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NCN: [2021] EWCA Crim 538



IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202001969/B4 & 202001970/B4

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday 24 March 2021

LORD JUSTICE SINGH
MR JUSTICE WILLIAM DAVIS
MRS JUSTICE ELLENBOGEN DBE

REGINA
V
RYAN THOMAS KENNEDY

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MR T QURESHI appeared on behalf of the Applicant

J U D G M E N T

1. LORD JUSTICE SINGH: There are two renewed applications for leave before this court, the first to appeal against conviction and the second to appeal against sentence. The applicant also requires extensions of time.
2. On 12 March 2020 in the Crown Court at Liverpool, the applicant, then aged 26, was convicted by the jury of an offence of kidnapping (count 1), assault occasioning actual bodily harm (count 2) and possessing criminal property (count 4). He was acquitted of having a bladed article in a public place (count 3, the original count 5). Before the trial he had changed his plea to guilty in respect of an offence of burglary (which was the original count 3), possession of an offensive weapon, namely a sledgehammer (the original count 4) and handling stolen goods (the original count 6).
3. On 2 April 2020 the applicant was sentenced by His Honour Judge Warnock in the following way. On the offence of kidnapping, the sentence was an extended sentence under section 226A of the Criminal Justice Act 2003, comprising a custodial term of eight years and an extended licence period of three years, thus making an extended sentence of 11 years. On the count of assault occasioning actual bodily harm there was a concurrent sentence of 12 months' imprisonment. On the count of possessing criminal property there was a concurrent sentence of 18 months' imprisonment. On the count relating to burglary there was a concurrent sentence of 18 months' imprisonment. On the offence of possession of an offensive weapon in a public place there was a concurrent sentence of three months' imprisonment. On the offence of handling stolen goods there was also a concurrent sentence of three months' imprisonment. Accordingly the total sentence was an extended sentence of 11 years, comprising a custodial term of eight years and an extension period of three years.
4. There was a co-accused, Liam Rogan, aged 31, who was jointly tried and convicted in respect of the count of kidnapping and the count of assault occasioning actual bodily harm. He was sentenced to six years and 12 months concurrent respectively.
5. The facts can be summarised as follows for present purposes. The complainant, Macauley Sawyers, now aged 18 said that on 5 September 2019 he was forced into a Ford Fiesta car by the applicant and co-accused who then threatened and assaulted him with a Taser whilst demanding to know the whereabouts of his friend Josh Caddick. He was detained for over an hour during which the vehicle was driven around the local area searching for Josh. At one point they stopped whilst the applicant and co-accused burgled some commercial premises.
6. When arrested the next day the applicant was found to be in possession of a large quantity of cash which was seized as the proceeds of crime/drug dealing.
7. The prosecution case was that the applicant used young males, including Josh Caddick, to deliver drugs from Liverpool to Stockport and that Josh owed him money arising from this activity. In an attempt to locate him, the applicant and co-accused kidnapped the complainant, who was Josh's friend, and used a Taser to inflict pain and injury upon him. In addition, the applicant was in possession of a knife or dagger which he used to threaten the complainant. He was acquitted on that (count 3 at the trial).
8. The cash recovered at the time of arrest was said to be from his "county lines" drug dealing. To prove its case the prosecution relied on, first, the evidence of the complainant Macauley Sawyers; secondly, the evidence of the complainant's mother Rebecca Shaw; thirdly, an adverse inference from his failure to answer questions in interview; and fourthly, his bad character, previous convictions being placed before the

court.

