APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 7
HCA/2018/140/XC

Lord Justice General
Lord Menzies
Lord Drummond Young

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in

NOTE OF APPEAL CONVICTION AND SENTENCE

by

JOHN MILLER

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: O'Rourke QC, G Considine (sol adv); Faculty Appeals Service (for Bridge Litigation, Glasgow)
Respondent: A Prentice QC (sol adv) AD; the Crown Agent

23 January 2019

Introduction

[1] On 9 February 2018, at the High Court in Glasgow, the appellant was convicted, along with Robert McPhee, of two charges, as follows:

> "(28) on 29 and 30 December 2016 at an address in York ... and Curryside Piggery, Deas Road, Shotts you ... did abduct [KDW] ... and did force him into a motor vehicle

> ... detain him against his will, and did assault ... [KDW], convey him to ... Curryside Piggery, all to his injury and
>
> (29) between 1 November ... and 30 December 2016 ... at Curryside Piggery ... you ... did hold another person, namely [KDW] ... in servitude in that you did force him to live under your control at ... Curryside Piggery and hold him against his will, force him to carry out work for little or no pay, and the circumstances were such that you knew or ought to have known that ... [KDW] was so held: CONTRARY to the Human Trafficking and Exploitation (Scotland) Act 2015, section 4(1)(a)."

In returning their verdict on charge (28) the jury deleted the words "and lock him in a trailer". On charge (29), the jury deleted the words "refuse to allow him to leave". The trial judge had already removed a libel of "slavery" and the words "keep him in squalid conditions" from the jury's consideration. On 15 March 2018, the judge imposed an extended sentence of 9 years imprisonment (6 years custodial) in respect of charge (28) and 7 years concurrent on charge (29).

Evidence

[2] The appellant is the son-in-law of his co-accused, Mr McPhee. They ran businesses involving tarring and paving and, in the appellant's case, developing a site for caravans. All were members of the travelling community, who lived sometimes in caravans and sometimes in houses. The complainer, namely KDW, was a young and vulnerable man. He was aged 20. He had only recently been released from detention and was on licence. Early in cross-examination about his criminal record, the complainer said that he suffered from mental instability and had previously been compulsorily detained because of this. On being asked about the nature of his instability, he had said that he had a split personality disorder, depression, anxiety, PTSD, ADHD and drug induced psychosis. The complainer was not a member of the travelling community, but had worked with another travelling person in

England. When work became scarce with that person, it was arranged that the complainer should go and work for a relative of the person, namely Mr McPhee.

[3] According to the complainer, everything went well for a short time. Matters took a turn for the worse. He would be slapped about or locked in a shed if his work was not satisfactory. The complainer said that he wanted to leave, but could not do so. He was threatened by the appellant that he would be skinned alive if he left. He regarded the appellant as the person who controlled where he lived and worked and what he was paid. The complainer said that he was paid erratically; £20 per day for four days, although he worked every day. What he would get paid was never certain. Sometimes he was not paid at all. He was provided with accommodation in a caravan owned by the appellant.

[4] At Christmas 2016, the complainer was staying in York with a girlfriend and her family. He had gone to York to get away from the appellant and Mr McPhee. He had left the caravan by climbing out of the window and persuading his father to pay his train fare to York. The appellant had found out where he was and had threatened him with violence if he did not return to Scotland. The appellant and Mr McPhee went to York, located the complainer, forced him into a car, and took him back to Scotland against his will. There were recordings of telephone calls between the complainer and the appellant when the appellant was looking for the complainer in York. The trial judge described these as "chilling". The appellant said, for example, "You had better come out ... I will skin you alive" and "I'm coming to get you, just tell me where you are ...". Mr McPhee was present in the car when these conversations were going on and could be heard in the background.

[5] Soon after he had been taken back to Scotland, the complainer contacted the police and told them of his whereabouts. He was able to do this as he had a mobile phone. He

arranged to hand himself in for a breach of bail charge in England. He had climbed out of the caravan window again to go into town and meet the police.

[6] The appellant gave evidence essentially to the effect that nothing had been against the complainer's will. He had been allowed to leave the caravan and go to the local pub and shops. There was independent testimony to support this. The complainer could come and go as he pleased. Had he had any difficulties about anything, he could have spoken to people in the community or to the authorities without any difficulty. The complainer had gone to York at Christmas for a few days. He had asked the appellant to collect him, which he had done. At some point the complainer said that he wanted more time in York and had refused to tell the appellant where he was. The appellant had lost his temper because he thought that the complainer was "mucking him about". He denied threatening him or forcing him to return to Scotland against his will.

