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IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NOS 202103668/B3 7 202103669/B3

[2022] EWCA Crim 1736

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 9 September 2022

Before:

LORD JUSTICE BEAN
MR JUSTICE HOLGATE
MRS JUSTICE THORNTON DBE

REX
V
MARK POVEY

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NON-COUNSEL APPLICATION

J U D G M E N T

1. MR JUSTICE HOLGATE: On 30 July 2021 in the Crown Court at Wolverhampton before Her Honour Judge Wall, the applicant was convicted of an offence under section 18 of the Offences Against the Person Act 1861 (count 1) and kidnapping (count 2).
2. On 8 November 2021 the applicant was sentenced to 15 years' imprisonment on count 1 and seven years' imprisonment on count 2 to run concurrently. His co-accused, Colin Edie, was also convicted of counts 1 and 2 and was sentenced to a total of 15 years' imprisonment. He renews his application for an extension of time for leave to appeal against conviction and sentence following refusal by the single judge.
3. On 10 June 2018 at around 5 am the police received a report that a man was being bundled into the boot of a car behind the Brown Lion flats. PS Keasey went to investigate, arriving at 5.20 am. He spoke to the applicant and a Valerie Williams, who were both standing outside the flats but they denied knowing anything about an incident.
4. At around 6.30 am the same morning the complainant was found by a passer-by shuffling out of a lane leading to some allotments. He had suffered serious injuries, including wounds to his head and neck and 12 per cent chemical burns to large areas of his body, and he was missing the tips of two fingers on his left hand. His hands and feet had been tied together and he was missing a shoe. He could not explain what had happened other than to say that he had been attacked at some point during the night.
5. The prosecution's case was that the applicant and the co-accused, and potentially others unknown, had attacked him in the early hours of the morning inside those flats and then forced him, bound and gagged, into a car to dump him. To prove their case the prosecution relied upon:-
6. the evidence of the complainant;

7. evidence that the vehicle used to transport the complainant to the lane was registered to Edie and that he lived in Brown Lion flats;
8. evidence of PS Keasey who had seen Williams and the applicant outside the flats shortly after the report of a man being forced into a car, the applicant had a hand injury and his glasses were broken;
9. CCTV evidence from which the police could identify the applicant getting out of and then back into the car in the lane near the allotments at around the same time as the complainant was dumped in that location;
10. CCTV evidence showing Miss Williams using the complainant's bank card to purchase items later that day;
11. DNA evidence showing the complainant's blood was on a machete that the police found hidden under Edie's pillow, along with a kitchen knife;
12. evidence that one of the complainant's shoes was found on a flat roof near to the flat of the co-accused;
13. inferences to be drawn against the co-accused because of his failure to mention various facts in interview;
14. the applicant's account in interview during which he admitted that he had been present at the time the complainant was assaulted in the flats, but denied having taken part. He admitted that he had assisted other men to put the complainant in the car and had taken him to the allotments. He claimed that he had only done so because he was scared that if he did not help the men they would attack him as they had the complainant. The prosecution also relied upon the inconsistencies in his account and also his misleading account given to PS Keasey.
15. As regards the defence case, the applicant said he had been drinking when he decided to

travel to Walsall to find a prostitute. He met Valerie Williams and she told him they could have sex in Brown Lion flats. So they went there together. Soon after they arrived the applicant was under the impression that a police raid was taking place and so he jumped out of a back window together with Miss Williams. They walked for a while and returned to the flats thinking the raid was over. It was then they spoke to PS Keasey. They went back into the flat. The complainant was lying on the floor. He was being attacked by some black men and a skinny woman who poured the contents of a kettle over him. One man was wielding a machete. The applicant referred to threats which were made against him by one of the men, to support his defence of duress.

16. The applicant's advocate made a submission to the judge of no case to answer. Under the second limb of Galbraith it was said that although there was some evidence on count 1, it was of such a tenuous character that the count should be withdrawn from the jury. The submission did not extend to count 2. The judge ruled that there was a case to answer and in due course the applicant was convicted.

17. In her sentencing remarks the judge said that the applicant had played a full and active role. There was no mitigation for the applicant having informed the police about some of what had happened in the flat, because he had gone on to lie about his role and the true story. The only credible explanation for his behaviour during and after the kidnap was that he had been involved in the assault shortly before. The judge found no reason to distinguish between the applicant and Edie when sentencing. The attack was horrific and the injuries severe, causing the complainant to spend two weeks in hospital. He was completely helpless and no doubt in extreme agony when he was dumped in the deserted allotments. The applicant and Edie had no concern as to whether the victim would receive the medical treatment he so clearly required. It was unsurprising that he had

thought he might die. His ordeal was unimaginable. The victim personal statement sets out the long lasting and devastating impact the attack had had and continues to have on his life.

