Garie David Hewlett v The Law Officers of the Crown
Court of Appeal
18th May 2016

JUDGMENT 19/2016

Leave to appeal and appeal against sentences imposed for indecent assault and possession of indecent photographs of a child

IN THE COURT OF APPEAL OF GUERNSEY

CRIMINAL DIVISION – APPEAL NO. 472

18th May 2016

Before: **Robert Logan Martin QC**
David Anderson QC
Sir Michael Birt

Between: **Garie David Hewlett** **(Applicant)**

-and-

The Law Officers of the Crown **(Respondent)**

Advocate Ayres for the Applicant
Crown Advocate Calderwood for the Respondent

BIRT, JA

This is the judgment of the Court

1. This is an application for leave to appeal against the sentence imposed on the applicant by the Royal Court (Judge Finch and Jurats) on 14th December 2015. Leave to appeal was refused by the Bailiff sitting as a single judge on 2nd March 2016 and the applicant now renews his application to this Court.

The factual background

2. The applicant pleaded guilty to an indictment containing nine counts. Counts 1 – 4 were offences of possessing an indecent photograph of a child contrary to section 3A(1) of the Protection of Children (Bailiwick of Guernsey) Law 1985.

3. Counts 5 – 8 were specimen counts covering multiple occasions of sexual intercourse during the two year period between 9th July 2012 and 21st July 2014 with the complainant when she was aged 13 – 15 years. They were however charged as indecent assault, a common law offence,

rather than the statutory offence of unlawful sexual intercourse under Article 3(a) of the Loi Relative à la Protection des Femmes et des Filles Mineurs 1914 ("the 1914 Law"). The reason for that was that the 1914 Law imposes a one year time limit for prosecutions of unlawful sexual intercourse under Article 3(a) and accordingly it was too late to charge that offence for the period prior to July 2014.

4. Count 9 was a further specimen charge alleging unlawful sexual intercourse contrary to Article 3(a) of the 1914 Law between 22nd July 2014 and 26th August 2014, when the complainant was 15 years of age.

5. At the hearing before the Royal Court, the applicant was sentenced to a total of 4 years imprisonment as follows:-

   (i) in respect of counts 1 – 4 (indecent images), 12 months' imprisonment concurrent on each count;

   (ii) in respect of counts 5 – 8 (indecent assault), 3 years imprisonment concurrent on each count but consecutive to the sentence on counts 1 – 4; and

   (iii) in respect of count 9 (unlawful sexual intercourse), 18 months' imprisonment concurrent.

   In addition, the Court imposed an extended period of imprisonment with an extension period of 2 years.

6. The background to the offences is as follows. There is an extended family connection between the complainant and the applicant but no blood relationship. They met as a result of this family connection when the complainant was 12. The applicant was 20 or 21 at the time. They became friends and exchanged messages via social networks.

7. When the complainant was 13, they kissed for the first time and shortly afterwards they had sexual intercourse. Thereafter they continued to have sexual intercourse on a regular basis, initially every other day and then about once a week. This was usually in the applicant's bedroom but there were about four occasions when they had sexual intercourse at her home. The complainant told officers:-

   "I did feel a bit pressured into having sex with him but I just went along with it. I consented to having sex but I did worry that he would get angry if I didn't go along with it. [the applicant] told me not to tell anyone about us having sex as he didn't want to get into trouble for it. He said he didn't want to be branded as a paedophile."

8. The applicant purchased several items of underwear for the complainant including lingerie from Ann Summers and vibrating underwear.

9. The applicant had 278 images of the complainant stored on his two mobile telephones. They all fell within level 1 of the Sentencing Advisory Panel categories ie they were images depicting nudity or erotic posing of a child but with no sexual activity. According to the complainant, the applicant had asked her to send him photographs of herself. They ranged from photographs of her in her underwear to close up photographs of her vagina. She told the police:-

   "I felt pressured into sending these photos to him as he would send photos of himself to me. I would feel like I had to send ones of me in return. [the applicant] would get angry if I did not send him photos of me."

10. The applicant and the complainant last had sexual intercourse in early September 2014. The defendant was arrested by police on 10th November 2014. When interviewed he denied that there had been any form of relationship or that they have ever kissed or had any form of sexual

contact. In relation to the photographs, he denied having asked her to send them to him, although he was unable to explain why he had stored them and not deleted them.

11. Despite his denials during the police interviews, the applicant indicated a guilty plea at an early stage in the court proceedings and, as already indicated, pleaded guilty upon indictment. He was 25 at the time of sentencing and had been aged between 21 and 24 at the time of the offending. He was in full time employment and lived with his mother. He had a young son with whom he was in regular contact. He had two minor previous convictions but they were not relevant to the present offending.

