

Neutral Citation Number: [2018] EWCA Crim 480
No. 2017/02984/A1, 2017/03305/A1, 2017/03199/A1 & 2017/03125/A1
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 27th February 2018

Before:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
(The Lord Burnett of Maldon)

MR JUSTICE SWEENEY

and

MR JUSTICE WILLIAM DAVIS

REGINA

- v -

COURTNIE SPENCER OWEN GREENE
HARIS MAHMOOD KHAN
BRENDAN SLYVESTER MAKUMBI
CHAYCE CHANDLER GREENE

Computer Aided Transcription by
Wordwave International Ltd trading as DTI
165 Fleet Street, London EC4A 2DY
Telephone No: 020 7404 1400; Fax No: 020 7404 1424
(Official Shorthand Writers to the Court)

Mr D Burgess appeared on behalf of the Appellant Courtnie Spencer Owen Greene
Mr S Reiz appeared on behalf of the Appellant Haris Mahmood Khan
Mr S B Sherriff appeared on behalf of the Appellant Brendan Sylvester Makumbi
Mr D Cox appeared on behalf of the Appellant Chayce Chandler Greene

J U D G M E N T (Approved)

THE LORD CHIEF JUSTICE: I shall ask Mr Justice Sweeney to give the judgment of the court.

MR JUSTICE SWEENEY:

1. This is an appeal against sentence by leave of the single judge.
2. On 23 May 2017, at the conclusion of their trial in the Crown Court at Isleworth before His Honour Judge Matthews and a jury, the appellants were all found guilty of an offence of kidnapping. Courtnie Greene had previously pleaded guilty, for which he received full credit, to offences of violent disorder and having a bladed article.
3. On 26 June 2017 the appellants were sentenced as follows: Haris Khan, to an extended sentence of fifteen years, comprising a custodial term of ten years and an extended licence period of five years; Courtnie Greene, to an extended sentence of fifteen years, comprising a custodial term of eleven years and an extended licence period of four years for the kidnapping and to concurrent terms of two years' imprisonment and twelve months' imprisonment respectively for the violent disorder and having a bladed article; Brendan Makumbi, to an extended sentence of thirteen years, comprising a custodial term of nine years and an extended licence period of four years; and Chayce Greene, to an extended sentence of eleven years, comprising a custodial term of eight years and an extended licence period of three years, which was ordered to run consecutively to a sentence of two years and nine months' custody that had been imposed upon him in March 2017
4. We observe at the outset that, as Chayce Greene was aged 19 at the time of his conviction, the custodial term imposed upon him should have been expressed as being one of detention in

a young offender institution, rather than imprisonment. We will correct that in due course.

5. The facts, in short, are these. Khan, Courtnie Greene and Makumbi were all born in the summer of 1995 and were thus aged 21 at the time of the kidnapping; they are now all aged 22. Chayce Greene, who is the brother of Courtnie Greene, was born in mid-February 1998 and was thus aged 18 at the time of the offence and is now aged 20. By the time of sentence, Khan had three previous convictions: two for the possession of cannabis and one for the possession of heroin. Courtnie Greene had six convictions for six offences in the period between October 2010 and September 2013, including affray and, in September 2013, wounding with intent, for which he was sentenced to 36 months' detention in a young offender institution. Makumbi had seven convictions for fourteen offences in the period between June 2011 and September 2014. The last one was for wounding, resulting from a stabbing, for which he was sentenced to two years' imprisonment. By the time of sentence for the instant offences, Chayce Greene had a conviction for affray in 2013 and (as already touched on above) in March 2017 had been sentenced by His Honour Judge Matthews to a total of two years and nine months' detention in a young offender institution - for offences of violent disorder and possession of an offensive weapon, of which had been convicted, and aggravated vehicle taking and dangerous driving, to which he had pleaded guilty. The violent disorder and possession of an offensive weapon were committed during the same incident as the offences of violent disorder and having a bladed article, for which his brother Courtnie Greene fell to be sentenced by the judge.

6. That incident occurred on Friday 29 July 2016, when there was an eighteenth birthday party at the Old Isleworthians Rugby Club. About 100 guests attended by invitation. Sometime before midnight, a convoy of three cars arrived at the rugby club. Those in the cars, who included the Greene brothers, were armed with weapons and, as the judge found,

were bent on violence, though why that was the case was never discovered. Chayce Greene had a large knife, described by some as a machete. Courtnie Greene had a smaller knife. Others had variously a firearm or imitation firearm, a belt, and two bottles, each containing a noxious substance like an ammonia solution (although not a particularly strong one).