9. The applicant's defence at the trial was that he did not kidnap the complainant, nor did he take part in or encourage any assault upon him. The complainant had gone with him willingly and indeed it was his idea to burgle the commercial premises, although he lost his nerve and did not in fact take part. As to the cash seized, it was said this was the proceeds of the sale of eight Bull Terrier dogs whom the applicant had bred and sold for approximately £3,000 each.
10. The issue for the jury was whether the complainant's account was true and accurate, whether the jury were sure that he had been held in the vehicle against his will, assaulted/injured with a Taser gun, threatened with a knife and whether the cash recovered from the applicant's address was criminal property rather than the legitimate proceeds from the sale of puppies.
11. During his evidence, the complainant suggested that he suffered from "cognitive difficulties" including dyslexia which hindered his ability to understand oral questions. Later in his evidence, dealing with the moment the applicant came into the chip shop to kidnap him, he said:

"I took what he said in but I have cognitive problems so I had to re ask what he said..."

12. The complainant's mother, Rebecca Shaw also gave evidence. She explained on this topic that her son had cognitive difficulties. She said that they had not discussed the incident much "because of my son's developmental issues, cognitive issues, it's not something we have been talking about because I didn't want to keep reiterating it in his brain."

13. In answer to a question from judge, she said:

"His brain cannot process information, nor can it retain information. He has social disengagement."

14. She said again that her son had cognitive difficulties, saying:

"At 17 years of age I'm still telling him things of a five-year/six-year-old child because his brain does not retain information. It just goes."

15. We will deal first with the renewed application for leave to appeal against conviction. In helpful revised written submissions and in his oral submissions, Mr Qureshi has clarified that he no longer pursues all of the original grounds of appeal. Rather, he pursues three grounds. Under ground 1, Mr Qureshi complains that the way in which the judge summed up the evidence on this topic was to over-emphasise the complainant's cognitive impairment. The relevant parts of the summing-up are as follows. First, at page 14E (page 150 of the bundle) the judge said:

"We start of course with the ABE interview of Macauley Sawyers. He was born on 24 August 2002. You may wish to recollect the evidence of his mother about what was said to be his cognitive impairment, if you accept that. That is a matter of fact for you to consider, but that is part of the picture, if you accept that evidence,

of this particular witness."

16. In summarising the evidence which had been given by Rebecca Shaw, the judge said the following at page 32F (page 168 of the bundle):

"She says, 'My son has cognitive issues'. Remember, she has described the problems. 'I presumed his phone had been taken off him. My knowledge of Reggie Kennedy is from what has happened to Josh Caddick in the past', and again I caution you about that. That is hearsay of course."

17. And at page 33A (page 169 of the bundle):

"In answer to me, she told us this: 'Macauley is 17 years of age, his brain cannot process information, he has had help at school, he's dyslexic and he's vulnerable. I am still telling him matters like a 5-year old.'"

18. Mr Qureshi submits that there was no medical evidence about the extent and effect of Mr Sawyers' cognitive impairment and the extent to which it affected his reliability. He submits that the judge over-emphasised the importance of this evidence when he suggested to the jury that this was "part of the picture". He submits that the impression left by this evidence was that Mr Sawyers' cognitive impairment meant that he was not only a vulnerable person by virtue of his age (17) but also because he suffered from significant impairment of intelligence and social function. Mr Qureshi submits that this court will quash a conviction where there has been a misrepresentation of the facts which is liable to make a conviction unsafe and draws an analogy with the decision in R v Bateson (1969) 3 All ER 1372.
19. We consider that there is no analogy to be drawn with that decision. In our view, there was no misrepresentation of the facts by the trial judge. His summing-up was simply a summary of the relevant evidence which the jury had heard and which included the evidence of Mr Sawyer's mother. The jury had evidence that the complainant had some degree of cognitive impairment. The fact that there was no expert or medical evidence on the topic did not mean that the evidence was irrelevant or inadmissible. It came principally from the complainant's mother, who was in as good a position as anyone to give the evidence. The judge was justified in saying that this was "part of the picture" so far as the jury's assessment of the complainant was concerned. There was no objection taken to this evidence at the time or at any stage during the trial, although the defendant was represented by counsel (although not at that time Mr Qureshi). Finally, we would note that the trial judge gave the usual direction to the jury that matters of evidence were entirely for them and that they should not read into his choice of the evidence any particular significance (see summing-up page 14C).
20. Under ground 2, Mr Qureshi submits that the prosecution failed properly to exercise their continuing duty of disclosure. They should have but failed to disclose to the defence relevant material which went to Mr Sawyers' reliability and credibility as a witness. After enquiries were pursued for the purpose of this appeal, the following factual position was agreed as between the Crown and the defence. It is set out at paragraph 56 of

