Reference by HM Procureur pursuant to s. 43B of the Court of Appeal (Guernsey) Law, 1961 for a review of the sentence imposed on the Respondents by the Royal Court on 17 Nov 2023.

[2024]GCA029

IN THE COURT OF APPEAL OF GUERNSEY

CRIMINAL DIVISION

Criminal Appeal No: 518

Before: **Jonathan Crow CVO, KC**
David Perry KC
Sir Adrian Fulford PC

Between: **THE LAW OFFICERS OF THE CROWN** **Applicant**

-and-

D1 **Respondents**

-and-

D2

Advocate J McVeigh for the Applicant
Advocate A Merrien for the Respondent D1
Advocate S Maindonald for Respondent D2

JUDGMENT

Fulford JA

Background

1. This is an Application brought by His Majesty's Procureur ("the Applicant") pursuant to section 43B of the Court of Appeal (Guernsey) Law 1961 ("the 1961 Act"), as amended, in relation to sentences which it is submitted by the applicant are unduly lenient pursuant to section 43B(2)(a) of the 1961 Act.

2. Given their ages, we have referred to the two Respondents as D2 and D1 and the victim of the offences as C. D1 was convicted on 4 September 2023 of vaginal rape, contrary to section 11 of the Sexual Offences (Bailiwick of Guernsey) Law 2020 ("2020 Law"), (count 1); sexual touching of a child by penetration, contrary to section 21 of the 2020 Law (count 2); oral rape, contrary to section 11 of the 2020 Law (count 3); assault by digital penetration contrary to section 12 of the 2020 Law, (count 4); and common assault (count 5). D2 was convicted of vaginal rape, contrary to section 11 of the 2020 Law (count 6); sexual assault contrary to section 13 of the 2020 Law (count 8); and common assault (count 9). A striking feature of the case is that the victim, C, D1 and D2 were all 14 years of age at the time of these offences.

3. On 17 November 2023, the Royal Court sentenced D1 and D2 as follows:

D1
Count 1 (vaginal rape): 2 years 9 months' Youth Detention.
Count 2 (oral rape): 2 years 9 months' Youth Detention, concurrent.
Count 3 (assault by digital penetration): 2 years' Youth Detention, concurrent.
Count 4 (assault) 1 year' Youth Detention concurrent.
D2
Count 6 (vaginal rape) 2 years 3 months' Youth Detention.
Count 8 (sexual Assault) 1 year' Youth Detention, concurrent.
Count 9 (assault) 2 years' Youth Detention, concurrent.

4. The overall sentences, therefore, were that D1 received 2 years 9 months' Youth Detention and D2 2 years 3 months' youth detention. The Royal Court additionally imposed an extended sentence licence period of 3 years in each case and the notification period for D1 and D2 was set at 7 years.

5. As at the date of sentence, D1 was 16 and D2 15 ½. They were both on bail pending trial.

The Facts

6. The Royal Court set out the facts and background circumstances with considerable care and the narrative that follows is to a large extent taken from the Royal Court's summary.

7. At the time of these offences, the two Respondents and the victim were still at school. D2 and the victim were friends and D1 had been the victim's boyfriend for a few weeks. Their physical intimacy had been confined to kissing and cuddling, although there were messages exchanged between the two Respondents in which there was a suggestion that sexual intercourse might occur. After school on the day of the offending they walked to a field where they talked and drank alcohol. The victim, feeling the effects of the alcohol, laid down. D2 grabbed her around the throat and squeezed (count 9); the victim passed out. When she recovered consciousness, she felt pain in her hip and genital area. Her shorts, pants and bra had been removed. Both Respondents were kissing her. D2 pulled her arms (count 9) and D2 penetrated her vagina digitally (count 3), whilst D2 touched her vagina (count 8). The victim again passed out and when she recovered consciousness, D2 removed her T-shirt. In addition to D2 holding C's arms, D1 held her hip (count 4) and simultaneously raped C (count 1). C tried but failed to close her legs. Both Respondents laughed when she cried out for her father. D2 then vaginally raped C (count 6), whilst C, clearly distressed, called for her parents. D1 twice simultaneously forced his penis into the victim's mouth (count 2). Neither Respondent used protection.

8. The Respondents dressed C and they left the field. C fell over whilst they travelled home. A friend joined them en route, and helped C who was barely able to walk, as did a couple who were passing by. On arrival, the victim told her family she had been raped. She underwent two medical examinations, and various injuries (bruises and abrasions) to her body, including her neck and genital area, were noted.