7. What happened next was caught on CCTV. The group from the cars approached the club, armed with their weapons. The cars were moved up to enable a quick getaway. Violent disorder broke out, during the course of which the firearm or imitation firearm was discharged at least once. The Greene brothers brandished their weapons, as did others, and, at the height of the disturbance the noxious liquids were squirted on party goers. It was a terrifying incident during which people could be seen on the footage to run away in fear. At the conclusion of it, the attackers made good their escape. Fortunately, no one was hurt.

8. In due course, both Greene brothers were arrested and bailed. Thus, each was on bail at the time of the kidnapping.

9. The background to the kidnapping was that Khan had fallen out with the victim, Kelvin Farinha. The judge concluded that the falling out was crime related, probably in connection with drugs. In the result, Khan decided to kidnap Farinha and to exact some punishment on him. There was a degree of planning. The Greens and Makumbi were informed of the need to locate Farinha and then to take him and detain him in a place where he would receive, as the judge found, a good beating.

10. By chance, on Thursday 13 October 2016, the Greens and Makumbi spotted Farinha in Kingston. He was detained by force and the threat of force, with Chayce Greene playing a leading role at that stage. Farinha was taken to a fast food restaurant, where he was kept.

Khan was then informed by telephone of his capture. Khan immediately took his father's Range Rover, without permission, and drove in it to Kingston. On his arrival at the restaurant, all four appellants ensured that Farinha was got into the vehicle. Once inside, he was struck by Khan. Khan drove the vehicle out of Kingston to the vicinity of some garages in the Hampton/Hamworth area. Farinha was punched by him again en route.

11. Once at the garage area, all the appellants, as the judge found, sought to humiliate Farinha by making him strip naked. He did so. Thereafter, Khan assaulted him in various ways, encouraged, as the judge found, by the other three - including beating him with a belt, punching and kicking him to the body and head, beating him with a branch that Makumbi handed to him, and burning the back of his left hand with a lighter. Towards the end of that assault, the Greene brothers used the word "allow" to Khan, to indicate that that was enough, but they did not physically intervene.

12. The assault, which had lasted for some five to ten minutes, came to an end because another vehicle drove by. Khan then told Farinha to put his clothes back on. They all got back into the Range Rover and Khan drove them to the Greenes' address, where he dropped off the other three appellants and Farinha before driving home to return the Range Rover. He then returned to the Greenes' address, where Farinha was still with the other three appellants. The four appellants then got into another car and instructed Farinha to go to another address. By then, the judge found, Farinha's ordeal had lasted for about two hours. However, he took the opportunity that the order to him had provided to escape. Thereafter, he travelled to Manchester, where, on 9 November 2016, he reported what had happened to the police.

13. Farinha's injuries were relatively minor and, it seems, did not require medical attention.

14. The report led to the arrest of their appellants and to their subsequent prosecution and conviction.

15. There were pre-sentence reports in respect of each of the appellants. In Khan's case, the author observed that he had tried to minimise and deny his behaviour, whereas in reality he had played a leading role in the offence. The instant offence represented an escalation in the seriousness of his offending. The author opined that he had limited insight as to the effect on the victim. He was assessed as posing a high risk of serious harm to the victim and a medium risk of serious harm to the public.

16. In Courtnie Greene's case, the author noted that he denied the offence of kidnapping and that he also claimed that he had been refused entry at the eighteenth birthday party, had been threatened with a knife, and had only armed himself to protect his brother and to scare others. He was assessed as posing a high risk of serious harm to known adults and to members of the public.

17. As to Makumbi, the author noted that he had failed to take responsibility for his offending and had failed to demonstrate remorse. He had also shown disregard for previous licence periods. He was assessed as posing a high risk of serious harm to the victim and a medium risk of serious harm to the public.

18. As to Chayce Greene, the author noted that there appeared to be an escalation in his offending. He was assessed as posing a high risk of serious harm to known adults and to members of the public.