Mr Qureshi's revised submissions:

- "1. On 25th February 2020, one week before the commencement of Mr Kennedy's trial, the police sent to the Crown Prosecution Service a letter from Mr Macauley Sawyer's GP dated 24th January 2020, along with a 2015 psychology report also in connection with Mr Sawyers.
2. The contents of the 2015 psychology report refer to Mr Sawyers suffering from cognitive impairment and the Crown accept, in 2015, they were indeed aware of Mr Sawyers suffering from cognitive impairment.
3. Notwithstanding the letter from the police and its enclosures, the Crown's position is that there was no evidence to suggest Mr Sawyers was still suffering from any such impairment at the date of the trial.
4. The full contents of the report have never been disclosed to the defence.
5. The medical documentation was sent by the police as a result of a discussion between the police and Mr Sawyer's mother in which Mr Sawyer's mother indicated to the police he was not well enough to give evidence. The details of this conversation, when it took place and any records pertaining to it have never been disclosed to the defence.
6. The GP's letter [that is the one from January 2020] stated Mr Sawyers was suffering 'with symptoms of severe stress'.
7. The police provided the medical documentation to the CPS with a view to inviting the CPS to apply to adduce Mr Sawyer's evidence via hearsay pursuant to s.116(2)(b) of the Criminal Justice Act 2003.
8. In receiving this documentation and deciding whether to make a hearsay application ... the CPS ... sent the material to Crown counsel. In the event, no application was pursued, but special measures were arranged to enable Mr Sawyers to give his evidence via live link.
9. The evidence lodged with the court, on 29th February 2020, in support of these special measures, made no mention of the medical evidence and the application was made on the basis of fear and panic.

10. The final schedule of unused [material] prepared before the trial is dated 30th January 2020. It was prepared after receipt of the medical documentation and after the conversation between the police and Mrs Sawyer's mother. The schedule makes no mention of the conversation and/or the medical documentation pertaining to Mr Sawyers.

11. When asked by Mr Kennedy's new lawyers why there was no reference in the Schedule of unused [material] to this material, the Crown have explained that this material did not form part of their case.

12. There is no record and no record has been disclosed indicating that the Crown reviewed the 2015 psychology report between its receipt ... and the conclusion of [the] trial with a view to determining whether it should be disclosed.

13. No assessment was made about the extent to which Mr Sawyers was suffering from cognitive impairment and the extent to which that would affect his ability to participate in the trial."

21. In those circumstances, Mr Qureshi submits that the Crown was in possession of material which might have undermined the claims made in evidence by Mr Sawyers and his mother to the effect that he did suffer from cognitive impairment. The Crown's position is that there was no evidence to suggest that Mr Sawyers still suffered from any such impairment by the date of the trial.
22. In the Respondent's Notice it is accepted that the document should have been placed on the unused material schedule and there was an oversight on the part of the Crown. However, it is submitted that in the event no hearsay application to adduce Mr Sawyer's evidence was in fact made. Further, it is submitted that even if there was an irregularity it did not affect the safety of the conviction. It is submitted that the reliability and credibility of a witness are always matters for the jury. The jury had the opportunity to see the complainant and to assess his evidence, including in cross-examination.
23. We accept those submissions on behalf of the respondent. In our view a report dating back to 2015 supporting the diagnosis of cognitive impairment has no direct relevance to the position some four years later. What the prosecution may say about the position is neither here nor there, unless based on evidence. In any event the issues at the trial had little or nothing to do with any impairment of the complainant. He gave a full account of being the victim of a kidnapping, with a view to his taking Kennedy and the co-accused to a friend of his who supposedly owed Kennedy money arising out of drug dealing. The complainant had injuries consistent with being Tasered. Kennedy's case was that the complainant had been with him and his co-accused in order to commit a burglary, from which the complainant had withdrawn at the last minute. We therefore do not consider that ground 2 has reasonable prospects of success.
24. Underground 3 Mr Qureshi submits in the alternative that if contrary to the prosecution's

