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Deputy J Macon
Chairperson
Home Affairs Scrutiny Panel
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23 February 2018

Our ref: 1648970/72342922/1

Dear Deputy Macon

Re: Scrutiny of new draft Sexual Offences Law

I write in relation to the above. For my part I was not aware that Scrutiny was taking evidence on the new draft Sexual Offences Law. I enclose an extract from the JEP dated 21st February 2018 which suggests such evidence has been given. May I be permitted to make this written submission to your committee. The contents are that of the writer and not that of the firm.

In the JEP extract the Attorney General refers to the case of Da Costa in 2016. I was Defence Advocate on that case both in the Royal Court and on appeal in the Court of Appeal. In addition, I have significant experience of sexual offending matters having been a Jersey Advocate for nearly fifteen years.

I wish to make one point to your committee. If it is being represented that sentences for serious sexual offending is lower in Jersey than the sentence passed in England for the same or similar offence(s), then I consider that to be an incomplete and potentially inaccurate statement.

The Defendant is concerned with the actual time he will spend in prison on sentence. That is the real issue for the Defendant. In Jersey, a serving prisoner is usually released on licence after having completed two thirds of his sentence. In England, I believe that a serving prisoner is usually released after having served just half of his sentence. This is an important difference. That same submission was made by me to the Superior Number of the Royal Court on sentence on the 7th December 2017. I placed before the Royal Court in support the case of R v RD and a summary sheet (both enclosed). I invite you to consider paragraphs 26 to 28 of R v RD and the detail of the summary sheet.

To make a comparison, on the 7th December 2017, my client received a sentence of thirteen years in respect of serious sexual offending to include rape. His release date would therefore be at eight years eight months. The same person being sentenced in England would receive a sentence of seventeen years four months (not thirteen years) in order to be released on licence after eight years eight months.

The above issue appears to have been recently highlighted in the English case of Warboys involving serious sexual offences committed by a taxi driver. I say again that when

comparing release dates, which is the material issue for Defendants, sentences in Jersey are not lower by comparison with sentences for the same or similar offences in England. I would submit that they are in fact higher.

Finally I trust this point better informs the debate to come in the States Chambers.

Yours sincerely

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in this area and is more conflicted than any other politician in the matter as a former member of the

which has been designed around a political agenda, one which is more likely to inflame matters than find a solution,' he said.

positive for the JLA, and therefore for all Islanders.

'It is a pity that the government's political games continue to provide an unnecessary distraction.'

Sex law overhaul 'would help victims'

By political correspondent
Michael Morris
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AN overhaul of the sexual offences law should give victims more 'courage to come forward' after a poor conviction rate last year, the Attorney General has said.

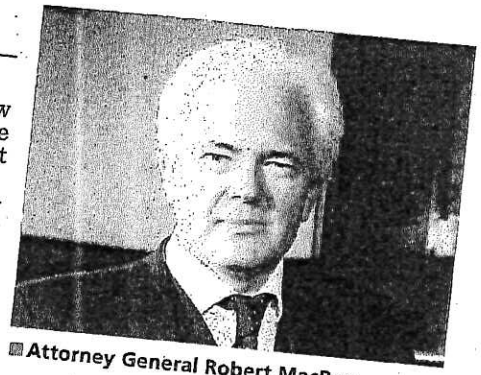
Criticism has been levelled at the current laws for being too soft on sexual offences and for often categorising serious sexual offences as the lesser charge of indecent assault rather than rape.

Home Affairs Minister Kristina Moore has lodged proposals which would make major changes to the law – including seeing more offences classed as rape and increased maximum sentences.

And speaking at a Scrutiny panel hearing this week, Attorney General Robert MacRae said the proposals, coupled with changes to the criminal procedures law, should create a more level playing field for victims of sexual offences.

Panel chairman Deputy Jeremy Maçon said that the charity Jersey Action Against Rape had concerns about the current situation, arguing that 12 rape cases were brought before the court last year with no convictions.

Advocate MacRae said that while he believed there had been at least one conviction last year, the point the charity made was a 'good one' and both he and Deputy Moore agreed that convictions in rape cases were low. Both said that they wanted to see a greater conviction rate when cases of serious sexual offending reached trial.



Attorney General Robert MacRae

Advocate MacRae added: 'The whole landscape for a victim of sexual offending will have changed. This has been designed to make sure victims have the courage to come forward and secondly, to make sure they are treated with respect.'