12. In mitigation, his advocate submitted that there was no question of the complainant being pressured into having sexual intercourse. The applicant said she was always willing and often initiated sexual intercourse herself. It was pointed out (and accepted by the prosecution) that she had previous experience of sexual intercourse and was not a virgin. It was also submitted that the difficulties of the complainant referred to in the victim impact statement (eg self-harming) had predated the relationship with the applicant and that accordingly the hurt that the complainant felt was not solely attributable to the applicant's conduct. The applicant also denied having pressured the complainant into sending photographs of herself. She was the one who had asked him to send photographs of himself naked to her because she felt it was unfair that she had sent so many to him and he had not reciprocated. Counsel further submitted that the sentence for the images should not be consecutive as they were all level 1 images and arose out of the relationship; they were not separate offences which would justify an increased sentence. He also pointed out that the reports indicated that the applicant acknowledged that he needed to develop an understanding as to why he had committed the offences and submitted that a suspended sentence supervision order would be appropriate so that he could undergo the type of therapy advised by Dr Briggs in his psychological report.

13. As already stated, the Royal Court felt unable to accede to this submission. The Court held that there were four aggravating factors in relation to the sexual offending, namely the difference in ages, the period and extent of the offences, the fact that the applicant was in a situation where trust was reasonably expected and a lack of acceptance or remorse. In relation to the indecent images, the Court found the following aggravating factors, namely, an element of breach of trust, a significant period in which a large number of images was accumulated and the fact that the victim was from the Bailiwick. The Court said that it would be following the guidance of the Court of Appeal in the case of Wicks v Law Officers 2011 – 2012 GLR 482.

14. Putting these matters together, the Royal Court took a combined starting point of 6 years. From this it allowed a total discount of one third to take account of the early guilty pleas attracting full credit, the lack of any similar previous conviction and the other mitigation put forward on behalf of the applicant. The Court indicated that girls of this age needed to be protected from predators. It stated that there had to be an element of deterrence and concluded that, despite the mitigation, this was still an exploitative relationship with a significant age difference.

Grounds of Appeal

15. The applicant submits that the total sentence of 4 years imprisonment was manifestly excessive. We would summarise the grounds of appeal as set out in the perfected grounds of appeal and developed in the written and oral submissions as follows:-

    (i) It was wrong to impose a sentence on the counts of indecent assault (3 years) which exceeded the statutory maximum for an offence of unlawful sexual intercourse when the conduct charged as indecent assault in fact consisted simply of unlawful sexual intercourse.

(ii) The Royal Court failed to take sufficient account of the fact that the complainant had had previous sexual experience with two older men and the other available mitigation.

(iii) The sentence for the counts of possessing indecent images was manifestly excessive. In particular, the Court was wrong to treat as an aggravating factor the fact that the complainant was from the Bailiwick.

(iv) The Royal Court failed to have proper regard to the totality principle. The sentence for the possession of indecent images should have been concurrent rather than consecutive and the overall starting point was excessive.

16. We shall consider each of these in turn.

Ground 1

17. The 1914 Law provides that the maximum sentence for an offence of unlawful sexual intercourse contrary to Article 3(a) is 2 years imprisonment. It also provides that a prosecution for such an offence may only be brought within one year after the offending. Conversely, indecent assault is an offence at common law for which there is no limitation period and which carries a maximum sentence of life imprisonment.

18. The prosecution accepted before the Royal Court that, just like count 9, counts 5-8 all related to unlawful sexual intercourse with the complainant and that the only reason that indecent assault had been charged on those counts, whereas unlawful sexual intercourse had been charged for count 9, was that the limitation period of one year had expired in relation to the offending reflected in counts 5-8.

19. Advocate Ayres submitted therefore that the Royal Court should have passed a sentence on counts 5-8 which did not exceed that which would have been permissible under Article 3(a), as to do otherwise would be to circumvent the maximum sentence laid down by the legislature.

20. We have not been referred to any Guernsey case which considers this issue. It has however arisen in England and Wales in respect of similar legislation in that jurisdiction, which laid down a limitation period of one year for prosecutions for unlawful sexual intercourse and a maximum sentence of 2 years' imprisonment, but no time limit for prosecutions for indecent assault and a maximum sentence for such an offence of 10 years.

21. Although it does not arise directly in relation to the issue which we have to consider, it is worth touching upon the question of whether it is proper for the prosecution to charge indecent assault, when all that is in reality alleged is unlawful sexual intercourse but the former charge is brought solely because a charge for unlawful sexual intercourse would be time barred. In R –v- J [2005] 1 AC 562 the House of Lords held (Baroness Hale dissenting) that if a statutory provision was clear and unambiguous, the court could not decline to give effect to it on the ground that its rationale was anachronistic or discredited or unconvincing. Parliament had to have intended the 12 month time limit for prosecutions for unlawful sexual intercourse to have some meaningful effect and accordingly, when only evidence of sexual intercourse with a girl under 16 was relied upon, a defendant could not be prosecuted for indecent assault after the time limit had elapsed.

