

[2024]GCA025

**IN THE COURT OF APPEAL OF GUERNSEY  
CRIMINAL DIVISION**

**Criminal Appeal No. 520**

**Before:**

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

**Between:**

**THE LAW OFFICERS OF THE CROWN**

**Applicant**

**-and-**

**FREDDIE CHRISTIAN TRENCHARD  
(KNOWN AS ALYSSA CHRISTINE TRENCHARD)**

**Respondent**

**Crown Advocate F.M. Russell for the Applicant  
Advocate O. C. Fattorini for the Respondent**

**JUDGMENT**

**Crow JA**

**INTRODUCTION**

1. This is the judgment of the court on a reference by HM Procureur pursuant to s. 43B of the Court of Appeal (Guernsey) Law, 1961 (“**the 1961 Law**”) for a review of the sentence imposed on the Respondent by the Royal Court on 30 October 2023. Leave to make the reference was granted by the single judge of this court on 18 December 2023.
2. The sentence was imposed in respect of a single count of rape following a conviction on 28 July 2023. The sentence was (i) 3 years’ immediate youth detention, (ii) 3 years’ extended sentence supervision, and (iii) 10 years’ notification. The Applicant no longer asks for the 10 years’ notification to be the subject of the reference.

**THE OFFENCE**

3. In mid-2021, the Respondent was aged 17 and the victim was aged 14. They were known to each other. The Respondent was in the early stages of gender transition (from male to female) and still had male genitalia. On a date between 1 May and 31 July 2021, the victim visited the Respondent’s mother’s home, where the Respondent lived. They went up to the Respondent’s bedroom and sat on the bed chatting for a while. The Respondent showed the victim some lubrication which was inside a bedside drawer, which the victim tried to “*laugh off*”. After around ten minutes, the Respondent began to touch the victim on her hips and her stomach which made her feel uncomfortable. The victim moved away and suggested they watch a film. The Respondent left the room to collect some equipment to enable them to watch a film.

4. The Respondent returned to the bedroom and began to touch the victim again, and the Respondent began to undress herself. She asked the victim to undress as well, saying that it was making her uncomfortable that the victim was still dressed. When the victim refused, the Respondent got on top of the victim and began to remove her clothes.
5. The victim attempted to cover herself with a blanket which the Respondent threw onto the floor. The victim was on her back and the Respondent was on top of her, kissing her neck and pinning her down by her wrists. The victim began to cry, and the Respondent told her to stop. The Respondent then had penetrative sexual intercourse with the victim by penetrating her vagina with her penis without the victim's consent and without the use of any protection. The Respondent turned the victim over and again penetrated her vagina with her penis. The victim was crying and the Respondent pushed her face into the pillow as she did not want her mother to hear. The Respondent ejaculated on the back of the victim.
6. After the incident, the victim reported vaginal pain and bleeding. She also stated that she had been a virgin at the time of the incident, and this was her first sexual experience.
7. The incident was officially reported to police on 8 February 2022 after the victim disclosed to her mother what had happened.

#### **THE CHARGE, TRIAL & SENTENCE**

8. The Respondent was charged on 7 October 2022. The Respondent pleaded not guilty, alleging that the victim had fabricated the story because she is transphobic. The three-day trial started on 26 July 2023. The Respondent was unanimously found guilty.
9. In its sentencing remarks on 30 October 2023, the Royal Court outlined the facts of the offence, and the Respondent's denial of any wrongdoing, and then dealt with the correct approach to sentencing:
  - (i) The court observed that, in the absence of any guidelines in Guernsey for sexual offending, the courts here have tended to look for guidance to the English Court of Appeal decision in *R v. Millberry* [2002] EWCA Crim 2891, an approach that was approved in *Hastie v. Law Officers of the Crown* (unreported) Judgment 59/2015.
  - (ii) As a general matter of approach, this requires the court to consider three factors: (i) the effect on the victim, (ii) the blameworthiness of the offender, and (iii) any threat to the public.
  - (iii) More specifically, it suggests a starting point for a single offence of rape with no aggravating factors of 5 years, and a starting point of 8 years where the victim is a child.
  - (iv) Pursuant to the ruling in *Topley v. Law Officers of the Crown* [2022] GCA085, the court had to take account of the offender's age as a mitigating factor.
  - (v) In particular, the court derived assistance from the English Sentencing Guidelines for Sentencing Children and Young People for Sexual Offences, which suggested applying a sentence for those aged between 15 and 17 that was broadly within the region of one-half to two-thirds of the adult sentence.
  - (vi) The Royal Court had to sentence the Respondent under the provisions of The Criminal Justice Youth Detention (Bailiwick of Guernsey) Law, 1990, which required the court to take into account any information relevant to the Respondent's character and physical and mental condition, and to consider a report.
10. The court said that it considered the medical reports as to the Respondent's diagnosis for ADHD, mental health issues and gender dysphoria and treatment. The court also considered a letter from the Respondent's GP, the Social Enquiry Report and the "*carefully crafted submissions*" of the

