



**Jamie McClaren v The Law Officers of the Crown**  
Royal Court  
21<sup>st</sup> April 2017

**JUDGMENT**  
**20/2017**

Appeal Against Sentence imposed by the Magistrate's Court

**IN THE ROYAL COURT OF GUERNSEY**

**Appeal Against Sentence imposed by the Magistrate's Court  
on 17<sup>th</sup> November, 2016  
(Magistrate's Court (Criminal Appeals) (Guernsey) Law, 1988)**

**Between: JAMIE McCLAREN Appellant ("A")**

**-and-**

**THE LAW OFFICERS OF THE CROWN Respondents ("R")**

**Appeal heard on: 12<sup>th</sup> April, 2017**

**Decision handed down: 21<sup>st</sup> April 2017**

**Before: John Russell Finch, Esq., Judge of the Royal Court**

**Counsel for the Appellant: Advocate S E Steel**

**Counsel for the Respondents: Crown Advocate R Calderwood**

**Legislation referred to in Judgment:**

The Criminal Justice (Sex Offenders and Miscellaneous Provisions) (Bailiwick of Guernsey) Law, 2013, Sections 1(1), 2, and 18;

The Telecommunications (Bailiwick of Guernsey) Law, 2001, Section 16;

The Sex Offenders (Jersey) Law, 2010, Section 3(5).

**DECISION**

**Introduction**

1. This is an appeal against part of the sentence imposed in the Magistrate's Court on 17<sup>th</sup> November, 2016. The Appellant ("A") pleaded guilty to an offence under section 16(2) of the Telecommunications (Bailiwick of Guernsey) Law, 2001, namely:

*“THAT YOU, between 22<sup>nd</sup> December 2015 and 20<sup>th</sup> January, 2016 in the Island of Guernsey did send, by means of a telecommunication network to [name of Complainant] messages and certain matter, namely images of a masturbating male, that were of an indecent character; contrary to section 16(1)(a) and punishable under Section 16(2) of the Telecommunications (Bailiwick of Guernsey) Law, 2001.”*

A was sentenced to three years' Probation. The Magistrate's Court certified that the offence was sexually aggravated, pursuant to Section 2(3) of the Criminal Justice (Sex Offenders and Miscellaneous Provisions) (Bailiwick of Guernsey) Law, 2013 ("The Law"). It is against that part of the sentence that the appeal is made.

2. A and the Respondent Law Officers ("R") agree that the Act of Court in the bundle of appeal papers ("the bundle") is wrong. It states A was made subject to a Sexual Offences Prevention Order under Section 18 of the Law for five years. In reality, the Judge of the Magistrate's Court expressly did not make such an order, but a Notification Requirement under Section 2 of the Law for five years (page 35 of transcript). The Act of Court (item 1 of the bundle) is therefore deficient and, in a substantial part, a nullity. Hence it is directed that an accurate Act of Court, showing the correct sentence is produced, headed "Amended Act of Court" with the date of handing down of this decision. The original Act of Court will be deleted.

## **Background**

3. The facts of the case are unusual. They are concisely set out in paragraph 2 of A's skeleton and also paragraphs 1 and 2 of the Probation Report for the Magistrate's Court (item 4 of bundle). Put briefly, A was in an "intimate relationship" with another male, who was also in a relationship with the complainant, at the time a 16 year old female. A was upset at this continuing relationship and this culminated in A approaching the complainant by messaging her informing her of the relationship. This was met with scepticism and A therefore escalated the contents of his messages by sending her images of her boyfriend's erect penis and of him masturbating, in order to demonstrate his infidelity. The messages, which in a substantial part were crude, offensive and unpleasant, were referred to in R's outline of the facts, transcript pages 3-12.

## **The Issue**

4. The appeal concerns the certification of this matter as "sexually aggravated". The Judge of the Magistrate's Court gave her reasons for so certifying at pages 33-35 of the transcript. The applicable provisions of the Law are found in Section 2. There are a number of offences, listed in Section 1(1) which are "relevant offences" and to which on conviction the Notification Requirements apply automatically. The offence which A pleaded guilty to is not in the list. However, by virtue of Section 2(3) a court has the power to certify an offence as sexually aggravated and this makes the offender subject to the requirements. Section 2(4) further provides:

*“(4) A court must not certify that an offence was sexually aggravated unless it is satisfied, on the information available to it –*

- (a) that at, before or after the time of committing the offence the offender's actions included a sexual element directly connected with the commission of the offence, and*
- (b) that the offender poses a risk of sexual harm to the public or any particular person or persons.”*

5. Counsel for A had argued in the skeleton that neither requirement was satisfied, but at the oral hearing abandoned the second limb and accepted that A did, as the Probation Officer indicated, pose a risk of sexual harm within the meaning of Section 2(4)(b). The question that remains for consideration is whether what is set out in section 2(4)(a) is met.