22. In Hastie –v- Law Officers of the Crown [29th September 2015] the Court of Appeal in this jurisdiction declined to follow R –v- J. It held that the existence of a single statute in England and Wales which dealt with both indecent assault and unlawful sexual intercourse was critical to the reasoning of the majority in that case. Conversely, in Guernsey the offence of indecent assault was a common law offence and was not mentioned in the 1914 Law. It was accordingly impossible to construe the time limitation provisions in the 1914 Law as implying a legislative

intention to limit the time for prosecutions for indecent assault. There was therefore no restriction, whether express or implied, under the laws of Guernsey on the prosecution of indecent assault even in circumstances where a prosecution for unlawful sexual intercourse contrary to Article 3 of the 1914 Law was time barred (see paras 10-15 of the judgment of Montgomery JA).

23. The courts in England and Wales have also had to consider the approach to sentences for indecent assault where, in reality, what is alleged is unlawful sexual intercourse.

24. In R –v- Hinton [1995] 16 Cr. App. R (S) 523 at 525 Lord Taylor CJ said this :-

> ***"However, the prosecution were prepared to accept a plea of guilty to the offence originally charged as count two, namely unlawful sexual intercourse with a girl under the age of 16. The maximum sentence for that offence is two years' imprisonment. The only reason why the learned judge was able to pass a sentence of three years was because the offence charged originally was time-barred, and accordingly, there was substituted for it what might seem the lesser offence of indecent assault, rather than unlawful sexual intercourse. An offence of indecent assault, since 1985, carries a maximum of 10 years. Accordingly, the learned judge's sentence was strictly lawful in terms of the maxima imposed by Parliament, but the unfairness of the situation is clear; had it not been for the time bar the appellant could not have been sentenced to more than two years' imprisonment. It would be unfair that he should be sentenced to more than that, simply because the case had been delayed in coming to court.***
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> ***We feel bound to review the sentence on the basis that the maximum the court could have imposed was two years' imprisonment; and bearing in mind the plea of guilty, there ought additionally to be some discount from that sentence. In the result, we have come to the conclusion that the sentence which we ought to substitute for the sentence of three years, which we quash, is one of 18 months' imprisonment."***

25. The decision in Hinton was followed in a number of subsequent cases in the English Court of Appeal. For example, in R –v- Jones [2003] 2 Cr. App R 8, the Court of Appeal said this:-

> ***"Equally, nothing we have said should detract from the now settled practice of this Court in treating two years imprisonment as the maximum sentence appropriate to a charge of indecent assault brought in circumstances where, but for the expiry of the 12 month time limit, the charge would appropriately have been [one of unlawful sexual intercourse]."***

26. This practice was arguably called into question in the case of in R –v- Figg [2004] 1 Cr. App. R (S) 68 where Leveson J said this at paras 14-16:-

> ***"14. Giving the judgment of the Court [in R –v- Iles [1998] 2 Cr. App. R (S) 63]] Jowitt J said:-***
>
> > ***"We must approach the sentence on the basis that the maximum sentence for this offence of indecent assault should be regarded as one of two years' imprisonment as the Court is really dealing with an act of unlawful sexual intercourse; see the judgment of Lord Taylor CJ in Hinton."***
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> ***Unfortunately the learned judge did not point to the significant feature in Hinton, that the Crown were prepared to accept a plea of guilty to unlawful sexual intercourse which itself gave rise to an unfairness.***
>
> ***15. In any event that case led to an editor's note in these terms:-***

"Where a defendant is convicted of indecent assault on the basis that he committed a single act of sexual intercourse with a consenting girl under the age of 16, the sentencer should pass sentence on the basis that the maximum sentence for the offence is two years (the maximum sentence for unlawful sexual intercourse) rather than ten years."

We do not agree that the effect of these authorities and, in particular, Hinton is accurately represented in that note.

16. Further, the fact of the anomaly in sentencing between unlawful sexual intercourse and indecent assault is not in itself decisive. There are other anomalies in the law, as Parliament recognises the gravity of offending and passes new legislation without updating what is already available on the statute book. … It is, in our judgment, ludicrous to say that the existence of the earlier legislation thwarts the intention of Parliament in the latter legislation and superimposes a maximum sentence of two years' imprisonment under whichever Act the offences charged. Thus, in this case, a justifiable choice to prosecute for indecent assault does not carry with it the limitation imposed by Hinton. We say "justifiable" bearing in mind the background of a middle-aged man grooming a 13 year old child and persuading her to consent to the act of sexual intercourse. That would not necessarily be the case if the facts were different, for example, revealing adolescent experimentation. To go back to answer the question which we posed earlier in this judgment, the learned judge was not constrained by the two years maximum."