Respondent's Advocate. Against that background, it applied the approach outlined above to the circumstances of this case with the following observations:

- (i) The Respondent pleaded not guilty and forced the victim to come to court and give evidence, thereby re-living her ordeal. As a result, no mitigation was available (as it would have been with a plea of guilty), but the plea of not guilty was not an aggravating factor.
- (ii) The Respondent continued to deny any offending and did not express any remorse, and for that reason no mitigation by that route was available either.
- (iii) The victim was a child, which is an aggravating factor.
- (iv) The respondent ejaculated, which is an aggravating factor.
- (v) The Victim Impact Statement was described as "*a powerful statement from one so young who has clearly been significantly harmed psychologically by the rape by someone she thought was a trusted friend*". Certain features of the statement were then summarised, including night terrors, and the effect on the victim's sense of self-worth and on her education. The impact was described as "*significant and ... ongoing*" and that the victim's childhood ended that day. The impact on the victim was taken into account in fixing the starting point.
- (vi) The Respondent was 17 at the time of the offence, which was a mitigating factor.
- (vii) The Respondent had no previous convictions and there was no subsequent offending, which is a mitigating factor.
- (viii) The court took note of several very positive character references.
- (ix) The court gave credit for the Respondent's stable and impressive employment history.
- (x) The court took note of the Probation Officer's professional opinion that the Respondent's childhood experiences were likely to have had an impact on her cognitive thinking.
- (xi) The court noted that the impact of a sentence of Youth Detention would be increased because the Respondent is a transgender person "*which presents its own challenges in a prison environment and we note the concerns expressed in this regard*".
- (xii) The court indicated that it took into account the fact that it was 2 ½ years since the offending.
- (xiii) The court took account of the fact that the Respondent was assessed as having a low likelihood of general re-offending, but the author of the Social Enquiry Report was unable to assess the risk of sexual re-offending. In the circumstances, the court took into account the fact that the Respondent posed an unquantifiable risk of sexual re-offending, though not imminently.

11. On that basis, the Royal Court took a starting point of 6½ years, reduced by one-third on account of the Respondent's age, and further reduced ultimately to 3 years in light of all the other mitigation and considerations. The court also imposed an extension period of 3 years (as recommended by the Probation Officer) for the purpose of preventing the commission of further offences and securing the Respondent's rehabilitation. Various conditions were attached, the details of which do not matter for the purpose of this reference. Finally, the court imposed a Notification Period of 10 years under The Criminal Justice (Sex Offenders and Miscellaneous Provisions) (Bailiwick of Guernsey) Law 2013 (as recommended by the Probation Officer).