**Does Section 2(4)(a) apply in this case?**

6. Section 16(1)(a) of the Telecommunications (Bailiwick of Guernsey) Law, 2001 states that a person who:

*“Sends, by means of a telecommunications network, a message, or other matter that is grossly offensive or of an indecent, obscene or menacing character;”*

shall be guilty of an offence.

Although not included in the list of offences to which Notification automatically applies, R submitted that there was good reason for this. It is an offence which on the disjunctive wording can be committed without any element of indecency or obscenity. An example might be ‘I’m coming round to slit your throat and petrol-bomb your house’. That, of course, would simply be menacing.

7. R, in oral submissions, put forward the equivalent Jersey statute (it should be noted that the legislation in England is different and any discussion of it should be aware of that fact). Section 3(5) of the Sex Offenders (Jersey) Law, 2010, which ante-dates the Guernsey Law, states that:

*“A court must not certify that an offence was sexually aggravated unless it is satisfied, on the information available to it –*

*(a) that the offence was sexually motivated; or*

*(b) that at, before or after the time of committing the offence the offender’s actions included a sexual element directly connected with the commission of the offence,”*

Accordingly, counsel suggested that the “*sexual element*” in sub-section 5(b) must be broader than “*sexually motivated*” in Section 5(a), and which does not occur in the equivalent Guernsey provision.

8. The learned Judge of the Magistrate’s Court dealt with this aspect of the case in considerable and commendable detail (pages 33-34 of transcript) and gave full reasons to justify the conclusion that A’s offence included “*a sexual element directly connected with the commission of the offence*”. A’s contentions in respect of these reasons are set out in paragraph 10 of his skeleton; responded to in paragraph 25 of R’s response. For the purposes of this appeal the following considerations stand out:

- (i) the complainant at the material time was 16. As the Judge below said, A was aware of her age and sent her “*explicit sexual images*” of “*a man she was in, at the very least, an emotional relationship with*”. This is plainly relevant and an aggravating factor;

- (ii) the images contained, in the words of the Judge, “*an obvious and clear sexual element*”. As R submitted, regardless of any motive, sending such images “*adds a sexual element to an offence that can otherwise be committed in an entirely non-sexual context*”. Furthermore, it was found that A had a sexual motivation “*to do with your perceived need to have a sexual relationship with that young man, in preference to the recipient of the messages was having*”. A suggested that the offence was not sexually motivated “*because the*

*Appellant did not receive any sexual gratification from sending the images” (paragraph 10(4)). As R responded there is no sexual offence under Guernsey Law which has “sexual gratification” as an essential element. Nor, indeed, would that be expected, as “for evidential reasons as much as anything else, this is fortunate”.*

9. However, the essence of this case is correctly pointed out in paragraph 27 of R’s skeleton. This states that after sentencing if anyone in the public gallery was asked if this offence had a sexual element to it, it is difficult to see any negative reply. Whatever mythical creature of the common law is conjured up, this spectator, ‘the officious bystander’, or the ‘man on the Clapham omnibus’ then the response would have been identical. Of course sending images of this nature has a sexual element, or how could it be averred that it did not? The whole tenor of these communications and their purpose make this unpleasant activity very much akin to so-called ‘revenge porn’. If this conduct did not have a sexual element directly connected with its commission, it is hard to see what conduct would qualify.

### **Conclusion**

10. For substantially the reasons given by the Judge of the Magistrate’s Court it is plain that it was open to her to certify that this offence was sexually aggravated and impose the five year Notification Period – indeed it is very difficult to see what other conclusion she could reasonably have come to.
11. The Appeal is dismissed. The need for a correct Act of Court of the decision is repeated (see paragraph 2 above).

**J R Finch**  
**Judge of the Royal Court**