face confrontation with a witness in a criminal trial. It is a right that is, at least, subject to qualification in the interests of justice.
15. The test for the use of screens Reliance was placed in the Grounds of Appeal on the decision of the English Court of Appeal in *Cooper v Schaub* [1994] Crim LR 531 in which Farquharson LJ appears to have expressed the view that the use of screens, being prejudicial to a defendant, should not be used to protect an adult witness, other than in “exceptional circumstances.”
16. The Appellants’ written submissions contend in addition that, by parity of reasoning with paragraph 6 of the Practice Direction No 5 of 2008 which deals with special measures in Guernsey, screens should only be permitted if there is evidence that a witness would decline or otherwise be reluctant to give evidence. The Complainant’s approach, namely that she was a willing witness but was concerned that she would be distracted in the course of her evidence, if she were not screened from the reactions of the defendants, is said to be insufficient to justify the use of screens. Only a reluctant witness is eligible to be screened.

³ *R v Levogiannis* [1993] 4 SCR 475

⁴ *White v Ireland*, [1995] 2 IR 268

⁵ *R v Accused T4/88*[1989] 1 NZLR 660

⁶ *Klink v Regional Court Magistrate* [1996] 3 LRC 667

⁷ *R v Smellie* (1919) 14 Cr App R 128, *R v X, Y and Z* (1990) 91 Cr App R 36

17. In so far as it is suggested that the views of Farquharson LJ in *Cooper v Schaub* were intended literally as a starting-point for the exercise of judicial discretion to permit the use of screens, the court in *R v Foster* [1995] Crim LR 333 made it plain that Farquharson LJ's statement was not intended to alter the analysis of the Court of Appeal in *R v X, Y and Z* (1990) 91 Cr App R 36, namely that the risk of prejudice is a factor to be considered by the judge in striking an appropriate balance, but it is no more than that. We agree with the observations of the Court in *Foster*. We observe that Finch J also considered that the approach in *Foster* and *R v X, Y and Z* to be appropriate in this case.
18. The suggestion that the Complainant's concern about distraction provided an insufficient justification for screens in this case does not do justice to the nature of the Complainant's fear as expressed in her pre trial statement made in support of the application for the use of screens. It is clear from her pre trial statement that the Complainant's concern was that her ability to give her evidence would be adversely affected by her seeing the defendants and that she had serious concerns about her ability to do so if she gave her evidence under physical scrutiny by the Appellants', their families and friends in the public gallery.
19. We consider that the Royal Court was bound to take this concern into account. In *R v Brown (Milton)* [1998] 2 Cr App R 371 the English Court of Appeal pointed out that a trial judge is obliged not only to have regard to the need to ensure a fair trial for the defendant but also to the reasonable interests of other parties to the court process, in particular witnesses who are obliged to re-live by describing in the witness box an ordeal to which they say they have been subject. It is the clear duty of any judge to do everything possible, consistent with giving the defendant a fair trial, to minimise the trauma suffered by other participants.
20. Whilst this court accepts that a defendant should only be denied an opportunity to see his accuser in relatively rare circumstances, it considers that the decision as to the use of screen was pre-eminently one for the discretion of Finch J, who clearly took into account the full range of factors identified in *X, Y and Z*. We do not believe that his decision to permit the use of screens can be faulted. It was in the interests of justice that the Complainant should give full and complete evidence. The screening was a proportionate response to her claimed concerns and did not purport to prejudice the questions of credibility and reliability in issue at the trial. The screening order did not interfere with the fair trial rights of the Appellants. The Complainant was visible to the Advocates as well as to the Royal Court. There was therefore a full opportunity to test her evidence.
21. Did the use of screens cause any prejudice to the Appellants? In any case we are satisfied that, even if Finch J erred in permitting the use of screens, no undue prejudice was caused to the Appellants. Finch J gave the Jurats a comprehensive direction that the use of screens and live-link evidence was commonplace and that the purpose of screens was to permit the witness the comfort of giving evidence away from the public gaze. The Jurats were warned that the use of screens did not reflect in any way on the defence and was a facility that was available for both prosecution and defence witnesses. It was made clear to the Jurats that the use of a screen was not intended to pre-judge the evidence which a witness gives and should not be regarded as prejudicial to the Appellants in any way. In our judgment this was an unimpeachable direction and served to remedy any prejudice that might have been caused.
22. We should note that it is at least open to question whether a request for screens is now to be regarded automatically as a source of prejudice to an accused person given that such measures are now much more common and are as likely to be interpreted as indicating a reluctance of a dishonest witness to confront innocent defendants as indicating the screened witness is an

honest witness being intimidated by a guilty accused.