### **SENTENCING FOR RAPE**

12. Rape is fortunately quite rare in the Bailiwick. As a result, this court has not had cause to lay down any sentencing guidelines, and the Royal Court has not heard a sufficiently large quantity of cases to establish any settled pattern. In the circumstances, our attention has been drawn to certain authority from England & Wales. Before considering that authority, we remind ourselves

of what was said in *Wicks v. Law Officers of the Crown* [2011-12] GLR 482, and repeated recently in *Barras, Watt & Orchard v. Law Officers of the Crown* [2021] GLR 374, at para. 58. The courts here are fully entitled to set their own sentencing levels as they consider appropriate, and it would be wrong to start from any assumption that sentencing in England & Wales is necessarily correct, or that any specific reason must be identified for departing from them. This is a separate jurisdiction from England & Wales, with a different legal heritage, a different legal system, different legislation and different historical, social, economic and cultural conditions. As noted in *Wicks*, one of the special features of this jurisdiction is the role of the Jurats in sentencing. We were also reminded, in the course of oral argument, of the small number of judges hearing criminal cases in the Royal Court, which also helps in establishing an appropriate degree of continuity in sentencing.

13. Having said that, it is entirely appropriate to consider at least the principles that have been applied in the English case-law and guidelines in order to assess the gravity of the offending, and the nature of any relevant aggravating or mitigating circumstances. In that context, our attention has been drawn to the decision of the English Court of Appeal in *Millberry* and the Sentencing Guidelines to which the Royal Court referred. The Sentencing Guidelines are more detailed and more prescriptive than *Millberry*, but in broad terms their overall structure is similar. There are essentially two stages, the first being an assessment of gravity. That involves taking account of three criteria: (i) the degree of harm to the victim; (ii) the level of culpability of the offender; and (iii) the level of risk posed by the offender to society. That leads to the selection of a starting point for the sentence, which is then increased or decreased at stage two by reference to aggravating and mitigating factors.
14. In broad terms, we consider that the sentencing court is entitled to use such materials from England & Wales, whether case-law or published guidelines or other sources, to the extent that it considers appropriate, not because they are binding or correct, but rather because they may provide a useful reference point for the development of local practice. That much was also common ground in this case.
15. We do not consider that it is either necessary or appropriate, at least at this stage, to lay down a fixed list of starting points for different categories of sexual offending. We would only add (as Lord Lane CJ did in *A-G's Reference (No 4 of 1989)* [1990] 1 WLR 41, at p. 46B – C) that it must always be remembered that sentencing is an art, rather than a science; that the trial court is particularly well placed to assess the weight to be given to various competing considerations; and that leniency is not in itself a vice.

### **THE LEGISLATIVE FRAMEWORK**

16. The relevant parts of s. 43B of the 1961 Law provide as follows:

*“(1) This section applies to any case in which a sentence is passed on a person for –*  
*(a) an offence for which the maximum penalty is imprisonment for a term of five years or longer (whether or not it is one for which any other penalty may be imposed)*  
*...*  
*(2) If it appears to Her Majesty's Procurer –*  
*(a) that the sentencing of a person in any proceedings in the Royal Court has been unduly lenient, and*  
*(b) that the case is one to which this section applies,*  
*Her Majesty's Procurer may, with the leave of the Court of Appeal, refer the case to the Court of Appeal for it to review the sentencing of that person.*

*(3) Without prejudice to the generality of subsection (2), the condition specified in paragraph (a) of that subsection may be satisfied if it appears to Her Majesty's Procureur that the Royal Court –*

*(a) erred in law as to its powers of sentencing, or*

*(b) failed to impose a sentence which it was required by law to impose.”*

17. This court is then given certain powers under s. 43C, including the ability to quash any sentence and to impose in its place such sentence as this court considers appropriate:

*“(1) On a reference under section 43B, the Court of Appeal may –*

*(a) quash any sentence passed on the person for an offence (whether passed on the person's conviction or in subsequent proceedings), and*

*(b) in place of it pass such sentence as the Court thinks appropriate for the case and as the Royal Court had the power to pass when dealing with the person.*

*(2) In deciding under subsection (1) the appropriate sentence to pass on a person for an offence, the Court of Appeal shall not make any allowance for the fact that the person is being sentenced for a second time in relation to the offence.”*