The judge's charge

[7] The trial judge defined assault and abduction for the jury. Her directions in that respect were not under challenge. What was under challenge were the directions in respect of charge (29); holding a person in a state of servitude, contrary to section 4(1)(a) of the 2015 Act. In this regard the judge had also to define slavery or servitude, contrary to the Criminal Justice and Licensing (Scotland) Act 2010, section 47(1)(a), which had been the subject of an earlier charge (22), pre-dating the 2015 Act, and involving Mr McPhee and another complainer.

[8] The trial judge said this:

> "... What does 'slavery or servitude' mean? In both Acts of Parliament, Parliament has laid down that they are to be construed in accordance with the European Convention on Human Rights. The words 'slavery or servitude' are not given any

> special definition for the purposes of these Acts, so they are ordinary words in the English language, but in my telling you what they mean I am told that I have got to have regard to the European Convention on Human Rights and the law that has been developed under that Convention.
>
> ... [T]he Convention says that no one is to be held in slavery or servitude, and it does, in the cases that have been decided under the Convention, give the definition of slavery and it is 'the status or condition of a person over whom any or all of the powers attaching to the rights of ownership are exercised'. So the definition of slavery involves ... rights of ownership.
>
> The definition of servitude is where there is an obligation to provide one's services imposed by the use of coercion, including an obligation to live on another person's property and the impossibility of altering that condition. And the law says that this definition includes the idea that the person who is held in servitude ... feels that his situation is permanent and he can't change it. It is enough that those feelings are engendered and kept alive by the person who is responsible for the situation.
>
> ...".

[9] The trial judge directed the jury that there was no evidence upon which they could hold that the complainer had been held in a state of slavery. She continued:

> "The situation is different for servitude. I do not say for a moment that the evidence proves people were held in servitude because ... it's for you to decide what is proved, but I do say that you could decide ... on the evidence, depending on the view that you take of the facts, that people were held in servitude in terms of these charges.
>
> ... Obviously there are plenty of people who work, for example, in hotels, and ... live in for their jobs, and of course they're not held in servitude. They go to their work, they stay there overnight and they get paid. That does not mean that they are held in servitude. And the reason for that is that the definition includes an element of coercion, which means people being forced to work by some means. Now it's a very wide definition, and so the forcing could be physical force, or the threat of it, or it could be more subtle than that. It could be not getting paid the right amount that you think you're due. It could be not getting fed if they don't work.
>
> ... [T]he definition also imports into it a feeling of the person concerned not being able to alter the situation."

[10] The trial judge gave an example of a young girl being brought to the United Kingdom and forced to work in a house. This was derived from *Siliadin* v *France* (2006) 43 EHRR 16. She then continued:

"... As regards ... charge 29 ... it's got the two extra bits where you have to consider any personal attributes of the person that make him more vulnerable than other people, personal circumstances of the person and examples are given in the act of being a child, or the person's age, or the person's family relationships or health. They are examples. They are not exclusive, there could be other things, but these are examples to give you the flavour of the sorts of things you've got to consider ... so that's the first thing, the personal circumstances. And the second one is the consent of a person to any of the acts does not preclude a determination that he ... is held in servitude.

Now what does that mean? Well, it could mean that if the set up is such that a person feels that he is coerced to work, that he has to stay in the property where he is sleeping, if he feels, with some basis, not in imagination, but with some basis that he can't get out, then it may not be necessary for him to be threatened and reminded of that every morning first thing, because it may be that that's the set up and some threat of violence now and again would suffice.

...[S]o ... a matter of fact and degree in light of all the evidence ... the fact that somebody actually does get away doesn't mean that they've never been held in servitude ...

So it's all a matter of fact and a matter of degree for you to decide. Now, of course, you know what counsel says ... that this is ridiculous, because the evidence showed that people were free to come and go ...

So various counsel have said how can you be in servitude if you're out and about? You're either canvassing at people's houses or you're laying tarmac or monoblocs and you can just walk away.

... But, in this case, what is being suggested here is that these people in these two charges, 22 and 29, were held in servitude because they felt threatened if they didn't, and you've got to consider all of the evidence in the case, as I've told you several times, and so the suggestion is that their evidence is to the effect that they thought that they had to work, they got paid some times and not other times, they weren't very sure how much they were supposed to be paid. They could walk away but they thought there were consequences if they did. They thought that they would be found and brought back, and they thought that there would be violence visited on them if they did that.