[2] The rationality of the decision of the Jurats

23. The submissions of the Appellants on occasion failed to recognise the constraints that Article 25(1) of the Court of Appeal (Guernsey) Law 1961 imposes on this Court. In *Aladesuru v R* [1956] AC 49, Lord Tucker at p. 54 observed that a statute (materially identical to the Guernsey Law) conferred a right only to "a limited appeal which precludes the court from reviewing the evidence and making its own evaluation thereof." In *AG v O'Brien* [2006] JLR 133, Lord Hoffman reviewed Article 26(1) of the Court of Appeal (Jersey) Law 1961 (which is materially identical to Article 25(1)), quoted Lord Tucker's words with approval and emphasised that: "It is not the function of the Court of Appeal to say that the evidence of the accused should have been accepted."
24. It is to be noted that although in *O'Brien* Lord Hoffman referred to the possibility of legislative change or a more liberal interpretation of the statutory language being adopted, no change has been made to either the laws of Jersey or Guernsey. In *Bhojwani v AG* [2011] JCA 034, Beloff JA speaking for the Jersey Court, but using language that is equally apposite to the Guernsey Court of Appeal, said: "This Court has consistently and recently approached its role in a way which recognises the difference between the Jersey and English statute: e.g. *Hall v AG* [1995] JLR p.102 (notably it has been observed that the 'unsafe and unsatisfactory verdict' is no part of Jersey Law) ... If the States wished to align Jersey to mainland law in this area, they could have done so. Our researches suggest that the issue of reform has never been seriously raised: the record shows that, even if it had been raised, it was rejected."
25. Accordingly we consider it appropriate to follow the guidance given in *Taylor v Law Officers of the Crown* (2007–08) GLR 207 by Beloff JA as to the approach of the Court of Appeal in Guernsey to grounds of appeal based upon the rationality of factual conclusions reached by Jurats. The guidance may be distilled into three principles:-
- [1] The jurisdiction of this Court is defined by the 1961 Law and the powers of Court are more limited than those enjoyed by the Court of Appeal (Criminal Division) in England and Wales which incorporates the concept of an 'unsafe' verdict, and, by judicial gloss, that of a lurking doubt.
- [2] Where an appeal is from the verdict of Jurats, which does not disclose the reasons upon which the verdict is based, "if the summing up is sound the court may well not be able to interfere unless the verdict is obviously wrong" (*Guest v The Law Officers*; (2003) GLR N-7). Furthermore, as Le Quesne, J.A. observed in *Tilley v Law Officers C.A.*, November 27th, 1973, unreported (Guernsey C.A. Judgments 1964–1989, 88) "... the Jurats are holders of judicial office and are far more experienced in the affairs of law and legal procedure than the normal juryman in the United Kingdom." A challenge to their verdict as unreasonable is especially difficult to make good.
- [3] In assessing the rightness or wrongness of the verdict, the Court of Appeal must at all times bear in mind that the function of fact finding has been left to the lower court and that, particularly where credibility is in issue, the lower court, notoriously, has the advantage, denied to the Court of Appeal, of seeing and hearing the witnesses including, most importantly, the defendant.
26. The Appellants submit that the prosecution case was predicated on the proposition that a date rape drug has been administered to the Complainant. Accordingly it is submitted that the decision to convict must be logically inconsistent with the fact that the Jurats found that they were not satisfied to the criminal standard that such a drug was used or administered.