assessment Mr Sawyers did continue to suffer from cognitive impairment by the time of the trial, then in the interests of a fair trial the possibility of providing him with additional measures such as an intermediary ought to be explored.

25. In our view this has no material bearing on the fairness of the trial so far as the applicant is concerned. What if any special measures beyond what was already put in place for the benefit of Mr Sawyers should have been considered has no material impact on the fairness of the trial for the defence. Further, and in any event, the argument about an intermediary or other special measures might have had some force if there were any example given of the complainant failing to understand evidence or missing the point. In fact, as appears from the full summing-up of the complainant's evidence, both via the ABE and cross-examination, the complainant was well able to follow the propositions being put to him. At this hearing, when pressed by the court, Mr Qureshi was unable to draw our attention to anything specific in the complainant's evidence to show that he, as it were, got the wrong end of the stick. Accordingly, we conclude that ground 3 also is not reasonably arguable.
26. We turn then to the renewed application for leave to appeal against sentence. There are no Sentencing Council Guidelines for the offence of kidnapping. Reference has been made by Mr Qureshi to decisions of this court which have set out helpful guidance, in particular R v Iqbal [2020] EWCA Crim 376 and Attorney General's References Nos 92 and 93 of 2014 (Gibney) [2014] EWCA Crim 2713.
27. Mr Qureshi submits that the facts of the present case did not have the aggravating features such as to place it close to the facts of a case of the sort exemplified by Gibney. At the other end of the spectrum, Mr Qureshi accepts was a case such as R v Abbas [2017] EWCA Crim 201. Mr Qureshi rightly accepts the facts of the present case were significantly more serious than those in Abbas.
28. Mr Qureshi submits that the judge was wrong to sentence against the background of the county lines operations in Scotland. He submits that there was no evidence to suggest that Mr Kennedy was involved in such an operation beyond the general comments made by Mr Sawyers based upon his understanding. We see nothing in this argument. This was part of the factual background with which the judge was familiar having presided over the trial.
29. Next, Mr Qureshi submits that the entire incident took place over a relatively short period of something like three hours, between about 4.30 pm and 7.30 pm. He submits that the only time that a knife was produced was at the point when the victim was in fact being released from the car. Mr Qureshi submits that no lasting physical harm was caused to the victim, although he accepts that he was Tasered four times.
30. It is accepted the victim was 17 at the time of the offence. Nevertheless it is submitted that Kennedy did not single the victim out on account of his age, but rather because of his association with Josh. Mr Qureshi also submits that Kennedy has no relevant previous convictions and the victim was not robbed. In the circumstances, he submits that the judge was wrong to impose an extended sentence.
31. We disagree. In our view the judge was perfectly entitled to reach the conclusion which he did on dangerousness, not least as he had presided over the trial. As the single judge observed when refusing leave on the papers, the judge could have structured the sentence in a variety of different ways. He chose to make the kidnapping offence the lead offence and was therefore entitled to impose a higher sentence than might otherwise be

appropriate for that offence, while taking into account the principle of totality. The other sentences were rightly made concurrent.

32. In all the circumstances, we have reached the firm conclusion that there is no arguable basis for saying that the sentence was either wrong in principle or manifestly excessive. If there had been any merit in any of the grounds of appeal against either conviction or sentence we would have extended time, but in the result we refuse those applications too.

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