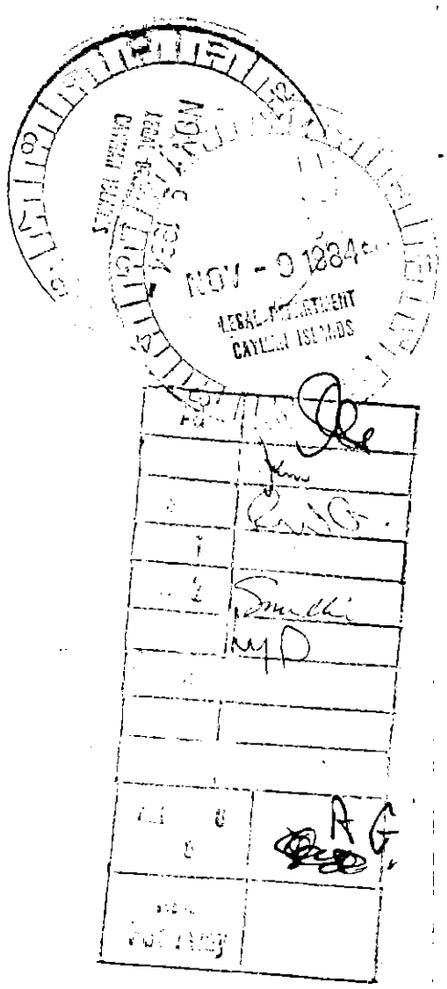
9.11.84



IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN

BEFORE THE HON. SIR JOHN SUMMERFIELD C.B.E., Q.C., J.P.

ON THE 19TH OCTOBER 1984

Case No. 392/83

Appeal No.

HANNA EMILIE HELNER

V

REGINA

Mr. N. Hill Q.C. (with him Mr. A. Foster) for appellant

Mr. R. Ground for respondent

JUDGMENT

The appellant was convicted of making a false report of the commission of an offence to a Police officer contrary to section 64 of the Police Law.

The case for the Crown was that the appellant had instigated three others to fake a kidnapping of the appellant and demand a ransom in the sum of $180,000 from her husband for her release.

The three others, Eden Mellad, Clayton Hodgson (the two main witnesses for the prosecution at the trial) and Alex Gomez (who was apparently not available to give evidence at the trial) had been charged jointly with attempting to obtain property by deception. They pleaded guilty and were fined. The allegation was that the appellant approached Gomez to arrange the fake kidnapping to obtain the ransom money from her husband and that Gomez employed Mellad and Hodgson to put it into effect. Why the appellant who, on the Crown version, would appear to have been the leading conspirator in the exercise was not also charged with the more serious offence of attempting to obtain money by deception is not apparent from the record. As it was, she faced the comparatively minor charge under

section 64 of the Police Law based on the report she made to Superintendent Dalziel that she had been kidnapped. She was fined the maximum amount as a first offender.

There could have been no doubt that she knowingly made the report to Superintendent Dalziel that she had been kidnapped. The only issue at the trial, therefore, was whether that report was false. Inherent in that issue was the question of whether she was a willing participant in the kidnapping, indeed, directing its course; or whether she was in fact truly abducted against her will without any knowledge of any plan for the kidnapping.

It can be observed here that kidnapping carries a maximum penalty of life imprisonment (section 207 of the Penal Code). Attempting to obtain property by deception carries a maximum penalty of three years (section 223 and 290 of the Penal Code). It could well be, therefore, that being charged with the latter offence would be advantageous and that could be an inducement for a true kidnapper to hold himself out as merely taking part in a fake exercise with a view to obtaining money by deception. The end result turned out favourably for the other three. They were only fined. The possiblility of such an inducement does not appear from the record to have been examined.

The learned Magistrate, when delivering judgment in this case, gave a lengthy analysis of his reasons for reaching his decision. Those reasons do not appear to have been reduced to writing in conformity with section 52 of the Criminal Procedure Code. However, a shorthand typist, assisting the defence, was present when judgment was delivered and took notes of it, or most of it. Her transcription is amplified by notes taken by Crown Counsel who prosecuted. That transcription, supplemented by Crown Counsel's notes, must constitute the judgment of the court when it was delivered and the appellant was convicted. In my view, this court cannot look to any other judgment giving reasons for the conviction. The short "reasons for judgment" subsequently prepared cannot supplant or

supplement the judgment delivered at the relevant time. There is no statutory provision for supplanting or supplementing a judgment delivered at the time of conviction. The transcription, as amplified by Crown Counsel's notes, must, therefore, be treated as the only record of the learned Magistrate's judgment in this case.

An important point should be made at this stage. If Mellad and Hodgson were telling the truth in substance then they were accomplices and should have been treated as such. Nowhere in the judgment is there any reference to the proper approach to the evidence of an accomplice or any search for evidence which could be treated as corroboration. Of course, if they were not telling the truth in substance they would still be accomplices, but then the whole case for the Crown would collapse.

