Neutral Citation Number: [2021] EWCA Crim 1157

Case No: 2020/02564/B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CAMBRIDGE CROWN COURT
HHJ Farrell QC
T20207016

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/07/2021

Before :

PRESIDENT OF THE QUEEN'S BENCH DIVISION
MR JUSTICE SWEENEY
and
MR JUSTICE FOXTON

- -

Between :

Ebony Dean	**Appellant**
- and -	
Regina	**Respondent**

- -
- -

Ms Sally Hobson (instructed by **Shelley & Co**) for the **Appellant**
Mr Michael Procter (instructed by **CPS Appeals Unit**) for the **Respondent**

Hearing dates : 6 May 2021

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Approved Judgment

Dame Victoria Sharp, P. :

Introduction

1. On 11 September 2020, in the Crown Court at Cambridge the appellant was convicted of Kidnapping (Count 1) and Wounding with Intent (Count 4). She was acquitted of Robbery (Count 2) by the jury on the direction of the Judge. She now appeals against her conviction on Count 1 by limited leave of the single judge.

2. There were two co-accused. Mohammed Sharif was convicted on Counts 1 and 4 and acquitted on Count 2. His application for leave to appeal against conviction was refused by the single judge and has not been renewed to the full Court. George Evans was convicted on Count 4. He was also convicted of possession of an Offensive Weapon (Count 3).

3. The prosecution case in summary was as follows. On 17 January 2020, an 18 year old man, Jay Hesketh, was kidnapped by a group of four people who were working for a drugs gang, because of their belief that he was working for a rival gang. This kidnap was therefore part of a drugs 'turf war'. Mr Hesketh was taken by force, firstly to Grantchester and then to Sawston where the three men in the group, now joined by a fourth man (Evans), assaulted him by stabbing and cutting him with knives. After going to a local house for help, Mr Hesketh went to Addenbrookes hospital, where he was found to have lacerations to his buttock and thigh, bruising to his forehead, a black eye and multiple lacerations to the back of his left hand. Two of the perpetrators had not been identified. Sharif, also known as 'Ace', and the partner of the appellant, was the organiser of all that took place. The appellant was the driver of the car in which Mr Hesketh was taken, and was a willing participant in the kidnap. She drove or continued to drive Mr Hesketh away, knowing that he had been taken by force and without his consent.

4. The judge rejected a defence submission made on behalf of the appellant at the close of the prosecution case that there was no case answer on Count 1. This was advanced, in reliance on *R v Reid* [1973] 56 Cr. App. R. 703, CA, on the basis that kidnapping was not a continuing offence. It was acknowledged that Mr Hesketh was initially taken and carried away (from the cemetery in Cambridge where he was dealing drugs) by force. But, so it was said, the appellant could not be a party to the kidnapping because the offence of kidnapping was complete before Mr Hesketh got into the car and there was no evidence that the appellant was complicit in what had taken place before then.

5. The sole ground of appeal is that the judge fell into error in ruling that there was a case to answer on Count 1. In short, it was submitted, as it was to the judge, that the offence of kidnapping was complete before Mr Hesketh was put into a car being driven by the appellant The correct charge against the appellant ought therefore to have been one of false imprisonment given that there was no suggestion or evidence that she had prior knowledge of, or participated in the planning of, the kidnapping. In that connection, the judge erred in declining to follow the authority of *Reid*, in which the Court of Appeal, Criminal Division held that kidnapping was not a continuing offence, and in preferring instead the rationale of the Supreme Court of Canada in *R v Vu* [2012] 2 S.C.R. 411

6. In our view, the judge did not fall into error and at the conclusion of the hearing we dismissed the appeal. These are our reasons.

The facts

7. The case against the appellant at trial, rested on a number of strands of evidence. These included (i) the evidence of Mr Hesketh about the events in and outside the car, which the appellant must have witnessed, and from which it was plain that he had been kidnapped; (ii) CCTV evidence which captured what had occurred in and around the appellant's car before and after Mr Hesketh was put into it; (iii) the appellant's failure to give evidence and (iv) her previous convictions, which demonstrated that she was clearly associating with drug dealers or gangs. As to that, the appellant had previous convictions for offences of being concerned in the supply of Class B drugs and possession with intent to supply Class A drugs, offences to which she had pleaded guilty on the basis that she was a vulnerable adult who had been exploited and whose home had been taken over by drug dealers. The appellant's previous convictions were in evidence as an agreed fact at the trial.