27. The most recent English case to which we have been referred is R -v- Cronshaw [2005] 1 Cr. App. R (S) 89. The Court there pointed out that the case of Jones (supra) had not been cited in Figg and went on to say at para 18:-

"18. We for our part are satisfied that, as this Court said in its review of the cases in Jones there is a settled practice of the Court of Appeal in treating two years' imprisonment as the maximum sentence appropriate to a charge of indecent assault brought in circumstances where a charge of unlawful sexual intercourse would have been properly brought, but for the expiry of the 12-month time limit relating to that offence. Whether or not the settled practice applies will depend upon the facts of any given case, but the principle lying behind the practice is that where the offence of indecent assault is, in truth, no more than the unlawful sexual intercourse, it would not be fair or appropriate to impose a greater sentence than that available to the Court had unlawful sexual intercourse been the offence charged. … In some cases it will be clear that the only offence which would have been charged had it been available, but for the time bar, would have been unlawful sexual intercourse, and hence the appropriate maximum sentence for indecent assault, where charged instead of unlawful sexual intercourse, would be two years. … The same may also apply where unlawful sexual intercourse is charged as well as indecent assault but where the indecent assaults may be regarded as part of the foreplay leading to the unlawful sexual intercourse and should not be regarded properly as separate or distinct offences.

19. In other cases, however, such as in the case of Figg, where rape and indecent assault were before the court, but unlawful sexual intercourse was not, and was not likely to be charged, the practice may not apply. If the acts of indecent assault are separate and distinct, for example where they occur on different days to the sexual intercourse, or where the indecent assaults can be, as they were in Figg, regarded as acts of grooming by a man who was considerably older, they could not be regarded as part of or, as Schiemann J said in Quayle, "In truth, no more than unlawful sexual intercourse." We do not regard the case of Figg as either overruling or seeking to overrule the line of cases starting with Quayle and Hinton. We reject Mr Medland's submission to this effect. The Court in Figg was distinguishing those cases and setting out the reasons why the convention or practice did not apply to the facts of the case being considered by them."

28. Unfortunately neither the prosecution nor the defence alerted the Royal Court to this issue. It is accordingly not addressed in the Court's judgment. However, Advocate Ayres now submits to this Court that we should follow the 'settled practice' as described in Cronshaw. We should therefore take a maximum sentence of two years' imprisonment for the offences of indecent assault and, after deduction for a guilty plea and other mitigation, impose the same sentence as in respect of count 9, namely 18 months.

29. Crown Advocate Calderwood, on the other hand, submits that we should not follow the English practice. He refers to the decision in Hastie, which declined to follow the decision in R -v- J on the ground that the problems in England arose from inconsistent provisions of the same statute whereas that was not the case in Guernsey. To accede to the argument for the applicant would, he submitted, be to suggest that the 1914 Law altered the maximum penalty in the pre-existing common law (for indecent assault) when there is no express reference to the offence of indecent assault in the 1914 Law itself. He referred to the observation of the Court of Appeal in Hastie at para 13 that "… *it is impossible to construe the time limitation provisions in the Guernsey laws of 1914 and 1930 as implying a legislative intention to limit the prosecution of indecent assaults*" and argued that replacing the words 'time limitation' with 'maximum sentence' and the word 'prosecution' with 'sentencing' provided the answer to the issue before the Court.

30. The reasoning of the Court of Appeal in Hastie is important and is contained in the following paragraphs:

> ***"10. The existence of a single statute in the form of the 1956 Act was, in our judgment, critical to the reasoning of the majority in R v J. The majority held that Parliament must have intended to prohibit prosecution under section 6 of the 1956 Act after the lapse of 12 months and that clearly expressed statutory intention would be undermined if exactly the same conduct could thereafter be prosecuted, with exposure to the same penalty, as an indecent assault under section 14 of the 1956 Act. It was for this reason that the majority held (see the analysis of the Court of Appeal in R v Timmins [2006] 1 W.L.R. 756) that the prosecution in R v J was unlawful rather than an abuse of process.***
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> ***11. In Guernsey, indecent assault is a common law offence. Unlawful sexual intercourse with a minor aged 13 to 15 is a statutory offence under Article 3 of the Loi relative à la Protection des Femmes et des Filles mineures of 1914 (the 1914 law). The Article 3 offence has always been subject to a statutory limitation period; originally six months but later 12 months under the Loi relative à la Protection des Femmes et des Filles mineures (Amendement 1930) (the 1930 law). Unlawful sexual intercourse with a minor under the age of 13 is a statutory offence under Article 2 of the 1914 law and subject to no limitation period. Accordingly, unlike the case of R v J, there is in Guernsey no single statute with "clear and unambiguous provisions" (per Lord Bingham in R v J at para 15) that can be read as prohibiting prosecution of indecent assault in place of unlawful sexual intercourse.***
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> ***12. Advocate Fooks nevertheless contends that it is a necessary implication of the Guernsey legislation that the delayed prosecution of indecent assault, where the assault would also constitute an Article 3 offence, is prohibited. She suggests, albeit faintly, that the 1914 Law is the source of this prohibition. However there is nothing in the 1914 Law that would enable us to draw the conclusion that the legislation was intended in 1914 to prevent the prosecution of offences of indecent assault even where they consisted of acts of intercourse with minors between 13***

and 15.