In 2016 he argued in the Royal Court during the case of Jose Avelino Da Costa Cabral – who admitted two counts of indecent assault against a child – that the assaults would have been classified as rape of a child in the UK rather than indecent assault. Cabral was jailed for ten years.

The changes to the sexual offences law are due to debated by the States on Tuesday 20 March.

21/2/2018

Randalls to

Sentencing Levels

Comparison between England and Jersey

R v RD [2009] EWCA Crim 2131. Refers.

To Serve	Sentence England	Sentence Jersey
12 years	24 years	18 years
10 years	20 years	15 years
8 years	16 years	12 years
6 years	12 years	9 years
4 years	8 years	6 years
2 years	4 years	3 years

In K v AG [2016]JCA219 at Para 32:

"....there is no reason why sentencing levels in Jersey for these offences (sexual offences) should be markedly lower in Jersey than in England and Wales,....."

On the basis of the above, the correct question is to ask why sentencing levels in Jersey for sexual offences should be markedly higher than in England and Wales.

Advocate M J Haines (7.12.2017)

Status: Positive or Neutral Judicial Treatment

Regina v R.D.

No: 2008/5146/D1

Court of Appeal Criminal Division

6 October 2009

[2009] EWCA Crim 2137

2009 WL 3398651

Before: Lord Justice Keene Mr Justice Blair His Honour Judge Rogers QC (Sitting as a Judge of the CACD)

Tuesday, 6 October 2009

Representation

Mr J Lamb appeared on behalf of the Appellant.

Miss R Burns appeared on behalf of the Crown.

Judgment

Lord Justice Keene:

1 On 20th August 2008 at Lewes Crown Court, before His Honour Judge Lawson QC, this appellant was convicted of nine counts of incest (counts 1 to 9), three counts of rape (counts 10 to 12) and eight counts of indecent assault on a male person (counts 13 to 20). He was sentenced on the same day to a total of 21 years' imprisonment. He now appeals against both conviction and sentence by leave of the single judge.

2 The complainants were all children of the appellant and their complaints related to events which had allegedly taken place over a period between 1973 and 1989. The incest counts all related to his daughter (T), the three rapes to another daughter (A), four of the indecent assaults on a male concerned a son (M) and the remaining four such assaults another son (J).

3 In 1990 their mother left the appellant and she was later divorced from him. By 1990 all four complainants had moved out of the family home. In 1992 the appellant disappeared. The complainants and their mother were told that he had died at sea. This, as it eventually emerged, was untrue.

4 In 2006 the daughter, T, made allegations of sexual abuse against the appellant. The police contacted the other three complainants who made their allegations which formed the basis of the other charges on the indictment. These were in short that the appellant raped and sexually abused them over many years whilst they were living at the family home in Hastings. They said that they left home as soon as they could and wanted nothing more to do with him. The daughter T was 10 years old, the daughter A was aged 15, the son M was aged 8 and the son J was aged 9 when the appellant started to abuse them. The delay in making their complaints, they said, was due to their fear of the appellant.

5 All four complainants gave evidence at trial, as did their mother who described the appellant as having been physically violent towards her and the children.

6 The daughter T described the appellant having regular intercourse with her over many years between the ages of 10 and 16 and then again when she was 17 and 18.

7 The daughter A described the appellant raping her, first when she was about 12 or 13 and then again a few months later in a park after dark. The third alleged rape took place a few months after that at home when the others had gone to bed.

8 The son M described incidents of the appellant sexually abusing him continuously between the ages of 8 and 9, with attempted buggery and oral sex.

9 The son J gave evidence of the appellant masturbating him regularly about once a week from the age of 8 or 9 until he was 11 or 12.

10 In interview the appellant denied all these allegations. He did not give evidence at trial, nor did he call any evidence.

11 Although the grounds of appeal against conviction are five in number, they all boil down to an argument which flows from a ruling by the trial judge, and the single judge gave, as we have indicated, leave to appeal against conviction on that basis.

12 The defence applied under section 41 of the Youth Justice and Criminal Evidence Act 1999 and the Criminal Justice Act 2003 , in so far as that related to bad character evidence, to cross-examine the complainant A about an allegation of rape which she had made about a man, to whom we shall refer simply as "Gary". There was no doubt that she had made such an allegation in December 2002, alleging a rape in August 1996. The police had investigated this but eventually concluded that there was insufficient evidence for a successful prosecution of the man Gary. The offence had been denied by him.