8. The appellant gave a 'no comment' interview after her arrest, and did not give evidence at trial. Her case (put forward in her defence statement and earlier in a prepared statement) was a denial of any involvement or participation in the offences. Her specific case on Count 1 was that she was not party to any plan to take Mr Hesketh by force or threat of force. He got into her car voluntarily with others or otherwise, she was unaware that he had been taken by force and without his consent. She did not learn anything of any kidnapping during his time in the car. She did not assist or encourage anyone to commit any offence and had no knowledge that any offences would occur.

9. In his evidence, Mr Hesketh said he was selling drugs for a gang called the A1 gang in a cemetery off Norfolk Street in Cambridge. He was assaulted from behind by a man of Somalian appearance who put him into a headlock and then took him down an alleyway and out into Burleigh Street into a waiting car. There a further two men were waiting, one of whom he recognised as 'Ace' and he subsequently identified at a formal identification procedure as Sharif. He and two of the men got into the rear of the car. 'Ace' got into the front passenger seat. The appellant then drove off with Mr Hesketh inside the car, sandwiched between the two rear passengers.

10. As the car drove off, Mr Hesketh was punched. He kept telling the men to stop. The punching went on for a couple of minutes. The men then started asking him why he was drug dealing and started punching him again. This continued until they reached Grantchester, a journey which took about 15 minutes. Mr Hesketh said the men appeared to be in some sort of gang of which 'Ace' was the ringleader as the other two men did what he said. At Grantchester he was taken from the car and pushed over towards a wall that was not far from where the car was parked. He was in a position where the driver of the car (the appellant) would have been able to see what was happening. All three men assaulted him, punching him so that he fell to the ground. Other cars were driving past so they got back into the car and the men indicated that they needed to go to a more remote location. During the next stage of the journey 'Ace' telephoned the men for whom Mr Hesketh was working and demanded a ransom which they refused to pay. During this call Mr Hesketh was punched and told to make a noise so that the gang member on the phone would know that he was being assaulted.

11. During the journey Mr Hesketh gleaned that the appellant and 'Ace' were in a relationship together. At some point the men said to keep his blood off the car as it was the appellant's car. They arrived in Sawston and were there for a number of hours.

'Ace' then called someone and asked them to bring 'Rambos' i.e. knives. Mr Hesketh feared that he was going to die. A charger cable was placed around his neck and he was told to bark like a dog. Eventually a fourth man arrived. All the men got out of the car and he was forced into a field. The four men were now armed with knives. He was forced onto the ground where one man, named 'Risky' started to saw through the fingers of his left hand whilst others stabbed him once in the buttocks and once on his inner leg. Although the fourth man was encouraging Risky to kill him, the assault came to an end when 'Ace' told the men to stop. The men returned to the car and it drove off leaving him injured in the field. In cross-examination on behalf of the appellant he said he was not on his own when he got into the car. He was physically taken to the car and the appellant saw that.

12. As for the CCTV footage, this showed the car being re-positioned close to the entrance of the alleyway, shortly before Mr Hesketh was assaulted in the cemetery. On the prosecution case, this enabled the front seat passenger to slip out of the car, almost unseen, and showed the clandestine way in which the two rear passengers left the car and returned to it with Mr Hesketh.

