IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM

THE CROWN COURT AT SNARESBROOK

Her Honour Judge Amakye

[2023] EWCA Crim 1235

No. 202300298 A4

Royal Courts of Justice
Friday, 6 October 2023

Before:

LORD JUSTICE WARBY

MR JUSTICE MURRAY

HIS HONOUR JUDGE MENARY KC
(RECORDER OF LIVERPOOL)

REX
V
SAMMY MICHAEL MCCARTHY

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Mr. I. Sheikh appeared on behalf of the Applicant.
The Crown were not represented.

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J U D G M E N T

LORD JUSTICE WARBY:

1 On 28 October 2022, having earlier pleaded guilty, Sammy McCarthy (now aged 29) was sentenced in the Crown Court at Snaresbrook for two counts of kidnapping, two of assault occasioning actual bodily harm, and one of assault by beating. The judge treated the first count of kidnapping as the lead offence. On that count, having found the applicant to be dangerous, she imposed an extended determinate sentence which she set at 13 years, comprising a custodial term of 10 years and an extended licence period of 3 years.

2 Concurrent determinate sentences were passed on the other four counts. On count 2 (kidnapping) the sentence was one of 10 years. On each of counts 3 and 4 (the counts of actual bodily harm) the sentences were 3 years. A sentence of 4 months was imposed on count 5, the assault by beating.

3 This has been the hearing of the applicant's renewed application for an extension of time of 63 days in which to apply for leave to appeal against sentence after refusal by the single judge.

4 In the light of the explanation provided for the delay, the single judge said that he would have extended time if he had seen any merit in the grounds of appeal. Our approach will be the same. The outcome of today's hearing therefore turns exclusively on our response to the applicant's contention that his sentence was manifestly excessive.

The facts

5 We can take our summary of the facts directly from the sentencing remarks of the judge, whilst anonymising the two young victims. Addressing the applicant, the judge said this:

> "[...]early in 2021, you had a relationship with YM, who was 16 years of age, you were 10 years older. The relationship was toxic on her account, in that you were coercive and violent towards her, culminating in your, in fact, meting out violence by striking her and causing her nose to be broken. That is reflected on the indictment in count four. YM terminated your relationship. However, it appears that you were not able to or indeed refused to accept her decision.
>
> You endeavoured to contact her in the intervening period since early 2021 and it happened that on 17 October 2021 YM and her friend CL, both 17 years of age, were out in the Islington area of London. You were being driven by an individual who, as yet, has not been identified or apprehended. You were the passenger in the car. On seeing YM, you offered YM a lift home. By virtue of the past history, she declined your invitation. You got out of the car and pressurised YM and CL to get into the vehicle.
>
> Contrary to your assertion that you intended to give her a lift home, you in fact embarked upon driving to South London and detained them in the vehicle. In spite of the repeated requests to be let out, you resisted and kept them in the vehicle and drove to the Peckham area where you purchased some drugs and then you proceeded towards the Beckenham area, and in the course of the journey you became progressively violent towards both YM and CL.

> You headbutted YM, breaking her nose, you bit her on the cheek and the knee, you elbowed her in the face, you pulled out her hair by her extensions which, in fact, detached from the root of her hair, causing her injury to her head and you tried to dislocate her fingers by pushing her hand backwards. You were violent as well towards CL. You pushed her fingers backwards in a bid to dislocate them and threatened to break her jaw and knock her teeth out to the back of her throat. YM and CL, to say the least, were terrified. You detained them, it is estimated, for a period of some five hours. You forced, ultimately, CL to get out of the vehicle in an area of South London that she was not acquainted with and you continued to detain YM against her will inside that car, still being violent towards her. YM ultimately requested to use the toilet facilities in the vicinity and on being allowed to get out of the vehicle, made good her escape by seeking the assistance of an AA mechanic who was parked nearby…"

6 We pause here to note that, as this was happening, the applicant pursued YM, threatening further violence, including with a blade. He said, 'If you leave me now, I'll swear I'll wait outside your work, I'll wait outside your mum's, I'll wait outside your Nan's I'll kill your mum and sister'.

7 The Judge went on:

> "…. The police were alerted as to your extreme behaviour of violence towards her. You were arrested and whilst in custody your violence did not stop because you threatened her with text messages, you tried to bribe her, offering her money if she did not co-operate with the police."

The court has seen some of these text message sent by the applicant while YM was at the police station. He was pleading with her to help him out of the fix in which he found himself saying the following:

> "I beg you. I am fuckt, please [YM]. Can't remember what happened. I beg you. I'll give you 5,000." Another message said, "I'll come. Give you the money. Did you ring the police?" He went on, "I'll pay to have your nose sorted out. Please. I won't not even contact you any more. You can do what you want."