19. In his sentencing remarks, the judge found the various facts that we have already

summarised above. He concluded that there were a number of aggravating factors common to all the appellants, namely: the degree of planning; the group involvement; the criminal background; the location; the humiliation of the victim; the beating of the victim, involving fists, a stick and a shod foot; the burning of the victim; and the length of his ordeal. The judge concluded that Khan had played the pivotal role; that his previous convictions were not aggravating features but that, notwithstanding some helpful character references, there was no mitigation in Khan's case. Khan had regarded himself in relation to Farinha, said the judge, as someone who could take the law into his own hands and to mete out a form of punishment. Against that background, said the judge, he had come to the conclusion that Khan was a dangerous offender. Thus, from a starting point of eight years, and given the aggravating features, including Khan's leading role, the judge thus imposed the fifteen year extended sentence which we have already detailed above.

20. As to Courtnie Greene, the judge noted that he had previous convictions for violence, including wounding with intent, and that the kidnapping had been committed whilst he had been on bail for the offences of violent disorder and having a bladed article. In his case also, the judge found, there was no mitigation, save for his pleas of guilty to the offences committed at the birthday party. Given his previous offending and the facts of the instant offences, the judge said that he was driven inexorably to the conclusion that Courtnie Greene was a dangerous offender. The starting point, he said, for the combination of the violent disorder and the bladed offences was three years' imprisonment, reduced to two years in light of the guilty pleas. That was then taken into account in calculating the length of the custodial term of the extended sentence for the offence of kidnapping which, from a starting point of eight years and when combined with the aggravating features personal to him, resulted in the imposition of the fifteen year extended sentence, which we have also detailed above.

21. In Makumbi's case, the judge observed that his offence was aggravated by his previous conviction for wounding and the fact that he had handed Khan the branch with which to beat the victim. There was, said the judge, very little mitigation in his case either, and, given the combination of the content of his pre-sentence report, his previous conviction for wounding and the facts of the kidnapping, the judge concluded that he, too, was a dangerous offender. In his case, from a starting point again of eight years, those factors resulted in the imposition of the thirteen year extended sentence detailed above.

22. As to Chayce Greene, the judge recognised that he was aged 19 at the time of sentence, but observed that he had been at the forefront of detaining Farinha at the restaurant in Kingston. Whilst it was accepted that he was one of those who, during the beating at the garages, had indicated to Khan that that was enough, which, said the judge, was some mitigation, it had to be seen in the context of what had gone before. There was no other mitigation in his case, the judge said. In addition, the combination of his offending at the birthday party and the kidnapping indicated a clear pattern of behaviour involving violence to members of the public, such that the judge concluded that he, too, was a dangerous offender. In his case, from a starting point of eight years, the judge imposed the eleven year extended sentence that we have also detailed above.

23. The grounds of appeal are as follows. On behalf of Khan, it is said: first, that the judge erred in passing an extended sentence of imprisonment; and second, that, based on the facts of the offence and the mitigating factors, the custodial term of ten years' imprisonment was manifestly excessive. On behalf of Courtnie Greene, it is said: first, that the judge's starting point of eight years' imprisonment was too high and/or failed to reflect the lesser culpability of the appellant; and second, that the overall custodial element of eleven years was manifestly excessive for a 21 year old. On behalf of Makumbi, it is said: first, that the starting point of

eight years' imprisonment was manifestly excessive when the facts and circumstances of the offence were closely analysed; and second, that the sentence was manifestly excessive because, when assessing dangerousness, the judge failed to take proper account of the age of the appellant and (more specifically as a young offender) the possibility that he may change and develop as to his future conduct and may not present a significant risk of serious harm in the future, and should not have been sentenced to an extended sentence. On behalf of Chayce Greene, it is said: first, that the judge failed to make any or any appropriate allowance for the fact that he was aged only 18 at the time of the offending; and second, that in those circumstances, against a background that he was already serving a sentence of two years and nine months' custody, the sentence imposed also failed to respect the principle of totality and was too long.

24. On behalf of Khan, Mr Reiz, combining his written and oral submissions, argues that the conclusion on dangerousness in the pre-sentence report was apparently premised, in part, on police intelligence, which had not been disclosed to the defence or the court; that the judge gave insufficient weight to a passage in the pre-sentence report which indicated that the appellant had displayed a good level of motivation to address his offending and that feedback from prison staff attested to his positive behaviour; the fact that the appellant was aged 21 at the time of the offence and had only modest previous convictions, which were not of a type that was relevant to the offence of kidnapping; that the judge erred in concluding that the appellant posed a significant risk of serious harm, whether to Farinha or to others; that, furthermore, there was no pattern of offending in his background which suggested that such conduct was likely to be repeated; and that, as underlined in *R v Lang* [2006] 2 Cr App R(S) 3, it is necessary to bear in mind when sentencing young offenders that they may change and develop within a shorter time than adults, which, combined with their level of maturity, may be highly pertinent when assessing their future conduct. Whilst this was, Mr Reiz accepts, an

