

Appeal against the condition of an Extended Licence, concerning contact with females under the age of 18 and against the custodial term of the sentence imposed by the Royal Court.

[2021]GCA005

**IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY
ON APPEAL FROM THE ROYAL COURT
CRIMINAL DIVISION APPEAL No. 499**

13 April 2021

BEFORE:

**James McNeill QC, President
Clare Montgomery QC
George Bompas QC**

BETWEEN:

JOSE ALBERTO BARROS ANDRADE **Appellant**

and

LAW OFFICERS OF THE CROWN **Respondent**

**Advocate L Roffey for the Appellant
Advocate J McVeigh for the Law Officers**

Montgomery JA:

1. This is the judgment of the Court. On 21 December 2020, the Appellant was sentenced by the Royal Court (Lieutenant Bailiff Finch sitting with Jurats) in respect of three counts of indecent assault in respect of three different victims committed in the course of the evening of 27 June 2020 during a party in a flat in St Peter Port.
2. Two of the victims were women (referred to as A and B) and the third victim (C) was a man. Victim A was 20 and the assault on her (Count 1) involved the Appellant restraining her in a bathroom, holding her by the throat to prevent her escaping, pulling down her bra and sucking her nipple, then inserting 3 or 4 fingers high into her vagina causing her significant pain and injury, for which the sentence imposed was 3 years and 6 months' imprisonment. Victim B was 16 at the time and the offence (Count 2) involved slapping and grabbing her bottom and then later grabbing her throat and forcing her onto a bed where she had to fight him off, for

which the sentence imposed was 2 years' imprisonment consecutive. Victim C was 18 at the time and the assault on him (Count 3) involved smacking his penis after the Appellant had exposed his own penis to C, for which the sentence imposed was 12 months' imprisonment, again to run consecutively. The order of offending was Victim B, then Victim C and finally Victim A.

3. In addition to the total sentences of 6 years and 6 months' imprisonment, to run from 25 August 2020, the Appellant was made subject to a Sexual Offences Notification Order for 10 years and a Extended Sentence of 3 years in respect of Counts 1 and 2 only, which includes an additional condition to those which are standard relating to the Appellant not having contact, directly or indirectly, with a female under the age of 18 without prior approval of the supervising officer, other than inadvertent contact which is not reasonably avoidable in the course of daily life ("the under 18 female condition"), which was imposed pursuant to the Criminal Justice (Supervision of Offenders) (Bailiwick of Guernsey) Law, 2004, as amended. The Court also made a recommendation for the Appellant's deportation at the conclusion of his sentence.
4. On 18 January 2021, the Bailiff granted the Appellant leave to appeal in respect of the custodial term of his sentence and the addition to the Extended Sentence of the under 18 female condition. There is no appeal against the length of the Extended Sentence, the Notification Order, or the recommendation for deportation.
5. The Appellant submits that the imposition of the under 18 female condition was wrong in principle and that no proper explanation was given by the Lieutenant Bailiff for its imposition, contrary to the guidance of this Court in Halker v Law Officers of the Crown (unreported, 11 December 2020). The Appellant also contends that the overall sentence, with a starting point of 9 years 6 months, was manifestly excessive and that in any event his sentence should have been reduced by one third to reflect his pleas of guilty.
6. On behalf of the Law Officers Advocate McVeigh accepts that the imposition of the under 18 female condition was wrong in principle but submits that it should be replaced on appeal by a condition that the Appellant must not have contact, directly or indirectly, with a female under the age of 16 without prior approval of his supervising officer, other than inadvertent contact which is not reasonably avoidable during daily life.
7. Contrary to the Appellant's submission, we consider that the sentencing court was entitled to conclude that Appellant presented a risk of further serious sexual offending. There was material in the probation report that justified that conclusion. The probation officer identified the escalating level of violence involved, the risk taking, and the apparent sense of sexual entitlement in the face of the victims' rejection of his advances as indicating a level of risk of sexual recidivism. In these circumstances the Royal Court was entitled to consider whether there were proportionate conditions that could be imposed so as to reduce that risk. The reasoning of the Lieutenant Bailiff was relatively truncated but reflected the concern of the court to protect the public.
8. We consider it was reasonable to impose a condition that provided specific protection for underage females given that there would be no necessity for the Appellant to seek out their society on his release from prison. Although we accept that the Appellant did not target Victim B because of her age, her age was known to him and he carried out his assault on her in disregard to her age and consequent vulnerability. We have concluded that a condition imposing a condition in respect of females under 16 is justified in his case. It is a proportionate condition to minimise the risk he presents.