27. However the prosecution case was not contingent on the use of a date rape drug. The Complainant undoubtedly thought her drink might have been spiked but she did not advance a positive case on when, how or even whether this had happened. The highest she put it was: "I believe my drink may have been spiked." The evidence of the toxicologist did not confirm this belief since, by the time samples of the Complainant's blood were taken, a date rape drug such as GHB would not have been detectable. The Crown Advocate confirmed in closing the case at trial that the relevant question for the Jurats was the physical state in which the Complainant found herself when she was in contact with the Appellants and not how she got into that state.
28. The Appellants submit that the evidence of the Complainant should have been treated as unreliable and incredible because her account of her symptoms was obviously untrue if the use of a date rape drug could not be established. Advocate Ayres submits that, as a matter of common experience, the description of the symptoms the Complainant claimed to have experienced were not explicable by reference to her admitted intake of alcohol. There was therefore no rational explanation for the symptoms she said she suffered and her account must thus be untrue. We note that this was not a submission advanced on behalf of any of the Appellants at trial at the close of the case for the Crown, notwithstanding the fact that, on Advocate Ayres' submission to this Court, there could have been no rational basis on which the case could be left to the Jurats.
29. We consider that the account of the symptoms experienced by the Complainant could not be dismissed as obviously untrue. The Jurats were entitled to have regard to the evidence corroborating the Complainant's description of experiencing blurred vision and nausea, followed by a loss of equilibrium and consciousness. Her evidence was confirmed by, amongst other things, the evidence from the Appellants (either in admissions made to the police or in their own defence) that she had vomited and/or was unsteady on her feet at Clevancey. Each of the Appellants accepted that the Complainant had lapsed into unconsciousness at some stage during the night albeit the Appellants Loreto and Almeida said any insensibility was fleeting. In addition there was the photographic evidence that suggested the Complainant was unconscious at the time the photographs were taken. Finally the Appellant Pinto pleaded guilty to an offence of indecent assault on the basis that the Complainant was unconscious when he assaulted her. That plea was before the Jurats.
30. Moreover, even if the Jurats accepted that there was no rational explanation for the full range of symptoms described by the Complainant, it was still open to the Jurats to conclude that she was telling the truth when she said she had not given any consent to any act of intercourse and had drifted in and out of consciousness while at Clevancey. The issue of credibility and reliability was a matter for the Jurats and we do not consider that a conclusion in favour of the Complainant was outside the range of rational responses to the whole of the evidence in the case.
31. Attention is drawn by the Appellants to internal inconsistencies in the account given by the Complainant. It is said her account of kissing the Appellant Loreto was inconsistent both in relation to the time it was said to have taken and the passion with which it was undertaken. It is submitted that the failure by the Complainant to identify the Appellant Loreto as being the 'muscular man' who raped her was incredible. Her description of her previous sexual history was also subject to detailed scrutiny and criticism.
32. We do not consider that these inconsistencies are such as to render her account incapable of belief. It was open to the Jurats to regard the claimed inconsistencies as no more than the result of the Complainant honestly trying to recall a traumatic experience when she was affected by drink or drugs or exhibiting a natural reluctance to provide a detailed account of her previous sexual and social history in a manner that did not affect her credibility on the core issue of consent.