unpleasant offence which undoubtedly justified a sentence of imprisonment, the judge, he submits, was wrong to conclude that an extended sentence was required. Taking into account the matters identified at [19] of the judgment in *Attorney General's Reference Nos 92 and 93 of 2014* [2015] 1 Cr App R(S) 44, to which we will return in due course, Mr Reiz submits that a custodial term of ten years for a 22 year old with no previous convictions was simply too long.

25. On behalf of Courtnie Greene, Mr Burgess accepts that, in his case, the judge was entitled to make a finding of dangerousness and indicates that there is no criticism as such as to the sentences imposed for the birthday party offences. However, he submits that, when the matters identified in *Attorney General's Reference Nos 92 and 93 of 2014* are considered, there was in reality little or no planning; the detention was two hours at most; the injuries, whilst undoubtedly unpleasant, were not such as to prevent Farinha from attending and apparently enjoying a birthday party where he was photographed two days later; and to that extent it can be argued that the offence warranted a lower starting point. Further, Mr Burgess submits that the judge's differentiation between Khan and the others, combined with the fact that, on the evidence, Courtnie Greene was the other person mentioned by the judge when dealing with his brother as having verbally intervened to stop Khan's violence, a should have resulted in a lesser sentence.

26. On behalf of Makumbi, Mr Sherriff submits that the correct approach to sentence was the consideration of culpability and harm by the careful analysis of the facts and circumstances, rather than simply by "ticking the boxes" in relation to the matters identified in *Attorney General's Reference Nos 92 and 93 of 2014* as, he submitted, may have been the case here. This was, he points out, an incident which lasted for no more than two hours. The victim was not taken from his home; he was not tied up or gagged in any way; the violence was minimal;

only improvised weapons were used; no demands were made of others; the effect on the victim was physically modest; there was no real planning; four men were involved; whilst there was also humiliation, there was no photography or any posting on social media; and whilst the offence arose against a background of criminal behaviour of some sort, harsher sentences, such as the instant sentences, should only be imposed when the victim suffers more greatly than was the case here. He also points out that the victim was not particularly vulnerable. Viewed in that light, he submits, the sentence should have been shorter. As to dangerousness, Mr Burgess submits that the judge failed to take sufficient account of the appellant's age (21 at the time of the offence) and the fact that he might change and develop. The pre-sentence report assessed him as posing a high risk only to the victim, who was known to have moved out of London, and the judge erred, therefore, in finding that Makumbi posed a significant risk of serious harm, whether to him or to others.

27. On behalf of Chayce Greene, in his written submissions Mr Cox submitted that the violence was meted out by Khan and, as the judge accepted, Chayce Greene was one of those who had verbally encouraged him to stop. Whilst the incident took about two hours in all, and there was some degree of planning, the weapons used were only improvised; and whilst the victim was humiliated, he suffered only minor injury, which did not place the offence in the highest category of culpability - and it clearly lacked some of the worst features of other kidnapping cases, such as demands for ransom, or a much longer period of detention, or much more serious injuries. Mr Cox submitted that the offences in *Attorney General's Reference Nos 92 and 93 of 2014*, and in *Attorney General's Reference Nos 102 and 103 of 2014* [2015] 1 Cr App R(S) 55 were much worse than the instant offences and yet, he points out, in both those cases the sentence was increased to ten years' custody, which was the ultimate custodial term imposed on Khan, which reflected on the custodial term imposed on Chayce Greene. Equally, Mr Cox submitted, in Chayce Greene's case it was important to

bear in mind that it was accepted that he had encouraged the end of the violence; that it was not suggested that he himself had actually used any violence; most importantly, that he was aged 18 at the time of the offence and therefore the youngest by some three years of the offenders; and that there were some positive factors in his pre-sentence report which the judge did not take sufficiently into account, namely, that he presented with a positive self-image and view of others and was pleasant, polite and answered all questions and did not display attitudes condoning offending. Finally, Mr Cox submitted, particularly when the appellant's age was taken into account, the judge had taken insufficient account of the important principle of totality.