13. The reason we are not able to conclude that the 1914 Law was intended to inhibit the prosecution of indecent assaults is that, at least until 1950, the possibility of prosecuting an indecent assault on the same facts as an Article 3 offence did not arise, since the consent of the victim that is a feature of the Article 3 offence would constitute a defence to an allegation of indecent assault. It was only with the passage of the Offences against Girls (Availability of Defences) Law 1950 (the 1950 Law) and a further law in 1956 that the consent of a child ceased to constitute a defence to indecent assault (other than in relation to the so called young man's defence). Accordingly it is impossible to construe the time limitation provisions in the Guernsey Laws of 1914 and 1930 as implying a legislative intention to limit the prosecution of indecent assaults.

14. We see no reason to apply an updating construction to the Guernsey Laws of 1914 and 1930 to produce the prohibition for which the Appellant contends. Although it is presumed that a court will apply to an ongoing Law a construction that updates its wording to allow for changes since the Law was initially framed (so that it is to be treated as always speaking), this does not means that it can be updated so as to prohibit prosecution of offences that are not covered by the Law merely because of some later changes in the rules relating to criminal responsibility. As Lord Bingham put it in R (on the application of Quintavalle) v Secretary of State for Health [2003] 2 AC 687 at [9]: "There is, I think, no inconsistency between the rule that statutory language retains the meaning it had when Parliament used it and the rule that a statute is always speaking. If Parliament, however long ago, passed an Act applicable to dogs, it could not properly be interpreted to apply to cats; but it could properly be held to apply to animals which were not regarded as dogs when the Act was passed but are so regarded now." In our view the Guernsey Laws of 1914 and 1930 were not Laws applicable to indecent assault when they were passed and cannot properly be interpreted as being applicable to indecent assault now.

15. There is therefore no restriction, whether express or implied, under the laws of Guernsey on the prosecution of indecent assault even in circumstances where a prosecution for unlawful sexual intercourse contrary to Article 3 is time barred."

31. We can see no ground on which properly to conclude that the reasoning in Hastie is not just as applicable to the question of the maximum sentence as it is to the question of time limits. Both aspects are laid down specifically in the 1914 Law which does not mention the offence of indecent assault. It would therefore be a strong thing to hold that the sentencing level in the 1914 Law should determine the sentencing levels for the common law offence of indecent assault. Furthermore, as pointed out in paragraph 13 of Hastie, indecent assault could not be prosecuted on the same facts as an unlawful sexual intercourse offence until at least 1950, since the consent of the victim that is a feature of the unlawful sexual intercourse offence would have constituted a defence to an allegation of indecent assault until that time. Accordingly, just as it is impossible to construe the time limit provisions in the 1914 Law as implying a legislative intention to limit the prosecution of indecent assaults, so it is impossible to construe the sentencing provisions of the 1914 Law as implying a legislative intention to limit the sentencing for indecent assaults (consisting of unlawful sexual intercourse) to the maximum level laid down in the 1914 Law for the offence of unlawful sexual intercourse.

32. As the court in Hastie said in the last sentence of paragraph 14 of its judgment, the 1914 Law (and the 1930 Law) were not Laws applicable to indecent assault when they were passed and

cannot properly be interpreted as being applicable to indecent assault now. There is no logical reason for that observation to be true in relation to the time bar provisions of the 1914 Law, but not in relation to the sentencing provisions of that Law.

33. We would respectfully agree with the observation of Lord Bingham at para 22 of R v J where, having referred to the practice of the English courts of adjusting the sentences imposed on those whose indecent assaults consisted of unlawful sexual intercourse so that they reflected the maximum sentence fixed by statute for that offence, he said:

> ***"It is, however, symptomatic of the irregularity of the exercise on which the courts were engaged that they felt constrained informally to reduce, by four fifths, the maximum penalty set by Parliament for the offence of which the defendants had in fact been convicted."***

34. Furthermore, the consequences of not applying the reasoning in Hastie would lead to very illogical and undesirable consequences. The courts regularly impose sentences for indecent assaults falling short of full sexual intercourse – eg digital penetration – which exceed 2 years. The public would find it hard to understand that, if the offender goes further and has full sexual intercourse, the sentence would be less than where he has stopped short of full intercourse.

35. Accordingly, following the reasoning in Hastie, we hold that when passing sentence for indecent assaults, which consist of unlawful sexual intercourse, the court is not limited to the maximum sentencing level under the 1914 Law for offences of unlawful sexual intercourse. We therefore reject Advocate Ayres' first ground of appeal.

36. However, that is not to say that, in circumstances where the indecent assault consists solely of unlawful sexual intercourse, the Court can ignore altogether the maximum sentencing level for the latter offence. In our judgment, in such circumstances, the sentencing court must at any rate have some regard to the sentence which would have been imposed had unlawful sexual intercourse been charged.