33. Applications were made and granted by Finch J under which the Appellants were permitted to question the Complainant about her previous sexual history. Complaint is made about the failure by Finch J to permit counsel for Almeida to ask the Complainant about her admission to hospital and it is suggested that counsel for Pinto was impeded in his cross examination of the Complainant on her recollection of the events of the evening by Finch J's suggestion that it was not reasonable to suggest that the Complainant would have agreed to have group sex with the Appellants. The objection raised by Finch J to this suggestion is said to have been facetious.
34. In our judgment, the interruption of the cross examination on behalf of the Appellant, Pinto, has to be seen in the context of the defence case advanced by Pinto. He had admitted that the Complainant had been unconscious whilst others had had sexual contact with her and accepted he had been guilty of indecent assault on the grounds that she lacked capacity to consent when he assaulted her. In those circumstances the Judge was entitled to question whether the suggestion being made by his Advocate that she might have given an unlimited consent to group sex was realistic and appropriate.
35. As for the cross examination on the admission to hospital, the Advocate for Almeida had made it clear that he merely was seeking to establish was that in the run up to the complaint, the Complainant was destabilized and deeply upset, as the result of the breakup of her relationship with a former boyfriend only a few months before. This background had largely been established by cross examination at the point when Finch J intervened to question the need for detailed questioning about her admission to hospital. We consider that this intervention caused no significant damage to the defence case. The point was of marginal relevance and the importance was significantly diminished by the Complainant's acceptance that she was in a state of emotional turmoil at the time. As the Advocate for Almeida accepted: "I've got better things to ask, it's just one of those things that I thought it appropriate to ask." The Advocate was not able to point to any particular relevance that the point might have. His submissions concluded: "Personally I think it's relevant. It's a strange thing to do. But again, I can see that it's exercising your mind, Sir. I'm happy to move on and deal with matters expeditiously if you wish me to."
36. We consider that the Appellants' more general complaints as to restrictions on cross examination have to be examined against the backdrop of the wide-ranging cross examination that was permitted by Finch J. This allowed a broad examination of the Complainant's personal, medical and sexual history. We do not consider that it was necessary or appropriate for that examination to range even more widely. The cross examination gave the defence a full opportunity to test the accuracy and reliability of the Complainant by reference to her history. Insofar as that examination revealed inconsistencies in her earlier accounts of her sexual history we do not consider that those inconsistencies rendered her evidence incapable of belief. Indeed the admissions made by the Complainant in the course of her evidence in relation to her casual sexual relationships with two men other than her former boyfriend tended to support her credibility rather than undermine it.
37. For these reasons, even taking what Advocates Ayres describes as the more generous approach to an appeal on the basis of a lurking doubt, we do not entertain any lurking doubt about the safety of the convictions in this case. We consider that the Jurats were entitled to look at the evidence in the round and to conclude that the defence evidence that the Complainants had consented was obviously untrue, that each of the Appellants knew that she had not consented and would not consent to intercourse with them, whether vaginal or anal.

The appeals against sentence

38. It is suggested on behalf of the Appellants that the appropriate starting point after a trial was a sentence of eight years imprisonment, having regard the English sentencing guidelines on the offence of rape, see *Sentencing Guidelines Council definitive guideline on sexual offences*. It

is submitted by each of the Appellants that the taking of indecent photographs during the course of the rape should not have been treated as an aggravating factor in setting the starting point. The Appellant Pinto also suggests that, since he was not actively involved in the photography, it should not be treated as an aggravating feature in his case.

39. However these submissions ignore the fact that the offence of rape was charged as a joint enterprise and the conviction of each of the Appellants involved a finding by the Jurats that they were jointly responsible for the treatment of the Complainant. The starting point for any sentence must therefore reflect that joint treatment.
40. We consider that in this case it was open to the court to select ten years as the starting point. Under the English sentencing guidelines, the recommended range in the case of rape by more than one offender acting in concert is between six and eleven years imprisonment and the existence of aggravating features may significantly increase the starting point. A starting point of eight years under the guideline is said to be appropriate where any one of the relevant aggravating features is present. In this case there were at least two relevant features present. The rape was “committed by two or more offenders acting together” and there was “repeated rape in the course of one attack (including cases where the same victim has been both vaginally and anally raped).”
41. This was a case of gang rape in which multiple rapes (vaginal and anal) were performed on the Complainant. So far as anal rape was concerned, although this allegation was denied by each of the Appellants, DNA from two people was found in the Complainant’s anal canal. Her evidence confirmed that someone had forced his penis into her anus and she had been unable to prevent it. She also recalls someone (probably the Appellant Pinto) trying to put his penis into her mouth. This act was admitted by Pinto in his probation report. This evidence meant that the Court was entitled to conclude that the Complainant had been subjected to multiple acts of anal rape, vaginal rape as well as an attempted oral rape. Given the evidence that the Appellants were acting in concert we see no reason in principle for not using these acts to determine the appropriate starting point for their sentences even though it is not possible to determine which of the Appellant’s carried out each aspect of the attack on the Complainant.
42. Furthermore in our judgment the taking of photographs was an aggravating feature of the offending. It matters not who held the camera since each of the Appellants was present when the pictures were taken. Pinto may have been in the background but he did not intervene to prevent the camera being used and later looked at the pictures himself. In our view, the taking of photos and their viewing, contributed to the further humiliation of the Complainant. The existence of the photographs presented a threat that her degradation might be exposed to others. The fact that the photographs were shown to Pinto confirms this risk. That the photos were not more widely distributed cannot be regarded as a mitigating or ameliorating feature since the Appellants were arrested shortly after the offences were committed and before any real opportunity had arisen for the photographs to be distributed outside their number.
43. We consider, leaving aside the special need to protect the community in Guernsey from the scourge of sexual offending and the issue of deterrence, that a starting point of ten years imprisonment was amply justified in this case. Whilst the starting point may be regarded as being at the top of the range, this was an offence of gang rape, involving multiple acts of depravity and the abuse of a vulnerable woman, whom each of the Appellants must have realised was helpless. The photographic evidence served to reveal the callous indifference of the Appellants to the state of the Complainant and their triumphalist approach to their sexual crimes. The impact on the Complainant has been severe and is described in moving detail in a victim impact statement which ends with these words: “There isn’t a day that goes by that I don’t think of what happened that night. Having my life exposed for all to see, the horror of having to relive it again and again, facing the lies and the accusations from [the Appellants] and the lack of remorse they have shown throughout has made this an absolute nightmare. It has had a massive effect on my life and those of my family and friends.”

