

3. For the purposes of determining this application for leave to refer, I do not need to summarise the facts, which were set out briefly in the sentencing remarks of the Royal Court and to which I have had regard.
4. The way the sentences were constructed were explained in the sentencing remarks. It involved a starting point for D1 of 8 years and 3 months' youth detention, with a reduction to reflect that, at the time of this offending D1 was aged 14, which was put at a 60% reduction from the sentence applicable to an adult after trial, with a further discount for other mitigation resulting in concurrent sentences of 2 years and 9 months for each of Counts 1 and 2, 2 years for Count 3 and 1 year for Count 4. The starting point selected for D2 was 6 years and 3 months' youth detention, with the same reduction to reflect his age of 60%, with other mitigation procuring sentences for Count 5 of 2 years and 3 months, with the sentences of 1 year and 2 years in respect of Counts 6 and 7 respectively running concurrently. In both cases, there was an extended sentence licence of 3 years, with conditions attached, and the notification period was fixed at 7 years for both.

Legal principles

5. The provisions found in Part IIIA of the 1961 Law were inserted by the Court of Appeal (Guernsey) (Amendment) Law, 2021, with effect from 7 February 2022. The time for applying for leave to refer a sentence is 28 days from the date sentence was passed (section 43I). An application for an extension of time was made pursuant to subsection (2) of that section and, on 22 December 2023, I decided that an additional 14 days for the giving of the notice to refer should be granted. The Notice required under rule 18A of the Court of Appeal (Criminal Division) (Guernsey) Rules, 1964, as amended, which is dated 21 December 2023, was then served. Respondent's Notices in accordance with rule 18B dated 9 January 2024 were then served on behalf of each Respondent.
6. The Advocates acting for the Respondents have each confirmed by e-mail on 18 January 2024 that neither of them wishes to make any representations on HM Procureur's application for leave to refer these sentences. In those circumstances, I have decided that I can dispense with the hearing that the Registrar has to fix under section 43J and proceed to determine the application for leave on the papers sitting as a single judge, as is permitted by section 43K.
7. I have the benefit of a Skeleton Argument from Advocate McVeigh, who appears on behalf of HM Procureur dated 15 December 2023. It is most unfortunate that that Skeleton Argument refers throughout to "*the learned judge*" falling into error. The sentencing remarks were delivered by the Judge of the Royal Court, but the sentences passed were on behalf of the Royal Court constituted with Jurats. Any errors are those of the Court and not of the Judge who presided.

Procureur's contentions

8. In summary, the Application for leave to refer the sentences as appearing to be unduly lenient draws attention in para. 5 to the starting points selected, the size of the percentage reduction relating to the age of the Respondents and the disproportionate reductions awarded in respect of other mitigation.

Discussion

9. Very recently, I have dealt with the first application by HM Procureur for leave to refer a sentence on the ground that it is unduly lenient (*Trenchard*, which was a decision given on 18 December 2023). The basis for that application also relate to an offence of rape (albeit not

under the 2020 Law because of when it took place) and the issues raised in that matter bear a number of similarities to the present Application.