18. The reference in this case is being heard in the same sitting and by the same constitution of this court as the case of *Law Officers of the Crown v. D1 & D2*. Together, they represent the first opportunity this court has had to deal with a reference under s. 43B.
19. The starting point must be to identify the correct trigger for the exercise of this court's powers under s. 43C. It will be seen from the statutory language quoted above that a reference can be made under s. 43B (with leave) if it appears to HM Procureur that a relevant sentence is unduly lenient. Perhaps surprisingly, s. 43C then confers certain powers on this court without expressly providing that they can only be exercised if this court agrees with HM Procureur that the sentence is unduly lenient. Nevertheless, it is in our judgment clear that that is what the statute intended. It would be perverse to limit HM Procureur's power under s. 43B by reference to a test of undue leniency, but then to confer on this court a power to quash any sentence under s. 43C without also being satisfied that it is unduly lenient.
20. The next step is to identify an appropriate test for determining whether a sentence is 'unduly lenient'. Any such endeavour must tread a careful path between (on the one hand) imposing an unwarranted gloss on the statutory language and (on the other) leaving the jurisdiction so open-textured that its application would risk being arbitrary and unpredictable. In our judgment, a number of guiding principles should be kept in mind.
- (i) The first is that, in order to remain faithful to the statutory language, it is plainly not sufficient for this court merely to reach the view that the sentence was lenient: the test is 'unduly lenient', and real value must be given to the word 'unduly'.
  - (ii) The second point is to recognise that this is an appellate court, not a sentencing court. Accordingly, the question in any given case is not whether this court would have passed a different sentence if it had been conducting the sentencing exercise.
  - (iii) The third consideration is to recall the unique legal structure in this jurisdiction, particularly the participation of Jurats, as noted above. That again militates in favour of interpreting the scope of ss. 43B and 43C in such a way as to keep the exercise of this court's powers within appropriately principled constraints.
  - (iv) The fourth consideration is that any test must be clear and practical, so that it can be applied readily and predictably in individual cases.

- (v) Finally, we are acutely conscious that this is a relatively new legislative regime and the proper scope of its operation will need to be explored and tested in individual cases over time. It would be unwise to be unduly prescriptive at this early stage.
21. Taking all these considerations into account, in our judgment the appropriate test for deciding whether any given sentence is unduly lenient is to ask whether it was outside the range which the trial court, applying its mind to all relevant factors (and only to relevant factors), could reasonably consider appropriate. In applying that test, although this court will plainly have regard to the process by which the sentencing court arrived at its decision, ultimately the judgment under ss. 43B is made by reference to the overall sentence that is passed.
22. We are reinforced in taking this approach by two considerations. The first is the fact that comparably worded legislation (using the expression ‘unduly lenient’) has existed in England & Wales since the introduction of s. 36 of the Criminal Justice Act 1988. Its scope was considered by the English Court of Appeal in *A-G’s Reference (No 4 of 1989)*, which (at p. 46A – B) adopted essentially the same test as that proposed above. The second consideration is that the applicable test was common ground between the parties in this case.
23. Our attention has also been drawn to a number of other English authorities. The decision in *A-G’s Reference (No 16 of 2005), R v. Wilson* [2005] EWCA Crim 1285, at para. 19, adds nothing of principle to the test proposed in *A-G’s Reference (No 4 of 1989)*. The decision in *A-G’s Reference (No 60 of 2012), R v. Edwards* [2012] EWCA Crim 2746 used labels such as “gross error” and “errors of principle” as the touchstone for identifying a sentence that could be considered unduly lenient: in our judgment, it does not necessarily assist to apply any such further gloss to the test we have proposed, and indeed there may be some risks in doing so. In our judgment, it is better to adopt without elaboration the approach outlined in para. 21 above.
24. If that test is satisfied in any given case, there would then be a question whether this court could properly exercise the discretion (which is apparently conferred by the use of the word ‘may’ in s. 43C(1)) not to vary a sentence even if it is held to be unduly lenient. For the reasons explained below, that question does not arise in this case, and in our judgment, particularly when dealing with a new legislative regime, it would not be appropriate for this court to express any views on issues which do not need to be determined.

