IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA (Crim) 11/12
Ind 37/10
C03543/2010

The Right Hon Sir John Chadwick, President
The Hon Elliott Mottley, Justice of Appeal
The Rt Hon Sir Anthony Campbell, Justice of Appeal

ON APPEAL FROM THE GRAND COURT

BETWEEN

HM THE QUEEN

Respondent

-and-

CHARLES WEBSTER

Appellant

The Appellant, Charles Webster, appeared in person
Ms Lobban-Jackson instructed by the Director of Public Prosecutions appeared for the Crown

Hearing: 12 November 2013
Judgment: 13 November 2013

JUDGMENT

Revised from transcript and Approved

Released: 27 November 2013

Sir John Chadwick, President:

1. On 30 March 2011, Charles Webster and Allan Kelly were convicted, after trial before Justice Harrison, sitting alone without a jury, on six counts arising out of the abduction of Tyson Tatum on 18th March 2010 and the blackmail of his mother, Mrs Angelica Tatum. A third man, Wespie Mullings, had been a

participant in that venture. He pleaded guilty to the offence with which he was charged and he gave evidence for the prosecution at the trial of Mr Webster and Mr Kelly. A fourth man, Richard Hurlston, whom the judge described as the "mastermind behind the abduction", was arrested, but subsequently fled the jurisdiction. He has not been tried.

2. The judge sentenced each of Mr Kelly and Mr Webster to terms of 10 years' imprisonment on the first count (abduction) and on the third count (keeping in confinement an abducted person). He sentenced them to six years' imprisonment on Count 2 (blackmail); to five years' imprisonment on Count 5 (robbery); to three years' imprisonment on Count 4 (assault occasioning bodily harm); and to two years' imprisonment on Count 6 (threatening violence). He sentenced Mr Mullings to five years' imprisonment for the offences of abduction and keeping in confinement an abducted person; to three years' imprisonment for blackmail; and to two years' imprisonment for assault occasioning bodily harm. Mr Mullings was not charged with offences of robbery or threatening violence. All sentences were to run concurrently, with time spent in custody to be taken into account.

3. It can be seen that Mr Mullings received sentences on the principal offences - abduction, keeping in confinement an abducted person and blackmail - which were one half of the sentences imposed on Mr Webster and Mr Kelly in respect of the same offences. For assault, Mr Mullings received a sentence of two thirds of that imposed on Mr Webster and Mr Kelly. The reason for that disparity, as the judge explained in the course of his sentencing remarks, was that Mullings had pleaded guilty at an early stage; had given full cooperation to the police; and had given evidence on behalf of the prosecution. As the judge pointed out, Mr Kelly and Mr Webster did not avail themselves of what would have been the considerable mitigating factor of a plea of guilty.

4. In the course of his sentencing remarks, the judge described the circumstances of the offences. He said this:

> "The victim in this particular case, Mr. Tatum, was treated with brutality. He was punched, kicked and choked and was terrified. He was threatened with death, and he begged his captors to spare his life. The trauma he experienced will take a very long time to be erased from his mind. I have no doubt that his parents suffered immeasurable distress and must have endured two days of the

most agonizing anxiety. This is a very serious matter, and people must be deterred from thinking that behaviour like this will meet with anything other than an extremely severe penalty."

5. The judge referred to the observations of the Court of Appeal in England and Wales in *Clinton Spence v. The Queen* [1983] 5 Cr.App.R.(S) 413. In the course of his judgment in that case, Lord Lane CJ had said this:

> "It seems to this Court that, as with many crimes so with kidnapping, there is a wide possible variation in seriousness between one instance of the crime and another. At the top of the scale of course, come the carefully planned abductions where the victim is used as a hostage or where ransom money is demanded. Such offences will seldom be met with less than eight years' imprisonment or thereabouts. Where violence or firearms are used, or there are other exacerbating features such as detention of the victim over a long period of time, then the proper sentence will be very much longer than that. At the other end of the scale are those offences which can perhaps scarcely be classed as kidnapping at all. They very often arise as a sequel to family tiffs or lovers' disputes, and they seldom require anything more than 18 months' imprisonment, and sometimes a great deal less."