For this reason the evidence of Mellad and Hodgson called for the most careful scrutiny and any inconsistencies and conflicts, or self contradiction, required careful assessment. This was also important because of their improbable account. One does not easily accept that a happily married woman will fake a kidnap of herself to extract money from her husband unless there are convincing reasons for believing that she did.

The whole episode can be broken down into three phases. The first is the initial abduction at the appellant's house in Red Bay. The second covers the detention at an uninhabited house at Prospect during which the demand for the ransom was made. The third covers the appellant's conduct after her release. All occurred within about twelve hours.

As to the first phase, the appellant's version was that her two abductors drove into the carport of her house at about 9.00 a.m. and, after some preliminary skirmishing, the taller one grabbed her round the neck from behind and pushed her into the house; he then forced her to the floor and held a knife to her throat while they tied her arms and legs and taped her mouth and eyes, right round her head; they threatened her and ordered her to remain silent; they then carried her to the car and put a light white cover over her head and drove off.

The Crown case was that she submitted willingly to the trappings of being bound and taped and that her legs were never tied.

Mellad in his evidence in chief said that she sat on the ground while they tied her hands and taped her face, after she had told them to get on with it. The question poses itself: Why sit on the ground to participate in a fake tying of her hands and taping of her mouth and eyes? Hodgson said that she bent down and put her hands behind her while they just wrapped a rope around them and she kept it there; that if she had wanted to she could have undone it. A fairly glaring inconsistency there.

In examination in chief Mellad said twice that they carried her to the car. That corresponded with her version, tying in with her explanation that her feet were tied. Under further examination in chief he said that they led her to the car and then he went on to say that they did not exactly lead her to the car but walked on either side of her. Hodgson said that she walked to the car. With her eye sight seriously impaired with tape over them some consideration should have been given to whether she could have walked to the car unaided.

In examination in chief Mellad indicated that they did not tape her eyes. In cross examination he repeated this and then admitted that they had. Hodgson said they they taped over her eyes.

Mellad said that they used two of the three pieces of rope they took with them. Hodgson said that only one piece had been used. If two had been used then the likelihood is that the second would have been used to tie her legs as she claimed. But this aspect was not analysed.

Both Mellad and Hodgson said that they never placed the pillow case over her head. But a pillow case was found in the car. How would she have known of its presence in the car if it had not been used? It would correspond with the light, white, cover which she said was placed over her head. This was not analysed.

But one question immediately springs to mind. If this had been a fake kidnapping why was it necessary to tie her hands and tape her mouth and eyes at all? That would obviously cause discomfort and it impaired her speech. The taping left deep red marks around her eyes and cheeks and there were deep rope marks on her wrists. Removing the tape resulted in hair being pulled from her head. If it were a fake, would it not have been sufficient to keep her head low as they drove in the car? It has been suggested that these trappings were necessary to give the kidnapping a semblance of verisimilitude in the event of a chance observer seeing her being carried in the car. But if one analyses that, is a kidnapper likely to advertise the fact that he is kidnapping someone by displaying her with taped mouth and eyes? Would not that alarm the chance observer who might then note the car registration number and telephone the Police? Obviously a kidnapper would conceal the victims from chance onlookers. Neither Mellad nor Hodgson said anything about keeping her head down or otherwise concealing her from chance observers. But that is what the appellant said happened i.e. that she was turned round and had her head placed on the the lap of one of them. One would have expected something like that to have happened whether the kidnapping was real or fake. In either case the object would have been to get her to a chosen place secretly so that the demand for ransom could be made. However, this aspect was not analysed.

With regard to the second phase - at the uninhabited house at Prospect - the appellant's version was that on arrival they untied her legs as there was some distance to walk; that her hands remained tied for some time until she asked to go to the washroom; and that the tape over her eyes and mouth remained until eventually the two kidnappers abandoned the project, left her, and she removed it herself. The project was abandoned at about 1.00 p.m.

It was common ground that they got her into that house by lifting her several feet through an area of broken mosquito mesh on the back porch. Here again one wonders why, if this were a fake, they would have kept her hands tied and her mouth and eyes taped, thus making it necessary to have to lift her bodily through the hole in the mesh. It could not be play acting for the

benefit of any casual observer because any such casual observer, alarmed by such a sight, would no doubt have taken steps to have the police at that house in short order. One would have expected them to to free her hands and face so as to facilitate her entry.