## **THE APPLICATION OF THE LAW TO THIS CASE**

### **Introduction**

25. In this case, it is common ground that the jurisdiction under ss. 43B and 43C applies by virtue of s. 43B(1)(a). It is also common ground that the power under s. 43B(3) is not being invoked. The only question is whether the sentence was unduly lenient within the meaning of s. 43B(2)(a).
26. The Applicant’s argument was initially advanced under 7 main headings. One of them was dropped before the hearing, and there is a certain amount of overlap between some of those that remain. Ultimately, the assessment of whether the sentence was unduly lenient must be made by reference to the cumulative effect of all the considerations together. Nevertheless, it is convenient to deal with each of the Applicant’s main arguments in turn.

### **(1) The starting point**

27. The Applicant’s first argument is that the starting point of 6½ years did not sufficiently take into account the aggravating factors identified in *Millberry*.
28. The first consideration under this heading is the fact that the victim was a child. The Applicant relies on the fact *Millberry* suggests that 8 years is the correct starting point when the matter involves the rape of a child, or when repeated rape has occurred in the course of one attack. The Applicant submits that the finding of the trial court was that the Respondent had penetrated the

vagina of the victim on two separate occasions during the course of the rape, making it a repeated rape. In our judgment, two considerations need to be kept in mind in this context:

- (i) The first is that *Millberry* (and, for that matter, any other English case-law and the English Sentencing Guidelines) should be regarded as laying down guidelines, not rigid rules to be applied mechanically. In particular, there is a spread between the starting points of 5 years and 8 years, and a trial court is not forced to make a binary choice between the two. In a case such as this, where the trial court specifically paid attention to English guidelines and selected what it considered to be the appropriate starting point somewhere between 5 and 8 years, it cannot be said that this is indicative of an unduly lenient approach.
  - (ii) Secondly the fact that there were two incidents of vaginal penetration within the course of the same offence does not, in our judgment, necessarily put this case into the category of a 'repeated rape': it all depends on the circumstances.
29. The Applicant's second point under this heading is that the rape involved violence: the Respondent undressed the victim involuntarily, pinned her down to rape her and buried her head with a pillow to muffle any sound she might make; the victim was then initially prevented from leaving. In our judgment, the various factors on which the Applicant relies were indeed present, but they were properly recited in the court's sentencing remarks, and as such it cannot be suggested that they were not taken into account. So, the Applicant's submission has to be that no reasonable sentencing court, taking these factors into account, could have fixed 6½ years as the starting point. In our judgment, any such submission has to be rejected.
30. The Applicant's third point under this heading is that the starting point of 6½ years failed to take sufficient account of the significant physical or mental harm caused to the victim: the attack took the victim's virginity; the victim suffered pain and vaginal bleeding; her Victim Impact Statement indicated that she had resorted to self-harm and an attempted overdose, and that her education had been adversely affected. In our judgment, the same observations can be made as in the previous paragraph: the Victim Impact Statement was cited extensively in the sentencing remarks, it was taken fully into account, and it cannot be suggested that no reasonable court could have fixed the starting point at 6½ years.
31. The Applicant's final point under this heading is that the starting point did not take sufficient account of the further degradation to which the victim was subject: the Respondent ejaculated on the victim's back and subsequently wiped off the ejaculate along with the make-up from the victim's face. In our judgment, although the specific detail of wiping off the victim's make-up is not mentioned in the sentencing remarks, the same response can be made here as in relation to the two previous points.

## **(2) The gravity of the offence**

32. The Applicant's second main point is that the starting point selected by the trial court did not sufficiently take into account the gravity of the offence by reference to the considerations identified in *Millberry*, namely: (i) the degree of harm to the victim: this is again based on the Victim Impact Statement; (ii) the Respondent's culpability: this was a violent rape of a child; (iii) the level of risk posed to society: the Respondent posed a low risk of general re-offending, but this could not be said in respect of potential sexual reoffending, an assessment rendered more difficult by the Respondent's continued denial. In our judgment, none of these points can be sustained. It is apparent from our summary of the sentencing remarks above that all of these considerations were taken into account. It is a matter for the trial court to exercise its judgment as to where to fix the starting point, by reference to the guidelines (not rules) in *Millberry* any other relevant materials and, applying the approach to s. 43B outlined above, it cannot be said that the decision in this case was one that no reasonable sentencing court could have reached.

