Appeal against sentence

[2019]GCA042

IN THE COURT OF APPEAL OF GUERNSEY

CRIMINAL DIVISION APPEAL No. 490

15 July 2019

Before:

Sir Richard Collas, Bailiff of Guernsey, President
John Martin QC
Clare Montgomery QC

Between:

ROBERT LEONCZUK

Appellant

-and-

THE LAW OFFICERS OF THE CROWN

Respondent

Advocate S E Steel for the Appellant
Advocate R J Calderwood for the Respondent

JUDGMENT

Montgomery, JA

This is the judgment of the Court

1 This is the judgment of the Court. On 21 May 2019, after a trial in the Royal Court, the Appellant was sentenced to four years imprisonment for an offence of indecent assault committed on 31 July 2016. He was also sentenced to a consecutive sentence of two months' imprisonment for failing to surrender to custody contrary to s 10(1) of the Bail (Bailiwick of Guernsey) Law, 2003 (as amended). The Appellant submits that the sentence of four years was manifestly excessive. There is no appeal against the remainder of the sentence or the various ancillary orders.

2 On 31 July 2016 the Appellant, who was then aged 33 years, was in a nightclub in St Peter Port. The Complainant, who was visiting the Island from England, was spoken to by the Appellant in the club. She showed no interest in him. Despite this the Appellant continued to show an interest in her and squeezed her buttocks, although she had not invited this attention. The Complainant left the club at about 0300 and was sitting outside by a wall with her back towards the Appellant when the Appellant lifted her into a standing position. The Complainant then walked away to get a taxi and the Appellant walked off by her side. The Complainant said she had no intention of walking anywhere with the Appellant. Once in the Quay, the Appellant pinned the Complainant into a position where her back was forced against a shopfront window. The Appellant then put his hand down the Complainant's dress and inside her underwear and pushed his finger into her vagina. The Complainant was able to escape by punching the Appellant.

3 The Complainant reported the matter to the police and in the immediate aftermath of the events was shocked, angry and saddened. She found it hard to tell her parents what had happened to her and found it difficult to discuss the events with her boyfriend. She also felt isolated at work. The fact that the process of bringing the Appellant to trial took nearly three years was something that weighed heavily on her.

4 The Complainant said that she found the trial scary and stressful and that she felt ill equipped to deal with it. As she put it in her victim impact statement: "The feeling of not being believed and the claims made about me while in Court meant that I did not sleep for the nights leading up to and during the case and was very on edge, unable to think about anything else."

5 The argument that the sentence of four years was manifestly excessive is premised on the proposition that the appropriate starting point for sentence should have been determined by reference to the Definitive Guidelines issued by the Sentencing Council in England and Wales in respect of the offence of Assault by Penetration contrary to section 2 of the Sexual Offences Act 2003. The Appellant complains that by taking a starting point of five years imprisonment (albeit then reducing the sentence to four years to reflect a discount of 20%) the Royal Court exceeded the sentencing range that would have applied to this offence in England. The Appellant argues that, under section 25(3) of the Court of Appeal (Guernsey) Law 1961, a less severe sentence should be imposed.

6 The impact of sentencing practice in England and Wales on Guernsey was considered by the seven judge Court of Appeal in *Wicks v Law Officers* [2011 – 12] GLR 482 when, having indicated that where the elements of the offence in question are comparable in the two jurisdictions of Guernsey and England and Wales, the Guernsey courts might well derive considerable assistance from the sentencing practice applied in England because of its larger size and the greater number of cases, the Court added at [18]:-

> "there is no need for there to be a significant difference in social or other conditions for the Guernsey Courts to take a different approach from England and Wales and adopt a different level of sentencing. The Guernsey Courts may simply consider that the sentencing levels in England are either too high or too low and should not be followed. They are perfectly free to do so. It is wrong to start from the position that sentencing levels in England are correct and that there must be some specific reason to depart from them. Rather, the position from which it is right to start is that the Guernsey Courts must determine the appropriate sentencing levels for offences committed in Guernsey and that, in doing so, they may or may not derive assistance from what is done in England and Wales or in any other jurisdiction."

7 The impact of the sentencing guidelines in England and Wales has also been the subject of appellate consideration in Jersey. In *AG v K* [2016] JCA 219 at [27] the Court of Appeal observed that:-

> (i) Jersey is a separate jurisdiction from England and Wales and the courts in Jersey are entitled to fix their own sentencing levels. The Royal Court is not in any sense bound by the Guidelines.
> (ii) The analysis of aggravating and mitigating factors which is frequently set out in the Guidelines may often provide a convincing rationale for the assessment of the seriousness of the offending which can conveniently be adopted in Jersey.
> (iii) The Court would be influenced by the sentencing levels envisaged by the Guidelines when considering conduct if it considered the sentencing levels to be correct for that conduct.
> (iv) The Court should decide on the appropriate sentence for the offence before it in every case, and it did not follow that because the Guidelines were helpful in any particular case, they would always be helpful to enable the Court to arrive at the correct level of sentence for that particular offence in the jurisdiction of Jersey.

8 These propositions were founded on principle, see *AG v K* [28-31], based on the marked structural differences between the application of the criminal law in Jersey from that in England and Wales.

