ROYAL COURT
(Samedi Division)

58.

21st March, 1996

Before: The Bailiff, and Jurats Blampied, Orchard and Gruchy.

The Attorney General

- v -

Ronald George Halley

Sentencing by the Superior Number of the Royal Court, after conviction by the Royal Court *(Assise Criminelle)* on 22nd February, 1996, following a not guilty plea entered on 19th January, 1996, before the Inferior Number to:

1 count of rape.

Plea: Not Guilty.

Age: 38.

Details of Offence:

The defendant, who was a caretaker/handyman at a guest house entered the victim's bedroom whilst she was asleep and proceeded to rape her. He claimed at the trial that she consented. Some six months after the trial the victim was still suffering psychological trauma.

Details of Mitigation:

Given the not guilty plea, little by way of mitigation. Was given credit for his previous good character.

Previous Convictions: I minor drug offence which was disregarded by the Court.

Conclusions: 6 years' imprisonment.

Sentence and Observations of the Court:

Conclusions granted. Court approved the Crown's starting point of seven years' in accordance with Billam guidelines taking into account the fact that the rape took place where the victim was living. Twelve months' credit given for good character.

A.R. Binnington, Esq., Crown Advocate.
Advocate J.C. Gollop for the accused.

JUDGMENT

THE BAILIFF: With the possible exception of sodomy, rape is probably the most serious of sexual offences. It involves a gross violation of a woman's body which, it is now generally recognised, can have very grave psychological consequences, quite apart from any physical injury which may be inflicted.

The Court has considered very carefully the guideline case of Billam & Ors. (1986) 8 Cr.App.R.(S) 48, which has been adopted by the Court on a number of occasions and the Unreported Judgment of the Jersey Court of Appeal in Heuzé -v- A.G. (27th September, 1995). We agree with Mr. Gollop that, on the face of it, the case of Heuzé was a worse case than the present.

However, having applied as best we can the guidelines set out in the case of Billam we find it impossible to say that the starting point of seven years' imprisonment taken by the Crown Advocate in this case, is excessive. We think that the decision of the Court of Appeal in Heuzé must be regarded as one which reflected the Court's view of those particular facts and not one which laid down any principles of general application.

The defendant did add to the humiliation of the victim by pleading not guilty and requiring her to re-live her ordeal in the witness box. There is therefore no mitigation available to him by virtue of his plea and no evidence of remorse. There is evidence that six months after the offence the victim is still suffering from the psychological consequences of the trauma which she suffered.

As Mr. Gollop has properly urged the offence is at the lower end of the scale and the defendant should be given credit for his previous good character. In our judgment the Crown Advocate has applied the correct reduction to take account of the mitigating circumstance and the conclusions are accordingly granted. Halley, you are therefore sentenced to six years' imprisonment.

Authorities

Billam & Ors. (1986) 8 Cr.App.R.(S) 48.

A.G. -v- Heuzé (30th January, 1995) Jersey Unreported.

Heuzé -v- A.G. (27th September, 1995) Jersey Unreported CofA.

A.G. -v- Herlihy (1st March, 1995) Jersey Unreported.

A.G. -v- de la Haye (4th December, 1995) Jersey Unreported.

Attorney General's Reference No.1 of 1991 (1992) 13 Cr.App.R.(S) 134.

ROYAL COURT
(Samedi Division) 58A.
21st March, 1996
Before: The Judicial Greffier

Between	David William L. Dixon	Plaintiff
And	Jefferson Seal Limited	Defendant

Application by the Plaintiff for the specific discovery of certain categories of documents.

Advocate M.St.J. O'Connell for the Plaintiff;
Advocate A.D. Hoy for the Defendant.

JUDGMENT

THE JUDICIAL GREFFIER: This action is one of a number which have been brought against the Defendant in connection with the failure of the Confederation Life Insurance of Canada 9.875% 3-3-2003 Bond (hereinafter referred to as "the Bond"). The Plaintiff was a private investor and the Defendant was a firm of stockbrokers. The Plaintiff alleges that in 1987 he engaged the Defendant to act as investment advisers and brokers for him. The Plaintiff alleges breach of contract and negligence in connection with advice given by a Mr. Beadle, an employee of the Defendant in relation to the Bond. It is alleged that as a result of that advice the Plaintiff invested just under £200,000 in the Bond all of which has been lost. The Plaintiff alleges that he should only have been advised to invest in bonds which were rated AA or above and that the rating of this Bond at the relevant time was A-. The Plaintiff also alleges in the Order of Justice that the Defendant did not adequately review the ongoing position of the Bond and advise the Plaintiff accordingly.

Paragraph 4 of the particulars which the Plaintiff filed on 9th February, 1996, contained a response to the following request-

> "<u>Under paragraph 3</u>
> Of: *"The basis of such engagement was not reduced to writing but the Plaintiff avers that pursuant to*

Requests (a) and (b) are so wide that they also fail the necessary test.

The documents sought under category 14 were all documentation relating to the management and control of the Defendant. This request was closely related to that under category 12 in order to check that there was a proper control and it failed for exactly the same reasons as set out under category 12.

Under category 15 the documents sought were all records relating to dealings in the Bond, whether hard copy, computer printout or microfiche. This is another variant on the theme of obtaining documentation relating to all dealings in the Bond. It failed the wider relevance test and the necessary test.

The documents sought under category 17 were all documentation relating to management control of the dealing process at the Defendant e.g. procedures manual, board directives etc. This request also related to control of the Defendant's operations and was similar to categories 12 and 14 and was refused for the same reasons.