44. Each of the Appellants argues that any sentence should have been discounted on account of good character. However, in the context of a contested trial, we do not consider that there was any obligation on the Jurats to make a downward adjustment of the sentences. The fact of good character is reflected in the starting point. All sentencing guidelines starting points and sentencing ranges relate to adult offenders of previous good character convicted following a plea of not guilty. Moreover, as the English Court of Appeal observed in *Millberry* [2003] 1 WLR 546 at [29] a defendant's good character, although it should not be ignored, does not justify a substantial reduction of what would otherwise be the appropriate sentence for offences of rape. We do not consider that the starting point required any adjustment in this case. The probation reports on each of the Appellants reveal a marked lack of remorse and a complete absence of insight into their offending.
45. The Appellant Pinto also argues that he was entitled to an additional discount of up to a third so as to distinguish his case from that of the other Appellants because he made partial admissions in interview, admitted his guilt in relation to an indecent assault and did not personally rape the Complainant. We do not consider that Pinto was entitled to any further discount (over and above the 20% reduction allowed by the Royal Court) to reflect the minor differences between his case and those of the other Appellants. On his own admission he attempted vaginal intercourse with the Complainant and only failed in his attempt because he could not achieve an erection. He was in any event jointly liable for the acts of rape on the verdict of the Jurats and the overall depravity visited on the Complainant.
46. The Appellant Almeida alone complains about his recommendation for deportation. At the time of sentence he had been permanently resident in Guernsey for 13 years and had a large family resident in Guernsey, including importantly a six year old daughter. The mother of his daughter ceased to have contact with the daughter when she was two years old. The Appellant was therefore effectively her sole parent, sharing parental responsibility with his own mother.
47. It is clear that Finch J gave close attention to the decision of this court in *O'Dette v Law Officers of the Crown* (2007–08) GLR 16 at paragraphs 63-68 which the Appellant accepts sets out the relevant principles to be applied in making a recommendation for deportation. It is suggested that the summary of the Appellant's relevant personal circumstances in the sentencing remarks demonstrates that the sentencing court omitted to consider relevant factors. However it is apparent that the court had well in mind all the important factors identified in *O'Dette*, including the Appellant's age, his long standing connection with Guernsey as well as his family links to the island and his relationship with his daughter. The Court had a probation report that gave detailed consideration to the Appellant's personal history. The report referred to the Appellant's then plan to pursue a career in farming in Portugal upon his release from his sentence. In the circumstances we conclude that the recommendation for deportation made by the Royal Court was, on the information available, based upon appropriate principles and neither wrong in principle nor manifestly excessive.
48. Complaint is made that no sufficient attention was paid to the impact of the deportation of Appellant on his daughter and their right to family life under Article 8. It is suggested that further enquiries should have been conducted by the authorities and the Royal Court before any recommendation was made. We accept that the relationship between the Appellant and his daughter was of considerable importance in the sentencing process for the reasons set out below. The child's best interests should have been treated as a primary consideration and the Court needed to be armed with the facts required for a careful examination of those interests.
49. However the circumstances in which a sentencing court should exercise an inquisitorial function are extremely rare, see *SS (Nigeria) v Secretary of State* [2013] EWCA Civ 550 per Laws LJ at [34-35]. Where, as here, the detail of the relationship was a matter that lay peculiarly within the knowledge of the Appellant, we do not think it can lie in the mouth of the Appellant to complain about the failure of the Royal Court to avert in detail to the interests