9. D2 and D1 were arrested. They are both of previous good character. D2 stated that although D1 had had sex, he had not engaged in any form of sexual activity with C. This remained D2's case at trial. D1 answered some questions, in which he said that although he had intended and had been encouraged by D2 to have sex with C, he had not done so. At trial, he accepted that his erect penis had touched C's vagina but there was no penetration. Otherwise, C initiated oral sex which she performed on him. He passed out and was brought round by D2.

10. In her victim impact statement, C set out how the offences have left her withdrawn and wary of boys, including her friends. She felt betrayed by the Respondents. The two medical examinations were "awful" and she has experienced blackouts and flashbacks. Her eating was affected for a period. She changed school and her mother explained that she only attended for

half-days because of panic attacks, with a consequential reduction in the number of GCSEs she will sit.

The Sentence

11. The Royal Court noted that in the absence of Sentencing Guidelines for sexual offences in Guernsey, the courts, whilst taking into account the particular circumstances in the Bailiwick, have tended to follow the guidance of the Court of Appeal of England and Wales, most particularly in *R v Millberry* 2002 EWCA Crim 2891; [2003] 2 AER 939, as now supplemented by the Sentencing Guidelines of England and Wales (which, the Royal Court noted, are considered to be of assistance in passing sentence). The Royal Court focussed particularly on the effect on the victim, the culpability of the offender and any threat to the public.

12. The Royal Court observed that in *Millberry*, the starting point for a single offence of rape, without any of the "additional features and aggravating factors" is 5 years, but potentially increasing to 8 years if such features or factors are relevant.

13. As to aggravating factors, the Royal Court identified the victim's age and the use of violence over and above that which was necessary to commit these offences, along with the extent of the injuries. In D2's case there was the serious element of strangulation at the outset of the incident. The two Respondents jointly inflicted sexual activity on the victim which included holding her down. They degraded C, poured alcohol over her and laughed at her. Alcohol was used as part of the offending and there appeared to have been an element of planning in messages between the Respondents (although we observe it was notably unclear whether this evidence in fact revealed any preparatory steps). The Royal Court observed that the impact on C was taken into account when determining the appropriate starting point although all offences of rape have a significant impact on victims. The court did not identify any additional factors which increased the starting point.

14. The Royal Court considered the position if the Respondents had been adults, bearing in mind the differences in the offences of which they had individually been convicted. Sensibly in our view, the court approached the offending globally in each of the Respondents' cases in order to reach a "combined starting point". Against the important background that the Royal Court was not required to follow the Guidelines of the Sentencing Council of England and Wales, we note that the stepped approach which is a central feature of the Council's Guidelines was not adopted. This includes, as the second step (after determining harm and culpability), identifying the starting point **before** making adjustments to reflect the aggravating and mitigating features. Instead, the Royal Court included the aggravating factors at the outset without initially identifying the starting point absent both the aggravating and mitigating factors. Reflecting the principle of totality and therefore before taking mitigation into account, the Royal Court indicated that for adults the sentence would have been 8 years and 3 months' custody for CG and 6 years and 9 months' custody for DC.

15. The Royal Court then applied two relevant local statutory provisions, the Criminal Justice Youth Detention (Bailiwick of Guernsey) Law 1990 ("the 1990 Law") and the Criminal Justice (Children & Juvenile Court Reform) Law (Bailiwick of Guernsey) Law 2008. Under the latter statute, the court is required to have as its principal consideration the prevention of offending by the young perpetrator, taking into account the interests of the victim. The court must additionally reflect the welfare of the defendant and the desirability of ensuring that he or she remains in the community, to the extent that is practicable and consistent with the need to ensure the safety of the public. In this context, the Royal Court expressly stated that the youth of the Respondents was a "very important consideration". The Royal Court was satisfied that appropriate educational provision would be available in Youth Detention.

16. It was noted that under the 1990 Law, the court, before imposing a custodial term, must be satisfied that such a sentence was the only appropriate method of dealing with the offender, and that a custodial sentence should not be passed unless one of three factors is satisfied, two of which were applicable to the Respondents, namely, first, that a custodial sentence was necessary for the protection of the public or prevention of crime and, second, that the offence was so serious that a non-custodial sentence cannot be justified.

17. The Royal Court recognised the importance of taking into account any information relevant to the characters and the physical and mental condition of the offenders. The court paid regard to the Youth Justice reports that had been prepared.