10. The guidance derived from elsewhere, and particularly from the approach in England and Wales to references by the Attorney-General, is that the test for whether a sentence is unduly lenient is whether it falls outside the range of sentences that the Court, applying all the relevant factors, could reasonably consider appropriate. This is a reference to the decision in *Attorney-General's Reference No. 4 of 1989* [1990] 1 WLR 41. I am satisfied that this is the appropriate test to apply to this Application.
11. What matters, of course, is the final sentence and not necessarily the route by which it has been reached. Accordingly, I have focused on the sentences that were imposed, but in doing so I will deal with the arguments advanced by Advocate McVeigh as to why it is suggested that these two sentences of youth detention can be argued to fall outside the applicable ranges for the Respondents' offending. I can add that the Application concentrates on the lengths of the sentences of youth detention and does not expressly seek to refer the notification periods or, it seems the extended sentences, save to the extent referred to towards the end of Advocate McVeigh's Skeleton Argument, which is why my consideration is confined to whether there is a realistic prospect of succeeding on an argument that the periods of youth detention fall outside the applicable ranges.
12. In the course of the Royal Court's sentencing remarks, reference was made to the approach derived from *Milberry* [2003] 2 All ER 939, which had been approved as appropriate guidance by this Court in *Hastie v Law Officers of the Crown* 2016 GLR 60. As a result, the sentencing Court considers the effect on the victim, the blameworthiness of the offender and any threat to the public. A starting point of 5 years in the absence of additional features or aggravating factors was referred to and this increases to 8 years where such features or aggravating factors are present. The guidelines operating in England and Wales were also mentioned, where the minimum starting point is also 5 years, based on the lowest harm and culpability. In any event, the Royal Court found that aggravating factors were present.
13. Advocate McVeigh submits that the starting points for both Respondents were too low. She suggests that the aggravating factors when viewed in the round take both sets of offending outside of the ranges that appear to have been used when selecting the starting point.
14. As Advocate McVeigh appears to acknowledge, it is accepted that the Royal Court needed to distinguish between the two Respondents because the totality of the offending of D1 was greater than that of D2. Accordingly, I am not persuaded that differentiating between them is wrong.
15. It is arguable that, although the Counts were all distinct, the offending did involve more than a single case of rape, even for D2, because of what took place on that day. There is no obligation on the Royal Court to have regard to the guidelines operating in England and Wales, but in *Hastie* it was acknowledged that there is assistance to be derived from considering the approach that is set out in the most recent guidelines. If nothing else, it offers a sense-check for the conclusions the Royal Court is minded to reach.
16. Whilst Advocate McVeigh's submissions about the correct approach to follow, adhering to the guidelines in England and Wales are not necessarily right, the starting point selected for D2, bearing in mind that at this stage the Court was considering how it would identify a starting point if dealing with an adult, may be lower than appropriate. If only by comparison with *Trenchard*, I indicated there that I considered it to be arguable that the rape of a child could attract a starting point above 6½ years. I remain of that view in D2's case, where the chosen starting point was slightly higher at 6 years and 9 months. In other words, the starting point selected might have been higher. Similarly, in respect of D1, I consider it arguable that his

offending, particularly having regard to the totality principle and that it involved two offences of rape by him, might also have attracted a starting point above 8 years and 3 months.

17. In the course of delivering the sentencing remarks, the Court commented that violence had been used. When that is coupled with what appears to be more than a single rape, and bearing in mind the age of the complainant, I take the view that it is arguable that both starting points were low. I do not need to consider further whether the way in which Advocate McVeigh suggests the offending should be categorised is accurate, but in any event I am satisfied that there is a prima facie argument that the starting points selected were low and possibly even considerably lower than they should have been.
18. The second element of the Application is that the Royal Court fell into error when applying a discount of 60% by virtue of the ages of the Respondents. In reaching that conclusion, the Royal Court referred to *Topley v Law Officers of the Crown* [2023] GCA 027. In that decision, age was acknowledged as being a relevant factor to attract a discount.
19. In the sentencing remarks in the present case, the Royal Court referred to guidance as it operates in England and Wales, indicating that for persons aged 15 to 17 the appropriate sentence might be in the region of one-half to two-thirds of the sentence for an adult, whereas for those aged under 15 (possibly incorrectly referred to therein as under 14) there might be a greater reduction. That guidance adds: “*This is only a rough guide and must not be applied mechanistically.*”
20. The Application refers to a maximum reduction being 50% from the starting points selected, with the range reducing to one-third off as well. It suggests that the reduction of 60% was a flawed method “*in applying the guidelines*”.
21. I do not consider that the Royal Court had to apply the guidelines and, in any event, it is apparent that there is greater flexibility than this mechanistic approach perhaps implies. The sentencing remarks explain that consideration has been given to the ages of the Respondents at the date of offending and not solely at the date of sentence. That may well be a factor that can properly be taken into account, but there may be arguments to be had about the appropriate approach to take in this case on age. However, all I am considering on this Application for leave to refer is whether there are arguments that can be deployed that these sentences were unduly lenient.
22. Whilst it is important to remember that caution needs to be had not to treat any approach to an age-related discount as being anything akin to a straight line of appropriate discounts, I am conscious that a balance needs to be struck to ensure that the final disposal of a case falls within the applicable range of sentences. In both of these cases, a reduction of 60% might be regarded as being at the extremities of what ought to be applied for this offending by these Respondents or even beyond it. As such, there is an argument that HM Procureur can make that 60% is higher than was appropriate in respect of these Respondents.
23. All I am considering on this application for leave to refer is whether the combination of factors considered in reaching the sentences imposed mean that the sentences fall below the range capable of being imposed. Again, I consider that there is an argument to be had in respect of the reduction applied.
24. The final element relates to the further reductions that were applied for mitigation other than that by virtue of the Respondents’ ages. The sentences of youth detention imposed, switching for this purpose to months, were 33 and 27 months’ respectively. The starting points of 99 months and 81 months show that the total discount has been two-thirds in each case. As such, comparatively little has been achieved by virtue of the other personal mitigation available to the Respondents, aside from the considerable discount arising from their ages. If viewed in