There was then an abrupt change of tone and content. The applicant reverted to an aggressive mode writing "Snich" and 'U meet up with them boys ya I bet u did??? If u did, we will see.'

8 Continuing with the sequence of events, when the police went to arrest the applicant, he attempted to escape, and in interview he answered "no comment" to all questions asked.

9 Upon arraignment, he pleaded guilty to the single count of actual bodily harm and the one count of assault by beating that were then on the indictment but pleaded not guilty to counts 1 and 2 (the kidnapping charges). It was not until some two weeks before the date fixed for his trial that he changed his plea to guilty of kidnapping. He did so on a written basis. The essence of this was that the reason he persuaded YM to get into the car with him was that he "wanted to have some time with her to try to get back with her"; that although his offending was unjustified it was due to the consumption of alcohol and drugs (a matter that

he evidently regarded as a mitigating factor); and that he deeply regretted his behaviour. At the same time as pleading guilty to counts 1 and 2 the applicant pleaded guilty to an additional count of actual bodily harm that was added to the indictment as count 4, as mentioned in the sentencing remarks that we have quoted.

The sentencing process

10 The judge, rightly, took the view that of this catalogue of offending the most serious by far was that of kidnapping. There are no Sentencing Council Guidelines for that offence. The range of sentences appropriate and the factors to be taken into account are the subject of guideline decisions of this court. One of these was cited to the judge by the prosecution namely: *Attorney General's Reference (Nos. 92 and 93 of 2014*) (*R v Gibney)* [2014] EWCA Crim 2713 [2015] 1 Cr App R (S) 44. The judge herself identified the second and more recent case of *Attorney General's Reference* [2022] EWCA Crim 1358 [2023] 1 Cr App R S 12, otherwise known as *Bowskill*. The judge was guided by these authorities, which list the relevant factors for consideration.

11 The judge further and rightly recognised that she was concerned with a series of related offences, so that the appropriate course was to impose a sentence on count 1 that took account of the overall criminality, imposing concurrent sentences on the other counts.

12 As to the facts of the case, the sentencing judge had the benefit of the prosecution opening, impact statements from each of the victims which were read, and photographs of the injuries sustained by YM, all of which we have also reviewed. So far as the applicant is concerned, the judge had a pre-sentence report, details of his antecedents, character references and a letter that he had written expressing remorse. There were written and oral submissions from the prosecution and defence on the appropriate sentence in the circumstances.

13 In her sentencing remarks the judge made clear that she had read and considered all of this material. She summarised the facts of the case in the terms that we have adopted. She went on to say that having heard the victim impact statements of YM and CL, "Plainly, the impact of your violence has caused a tremendous psychological impact upon them both."

14 Dealing with the three offences of violence, the judge accepted the prosecution case as to their categorisation within the guidelines and, taking account of the guilty pleas, arrived at the sentences of 3 years and 4 months respectively that we have identified. Turning to counts 1 and 2, she concluded from the pre-sentence report that the applicant posed a high risk of serious harm to known adult females and children. She identified the least determinate sentence that she could have imposed in all the circumstances as one of 10 years imprisonment. Concluding that this would not be sufficient fully to address the risk presented by the applicant she held it necessary to impose an extended determinate sentence and identified the appropriate extended licence period as one of 3 years.

The grounds

15 In his grounds of appeal on behalf of the applicant Mr Sheikh, who appears in this court but did not appear below, accepts that the judge was entitled to find that the applicant was dangerous within the meaning of the statute. He does not dispute that the judge was entitled, accordingly, to impose an extended determinate sentence. Nor does he quarrel with the length of the extended licence period. The issue raised by the grounds of appeal is whether the custodial terms imposed, and, in particular, the term of 10 years on count 1, were manifestly excessive.

16 In support of the overarching submission than they were excessive Mr Sheikh contends that the Judge failed to take into account or to take sufficiently into account: (1) the applicant's guilty pleas; (2) the lack of any relevant convictions recorded against him, and (3) his personal mitigation.

17 In the written grounds and in oral argument today, Mr Sheikh has made the following main points. The applicant's previous convictions were old and of a different character from the index offending, and therefore fell short of being in any way an aggravating factor. There was, in fact, significant personal mitigation which merited a reduction from the sentence that would otherwise be imposed. Further, submits Mr Sheikh, the applicant was entitled to a one-third reduction for his plea of guilty to the most recent count of assault occasioning actual bodily harm, and a reduction of 25 per cent for his pleas to the two counts to which he had pleaded guilty at his original arraignment. In the circumstances, he contends, the sentences of 3 years' imprisonment on each of the counts of assault occasioning actual bodily harm were manifestly excessive, being based on the starting point in excess of the top end of the guideline range.