**(3) The reduction for the Respondent's age**

33. Initially, the Applicant's third main point was that the one-third reduction which was applied to the starting point in light of the Respondent's age was excessive. This argument was, however, abandoned before the hearing. It is accepted (rightly) that a reduction is appropriate, as confirmed by this court in *Topley*. The Applicant observes that the reduction applied in this case was out of line with the reduction applied by the Royal Court in the most recent case involving rape by a young offender (*Law Officers of the Crown v. Loveridge* [2021] GRC047), where a 15% reduction was applied to a 7-year starting point. Nevertheless, in our judgment the one-third reduction in this case was well within the appropriate range for the reasons given in the sentencing remarks, which have been summarised above. The fact that the court in this case applied a one-third reduction whereas the court in *Loveridge* applied a 15% discount merely illustrates the fact that sentencing is an exercise of judgment. By withdrawing this head of challenge, the Applicant accepts as much.

**(4) The particular circumstances of Guernsey**

34. The Applicant's fourth main argument is that the discount applied to the starting point should have taken into account the fact that rape is a serious crime and is relatively rare in the Bailiwick; Guernsey is free to set its own sentencing levels; and it is wrong to start from an assumption that sentencing levels in England are correct. In our judgment, this line of argument leads nowhere. The sentencing remarks make quite clear that the Royal Court regards rape as a serious offence which is thankfully rare in this Bailiwick, and that the guidance to be derived from English sources is just that - guidance. Indeed, we would observe that there is a degree of tension between the Applicant's argument under this heading (advocating a liberty to depart from English practice) and the arguments under Grounds (1) and (2) (which are predicated on a need to adhere to English practice).

**(5) The Respondent's personal circumstances**

35. The Applicant's fifth main argument is that too much regard was had to the personal circumstances of the Respondent: a discount of 1 year and 4 months was applied to reflect the Respondent's good character and the difficulties that are likely to be faced in prison on account of the fact that the Respondent is transgender; *Millberry* indicates that a defendant's good character should not be ignored, but it does not justify a substantial reduction of what would otherwise be the appropriate sentence. In our judgment, this line of argument cannot successfully sustain any challenge by reference to s. 43B. The sentencing remarks represent a model of careful consideration, taking into account all the relevant factors, without giving undue weight to any of them, and without ignoring any relevant factors. The fact that the Respondent is likely to face particular problems in prison by reason of being transgender was only one of the 13 factors summarised in para. 10 above which the sentencing court took into account, and there is no basis for suggesting that it was given excessive weight.

**(6) The overall reduction**

36. The Applicant's sixth main argument is that the overall reduction from a starting point of 6½ years to 3 years was excessive. In our judgment, this adds nothing to the debate.

**(7) The length of youth detention**

37. The Applicant's final argument is that an unduly lenient approach was taken to the length of the immediate youth detention: this should have taken up a larger proportion of the overall sentence. Again, this adds nothing to the debate. The implicit suggestion by the Applicant that the Royal Court reduced the custodial element because it was also imposing an extended sentence is not supported by the sentencing remarks.

**'Comparables'**

38. Finally, we should record the fact that both sides have drawn our attention to an outline of certain 'comparables', but sensibly neither side attempted to draw too much assistance from them. The number of cases is minimal, and the level of available detail is exiguous.

### **Conclusion**

39. In our judgment, the starting point of 6½ years was not unreasonable, nor was the reduction to 3 years. Both elements might be regarded by some as lenient, but as a matter of law they cannot be categorised as unduly lenient, because they are not unreasonable. Overall, the ultimate sentence was not unduly lenient, because it was not unreasonable.
40. The Applicant's general observations about the need to send the right message to the community are no doubt salutary, and they can always be put before the sentencing court in the Prosecution Outline. As this jurisdiction develops in practice, consideration may also be given to the possibility of the sentencing court inviting the prosecution to propose an appropriate sentence in cases to which s. 43B applies, but that is not a matter for this court to dictate. Nor is it the function of this court to decide what sentence we would have imposed if we had been conducting the trial. The only question in this court is whether the sentence was unduly lenient as a matter of law, and in our judgment it was not.