... it's a matter for you to decide whether or not you feel that that amounts to being held in servitude in the way in which I have defined it for you. As I said to you, it's not straightforward. Now, it requires quite a bit of thought and, as regards the second one, that's charge 29, because that's a later Act, 2015, it's got the two extra bits where you have to consider any personal attributes of the person that make him more vulnerable than other people, personal circumstances of the person and examples are given in the Act of being a child, or the person's age, or the person's family relationships or health. They are examples. They're not exclusive, there could be other things ...".

Submissions

Appellant

[11] The grounds in the Note of Appeal against conviction were that the trial judge misdirected the jury: (1) by failing to give adequate directions on what was required to constitute servitude; and (2) by advising that a vulnerability of the complainer, namely his mental health difficulties, was a relevant factor without directing the jury that they would have to be satisfied that the appellant had been aware of the vulnerability at the time. On the first element, the contention, as developed in oral submission, shifted from there being a misdirection to a suggestion that the judge's removal of "slavery" and the jury's deletion of "refuse to allow him to leave" were inconsistent with a finding of servitude, but more akin to forced labour.

[12] The offences of keeping a person in a state of slavery or servitude or of compulsory or forced labour were subtly different. Forcing a person into a state of slavery was an offence under the Roman Lex Fabia (Digest 48.15.6.2 (Callistratus)) and in early Scots law (*Reid* v *Scott of Harden* (1687) Mor 9505 (the "tumbling lassie")). Indicia of slavery included "control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour" (*Prosecutor* v *Kunarac and Others*, 12 June 2002, International Tribunal for the Prosecution of Persons ... in the ... Former Yugoslavia ..., at para 119).

[13] Servitude had to be construed in accordance with Article 4 of the Convention. In terms of *Siliadin* v *France* (*supra,* at paras 123 and 124), what was prohibited was a "particularly serious form of denial of freedom". It included, in addition to the obligation to perform services, the obligation for the serf to live on another person's property and the

impossibility of altering his condition (*Van Droogenbroeck* v *Belgium* (1980) Series B No. 44 at paras 78-80 and App No 7906/77, Commission decision of 5 July 1979, DR 17 at para 59). Servitude meant an obligation to provide services imposed by the use of coercion and was linked with the concept of slavery (see also *CN* v *France,* 11 October 2012, App No 67724/09 at para 91; *Attorney General's Reference (Nos. 2, 3 and 5 of 2003)* (*Connors and others*) [2013] 2 CR App R (S) 71). Servitude embraced the totality of the status or condition of a person. It was distinguishable from slavery in that it did not involve ownership but less extensive forms of restraint. It meant an obligation to provide services imposed by the use of coercion (see *R* v *K (S)* [2011] EWCA Crim 1691 at para [7]).

[14] Accordingly, servitude was defined as requiring that a person was coerced into living on another person's property in order to perform services for him or others in circumstances in which he was made to feel that it was impossible for him to alter his status. Put another way, servitude was an obligation to provide services imposed by the use of coercion and was linked with the concept of slavery. It was less restrictive than slavery, but more restrictive than forced or compulsory labour. It differed from slavery in that slavery represented ownership. Servitude was a less extensive form of restraint but, in addition to the performance of services, it required the person to live on another's property in circumstances in which it was impossible for the person to alter his condition.

[15] Although the trial judge's definition of servitude was consonant with its definition under Article 4 of the European Convention, she had not explained the distinction between servitude and forced or compulsory labour. That was a significant omission because the jury ought to have been directed that this was not a case where the allegation was merely that there was forced or compulsory labour. There had to be an element of control. There was evidence, which the judge did not mention during the crucial part of her directions, that

the complainer was a regular in a local pub and free to move around as he pleased. The jury had deleted part of the indictment involving the appellant refusing to allow the complainer to leave. The jury received no directions as to how to proceed if they found that the complainer was free to come and go as he pleased (*Rantsev* v *Cyprus and Russia* (2010) 51 EHRR 1 at para 276).

[16] The judge also misdirected the jury regarding the significance of the appellant's personal circumstances; that is to say his vulnerability. The evidence regarding his mental health vulnerability had come spontaneously from the complainer when he was in the witness box. The trial judge ought to have directed the jury that they could only take into account personal circumstances where there was evidence that the appellant knew or ought to have known about them. The international treaties suggested that knowledge of a person's vulnerability went to criminal intent. A person with the relevant knowledge could use it to manipulate or control the vulnerable person (Palermo Protocol to the UN Convention against Transnational Organised Crime 2000, Article 3; Gallagher: *The International Definition of "Trafficking in Persons ..."* 88-92 in Kotiswaran: *Revisiting the Law and Governance of Trafficking, Forced Labour and Modern Slavery*). If that factor was relevant, knowledge had to be proved. The Crown had not founded upon any vulnerability, but it had arisen in the evidence and the trial judge ought to have dealt with it. There had been no evidence that the appellant had been aware of the complainer's mental health problems.