of his daughter when it was given no specific information about her relationship with the Appellant or the likely impact of any order for his deportation. In all cases where the defence wish the Royal Court to take into account rights to family life, they must ensure that the court is provided with any information about the domestic circumstances of the defendant and his (or her) family that may be relevant.

50. The Article 8 rights to family life of the Appellant and his daughter were clearly engaged by the sentencing process in this case. By definition, imprisonment and a recommendation for deportation, was bound to interfere with the family life not only of the Appellant but of those with whom the Appellant normally lived and especially his daughter. The authorities however demonstrate that, while there is no rule of exceptionality requiring that the impact on the family life will be exceptionally severe if it is to succeed, they also show that the more pressing the public interest in imprisonment or deportation, the stronger must be the claim under Article 8 if it is to prevail.
51. The right approach to article 8 is to ask:
- [1] Is there an interference with family life?
 - [2] Is it in accordance with law and in pursuit of a legitimate aim within article 8.2?
 - [3] If so, is the interference proportionate given the balance between the various relevant factors, see *HH v Deputy Prosecutor of the Italian Republic, Genoa* [2012] 3 WLR 90 per Lady Hale at paragraph [30]?
52. As the English Court of Appeal subsequently observed in *R v Petherick* [2012] EWCA Crim 2214, in sentencing cases, the first two questions will usually be straightforward. There will almost always be some interference with family life and it will be in accordance with law and due to legitimate aims. It is the third question that may call for careful judgment.
53. In any criminal sentencing exercise, the legitimate aims of sentencing have to be balanced against the effect of any sentence on family life. These aims include the need of society to punish serious crime and to protect society from persons who may present a risk of committing further serious crimes. The interest of victims that punishment should constitute just desserts is also a legitimate aim as is the need of society for appropriate deterrence. The graver the offence the less likely it is that any interference with family life inherent in a sentence of imprisonment or an order for deportations will be disproportionate. It needs to be remembered that just as a sentence may affect the family life of the defendant and of his innocent family, so the crime will very often have involved the infringement of other people's family life. This present case is one in which Article 8 rights are affected not only in the Appellant and his child but in the Complainant and her family.
54. We have now had the opportunity to consider further information about the Appellant's personal circumstances. It is clear that the relationship between the Appellant and his daughter is a strong one and of real importance to the child since her natural mother has no contact with her. However we must weigh this relationship and the undoubted harm that may be caused to the child by the loss of contact with her father consequent upon any deportation against the interests of the Complainant and the people of Guernsey, given the seriousness of the offending and the threat that may be posed by the Appellant on his release, in circumstances where he has shown no real remorse for his conduct or insight into his behaviour.
55. We do not consider that it was either excessive or wrong in principle to recommend deportation in this case. We would observe however that it should not be assumed that the question of the proportionality of deportation has been finally settled by our decision to dismiss this appeal against sentence. In our view the Lieutenant Governor will be required to consider with care the proportionality of any deportation at the point when the Appellant is

considered for release and removal since the possibility exists that, by that stage, the balance may have shifted so as to require a decision to be taken in his favour notwithstanding the recommendation of the court. The Supreme Court decision in *H(H)* demonstrates that the interests of the child will remain a matter of substantial importance throughout the process of removal. The Lieutenant Governor will need to proceed on a proper understanding of the facts that illuminate those interests. At the same time the Lieutenant Governor will be entitled to weigh against those interests, the impact of the powerful interests in public protection and appropriate punishment that exist in this case.