In *Clinton Spence* the sentences of eight years and six years which had been passed on the appellants, in circumstances where the abduction was not dissimilar to the one in this case, were reduced to six years and four years.

6. In sentencing Mr Webster and Mr Kelly in the present case, the judge said this:

> "The mastermind behind the abduction was Richard Hurlston, as I did say in my finding. He recruited, so to speak, the other three men into this enterprise, which eventually led them into serious crimes. He has since fled the jurisdiction, but I hope that some day he will be tried because there is an order by this court for a trial in his absence. So it is entirely up to the Crown when they will proceed with that trial.
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> The authorities do indicate, and I have been referred to cases on both sides, that the prime mover or the mastermind should receive the greater of any kind of punishment, and the sentences in relation to the other peers should be reflected in the lesser role which they have played"

And he went on:

> "So what is a reasonable starting point when one comes to consider the lengths of your sentences? As the authorities say, we look first to the ring leader, the mastermind, and to see what type of sentence would be a proper starting point. Unfortunately, Mr. Hurlston is not before this court, but nevertheless we have to judge him being the mastermind to see what is a proper starting point.
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> The law in its wisdom has imposed that for abduction and for keeping in confinement an abducted person that the sentence is life imprisonment. But we do have guidelines in determining what ought to be a proper sentence, and I have been referred to the authority of the Attorney-General's Reference as to how one should approach this matter and to determine what is a good starting point. But as I say, life is the maximum, and the question now -- where would

> I have put Mr. Hurlston had he been before this court? I do believe that in that instance a starting point where he is concerned, in my view, would be at least 15 years.
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> I view the role that each of you played, that is Mr. Kelly and Mr. Webster, and as your counsel, that is as Mr. Tonner for Mr. Webster, has indicated that in your position you were like a foot soldier, that you came into the scheme of things at a very late stage. Mr. Kelly, you have also been placed in a situation where you came into it, based on the evidence that I have accepted -- through Mr. Hurlston, you became part of this entire plan. But in all respects, your role would still be a minor one in terms of Mr. Hurlston. In terms of the gravity of his involvement, it will be less when we come to think of the role that you played.
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> So having considered a starting point in respect of these offences for abduction and for keeping in confinement where the maximum imprisonment is life, I would think that in the circumstances, having considered all the other factors that have been moved on your behalf -- you have children who are not within the jurisdiction. Previously you were of good character. All these mitigating factors I take into consideration. I also take into consideration that you are, so to speak, not from this country, but you work here. You are like foreigners, in this country, so to speak. But that is of no excuse where these offences are concerned. One must be firm. One must be resolute and to stamp out this type of behaviour so that it does not spread."

7. Mr. Webster, but not Mr. Kelly, seeks leave to appeal from this Court from the sentences imposed upon him by the judge on the grounds that they were harsh or excessive. He has conducted his appeal in person, indicating that he did not wish to take advantage of whatever arrangements the Court could have sought to make for his representation. That was a position which he was entitled to take, and I have to say that he was not disadvantaged by doing so. He put before us a clear and comprehensive memorandum explaining the grounds on which he thought that the sentence imposed upon him was unduly high.

8. In substance, his grounds are focused on the part played by Mr. Mullings in the joint venture. He makes the point, as the judge himself made, that Mr. Hurlston was the mastermind or ringleader; but, he says, Mr. Mullings, on the evidence accepted by the judge, had been in the venture from an early stage and was to collect what seemed to be a lion's share of the proceeds of the proposed blackmail. He drew attention to a number of passages in the course of the judge's earlier remarks which indicated that Mr. Hurlston and Mr. Mullings were joint venturers from an early stage and were, in effect, recruiting the others to carry

through the venture. And he points to the fact that Mr. Mullings receives a sentence which is half of that which is imposed upon him.