Having dismissed the application for each and every category of documents, I went on to Order that the Plaintiff pay the costs of and incidental to his Summons seeking specific discovery in any event.

circumstances may include not only inherent evidence from the sources described in the passage which we have cited from the judgment of Brett, L.J. but also evidence which satisfies the test posed by Tomlin, J. in Astra-National Prods. (1), that is to say evidence sufficient to displace the oath of the party who has verified the list, by making a prima facie case that there are in that party's possession documents which are relevant to matters in issue in the action. In this connection we note the practice direction given by the Deputy Judicial Greffier in his judgment in Jones v. Atkinson (3) that -

> "...every application for an order for specific discovery must be supported by an affidavit stating that the deponent believes, with the grounds of his belief, that the other party has, or has had, in his possession, custody or power the document, or class of document, specified in the application and that it is relevant ...)

A party seeking further discovery after an affidavit has been made following an order under r.6/16(1), must persuade the court that, despite the affidavit, his opponent has not complied with the order. It seems to us that it must be necessary, in these circumstances, for the party seeking further discovery to show, by evidence on oath, not only a *prima facie* case that his opponent has, or has had, documents which have not been disclosed, but also that those documents must be relevant to matters in issue in the action. The court must be satisfied that the documents will contain information which may enable the party applying for discovery to advance his case, damage that of his opponent, or lead to a train of enquiry which may have either of those consequences. It is not enough to show only that the documents may be relevant in the sense described. A court faced with evidence which would not be entitled to disregard the oath of the party who, having (ex hypothesi) seen and examined the documents with the assistance of his advocate, has sworn, in effect, that they are not relevant.

We should add that, even where a *prima facie* case of possession and relevance is made out, an order for specific discovery should not follow as a matter of course. the court will still need to ask itself the question whether an order for specific discovery is necessary for disposing fairly of the cause or matter. It must be kept in mind that 0.24, r.7 of the English Rules of the Supreme Court is itself subject to r.8 of the same order, which makes this further requirement explicit."

relevance test for the same reasons as 2 to 4 and also failed the necessary test as being much too widely drawn.

Under category 6 the Plaintiff sought all documentation which will identify the total holding by clients of the Defendant of any Bonds which carried a rating of less than AA, as a percentage of the total number of Bonds held by clients of the Defendant. This failed the wider relevance test. There may well be other investors with the Defendant who had deliberately invested in lower rated Bonds. It would be necessary for the Defendant to perform a great deal of work to get together the documents which contain this information and it also failed the necessary test.

The Request under category 7 was for all documentation which will indicate what was the average weighting of the Bond in portfolios of the clients of the Defendant. This also failed the wider relevance test. The issue as to whether the Plaintiff was given proper advice as to the spread of risk in his Bond portfolio is an issue that can be dealt with by means of expert evidence as to usual practice. The actual practice of other investors employed by the Defendant is not, in my view, relevant. Again a great deal of work would be required in putting together such documentation and it fails the necessary test.

Under category 8 the Plaintiff sought all documentation which would show whether there were any sales of the Bond for clients of the Defendant from June 1994. The significance of this is that the Plaintiff is alleging that on 4th August, 1994 an announcement was made as a result of which the Bond was down rated to BBB- and that the Defendant should then have alerted the Plaintiff of the change of status so that the Bond could be sold. The purpose of seeking this documentation must be that if other clients of the Defendant were advised to sell then why was the Plaintiff not so advised. However, in his own Order of Justice at paragraph 15 the Plaintiff pleads that during the week between the announcements which led to the down rating to triple B- and the announcement on 11th August, 1994, that a liquidator had been appointed to the company, Mr. Beadle was absent from the Island on leave and that as a consequence the Defendant did not have any or any adequate expertise available within its offices properly to interpret the adverse information which it received and subsequently to recommend the disposal of the Bond. The documentation which the Plaintiff is seeking is therefore in direct contradiction to his own pleading. The request clearly fails the test of a *prima facie* case that such documents exist and it also fails the wider relevance test.

The request under category 9 was for all documents which will identify the turnover and profitability in bonds as a percentage of the Defendant's total business. This failed all three tests. It is most unlikely that any document would exist with this

obliged so to do and so how can I know whether or not they are in issue?

I decided that for the purposes of this application, I would treat the particulars filed as not widening the claim contained in the Order of Justice and would, therefore, treat the matters in issue in the action as being purely those matters in issue by reason of the claims contained in the Order of Justice. Upon that basis, I was satisfied that the Plaintiff failed to meet the test that the documents in relation to which specific discovery is sought "must be relevant to matters in the issue in the action".

However, I then went on to consider the question as to whether, if I treated the additional allegations in the particulars as giving rise to matters which were in issue in relation to the action, I was satisfied that the documents sought must be relevant to matters in issue in the action.

It was brought to my attention that paragraph 4.13 on page 94 of Matthews and Malek on Discovery (London, 1992) reads as follows:

> ***"Pleadings***
>
> ***4.13 In practice relevant is primarily tested by reference to the pleadings. However "matters in question" covers a wider ground than the issues as disclosed in the pleadings. The Court on discovery is entitled to look outside the pleadings in order to determine what matters are in issue between ths parties. Indeed, there need not be pleadings for a matter to be said to be in issue. "***

On page 99 of Matthews and Malek on Discovery there is a section on Fishing which reads as follows:-

> ***"(g) Fishing***
>
> ***Discovery will not be ordered to enable a party to frame a new case or to fish for evidence. Nor will discovery be ordered to enable "checks" to be made on opponents' statements on oath regarding existing discovsry."***

Advocate Hoy brought to my attention the section commencing on page 140 of Matthews and Malek on Discovery which reads as follows:-