18. Accordingly the judge said that count 1 fell into Category 1 of the guideline with a starting point of 12 years. This particular victim had not been targeted but both applicants had relevant previous convictions for violence. Count 2 was a serious aggravating feature intended to avoid detection and delay the victim seeking help. The sentence for count 1 would reflect the totality of the offending, but the kidnap alone merited a sentence of seven years. There was no mitigation for either the applicant or Edie. The global sentence would be 15 years.
19. The applicant was aged 56 at conviction. He had 22 convictions for 33 offences including actual bodily harm, actual bodily harm and affray, common assault and battery. In the pre-sentence report the author found the applicant was unwilling to provide a credible explanation for his involvement in these offences and he showed a degree of indifference to the suffering of the victim.
20. The grounds of appeal settled by trial counsel in relation to conviction say, first, that the judge erred in rejecting the defence submission of no case to answer in respect of count 1, there was no sufficient evidence of his involvement in the assault; and secondly, the jury did not deliberate for sufficient time to have properly considered all the evidence and consequently the conviction on count 1 was unsafe.
21. In relation to the application regarding sentence, it was submitted, first, that the judge did not give sufficient consideration to the limited role of the applicant and did not differentiate between the applicant and the co-accused who was more heavily involved. Secondly, it is suggested that the judge took a starting point in respect of count 1 that was

too high by double-counting some of the aggravating features. It is also suggested that the applicant's culpability was no more than medium. In relation to count 2 it is submitted that the sentence was manifestly excessive because the kidnap involved removing the complainant from the location of the assault to a lane where he was "freed", albeit tied and bound.

22. The single judge in refusing leave to appeal against conviction said that the judge had correctly addressed herself to the legal test for determining a submission of no case to answer. The single judge then said:

"In deciding the prosecution evidence fell into the second category [that is a matter which should be left to the jury] the Judge noted the following:

- Your own evidence was that you were present in the flat where the attack took place and that you at least witnessed it.
- You accepted taking part in the kidnap immediately afterwards.
- The jury would be fairly entitled to conclude there was a continuum between the assault and the kidnap – as you accepted yourself on your own account - and that those taking part in one also took part in the other as a joint enterprise activity.
- The jury would be fairly entitled to reject your defence of duress to the joint enterprise. They could take account of evidence that placed you outside the flats of your own accord less than half an hour after the kidnap, and of your demeanour at that time (either 'relaxed', or 'looking around'). If they rejected the kidnap defence they could consider, in the absence of any other explanation, that you were in fact a willing participant in the kidnap, and infer that your participation in the joint enterprise also encompassed the attack.
- The evidence of the victim, although limited, was that a number of male voices heard during the attack, pointing to the involvement of more than one man.
- There was evidence you were nursing a sore hand and dealing with broken glasses at the scene.

- You said the only reason you were present in the flat was that you went there with a woman for sex. There was evidence that the woman was seen at an off-licence some hours later with the victim's bank card.

The Judge concluded that the jury would be properly entitled, on the prosecution case at its highest, to be sure you and your co-defendant were part of a joint enterprise activity where there was a group attack on the victim and then the group together facilitated his kidnap. That was a conclusion she reached in accordance with the legal rules and principles, and it was properly open to her for the reasons she gave. She was entitled to put the prosecution case to the jury. Your conviction is not arguably unsafe on this ground."

23. With those reasons we entirely agree and consequently the renewed application for an extension of time in which to apply for leave to appeal against conviction is refused.

24. In relation to sentence, the single judge said this:

"For Category A/1 offending the guideline gives a starting point of 12 years' imprisonment with a category range of 10-16 years ... the Judge reduced the starting point in your case to 11 years, to take account of the fact there was no evidence of premeditation.

There were serious aggravating features. The violence had the character of gratuitous degradation and was inflicted in particularly traumatic circumstances. You had a considerable relevant record of previous convictions for violence. The Judge adjusted the sentence back up to 12 years for these reasons. She could well have increased it higher, consistently with the guideline."

25. The single judge then went on to explain how the sentencing judge decided to treat the kidnap as a substantial aggravating feature of the attack because it was closely associated with the assault. There is no Sentencing Council guideline for kidnap, but the single judge considered that the sentencing judge correctly directed herself to the relevant case law. Consequently, a sentence of seven years would have been justified for the

kidnapping as a stand alone offence. The judge then increased the sentence for the section 18 offence by three years to take account of the kidnapping. That accorded with the totality guideline and produced a just and proportionate sentence to reflect the totality of the offending. This was a case where there was no relevant personal mitigation, there was no remorse or willingness to accept responsibility for the offences committed. Consequently the single judge concluded that it is not arguable on any basis that the sentence was manifestly excessive or wrong in principle.

26. We entirely agree with those reasons and consequently the renewed application for an extension of time within which to appeal against sentence is refused.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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