Crown

[17] The advocate depute maintained that the trial judge had correctly directed the jury on servitude having regard to *Siliadin* v *France* (*supra*) and *CN* v *France* (*supra*)). There was a hierarchy of severity in relation to compulsory labour, servitude and slavery (*Attorney*

General's Reference (Nos. 2, 3, 4 & 5) (Connor and others) [2013] 2 Cr App R (S) 71 at para 7, citing Clayton and Tomlinson: *Human Rights* (2nd ed) paras 9.17-20). Slavery involved being in the legal ownership of another. Servitude embraced the totality of the person's condition or status, but it did not involve ownership. It meant an obligation to provide services by the use of coercion. It was different from compulsory labour as it also included the obligation to live on the other's property and the impossibility of changing the situation. The focus of the appeal had been on the deletion of that part of the libel relating to refusing to allow the complainer to leave. This was not destructive of the charge.

[18] The trial judge had not been asked to direct the jury that the personal circumstances of the complainer were relevant only if the appellant knew of them. The section only provided that in assessing whether a person had been a victim, the court had to have regard to his vulnerabilities (see also United Nations Office: Drugs and Crime Issue Paper – Abuse of a Position of Vulnerability at 13-14). Section 4(3) of the 2015 Act set out an objective test about the personal circumstances of the complainer. Whether the appellant had been aware of them was irrelevant. Vulnerability had not been founded upon by the Crown and there had been no suggestion that the appellant had been aware of the complainer's mental health problems.

Decision

[19] The essence of the offence in section 4(1)(a) of the Human Trafficking and Exploitation (Scotland) Act 2015 and its predecessor, section 47(1)(a) of the Criminal Justice and Licensing (Scotland) Act 2010, is that the accused "holds another person in slavery or servitude". The two terms are thereby distinguished despite, as the trial judge astutely recognised, the fact that both Chambers and the Shorter Oxford Dictionary define

"servitude" as the state or condition of being a slave. The section also distinguishes between servitude and being required to perform forced or compulsory labour. All of these terms are to be found in Article 4 of the European Convention on Human Rights. Section 4(2) of the Act directs that they are to be construed "in accordance with" the Article. Regard is to be had to "any personal circumstances ... that make the person more vulnerable than other persons". The statute thus introduces certain somewhat complicating features into what might otherwise be a straightforward question in a case such as the present.

[20] The broad question for the jury was whether the appellant deliberately kept the complainer "in servitude". The circumstances giving rise to that state were libelled as being that the appellant: (1) forced the complainer to live under his control at the Piggery; (2) held him against his will; and (3) forced him to carry out work for little or no pay. Although it is compulsory, in terms of sub-sections 4(2) and (3), to construe the reference to servitude in accordance with Article 4 of the European Convention and to have regard to any vulnerabilities of the complainer, it is difficult to conceive of a person not being in a state of servitude if, as the jury found in fact, the three elements of the libel were established. If a person is forced to live under another's control on that person's property, held against his will and forced to carry out work for little or no money, he is being kept in a state of servitude. A simple direction to that effect may have sufficed.

[21] The trial judge nevertheless took time to explain the wider meaning of servitude, first by distinguishing it from slavery; consideration of which she withdrew from the jury. As the judge correctly reasoned, slavery carries with it connotations of ownership, which might not be present in servitude. This is suggested by the classic definition of slavery in the Slavery Convention 1927 (see *Siliadin* v *France* 2006) 43 EHRR 16 (287) at para 122).

Servitude, according to *Siliadin* (at para 123), involves "a particularly serious form of denial of freedom (*Van Droogenbroeck* v *Belgium* (1982) EHRR 443 at para 58), including:

> "in addition to the obligation to provide certain services to another ... the obligation on the 'serf' to live on the other's property and the impossibility of changing his status" (*Van Droogenbroeck* v *Belgium* (*supra*), Commission report at para 79).

Servitude means (*ibid* para 124):

> "an obligation to provide one's services that is imposed by the use of coercion, and is to be linked to the concept of 'slavery' ...".