37. We draw some support for that approach from the judgment of a five-judge English Court of Appeal issued (after the close of argument in this case) in R v Kahar & Others [2016] EWCA Crim 568. That case was concerned with the appropriate sentencing level for offences under section 5 of the Terrorism Act 2000. That is a very widely drawn section and it was submitted to the Court of Appeal that prosecutions for that offence should only be brought after consideration of other more specific charges. In dismissing that submission, the Court of Appeal said as follows at paras 6 and 7:-

> ***"6. Mr Blaxland QC, on behalf of the appellant Sana Khan, submitted … that the offence under s.5 was enacted in order to extend the ambit of the criminal law in the context of contemplated acts of terrorism; that one of the problems which has arisen in sentencing in s.5 cases is where the conduct of the offender amounted to a different offence under the terrorism legislation, but with a lesser maximum sentence. Against that background, he invited the Court to state that prosecuting authorities should only charge offences under s.5 after consideration had been given to what other charges could appropriately be brought against the defendant - which would confine the breadth of the offence to those cases for which the offence was enacted, and would also help to avoid the difficulty of the sentencing judge having to make findings of fact.***
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> ***7. We declined the invitation. As a matter of constitutional principle, it is generally for the prosecutor to decide what charge to prefer. Whatever may have been the purpose of Parliament, the offence under s.5 is clearly on its ordinary language***

wide enough to cover conduct that might otherwise be charged as conspiracy or even attempt to commit particular offences and/or … to cover conduct that might otherwise be charged as another offence under the anti-terrorist legislation itself. It would, in our view, be inappropriate, both legally and practically, to confine the discretion of the prosecution as to the choice of charge … in the way suggested – albeit that there may be some cases in which it might be necessary to take into account, as one factor, the maximum sentence that could have been imposed for the offence(s) that could otherwise have been charged." [Emphasis added]

It seems to us that the emphasised passage is equally applicable to the sort of case with which we are concerned.

Ground 2

38. Advocate Ayres submitted that the Royal Court did not give sufficient weight to the fact that, at the time her relationship with the applicant began, the complainant had previously had sexual intercourse with two older men. He submitted that the Court also failed to take sufficient account of the fact that no violence or threats were used and that the complainant was an enthusiastic participant in the relationship, that no corruption was used, that any betrayal of trust was minimal given that the applicant and the complainant were not living together, that no perversions were practiced, that the complainant was the sole victim as the offences occurred within the context of the relationship, and that the applicant had no relevant previous convictions.

39. As to the first of these points, Advocate Ayres referred to the decision of the Jersey Court of Appeal in P –v- Attorney General [2012] JCA 070 where at paragraph 18 of the judgment, Nutting JA said this:-

"18. In that context, it is obvious that various factors which some English judges have taken into account in relation to aggravation and mitigation in this kind of case (for example in AG's Reference (No. 1 of 1989) and in R -v- Corless (1989) 11 Cr. App. R (S) 47) are also likely to be relevant in these courts. But that is simply because these are inherently and obviously relevant factors, not because their recognition as such in the English case-law gives them any special legitimacy. Thus, the sentencing court in cases of this nature will take into account (i) the age of the victim; (ii) whether the victim was sexually experienced; (iii) whether any violence or threats were used; (iv) whether any corruption was used; (v) the extent to which there was a betrayal of trust; (vi) whether perversions were practiced; (vii) the number of victims; (viii) the frequency of the offending; (ix) the period of time over which the offences took place; (x) the defendant's criminal record; and (xi) whether the defendant pleaded guilty, thereby saving the victim from having to give evidence." [emphasis added]

40. As can be seen, the Jersey Court of Appeal relied substantially on the case of AG's Reference (No. 1 of 1989). That is quite an old case and it was considered more recently by the English Court of Appeal in R v DM [2002] EWCA Crim 1702 in relation to the issue of the victim's previous sexual experience. The Court of Appeal said this at paras 20 – 21:-

"***20. The relevant mitigating features as set out in that guideline case [i.e. AG's Reference (No. 1 of 1989)] included; first, the entering of a plea of guilty; second, the extent to which there was genuine affection on the part of the defendant; and third, where the girl has had previous sexual experience.***

21. We would comment that whilst the general sense of the guideline case remains good, that last factor might not now be put in that same way, or one which would be regarded as significant in cases of father/daughter incest, even when the daughter is an adult at the time of the offences. Now it rather reflects the absence of what would otherwise be an aggravating feature."

41. That approach was also adopted in AG's Reference (No. 85 of 2014). This was a case of a woman of 43 who had pleaded guilty to sexual activity with a 14 year old boy. There was evidence that he was not sexually naïve and had had previous sexual experience with children of his own age. Nevertheless, at paragraph 28 of its judgment, the court held that this was not a mitigating factor; rather, it should be treated as an absence of the aggravating factor of taking a child's virginity.