18. The Royal Court was assisted by the approach of the Sentencing Council of England and Wales in the Guideline for Sentencing Children and Young People in the following regard:

> *"6.46 When considering the relevant adult guideline, the court may feel it appropriate to apply a sentence broadly within the region of one-half to two-thirds of the adult sentence for those aged 15-17 and allow a greater reduction for those aged under 14. This is only a rough guide and must not be applied mechanistically."*

19. As the Royal Court observed, this guidance reflects the lack of full maturity of young people including as to sexual matters, along with the impact on them of a custodial term. The Royal Court determined that, as a consequence, the sentences fell to be reduced by 60%.

20. Addressing mitigation, the Royal Court decided that this was principally to be found in their age at the time of this offending, their lack of emotional maturity and their likely vulnerability in Youth Detention. They have attracted the stigma of sex offenders, notwithstanding the reporting restrictions, which has resulted in social ostracism, and their convictions have had an impact on their families. Additionally, the Respondents were both of previous good character, they do not require assistance for substance addiction and they complied with their bail conditions.

21. The Royal Court noted that D1 experienced a period of familial instability at the time of this offending, which resulted in referrals to the convener and exclusions from school. He has been strongly supported by his grandfather. He has placed himself in solitary confinement since being remanded in custody and he is considered to pose a medium to high risk of reoffending.

22. It was observed that D2 also experienced some childhood adversity, albeit he has a supportive family. He has a particularly strong relationship with his grandmother and his father supported him continuously during the proceedings in the court below. D2 has engaged well with education since this offending and his tutor describes him as a pleasure to teach. He has cooperated impressively with Youth Justice and has been discharged from the Child and Adolescent Mental Health Service. There is some work to be undertaken, nonetheless, regarding sexual behaviour. He is assessed as posing a medium risk of re-offending.

23. The Royal Court set out that the mitigating factors merited a reduction in the sentence that would otherwise have been imposed. Having allowed for personal mitigation and applied the 60% reduction for their young ages, the Royal Court arrived at the sentences of 2 years 9 months' Youth Detention for D1 and 2 years 3 months' youth detention for D2. Given the Royal Court had determined that as adults the sentences, reflecting the aggravating factors, would have been 8 years and 3 months' custody for D1 and 6 years and 9 months' custody for D2, this means that the reduction for personal mitigation was significant.

HM Procureur's Application

24. The Applicant's written submissions were to a significant extent based on the sentencing provisions that apply in England and Wales. Indeed, the Applicant highlighted that the Royal Court in passing sentence referred to various English authorities and to the Definitive Guidelines of the Sentencing Council. The Applicant stressed that the Guidelines are mandatory in England and Wales: they **must** be followed by sentencing judges, save in exceptional circumstances. Furthermore, it was pointed out that the Royal Court referred to the indication given in the Guernsey Court of Appeal case of *Hastie v. Law Officers of the Crown* (unreported) judgment 59/2015 that the Guidelines provide "some assistance".

25. By reference to the Sentencing Guidelines for England and Wales, the approach of the Royal Court in the instant case was submitted to have been unsustainable. Specifically, the Royal Court was criticised for having relied on the approach approved in *Millberry* (which has been superseded in England and Wales), for not having followed the stepped approach that underpins the Sentencing Council's Guidelines and for having seemingly treated the case as involving a single offence of rape in each of the Respondent's cases.

26. It was suggested that the Royal Court failed to identify the correct category from within the Guideline for rape offences when it (erroneously) selected category 3B. The Applicant argued this was a Category 1 case (or at the least Category 2), because of the internal and external injuries, including the marks of strangulation; it was emphasised that C lost consciousness; and the Applicant relied on the content of C's impact statement. The Applicant submitted there was additional degradation based on the removal of C's tampon, the pouring of alcohol over her and the manner in which her cries for help were met with laughter. The detention and the incident were respectively prolonged and sustained, the violence went beyond that which was inherent in the offence and the victim was vulnerable due to her personal circumstances, most particularly because of the use of alcohol. It was contended that the Royal Court should have determined the offending fell into Culpability A, on the basis of significant planning (based on buying the alcohol), the "group action" and the use of alcohol to commit the offence.