13 At the present trial counsel for the defence made it clear that he wished to cross-examine A about the witness statement which she had made in January 2003 about the alleged 1996 rape and contrast it with her husband's witness statement and other evidence so as to point up inconsistencies and to show that this was a false allegation of rape. The judge in referring to section 41 of the 1999 Act observed that the credibility of the complainant A was clearly important, but that the question whether the previous allegation could be seen as false or not had been examined by the courts in a number of cases. He specifically referred to the case of *V [2006] EWCA Crim. 1901* and noted that, in two of the three instances dealt with in that case, this court had emphasised that there was no real evidence of the falsity of the allegation. It was only in the remaining instance where there was evidence of the complainant admitting that her earlier allegation had been false that this court ruled that cross-examination should have been allowed.

14 In his ruling in the present case, Judge Lawson said this:

> "The courts have been careful to limit the scope of that sort of cross-examination where it would involve a wide-ranging examination of evidence in the other matter, and it seems to me that this application falls into that category. The evidence or the argument which the defence seek to put before this jury is that because there are inconsistencies, because there are matters which are inaccurate in the complainant's statement as compared to the statement of the husband and the report, it is a report of the investigating officer, they say that that makes a foundation for the falsity of the accusation. I disagree. The examination of that is asking the jury to decide whether it is a false allegation, not proof that it is, and so I disallow the cross-examination as to the detail of the event."

15 The appellant now contends that that ruling was wrong. Before turning to the submissions made on his behalf we must set out the terms of section 41 or at least those material for present purposes. It provides as follows:

> "(1) If at a trial a person is charged with a sexual offence, then, except with the leave of the court—
>
> (a) no evidence may be adduced, and
>
> (b) no question may be asked in cross-examination

by or on behalf of any accused at the trial, about any sexual behaviour of the complainant.

(2) The court may give leave in relation to any evidence or question only on an application made by or on behalf of an accused, and may not give such leave unless it is satisfied—

(a) that subsection (3) or (5) applies, and.

(b) that a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case.

(3) This subsection applies if the evidence or question relates to a relevant issue in the case and either—

(a) that issue is not an issue of consent; ...

(4) For the purposes of subsection (3) no evidence or question shall be regarded as relating to a relevant issue in the case if it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced or asked is to establish or elicit material for impugning the credibility of the complainant as a witness."

16 As the trial judge said, there has indeed been considerable authority on those provisions to which we shall return. But in one of the earlier cases R v T and *R v H [2002] 1 WLR 632, [2002] 1 Cr.App.R 254* , where I gave the court's judgment, the distinction was drawn between cross-examination "about any sexual behaviour" of a complainant (the phrase used in the Act) and cross-examination as to previous false complaints. That distinction has subsequently been recognised in other cases. But the court in R v T and R v H was at pains to emphasize that there has to be a "proper evidential basis" for asserting that the previous complaint had been made and had been false. In the absence of such a basis the questions would become ones about previous sexual behaviour - see the case of *E [2004] EWCA Crim. 1313, [2005] Crim LR 229* .

17 It is now submitted by Mr Lamb on behalf of the appellant that there was in the present case a proper evidential basis for the proposed assertion that the daughter A's previous complaint of rape had been false. Mr Lamb has attached a schedule to his skeleton argument of apparent inconsistencies between her witness statement in 2003 and other witness statements produced at the time and comments in a police officer's report at the time. It is contended that the judge should have allowed him to explore these apparent inconsistencies by way of cross-examination at trial so as to persuade this jury that the complainant's earlier complaint had been false. Mr Lamb says that a defendant can only say that he asserts that the earlier allegation was false and then put it to the jury. He is not in a position normally to prove it, nor should he have to. But one may reach, it is said, an inevitable conclusion that the earlier allegation was false.

18 This court does not accept that line of argument. The phrase in R v T and R v H "a proper evidential basis" was intended to require a much more solid foundation than the sort of cross-examination as to inconsistencies being relied upon in the present case. It is significant that one of the authorities relied on by this court in that case of R v T and R v H , that of Cox (1986) 84 Cr.App.R 132 was itself a case where there had been evidence available of an admission by the complainant that her earlier accusation of rape against another man had been false - see page 135. In the case of V , as pointed out earlier, this court held that it was only in the instance where again there was evidence of an admission by the complainant that her earlier allegation had been false that cross-examination about it was allowable. This line of cases is not to be regarded as authorising the use of a trial as a vehicle for investigating the truth or falsity of an earlier allegation merely because there is some material which could be used to try and persuade a jury that it was in fact false. As was pointed out in the case of E , if the cross-examination elicited assertions that the allegation had been true, the trial court would have been faced with the dilemma of either letting those assertions of criminal conduct on the part of a named third party stand unanswered, or "descending into factual enquiries with no obvious limit and wholly collateral to the issue in the case." We agree with those comments. Nor does the mere fact that the police decided that there was insufficient evidence to prosecute on the past

complaint amount to evidence that that complaint was false.