18 As for the counts of kidnapping Mr Sheikh observes that the judge did not expressly mention any reduction for the applicant's pleas to those counts. These had been indicated, he says, months before the trial date that had been set, and it is submitted, they merited a reduction of at least 15 per cent. But the judge's 10-year custodial term implies, he said, a starting point before reduction for the pleas of 11 to 12 years, which is simply too high.

Discussion

19 For many years, the case of *R v Spence and Thomas* (1983) 5 Cr App R (S) 413 was regarded as the guideline authority in cases of kidnap. Today, 40 years later, the approach is much altered. The cases of *Gibney* and *Bowskill* make this clear. Those cases stand for the following propositions:

> (1) Although the seriousness of offending of this kind varies in degree, all kidnapping offences are to be treated as serious.
> (2) When assessing the degree of seriousness of any given offence the factors for consideration include the length of the detention; the circumstances, including the location and any method of restraint; the extent of any violence used; the existence of any threats; the effect on the victim and any particular vulnerability of the victim.
> (3) Today, the fact that an offence occurs in the context of an abusive personal relationship is likely to be a seriously aggravating factor, not a matter of mitigation, as was once considered to be case.
> (4) Where, as is often the position, an offence of kidnap is accompanied by other offending, the correct approach is to start by considering the kidnap alone and then to factor in the seriousness of the related offences to arrive at a final figure.

20 The decision on the facts of *Bowskill* provides helpful guidance. That case was one of kidnap committed in a domestic context against a background of domestic abuse, in which the victim had thrown herself from a fast-moving vehicle, suffering significant brain damage as a result. The context was controlling and coercive behaviour, which was a count on the indictment and there was also an offence of perverting the course of justice. The offender was 19 years old at the time. Making some modest allowance for his age, the court concluded that a sentence of 8 years' detention was merited for the kidnap alone. In combination with the other offending in the case the appropriate sentence- again, after

allowance for the offender's age - was one of 12 years' detention.

21 In the present case, the detention involved in the kidnap was achieved through deception or coercion or both; and it was prolonged, lasting for many hours. There were two offences, and two victims, both of them 17 years old. The aggravating factors in the case of count 1 included a background of abuse within the prior relationship. The aggravating factors on counts 1 and 2 included the fact that there were two men in the vehicle, the commission of the offences under the influence of alcohol and drugs, and the disparity of age which was more than 10 years.

22 As for the related violence, again there was offending against two victims. Although this had much less serious effects than the events in *Bowskill* it was a sustained incident that continued for, as we have said, many hours, and which called for hospital treatment in the case of YM. The combination of offences had profound psychological effects on each of the victims which were long lasting. The aggravating factors were the same as those we have already mentioned.

22 The appellant has no claim to any credit on account of youth. To the contrary, there was as we have mentioned a significant disparity of age. The mitigating factors were remorse and effective good character and there were then reductions to be applied to reflect the appellant's various guilty pleas.

23 We have carefully considered Mr Sheikh's submissions on all these matters and are grateful to him for his arguments in writing and today.

24 In our view, however, the two offences of kidnap in this case, taken together, each amply merited a starting point in the region of at least 8 years' imprisonment. The aggravating factors that relate to that offending in isolation significantly outweigh any mitigation. The basis of plea was with respect, scarcely worthy of the name. It did not take issue with any of the prosecution's factual case about the applicant's conduct, focusing instead on the causes of his behaviour and his subsequent regret. We do not see that it justified any delay in pleading guilty. And even if as much as 10 per cent credit were allowed for counts 1 and 2 - which in our view is the maximum this applicant could properly claim - an overall sentence of 8 years for these two offences, considered in isolation from the other counts, would still have been on the lenient side.

25 To reach an appropriate overall sentence, in line with the guidance provided by authority, it is then necessary to factor in the appropriate sentences for the offences of violence for which concurrent sentences were imposed. In our judgment, the judge's assessment of these was legitimate. The actual bodily harm offences were in category 1A with a range of up to 4 years. For one of them the credit was only 25 per cent. Given the multiple aggravating circumstances, and even allowing for such mitigating as there was, the judge was entitled to reach a notional sentence after a trial that was at or beyond the top of the range and then come down to sentences of 3 years on each of these offences after allowing- as she expressly did- for the guilty pleas.

26 The next step is to consider totality. At this stage it must be recalled that the offences of violence we have just been considering involved separate victims and separate occasions. In ordinary circumstances they could have merited consecutive sentences. In our opinion, in all the circumstances of this case, the overall custodial sentence of 10 years was not arguably manifestly excessive. It was, on the contrary, just and proportionate and well within the range properly available to the sentencing judge.

27 For those reasons, this renewed application is dismissed.

CERTIFICATE

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This transcript has been approved by the Judge.