Servitude involves "aggravated" forced or compulsory labour in which the person feels that his "condition is permanent and ... unlikely to change" (*CN* v *France,* 11 January 2013 App No. 67724/09 at para 91). It is sufficient if the person's understanding is brought about or kept alive by those responsible for the situation (*ibid*).

[22] It was not disputed that there was sufficient evidence that the appellant had kept the complainer in a state of servitude. That would seem clear from the periodic confinement of the complainer and a requirement upon him to work for little reward; all fenced by threats of violence. The trial judge had, as her report reveals, carefully considered the Convention jurisprudence. She directed the jury accordingly, using the guidance and the specific words provided by *Siliadin* v *France* (*supra*), *Van Droogenbroeck* v *Belgium* (*supra*) and *CN* v *France* (*supra*). There was no need for the judge to explain the distinction between servitude and forced labour. That may have served only to confuse. The appellant was not charged with forcing labour on its own.

[23] The evidence that the complainer was a regular in the local pub and shops was before the jury. The judge did not require to remind the jury of this, as no doubt that had just been done in the defence speech. The jury would have understood this, hence their deletion of the reference to refusing to allow the complainer to leave. The point was not that

he could not leave, it was that he was compelled to come back, live on site and perform the required labour. That was presumably the economic motivation behind keeping him in serfdom. His ability to wander about the local village and countryside did not change his servitude status. The jury's deletion of the words "refuse to allow him to leave" was not fatal in a situation where the person considered that he had no option but to stay or that, if he left, he would, as occurred in this case, be found and brought back. The first ground of appeal accordingly falls to be rejected.

[24] Section 4 somewhat unnecessarily expressly requires the accused to be aware that the complainer is being held in a state of servitude, but that is all. The provision relative to taking into account any vulnerabilities of the complainer might be seen as obvious. Equally, whether the appellant was aware of them may have been a consideration which the jury might have had regard to, if the appellant had professed ignorance of them. However, in circumstances in which the Crown were not founding upon an abuse of a vulnerable person (a fact which would have to have been libelled) there was no need for a specific direction on the point. Whether, at the time, the complainer had mental health difficulties was not a material part of the case, although it might be ventured that without the existence of some vulnerabilities it is difficult to conceive of a situation where keeping a person in servitude could persist for long. The second ground of appeal also falls to be rejected.

[25] The appeal against conviction is according refused.

Sentence

[26] Leave to appeal was granted only in respect of the 7 years imposed on charge (29). The basis for the appeal is that the period is excessive having regard to the duration of the libel (2 months). The trial judge noted the appellant's record of previous convictions, which

extended from 2004 to 2017 and included an offence in England in 2004 of threatening behaviour and a conviction at Falkirk Sheriff Court in 2005 for assault and abduction, albeit in a domestic context. The Criminal Justice Social Work Report described the appellant as a married man with five children. He had been involved in developing a caravan site, where he lived with his family, for holiday use. The judge considered that the charges, of which the appellant had been convicted, showed that his attitude was that he was entitled to tell the complainer what to do and where to live. He backed up his instructions with violence. The judge regarded keeping a man in servitude for a period of 2 months as a serious matter. In selecting the sentence of 7 years, it would appear that the trial judge took into account the complainer's mental instability as a vulnerability.

[27] The court is conscious of the words of Lord Judge CJ in *Attorney General's Reference Nos. 2, 3, 4 and 5 of 2013 (R* v *Connors)* [2013] 2 Cr App R(S) 71, cited by Davis LJ in *R* v *Zielinski* [2017] EWCA Crim 758 at para 18) that:

> "10. Sentences in this class of case must make clear, not merely that the statutory minimum wage should not be undermined, but much more important, that every vulnerable victim of exploitation will be protected by the criminal law, and they must also emphasise that there is no victim, so vulnerable to exploitation, that he or she somehow becomes invisible or unknown to or somehow beyond the protection of the law. Exploitation of fellow human beings in any of the way criminalised by the legislation represents deliberate degrading of a fellow human being or human beings. It is far from straight forward for them even to complain about the way they are being treated, let alone to report their plight to the authorities so that the offenders might be brought to justice. Therefore when they are, substantial sentences are required, reflective, of course, of the distinctions between enslavement, serfdom, and forced labour, but realistically addressing the criminality of the defendants."

A significant sentence of imprisonment was inevitable, although that selected on this charge was at the high end of the spectrum, given the limited timescale and the complainer's relative freedom of movement. In all the circumstances, and in the absence of evidence that the appellant was aware of the complainer's mental problems, the court will reduce the

7 years selected and substitute 6 years, to run concurrently with the same custodial term on charge (28).