42. Each case must ultimately turn on its own facts but we agree with the approach stated in these two cases. The previous sexual experience of a child is unlikely often to be a mitigating factor; rather it will be the absence of an aggravating factor. The previous sexual experience of the complainant in this case was with two older men. As Crown Advocate Calderwood submitted, at the age of 13 such sexual experience amounted to a crime against her. That a complainant has also been the victim of other sexual offences at the hands of others should not be considered a mitigating factor.

43. We therefore reject Advocate Ayres' submission that the Royal Court should have taken the complainant's previous sexual experience into account as a mitigating factor. We are also satisfied that there is nothing to suggest that the Royal Court did not take into account the other features of this case mentioned by Advocate Ayres and listed at paragraph 36 above.

Ground 3

44. This ground relates to the sentence of 12 months' imprisonment imposed for the possession of the indecent images sent by the complainant to the applicant and retained by him on his two telephones.

45. The Royal Court stated that it was following the 'binding guidance' of the Court of Appeal in Wicks. Whilst we agree that the examples of aggravating and mitigating factors given in Wicks may be of equal application to the present charges, it is important to recall that Wicks was concerned with the making or taking of indecent images of children; it was not concerned with simple possession of such images. Thus at paragraph 38 of the judgment, Nutting JA said this:-

"None of the counts in any of the indictments with which these appellants are concerned relates to simple possession of indecent images and since, importantly, that offence carries a different maximum sentence, we do not include advice on sentencing for this offence within the categories listed below, although no doubt the guidelines will provide general assistance to the Magistrate's Court and the Royal Court in such cases."

The maximum sentence for possession is 5 years whereas the maximum sentence for making images is 10 years.

46. Nevertheless the guidance given in paragraph 39 of Wicks is still of some assistance by way of analogy because the following is said in relation to what the Court described as category 6:-

"Category 6 – where an offender has made an image of material falling within level 1, a fine or community penalty, preferably with a condition of treatment, would be appropriate. Where, however, one or more of the aggravating factors which we list below, or any other aggravating factor which the court considers relevant, is present, the court may feel that the custody threshold is passed and may consider whether a sentence of up to 6 months' imprisonment would be appropriate."

47. In this case the Royal Court found three of the aggravating features listed in Wicks to be present, namely an element of breach of trust, a large number of images (the Court in Wicks regarded any number of images above 100 as constituting a large number) and the complainant was from the Bailiwick.

48. Advocate Ayres accepted the existence of the first two aggravating factors (albeit at a modest level) but submitted that the Royal Court should not have taken into account as an aggravating factor the fact that the complainant was from the Bailiwick. Although the complainant expressed concern that the applicant might distribute the images following the termination of the relationship, the fact was that the applicant had not distributed the images sent by the complainant to any other person but had simply retained them on his phone. It followed, submitted Advocate Ayres, that the complainant was not subject to the suffering envisaged in the case of Forno –v- Attorney General [2011] JCA 22 where images of a child are distributed within a small community and therefore lead to significantly greater and more persistent feelings of shame, self-reproach and alienation than in the case of a large jurisdiction.

49. He further pointed out that if, as indicated at para 39 of Wicks, a sentence of up to 6 months was appropriate for an offence of making indecent images of a child at level 1 where one or more aggravating features was present, the sentence of 12 months for mere possession of such images was manifestly excessive.

50. We take first the point concerning the fact that the complainant was from Guernsey. In Wicks, the Court of Appeal said this at paragraph 40:-

> ***"6 - Where the images of a child from this Bailiwick***
> ***Any child who is abused by the taking of an indecent image not only suffers from having his/her innocence destroyed by the abuse, but the perpetuation of the image in photographic or moving picture form renders the abuse more lasting. As the child grows older, nothing can effectively mitigate the knowledge that there exist on the Internet images of the abuse which he or she suffered and which are still being used by paedophiles for their perverse gratification. It is not unusual for the police to find indecent images which are tens of years old and when the victim is traced the trauma of the abuse resurfaces … In our view, the sentencing court would be entitled to consider that the fact that the child victim was from Guernsey constituted an additional aggravating factor of any offence. In this context we respectfully endorse and adopt what was said in Forno v Attorney General (2011) JCA 22, a case involving sexual images of Jersey children. The Jersey Court of Appeal said:-***
>
> > ***"The corrosive feelings of shame, self-reproach and alienation suffered by the child are significantly greater and more persistent in a small and relatively close-knit community than they are in the more anonymous environment of a highly urbanised country of more than 60 million inhabitants such as the United Kingdom"."***

51. Those observations were of course made in the context of images freely available on the Internet. That is not the case here. Furthermore, we do not think that the Court in Wicks was seeking to treat Guernsey or Jersey as a special case. The aspect with which the Court was concerned was that, in a small community, the circulation of any indecent images of a child will potentially have much more serious consequences if the child is from that community and is therefore identifiable.