27. On the basis of these submissions, in accordance with the Sentencing Council's Guideline for offences of rape, with an adult of good character following a trial, the starting point should have been 15 years' imprisonment with a range of 13 to 19 years' imprisonment. In her oral submissions, Advocate McVeigh accepted, however, that the courts in the Bailiwick regularly and appropriately refer to *Millberry* (as confirmed in *Hastie*), but she submitted that under the sentencing regime established in *Millberry*, which in many important respects is echoed in the Sentencing Guideline for offences of rape in England and Wales, the starting point was impermissibly low.

28. To the extent not already taken into account, it was submitted that the aggravating factors included the targeting of the victim, the public location, the commission of these offences by perpetrators who were drunk, the need for the victim to relocate to a new school, her loss of friendships and the impact on the victim and her family.

29. It was argued by the Applicant that the Royal Court deducted twice for ("double-counted") the mitigation based on the Respondents' ages and it is contended that the reduction of 60% was excessive and wrong in principle.

30. Finally, it was emphasised that rape is a serious crime and relatively rare within the Bailiwick. Therefore, as it was suggested, the starting point should have reflected the seriousness of this exceptional offence in Guernsey, and the need to deter others and to protect residents from such crimes. Further, it is said that long sentences will encourage victims to come forward and make complaints as this "will ensure that victims can feel a sense of justice and give them the strength to go through what is clearly a highly distressing experience". Other written submissions by the Applicant, not referred to by Ms McVeigh in oral argument, are briefly addressed below.

Discussion

31. This Application has been listed alongside *Law Officers of the Crown v Trenchard 2024 [GCA025]* in order for the court to give general guidance, if it chooses, as to the approach to be taken to applications of this kind. We have, at least to an extent, availed ourselves of this opportunity and we refer to the decision in *Trenchard* at paragraphs 12 – 24 for our view of the approach to be taken to sentencing for rape and the legislative framework. It is unnecessary to rehearse or even to summarise those conclusions save to indicate that the test on these applications, as set out in *Trenchard* at [21], is to ask whether the sentence was outside the range which the trial court, applying its mind to all relevant factors (and only to relevant factors), could reasonably consider appropriate.

32. As we have described above, the principal written submission of the Applicant (albeit, advanced more equivocally in oral submissions) is that, save in one respect, the Royal Court should have followed the Sentencing Guideline applicable in England and Wales for offences of rape. For the reasons given in *Trenchard*, we consider this submission is misconceived. The proper approach is that whilst it is entirely appropriate to take into account the Sentencing Guidelines for England and Wales, they are not binding and the court is entitled to seek guidance from elsewhere. This is precisely the course adopted by the Royal Court in the present case. Although the Guideline for Sentencing Children and Young People was treated as a significant reference point, the Royal Court, as it was entitled to do, sought generic assistance. The Royal Court, by way of example, applied the relevant Bailiwick legislative provisions (*viz.* the Criminal Justice Youth Detention (Bailiwick of Guernsey) Law 1990 and the Criminal Justice (Children & Juvenile Court Reform) Law (Bailiwick of Guernsey) Law 2008) along with English jurisprudence which pre-dated the Sentencing Guidelines (*viz. Millberry*). Given the Guidelines are not binding in the Bailiwick, this approach was not in any sense impermissible.

33. In this context, as the Respondents have observed, the Court of Appeal in *Barras, Watt and Orchard v Law Officers of the Crown [2021] GLR 374* at [58] (quoting *Wicks v Law Officers [2011-12] GLR 482*) indicated:

> *"Guernsey is a separate jurisdiction and has its own legal system. It is, therefore, free to set its own sentencing levels as the Island's court think appropriate for Guernsey* [....]. *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".*

34. Although we reject, therefore, the Applicant's written submission that the Royal Court was obliged to follow the Sentencing Guideline for offences of rape, we are in any event unpersuaded by the Applicant's submissions as to harm and culpability based on the Guideline. Without in any way undermining the impact of these extremely serious offences on C, the Royal Court was well placed to assess the harm caused by the offending. As to culpability, the extent of any planning and the use of alcohol to facilitate the offending was addressed by the Royal Court. Although it is clear the two Respondents committed the offences together, we repeat that the Royal Court was not obliged to apply the scheme, in its entirety or in part, as set out in the English Sentencing Guideline for offences of rape. The Royal Court properly addressed the seriousness of the offending and focussed on the appropriate means of marking its gravity.