9 Similar structural differences are apparent in the sentencing practices and procedures in Guernsey. In criminal trials in the Royal Court in Guernsey the length of sentence is determined by the Jurats. The Jurats are elected by the States of Election, which consists of the Bailiff (who has a casting and not an originating vote), the Jurats, the Rectors of the Anglican Parish Churches, the Law Officers of the Crown, representatives of the Parish Douzaines and the People's Deputies in the States of Deliberation. Candidates are typically people of proven ability, who bring a broad range of skills and experience to the Bench.

10 In addition, the criminal laws of Guernsey have not been subjected to the same degree of specification and (over) elaboration that has been a feature of criminal legislation in England and Wales since 1990. Estimates as to the number of new offences created in England and Wales have varied (for the reasons explained by James Chalmers and Fiona Leverick, 'Tracking the Creation of Criminal Offences' [2013] Crim.L.R. 542). However on any view the rate of creation of one or more new offences every day in England since the turn of the century has not been replicated in Guernsey. Accordingly, it is not possible accurately to map English legislation (particularly in the area of sexual offending) onto the laws of Guernsey.

11 In addition, whilst in England and Wales it has been thought necessary for the purposes of ensuring consistency to adopt a formulaic and mechanical approach to sentencing now reflected by the use of the Guidelines, backed up by statutory provision which requires the sentencing court to apply such guidelines, that is not an approach which has been adopted in Guernsey. No problem of inconsistency in sentencing has been apparent in Guernsey given the smaller size of the judiciary

12 In Guernsey, the Jurats sitting in the Royal Court are trusted to arrive at the appropriate sentence having regard to factors such as the individual features of the offence, the victim and the offender, and the requirements of sentencing policy having regard to the prevalence of offending of that kind in Guernsey and the needs of the community. The presence of the Jurats is an important feature. It is for the Jurats to settle upon the sentencing policy they consider to

be right given their knowledge of the community. The Jurats may wish to have regard to sentencing levels in England and Wales but there is no presumption that these should be followed and if the Court chooses not to adopt such sentencing levels, there is no obligation to justify why it has not done so. The Court does not start from the premise that the Guidelines provide a prima facie correct level of starting points or sentencing ranges.

13 Guidelines can be of assistance in the context of identical offences but even then, they are only of assistance. Although in this case the suggested comparator offence in England and Wales (assault by penetration) and indecent assault in Guernsey carry the same maximum punishment of life imprisonment, the Guernsey offence is much broader and covers a wide range of offending of which digital penetration represents one of the more serious forms of the offence.

14 Accordingly we do not accept the argument that the sentence of four years was manifestly excessive on the basis that the appropriate starting point for sentence should have been the lowest level (harm category 3 and culpability category B) provided for in the Sentencing Council Sexual Offences Definitive Guideline for assault by penetration contrary to section 2 of the Sexual Offences Act 2003.

15 However, even assuming that the assault by penetration guideline was appropriate and further assuming this was a case falling into harm category 3 and culpability category B, there were a number of features that suggest to us that the appropriate starting point for sentence in England would have been at the top of the category range, that is four years imprisonment, for a man of good character convicted after a trial, rather than the two years suggested on behalf of the Appellant.

16 In our view the factors that increase the seriousness of the offence include the fact that the Appellant appears to have targeted the Complainant who was obviously vulnerable given that she had been drinking and might have appeared to be unsteady on her feet. The Complainant was a stranger on the Island and not out in a group but rather a single female on her own. The offence took place late at night in an unprovoked and unheralded attack. The risk of the presence of onlookers does not appear to us to be necessarily an aggravating feature. However, the fact that the Appellant was willing to act in this indecent manner in a public place does appear to us to be an aggravating feature, suggesting that he has an unwarranted sense of sexual entitlement and may as a result pose an ongoing risk of harm to women. This sense of entitlement is a feature of the Appellant's conduct which the Social Enquiry Report suggested the Appellant was unwilling to address. The steps taken by the Appellant to avoid his trial also appear to us to be an aggravating feature, extending as it did the period of stress for the Complainant. We do not accept that treating this impact on her as aggravating the sexual offending amounts to double counting. On the contrary the sentence for the bail offence appears to us to give no weight to the harm caused to the Complainant and merely reflects the harm to the administration of justice more generally

17 In this case the Royal Court accorded the Appellant a discount of 20%. It seems to us that this is a case in which the Appellant was not entitled to any discount whether under the guidelines or otherwise. As the guidelines point out, in the context of sexual offending, previous good character is not normally to be given any significant weight and will not normally justify a reduction in what would otherwise be the appropriate sentence.

18 Not only did the Appellant fail to answer to his bail, he subsequently sought to evade detection and when arrested in London assaulted one of the arresting officers. On his return to Guernsey he contested the charge, suggesting falsely in his defence that the Complainant had offered him sexual services for money and she had become violent because he was not willing to pay

sufficiently for her sexual services. This defence was described by the Royal Court as "offensive and insulting".

19 The fact that the Appellant was of previous good character, had a family and an exemplary work record and made some limited admissions in the trial would not in our judgment have entitled him to any reduction in sentence in England given the gravity of his offending and its long-lasting impact on the Complainant. It did not entitle him to any discount in accordance with ordinary sentencing principles in Guernsey. In the context of sexual offending in Guernsey a discount will normally only be given to reflect a guilty plea.

20 The Appellant accepts that it is the sentence imposed, not the starting point, that has to be analysed for the purpose of the appeal against sentence. In all the circumstances, although the route by which we may have reached a sentence of four years differs from that taken by the sentencing court we consider that the sentence of four years was appropriate. The appeal against sentence is accordingly dismissed.