9. I should make it plain that, but for the element of disparity on which Mr. Webster relies, we would not have thought it appropriate for this court to interfere with a sentence of ten years. The judge's reasoning is not, with respect, altogether easy to follow: in particular, it is unclear the judge thought 15 years an appropriate starting point for Mr Kelly and Mr Webster and reached a sentence of ten years after discounting from that starting point. The better approach, as it seems to us, is that recognise that, although 15 years might be appropriate as a starting point for the mastermind, a proper starting point for those who were foot soldiers - coming into the venture at a later stage and playing only a relatively minor role in it - would have been less than the 15 years: a starting point for the foot soldiers of, say, 10 to 12 years. Approaching sentence from a starting point of 10 to 12 years, and giving some credit for the mitigating factors to which he referred, 10 years would have been an appropriate sentence to pass and could not have been challenged in this Court. This was a serious offence. Mr. Webster played, as the judge indicated, a relatively minor role in it; but he was, in fact, the individual who had enticed Mr. Tatum into the trap; and he was involved, on the findings of the judge, in the brutal treatment of Mr. Tatum.

10. Nevertheless, what can be said of Mr. Webster in those respects, can, as it seems to us, be said also of Mr. Mullings. There is nothing to indicate that his culpability in the venture was any less than that of Mr Webster; and, as I have indicated, a certain amount to suggest that, in fact, his culpability was rather greater. What then justifies the disparity?

11. In *R. v. Fawcett* [1983] 5 Cr.App.R.(S) 158, the Court of Appeal of England and Wales emphasised that where an appellant has received a sentence which is not excessive for his offence, but a co-defendant whose culpability is not significantly different has received a less severe sentence which is unduly lenient, the Court of Appeal may reduce the appellant’s sentence if the disparity is so substantial that the appellant has a sense of grievance. The test suggested by Lord Justice Lawton was this:

> "Would [right-minded] members of the public, with full knowledge of all the relevant facts and circumstances, learning of this sentence, consider that something had gone wrong with the administration of justice. When the question is posed in that form, we are of the opinion that the public would [have said] that something had gone wrong here …"

12. So we need to ask ourselves whether an informed and right-minded member of the public would regard the discrepancy between the sentences of 10 years imposed on Mr. Webster for the abduction and the confinement and the six years imposed for the blackmail, when seen in contrast with the sentences of five years and three years imposed on Mr. Mullings for the same offences, gave rise to a legitimate sense of grievance in Mr. Webster and suggested that something must have gone wrong.

13. There is no doubt that Mr. Mullings was entitled to a substantial discount for his guilty plea, for his cooperation with the police, and for his willingness to testify in favour of the prosecution. But should that discount have been as much as fifty percent off the appropriate starting point, which, as I have indicated, would have been between 10 and 12 years?

14. We take the view that that is a factor which would lead members of the public to think that something had gone wrong; and is a factor which justifies Mr. Webster claiming a legitimate sense of grievance. If the sentence passed on Mr. Mullings of five years was appropriate; that would indicate a starting point of about eight years in his case, or perhaps a little more. There is no reason, in those circumstances, why Mr. Webster should be sentenced on the basis of a higher starting point.

15. Taking these matters together - and emphasising again that there could be no legitimate challenge to a ten year sentence, viewed in isolation from the sentence passed on Mr Mullings - we have concluded that the appropriate course on this appeal is to reduce Mr. Webster's sentence so as to reduce the extent of the discrepancy.

16. Accordingly, we reduce the sentences passed on Counts 1 and 3 from ten years to eight years. We reduce the sentence passed on Count 2 from six years to four and a half years. But we do not disturb the sentences on Counts 4, 5 and 6. In relation

to Count 4, there is not such a material discrepancy; and in relation to Counts 5 and 6 there were no comparable sentences passed on Mr. Mullings.

17. So we allow the appeal in relation to Counts 1, 2 and 3. We reduce the sentences on those counts as I have indicated; and we direct that the terms are to be served concurrently, with time spent to be taken into account. We confirm the sentences passed on Counts 4, 5 and 6.

Chadwick P

Mottley JA

Campbell JA