28. There is no sentencing guideline in relation to offences of kidnapping. However, over the last seven years there have been a number of cases, culminating in *Attorney General's Reference Nos 39, 40, 41 and 42 of 2014* [2014] EWCA Crim 1557, *Attorney General's Reference Nos 92 and 93 of 2014* (above), *Attorney General's Reference Nos 102 and 103 of 2014* (above), *R v Mahmood* [2015] 2 Cr App R 18 and *R v Kane* [2016] EWCA Crim 860. Those cases give general guidance as to the appropriate starting point and as to the sort of factors to be taken into account in sentencing in cases of this type. In particular at [29] of the judgment in *Attorney General's Reference Nos 102 and 103 of 2014*, this Court said:

"The authorities establish that every case is fact specific. However, generally speaking, cases involving hostage taking and demands for ransom will attract figures close to the 16 year starting point. Others, where such behaviour has been absent, will still attract double figures, regardless of the degree of violence meted out."

At [19] in *Attorney General's Reference Nos 92 and 93 of 2014*, the Court said this:

"It seems to us that relevant factors in assessing the gravity of cases of this type will include the length of detention, the circumstances of detention (including location and any method of restraint), the extent of any violence used, the involvement of weapons, whether demands were made of others, whether threats were made to others, the effect on the victim and others, the extent of planning, the number of offenders involved, the use of torture or humiliation, whether what was done arose from or was in furtherance of previous criminal behaviour and any particular vulnerability of the victim, whether by reason of age or otherwise."

29. The list is plainly non-exhaustive. The reference to previous criminal behaviour originated from *R v McLosky* [2012] EWCA Crim 1663, in which the Court said that the commission of this type of offence, done in order to maintain authority in relation to a background criminal enterprise of some sort, is a significant aggravating feature.

30. Here the judge had the great advantage of having presided over the appellants' trial. He carefully analysed the facts and the ages of each of the appellants. It was, of course, for him to decide whether the appellants were dangerous.

31. It seems to us that the judge was plainly entitled to conclude, having weighed all the relevant factors, that a starting point of eight years' custody was appropriate. Equally, it seems to us that he was entitled to increase that to ten years in Khan's case, and to conclude, for the reasons that he gave, that Khan was a dangerous offender. Finally, and whilst it was a matter for his discretion, it seems to us that he was equally entitled to conclude that an extended sentence of the length that he imposed was appropriate in Khan's case.

32. Likewise, in the case of Courtnie Greene, the judge was entitled to start at eight years and, via the aggravating factors of Courtnie Greene's record, the fact that he committed the kidnap offence whilst on bail and with totality in mind, to increase that in combination with the birthday

party offences to a custodial term of eleven years. Further, in our view, he was also entitled to conclude, again for the reasons that he gave, that Courtnie Greene was dangerous and that an extended sentence was required.

33. The same applies in Makumbi's case, where the aggravating feature of his record and his assistance to Khan in the violence by the provision of a weapon to him, justified an increase from eight to nine years, and the judge was entitled, again for the reasons that he gave, to find that Makumbi was dangerous and to impose the extended sentence that he did.

34. However, insofar as Chayce Greene is concerned, the position is, in our view, different. Had Chayce Greene been a mature 21-year-old, there would have been nothing wrong in the judge's starting point or in his ultimate sentence. However, Chayce Greene was not. Albeit that he took a leading role at the restaurant, and was on bail at the time, he was three years younger than the other appellants. It is clear from the transcript that, notwithstanding that, the judge did not treat him any differently. In our view, he should have done so - in order appropriately to reflect Chayce Greene's younger age at the time of the offence. Whilst, Chayce Greene had verbally encouraged Khan to stop, the judge was plainly entitled to find that he was dangerous and to impose an extended sentence. Nevertheless, it seems to us that the custodial term of that extended sentence was, at eight years, somewhat too long. To reflect his age, it should have been an extended sentence of ten years, comprising a custodial term of seven years and an extended period of licence of three years.

35. Accordingly, we propose to quash the sentence imposed on Chayce Greene and to substitute for it an extended sentence of ten years, comprising a custodial term of seven years' detention in a young offender institution and an extended licence period of three years. As before, that will run consecutively to the sentence imposed upon him in March 2017.

36. It follows that the appeals of Khan, Courtnie Greene and Makumbi are dismissed. But, to the limited extent we have indicated, the appeal of Chayce Greene is allowed.