isolation, where it was common ground that there was some other personal mitigation, this further element of complaint would not justify granting leave to refer.

25. Advocate McVeigh has also cited the cases in other fields of the criminal law where it has been confirmed that Guernsey can sentence as Guernsey considers is appropriate (eg, Barras, Watt and Orchard v Law Officers of the Crown 2021 GLR 374, citing Wicks v Law Officers 2011-12 GLR 482). I was not persuaded by a similar argument in Trenchard, although I recognise that the plenary Court might decide that it is appropriate to make such comments about sexual offences, particularly the offence of rape. At this stage, I am not persuaded that this argument about long sentences operating as a deterrent is a basis on which to say that the sentences imposed on the Respondents were unduly lenient. In my judgment, the Application falls to be determined on the other matters that have been raised.

Conclusion

26. In summary, I am persuaded that the starting points selected might well be said to be on the low side. The reduction of two thirds for age-related and other mitigation appears to me to be very much on the outer limit of what could properly be applied. The combination of these two factors means that I take the view that there is an arguable case that the sentences that were imposed on each Respondent fall below the range of sentences that could properly be imposed, at least for the purposes of determining this Application for leave to refer. Whether this is the case and, if so, whether the sentences are unduly lenient, rather than just lenient, will be a matter for determination by the plenary Court, which is why I am keeping my comments to the minimum necessary to set out the reasons why leave to refer is being granted.
27. In reaching that conclusion, I have also borne in mind that this Application relates to two young persons who face the prospect of having their sentences increased, albeit that I expect the Court will consider carefully the element of double jeopardy involved. For young persons, I appreciate that these sentences may already appear to be long, but I am persuaded that it is more appropriate to grant the leave to refer sought rather than to refuse it where HM Procurer is entitled pursuant to section 43J(2) of the 1961 Law to have the application for leave determined by the plenary Court anyway. I consider it more appropriate that this Application proceeds to full argument for the reasons I have given, principally based on the selection of the starting points, but also the overall reduction for all mitigation, including that related to age, thereafter. The Respondents' Advocates will benefit from legal aid in preparing for the hearing.

The way ahead

28. I have also taken into account that the issues raised on this Application are similar to, although not identical with, those raised in the recent application in the Trenchard matter. I take the view that, because the offences are sufficiently similar and the issues raised involve a considerable degree of overlap, both hearings should now be consolidated and heard together. This will enable the full range of issues raised in these two references under section 43B to be addressed. Accordingly, the earliest hearing realistically for both matters will be the April sitting of the plenary Court and so I will provisionally direct that both matters be heard together no earlier than that sitting of the Court, subject to any contrary representations that might be made in the light of this indication of how I envisage matters proceedings.