9. The Court will therefore allow his appeal against sentence to this extent and will amend the condition imposed pursuant to the Criminal Justice (Supervision of Offenders)(Bailiwick of Guernsey) Law, 2004, to refer to contact with females under the age of 16 years.
10. The remaining issue in dispute in the appeal is whether 9 years 6 months was an appropriate starting point as a sentence in this case and whether the Appellant was entitled to a full one third discount on any sentence.
11. The Royal Court's sentencing remarks noted that the maximum penalty for Counts 1 and 2 was life imprisonment. For Count 3, it was 10 years' imprisonment. The Court chose to sentence in relation to each offence separately and run the sentences consecutively, but observed that the same outcome would have resulted whether the sentences were consecutive or concurrent.
12. The Appellant does not complain about the imposition of consecutive sentences given there were 3 different victims who were subjected to attacks of varying degrees of severity. The argument is that the totality of the sentences imposed produced a sentence that was too long in total.
13. The Court treated Count 1 as being the most serious offence, the chosen starting point was one of 5 years and reference was made to the conduct as being "very near the top of the range for indecent assaults".
14. The forcible digital penetration of Victim A's vagina after the Appellant had held her by the throat trapped and defenceless in the bathroom at the premises was clearly a grave indecent assault. It was aggravated by the Appellant's parting threat to Victim A: "I will find you; I will find you yeah and I will kill you". The force of his assault was revealed in a medical examination of Victim A which found bruising to her neck, superficial bruising and soft tissue swelling in and around the lower aspect of her vulva and labia and fresh bruising and fresh abrasions along both of her inner thighs.
15. The assault had a life changing impact on victim A. She told the police; "I just feel not that he destroyed my life but in the way that I am now not going to be the same person I was now at all. It was enough to maybe destroy a couple of years of my life for sure. I am just even scared to walk from my house to my car and I just feel so like no power at all, no energy, just if I like ruined a bit like really empty."
16. This conduct was rightly compared to the type of offending that is covered in England and Wales by section 2 of the Sexual Offences Act 2003 (assault by penetration). Given the gravity of the offending the Royal Court could have imposed a sentence of 9 years for this offending alone within the constraints of the English Sentencing Council's Sexual Offences Definitive Guidelines. The assault caused severe psychological harm to Victim A and involved violence threatened even after the assault was complete. It would have fallen within Category 2 for Harm and Category B for culpability of the Guidelines, if it had been committed in England and Wales, with the sentencing category range falling between 4 and 9 years custody and a starting point of 6 years. A Guernsey court would have been entitled to go above this sentencing range to reflect the concerns in the Bailiwick about serious offences of sexual violence. On any view a starting point for sentence of 5 years for the assault on Victim A could be characterised as objectionably low.
17. Given the gravity of this offending, we observe that the better course might have been to identify Count 1 as the lead offence and to impose a full tariff sentence in respect of this offence, with shorter sentences for the remaining offending, adjusted to reflect the need to have regard to the total impact of the overall sentence. This is because it is often difficult to arrive at a just and proportionate sentence for multiple offending simply by adding together

notional single sentences. It is necessary to address any offending behaviour, together with the personal characteristics of an offender, as a whole.

18. In relation to Count 2 a starting point of 3 years was taken. This reflected the fact that the age of Victim B was an aggravating factor as was the persistent nature of the assault and the psychological impact of the attack. However, the assault inflicted was not in the event grave since the Appellant did not succeed in going beyond grabbing Victim B by the bottom, lifting her off the floor and lying on top of her on a bed whilst Victim B was still fully clothed. The limit of the assault reflects the fact that Victim B was able to fight the Appellant off rather than his desisting in his assault. Under the English Guidelines for indecent assault, the use of violence and the sustained attempts to carry out the assault on Victim B would have indicated a sentencing range of 2 to 4 years imprisonment.
19. Count 3 was the least serious of the assaults. After the Appellant had asked C if he wanted to see the Appellant's penis and made derogatory remarks about C's own penis, the Appellant smacked C's penis through his trousers before walking off. C felt sick and uncomfortable. The starting point taken by the Royal Court was 18 months. This would, on one view, appear to be a severe sentence for a relatively minor sexual assault however the offence fell to be dealt with in the context of persistent sexual offending on the night in question.
20. In our view the total of these starting points aggregating to 9 years and 6 months, cannot be said to be too high in total given the manifestly low sentence on Count 1 can be regarded as offsetting the arguably high starting point on Count 3. Accordingly, we decline to allow the appeal on the basis that the starting point for the sentencing exercise was manifestly excessive or wrong in principle. The total sentence is severe but it reflects our judgment of the severity of the Appellant's conduct taken as a whole.
21. Complaint is made that the Appellant did not receive the full one third discount to reflect his pleas at the Plea and Direction Hearing (PDH) on 1 October 2020. Advocate McVeigh is inclined on behalf of the Law Officers to accept that these were pleas entered at the earliest opportunity and thus prima facie the Appellant was entitled to a full discount which would have produced a sentence of 6 years 4 months. The Bailiff in granting leave to appeal was also inclined to accept that the importance of encouraging guilty pleas should have resulted in a full one third discount.
22. However, we consider that the modest reduction in the one third discount made by the Royal Court was capable of being justified. The Appellant did not indicate his pleas when he was before the Magistrates Court. It took him four months to admit his offending conduct, having originally told the police that the allegations were false and that he was being "set up".
23. We also regard the argument advanced in the grounds of appeal to explain the delay in plea until the PDH that "there were triable issues in the case, not least the fact that [A] admitted consuming approximately 15 drinks and [B] admitted consuming an MDMA tablet prior to the offences taking place" as aggravating rather than mitigating the offending and potentially reducing the scope for any discount for plea. Issues of intoxication are not relevant to any question of guilt. They may be relevant to a cynical calculation by a defendant as to his chances of acquittal at trial. They do not reflect well on an Appellant who claims to be remorseful and who relies upon an early acceptance of his guilt. The Appellant must be taken to have admitted by his plea that he knew that neither A nor B had consented to his sexual advances.
24. If it be the fact that the women had been rendered vulnerable by the consumption of drink or drugs that would provide no mitigation and would potentially constitute an aggravating feature demonstrating that the Appellant had set out to prey on people made vulnerable by

intoxication. Indeed, the use of drugs/alcohol to facilitate the offence or the targeting of vulnerable victims would normally justify an upward adjustment of any sentence.

25. Critically, it is not clear from the sentencing remarks that the Royal Court intended to do anything more than give the Appellant the benefit of a discount “in the region of one-third”. In those circumstances a sentence of 6 years and 6 months imprisonment appears to us to be sufficiently close to the arithmetical one third point to be unobjectionable in principle. It would not be appropriate for us to make a downward adjustment of two months. The Court of Appeal will not tinker with sentences imposed by lower courts that are otherwise appropriate.
26. In the result the appeal is allowed in respect of the under 18 female condition. The remainder of the appeal is dismissed.