35. We indicated at [32] that the Applicant contends that in one respect the Sentencing Guideline for offences of rape should not necessarily be followed. This is the jurisdictional argument that the sentencing regime should be stricter in the Bailiwick than in England and Wales in the

context of sexual offences. We consider this is a double-edged argument: if the court is entitled to depart from the Guideline for purposes of severity, then it must be entitled to do so for the purposes of leniency. There is a clear tension in the submissions of the Applicant as to the need to adhere to the Sentencing Guidelines and the need, in this particular context, to depart from them.

36. The Applicant's submission, in our view, in support of imposing lengthy deterrent sentences outside of the Sentencing Guideline for offences of rape would have greater purchase if this offence was at risk of becoming prevalent in Guernsey, with the concomitant need to send out a clear message as to the potential consequences of such offending. For a crime that rarely occurs, the argument in favour of deterrence would need to be cogently explained. That is not the case here. Whilst we have well in mind the need to take into account the circumstances in Guernsey, we pay particular attention to the fact that the Royal Court had heard the evidence in the case, including the testimony from the Respondents. In *Wicks* at [22], this court observed:

> "*In relation to the present category of offences (indecent photographs of children), it is clearly the view of the Royal Court that the sentencing levels established in England are too low in certain respects. As this Court pointed out in Burton, this jurisdiction has the significant advantage that sentencing is not passed by a single professional judge; sentencing in the Royal Court is determined by a panel of Jurats who are elected for their independence of character and other attributes. They are particularly well placed to reflect local concerns. Whilst sentencing levels are ultimately a matter for this Court to determine, due weight should be given to the views of the Royal Court, consisting as it does of a panel of Jurats drawn from the local community*."

37. The Royal Court, therefore, was "well placed to reflect to local concerns" when it passed the sentences in the present case. We consider they are a persuasive indication that the suggested need for deterrent sentences is not made out.

38. In the Applicant's written submissions, it was contended that longer than usual sentences should be imposed to deter defendants from pleading not guilty and that victims derive a sense of justice from long sentences. These arguments were not advanced orally and with respect we agree that they did not merit pursuing.

39. In careful sentencing remarks, the Royal Court identified all of the key issues that fell properly for consideration, namely the severity and extent of the offences, the culpability of the accused, the impact on the victim, the sentence that would have passed on adults, the extent of the aggravating and mitigating features in the case, and the age and immaturity of the Respondents. The Royal Court made it clear that the notable youth of the Respondents was a significant factor to be taken into account. We emphasise that when sentencing young people there is a particular need to avoid a mechanistic or formulaic approach. Instead, the Royal Court should consider all the relevant circumstances of the offending and this will necessarily include a careful assessment of those who are to be sentenced. While the sentences might be considered to be lenient, we are unpersuaded by the argument that they fell outside the range which the trial court, applying its mind to all relevant factors, could reasonably consider appropriate. Hughes LJ in *Attorney General's Reference No. 60 of 2012, R v Edwards (Shane Stephen)* (2012) [2012] EWCA Crim 2746 set out the following at [19]:

> "*The procedure for referring cases under section 36 of the Criminal Justice Act 1988 is designed to deal with cases where judges have fallen into gross error, where errors of principle have been made and unduly lenient sentences have been imposed as a result.* ***Any case in which the proposition is that a sentence should not have been 2 years, but should have been a little over 3, is, almost by definition, unsuitable to a reference under the Act. It is certainly unsuitable in a case of this kind, where the judge was faced with a particularly difficult sentencing problem*** *and had to pass a sentence which, whatever it was, was not going to achieve what everybody would like*

to achieve, which is some means of preventing the defendant from repetition of the kind of self-harming and public nuisance behaviour to which he appears to be committing." (our emphasis)

40. This citation is particularly apposite in the present case for two principal reasons. First, this was an extremely difficult case given the age of the Respondents at the time of the offending. Second, Advocate McVeigh has candidly accepted that, based on a starting point of 10 years' custody, having taken into account the mitigating and aggravating factors and having discounted for the age of the Respondents, the sentence for the lead offence of rape for both Respondents should have been of the order of 3 years 4 months' custody (with an "uplift" for D1 based on his convictions for a greater number of offences). This case, therefore, involves the proposition that instead of 2 years 9 months' Youth Detention for D1 and 2 years 3 months' youth detention for D2 there should have been a sentence of the order of 3 years and 4 months for both Respondents. Such a relatively small suggested increase is unsuitable for a Reference. Other courts might have arrived at a somewhat longer custodial term, but that is not the same as determining that the sentence was unduly lenient. It follows that this application is refused.