52. We accept that in this case the images were not available on the Internet and had not been circulated by the applicant. Furthermore, there is no evidence that he intended to do so. Nevertheless, he had kept the images on his phone, rather than deleting them at the end of the

relationship and the complainant was fearful that he might make them available to others at some stage.

53. In our judgment, the Royal Court was entitled to find that this aggravating factor was present. However, on the particular facts of this case, we consider that only modest weight should be attached to it given that the images were not available on the Internet, but had merely been retained by the applicant and not circulated by him.

54. Turning to the overall level of sentence for the indecent image offences, we consider that a sentence of 12 months was manifestly excessive. We have already dealt with the aggravating factor of the complainant being from the Bailiwick. As to the number of images, this was greater than 100 but still in the low hundreds (278). Furthermore, as Wicks makes clear, the gravamen of the number of images is that it indicates a high level of personal interest in indecent images of children and/or a significant period of time over which the images have been collected. That is very different from images communicated in the context of a relationship. As to the breach of trust, whilst the applicant was connected to the complainant by way of extended family, he was not in any direct position of responsibility and, as the Royal Court itself said, there was merely an element of breach of trust.

55. Thus, although three aggravating factors were present, they were present to a very modest degree. In the passage cited above at paragraph 45, the Court of Appeal indicated that, for material falling at Level 1, a community penalty would be appropriate, save that where one or more of the aggravating factors were present, a sentence of up to 6 months might be appropriate. We can see no justification in this case for a sentence as high as 12 months and accordingly we consider that it was manifestly excessive and that a sentence of 6 months was the appropriate level.

Ground 4

56. Advocate Ayres submitted that the Royal Court did not have sufficient or proper regard to the totality principle. In particular, he submitted that the possession of the indecent images arose out of the same circumstances (i.e. the relationship) as gave rise to the other offences and a concurrent rather than a consecutive sentence should therefore have been imposed. Furthermore, the Royal Court was wrong to start with a combined total of 6 years before making a deduction for mitigation. It should have stood back at the end of the sentencing process in order to review whether the overall sentence was in total excessive.

57. We begin by considering the appropriate level of sentencing for the sexual offences i.e. Counts 5-8 (indecent assault) and Count 9 (unlawful sexual intercourse). In our judgment, the sentence of 3 years imposed for the sexual offending cannot possibly be categorised as manifestly excessive. This was a relationship which continued for over 2 years and which involved regular sexual intercourse between a somewhat troubled young girl of 13-15 and a man of 21-24.

58. Reverting to our conclusion in relation to Ground 1, whilst the Royal Court did not specifically advert to the sentencing level laid down under the 1914 Law because its attention was not drawn to it, we detect no inconsistency. Had Counts 5-8 been charges of unlawful sexual intercourse rather than indecent assault, we agree with Advocate Ayres that a sentence of 18 months on each count would have been appropriate. However, we would have imposed consecutive sentences so as to achieve a total of 3 years, which we would have considered appropriate having regard to the totality principle. That is because the maximum sentence laid down by the 1914 Law is for one offence of unlawful sexual intercourse. This, however, was a case where the offending occurred on multiple occasions. Where an offender commits multiple offences, it is clearly appropriate for the sentence to be higher than where he only commits one such offence. We would therefore have imposed sentences of 18 months on each of Counts 5-9 but we would have directed that the sentences on Counts 6-9, whilst concurrent with each

other, should be consecutive to Count 5, which is the first offence in time and occurred when the complainant was only 13.

59. That leaves the question of the sentence for indecent images. We have already held this should be reduced to 6 months. We also consider that, having regard to the totality principle and to the fact that the existence of the images arose out of the sexual relationship which gave rise to the sexual offences, the sentences should be made concurrent.

60. In all the circumstances, we grant leave to appeal against sentence and we allow the appeal to the extent of quashing the sentence of 12 months on each of Counts 1-4, substituting sentences of 6 months on each of those counts and ordering that those sentences run concurrently with the sentences on the remaining counts. The total sentence is therefore varied to one of 3 years' imprisonment. The Royal Court imposed an extended sentence with an extension period of 2 years. We make no change to that period. Thus the custodial term will be 3 years and the extension period 2 years.

Recommendation

61. We cannot leave this case without recommending that urgent consideration be given to amending the provisions of the 1914 Law relating to the offence of unlawful sexual intercourse. We can see no justification for there being a time limit in relation to this offence but no time limit in relation to other sexual offences such as indecent assault. Furthermore, the maximum sentence of 2 years is out of kilter with other sexual offences and leads to the kind of difficulty discussed earlier in this judgment. We note that in both England and Wales and Jersey, the old maximum sentence of 2 years for such an offence has been increased and the time bar has been removed. We recommend that similar reform be considered in this jurisdiction.