The judge's ruling

13. The judge said that the issue in *Reid* was whether the offence of kidnapping required some secreting or concealment of the victim. It was not authority for Counsel's submission that the offence of kidnapping was not a continuing offence. Kidnapping was a continuing offence in that a person may join in if they participate by, for example, driving someone away who they knew had been taken or carried away by another without consent and without lawful excuse. The correct approach was that set out in *Archbold* at paragraph 19-419 where reference was made to the Supreme Court of Canada judgment in the case of *Vu* in which it was held that: (a) kidnapping is a continuing offence; and (b) a person could be jointly liable for the offence if he joins the enterprise after the victim has been taken or carried away, but whilst the victim remains unlawfully confined. All that had to be proved was a deprivation of liberty and carrying away from the place where the victim wished to be. That definition, approach, and construction of the serious offence of kidnapping – which was a more aggravated offence than false imprisonment because it involved not simply the restraint on a person's liberty but the carrying away by one person of another – made sense on the facts of the case. The submission of no case to answer did not succeed because there was the clearest evidence from Mr Hesketh that he was taken and carried away by the person at the cemetery to the car where the appellant lay in wait to take and carry him away. He was subjected to violence both inside the car and outside the car in Grantchester and the appellant had ample opportunity to see and hear what was happening. Mr Hesketh was in her car all the way to Sawston where he was assaulted Even if there was any question mark over her knowledge and intention when she first drove away, there was the clearest of evidence, from Mr Hesketh and the circumstances, from which a jury could infer the appellant's involvement as a party to the offence of kidnapping.

Discussion

14. Ms Hobson who appeared for the appellant at trial, and in this appeal, submitted as follows. It was not suggested by the prosecution that the appellant was part of a joint enterprise; kidnapping is not (or was not in this case) a continuing offence; the offence

in this case was complete before Mr Hesketh got into the car. The appellant knew nothing about any of this before he did so, and if the prosecution wished to make a case against the appellant on the evidence as to what took place in the car, this should have been reflected in a separate count of kidnapping against her, alternatively of false imprisonment. Ms Hobson did not refer in her oral submissions to the various authorities that had been put before the judge in support of this aspect of her argument. Moreover, during the course of argument, she stepped back from the contention advanced in the grounds of appeal that kidnapping was not a continuing offence. Instead, she acknowledged that it can be, but submitted, in effect, that that there was no evidence that its continuance extended to any point capable of giving rise to criminal liability on the part of the appellant.

15. This was, in our view, a relatively straightforward case of its kind. The case against the appellant on Count 1 was that she was part of a joint enterprise kidnap from the outset, and we do not accept Ms Hobson's submissions to the contrary. The nature of the prosecution case in this regard was made plain in the prosecution's opening note, it remained a live issue at trial and was squarely left to the jury by the judge in the written directions of law given to the jury before speeches and in summing-up. Thus, it was the prosecution case that the appellant had prior knowledge that a kidnap was to take place as the driver (and controller) of the car, waiting in Burleigh Street before the victim was brought to the car (lending her assistance by waiting at a convenient point for her co-accused to return with him before driving off) and that she was a willing participant throughout. There was indeed ample evidence if not overwhelming evidence from which it was open to the jury to infer the appellant's knowledge of and participation in the kidnap both before Mr Hesketh was brought to the car and thereafter.

16. As Mr Procter submitted in helpful oral and written submissions, it is clear from *D (Ian Malcom)* [1984] AC 778 that the offence of kidnap, like false imprisonment, involves an attack on and infringement of the personal liberty of the individual. Unlike false imprisonment, it involves the taking and carrying away of an individual (Ingredient 1) by force or fraud (Ingredient 2). One of the questions that the earlier decision of *Reid* considered was whether an *additional* element of "secretion" or "concealment" of the victim was an essential ingredient of kidnap and it was determined that it was not (in the specific factual context of a husband not separated from his wife). In that case Cairns LJ observed: "The offence of kidnapping can be committed by a husband against his wife from whom he is not judicially separated and concealment is not a necessary ingredient of the offence." *Reid* is not however and never has been, an authority for the proposition that kidnap is not a continuing offence. The Court in that case decided, in that specific factual context, that the offence of kidnap can be legally complete once a victim has been seized and carried away against his/her will, without the need for there to be any concealment or secretion of the victim. The observations of the Court in *Reid* by no means translate into a legal principle that would require separate counts of kidnap and/or false imprisonment (covering the different stages of what occurred) on the factually and legally straightforward circumstances of the present case, in which a victim was seized from the street, forced into a waiting car and driven to other locations against his will, where his confinement continued, again, against his will. In our view, the judge was right therefore to conclude that the appellant's reliance on what was said in *Reid* was misplaced and to reject the submission of no case to answer.