19 In the present case there was no basis for expecting the complainant A to accept that her allegation of rape against the man Gary had been false. She had never in the past suggested anything of the sort. What was contemplated was in effect a trial of that allegation within this trial. Such a situation does not amount to the proper evidential basis contemplated in the authorities and it follows that the judge was right to rule out such questioning under section 41 .

20 In those circumstances it has to follow, as Mr Lamb recognises, that the appeal against conviction must be dismissed.

21 We turn therefore to the appeal against sentence. The only basis on which leave was granted in respect of sentence was that it was seen as arguable by the single judge that the total of 21 years' imprisonment was excessive. We have already set out the basic facts of the offences earlier in this judgment. The only additional matters we should refer to concern the incest offences with his daughter T. Her evidence was that on most occasions the appellant used no contraception and ejaculated inside her and that when she was 17 and 18 there was oral sex as well as intercourse.

22 The appellant is now aged 64, having been 62 at the date of sentence. He has a number of previous convictions including some old ones for violence but none for sexual offences.

23 On his behalf, Mr Lamb does indeed argue that the total of 21 years was manifestly excessive. In particular he points to the fact that under the statutory regime the appellant may serve two-thirds of the total sentence, not one-half as would be the case today, because of the date of those offences. Consequently, he submits, the total of 21 years must be seen as too high. Reference is also made to the age of the appellant.

24 These were patently grave and appalling offences which clearly merited a very long sentence of imprisonment. The sexual abuse went on with one or other of the appellant's children for over 16 years. There were four victims. In each case a gross breach of trust was involved. Some of the incestuous intercourse was regarded by the judge as having come close to rape and there were of course three offences of rape of daughter A as well. The forced fellatio in the case of the son M would today be regarded as rape and those offences began when he was aged 8. All the charges were contested with the result that no discount for a plea of guilty was available. The appellant's victims were clearly terrorised and there were instances of violence being used.

25 In the light of the Sentencing Council Guidelines in the case of *Millberry [2002] EWCA Crim. 2891*, this was a case where for current offences a sentence of more than 15 years in total was required to reflect the aggravating features to which we have referred. Some reference has been made to the decision in the case of *JO [2008] EWCA Crim. 738* where a total of 20 years' imprisonment was upheld in a case where there had been four victims and gross breaches of trust. We bear in mind that the victims there were generally somewhat younger than those in the present case.

26 The judge in his sentencing remarks in the present case made no express reference to the appellant's age, though we have no doubt that he had it in mind. What we do bear in mind is the point which is agreed between both Crown counsel and Mr Lamb for the appellant, namely that these offences, because they took place when they did, would have to be served under the earlier sentencing regime, so that there would be no duty upon the Secretary of State to release this appellant until he had served two-thirds of the total sentence rather than one-half as would be the case if these were sentences being imposed for current offences. That seems us to be of importance as well as the other matters to which we have referred.

27 In those circumstances, and solely for that reason, we propose to reduce the total in order to reflect the period of time which this man may well serve in prison. Reflecting on those different periods before there is a duty to release, it seems to us that the total of 21 years' imprisonment has to be reduced to one of 15 years' imprisonment. We shall achieve that by reducing both the 16 years imposed on counts 1 to 3 to terms of 15 years, to do the same on counts 10 to 12 so that they will become 15 years as well, all of those to run concurrently *inter se* and with each other, and make the five years' imprisonment in relation to the other counts on the indictment concurrent not consecutive. That will produce a total of 15 years' imprisonment.

28 We do emphasise that we do this solely for the reason that the sentencing regime has

changed since these offences were committed and that the period of time which this man is likely to serve in custody is likely to remain the same, as it would have been in respect of the total which the learned judge here imposed after trial. To that limited extent this appeal against sentence is allowed, but the appeal against conviction, as we indicated earlier, is dismissed.