17. In *Vu,* the Supreme Court of Canada (the SCC) had to decide two questions: first, whether kidnapping is a continuing offence, which continues so long as the victim of kidnapping remains unlawfully confined; and if so, secondly, whether a person who played no part in the original taking, but who learns of it and chooses thereafter to participate in the kidnapping enterprise, may be found liable as a party to the offence of kidnapping (see [23]). After an extensive analysis of the law, including the common law of this jurisdiction, the SCC answered both questions in the affirmative.

18. The SCC's reasoning was as follows. Kidnapping was an offence contrary to RSC Criminal Code (the Code); however there was nothing in the legislative history to suggest that Parliament intended to abandon the common law definition of kidnapping which remained an aggravated form of unlawful confinement. See in particular [26] to [28]. It was aggravated by the additional element of movement, which increased the risk of harm to the victim by isolating him or her from a place where detection and rescue were more likely. It is the element of movement that differentiated kidnapping from the lesser included offence of false imprisonment and made kidnapping an aggravated form of false imprisonment. This interpretation was consonant with the intention of Parliament as expressed in the Code, the crime's common law origins and legislative history, modern jurisprudence of the Canadian appellate courts and common sense. Parliament did not intend to restrict the offence of kidnapping to the victim's initial taking and movement, while leaving the victim's ensuing captivity to the comparably less serious crime of unlawful confinement. Parliament intended to include the offence of unlawful confinement in the offence of kidnapping so as to capture, under the crime of kidnapping, the victim's ensuing captivity. Where an accused – with knowledge of a principal's intention to see a continuing offence through to its completion – does (or omits to do) something with the intention of aiding or abetting the commission of the ongoing offence, party liability is established. The well-established principles of party liability apply with equal force to continuing offences that have been completed in law but not in fact. The crime of kidnapping continues until the victim is freed, and a person who chooses to participate in the victim's kidnapping, after having learned that the victim has been kidnapped, may be held responsible for the offence of kidnapping under the Code.

19. Once it is accepted that kidnapping is an aggravated form of unlawful confinement, as the SCC said at [33], the conclusion that kidnapping is a continuing offence is virtually axiomatic.

20. It is to be noted that in reaching its conclusions, the SCC at [49] rejected an argument made by appellant in that case that the dictum in *Reid* cited at para 16 above, supported the proposition that kidnapping is not a continuing offence. The SCC said instead that it stood for the proposition that that the crime of kidnapping is complete in law at the point of taking irrespective of whether the victim is subsequently "secreted" or held in confinement. Further, as the Court pointed out at [50], faced with a similar question, the Supreme Court of New South Wales unanimously came to the same conclusion: citing the following passage from *Davis v R* [2006] NSWCCA392 (AustLII) at [64]:

> "Neither Reid nor [other case law] supports the proposition that a taking ceases to be a taking at the moment that the kidnapper becomes criminally liable for the offence. The offence might at that moment be complete in law, because the taking has been completed for the purposes of proving the offence, but it is not

> necessarily complete in fact. Once it has been established that a person has been "taken", in the sense that he or she has been compelled to go where he or she did not want to go, the "taking" continues until the compulsion ceases. It does not cease merely because the person has been taken for a certain distance or for a certain time or even because the kidnapper has ceased to physically move the victim and has commenced detaining that person in one place. In a real sense, the kidnapper is taking the victim, that is causing the victim to accompany him or her, for the entire duration of the time, however long it is, that the victim is, as a result of the kidnapper's conduct, involuntarily detained in a place that is not the place where the victim was first detained. The taking begins with the detention and asportation of the victim, and only ends when the victim is released or ceases to withhold consent to the detention." (Emphasis added)

21. The SCC described this passage as persuasive, as do we. We heard no argument on the second question addressed by the SCC in *Vu*. On the straightforward facts of this case, it is unnecessary for us to address it. We are bound to say however that should that question have arisen on the facts, we can see no reason in principle, applying the law of joint enterprise, why our conclusion would have been any different to that of the SCC on that question, or as to the result of this appeal.