Mellad said, at first in evidence in chief, that as soon as they got her inside the house they took off the tape and untied her hands. Later, in chief, he said that after making the unsuccessful telephone calls to the husband from Gomez's house he returned and "released" her. Later in cross-examination he said that it was when he came back from making the telephone calls that he untied her hands. He also said that that was also when he took the tape off her face. Hodgson said that on getting her inside the house they left the rope on her; that he removed the tape from her mouth but left the tape over her eyes on. One wonders again how it could be that, if this were a fake, her hands were left tied and her face taped for so long after entering the house. That was another aspect which required examination.

Mellad also said that towards the end of the episode the appellant went to the washroom. Hodgson denied that this occurred, although he was there throughout. Some of the tape was found in the washroom which tends to support her version.

There was a curious passage in Mellad's cross-examination. He said he did not carry the knife to frighten the appellant; that he had been told by Gomez to carry it and that Gomez had told them that the appellant had said that they were to carry knives to scare her. Despite this, both Mellad and Hodgson claim that neither drew a knife; that both kept them sheathed at the waist under their upper garments. That was a passage which might well have drawn some comment in the light of the evidence of Mellad and Hodgson.

One can now turn to the third phase - her conduct after her release. When interviewed by Superintendent Dalziel shortly after her release she gave a description of her kidnappers and a description of the car. It is obvious

that Superintendent Dalziel began to suspect her bona fides. That suspicion stemmed mainly from four factors; her relative calm when he first confronted her; her description of one of the kidnappers (she said that they were both clean shaven whereas Mellad apparently had a small beard and moustache); her description of the car (she did not place the position of the white strip accurately); and, when confronted with the car and its contents (pillow case, knives, plaster and rope), her denial that it was the same car. She also claimed that the knives were longer and gave conflicting accounts of the number of knives. Superintendent Dalziel no doubt formed the opinion that she was trying to mislead the police and impede the investigation. Hence the charge he laid on the same evening of the incident.

What seems to have been overlooked is the the evidence of Mr. & Mrs. Dredge as to her condition immediately after her release. On her release she ran to an apartment about 200 feet away from the house she had been taken to. She was observed by Mr. & Mrs. Dredge as she approached and there is nothing to suggest that she knew she was so observed. Mrs. Dredge said that she looked upset and distressed, as if there had been an accident of some sort. Mr. Dredge said that she was walking in an agitated manner.

It is worthy of note that the account she gave to Mrs. Dredge, the verbal account she gave to Superintendent Dalziel very shortly afterwards and the written account she gave to him later and her evidence in court were all substantially similar.

As to the misdescription no account seems to have been taken of the fact that after her eyes were taped she could see very little; that if her ordeal had been a real one it could well have affected her memory. More important though, the description she gave led to the apprehension of Mellad, Hodgson and Gomez, and the tracing of the car, within a few hours of her release. There were factors which could have explained the misdescription, but these do not appear to have been taken into account.

I can turn now to the judgment. Three points can be made in

relation to it. As observed earlier there was no reference to the proper approach to the evidence of an accomplice, or even a finding that Mellad and Hodgson were accomplices. The judgment concentrated on aspects designed to demonstrate improbabilities in the appellant's version of events. It is conceded that some of the reasoning towards that end could not be supported. Finally it did not weigh in the balance the factors in the appellant's favour adverted to above. In particular there was no analysis of the conflicts and discrepancies in the evidence of the two main witnesses to assist a conclusion on whether or not they could be relied on. One would have expected a plausible explanation of the conflicts, inconsistencies and improbabilities adverted to above to justify reliance on those accomplice witnesses as being truthful and reliable.

It is unnecessary to examine the reasons for rejecting the evidence of the psychiatrist.

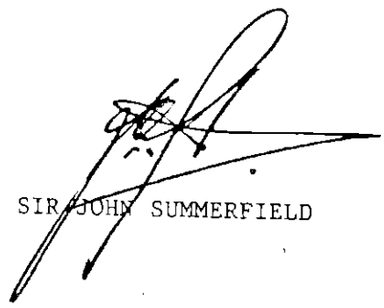
One incongruous and unexplained feature of this case is that at the height of the kidnapping, so to speak, when the ransom demand had been made and the police informed, Gomez, who had organised it, was at the home of the husband of the appellant at Red Bay (the husband being there at the time) and was seen to drive away in a van when Superintendent Dalziel arrived there at about 11.30 a.m..

It is sufficient if this Court, in weighing up all the foregoing factors, reaches the conclusion that it would be unsafe to allow the conviction to stand. I am certainly of that view. Indeed, having given carwful consideration to those factors I cannot escape the conclusion that the probability is that her version was the correct one.

In conclusion I feel obliged to make one observation. Mr.& Mrs. Dredge were material witnesses for two reasons. One is in relation to the version of events given by the appellant immediately after her release. The other is in relation to her condition at that time. The prosecution can, of course, decline to call an apparently material witness if they have

reason to doubt that he or she will tell the truth and wish to reserve the right to cross-examine him or her. In that event the prosecution has a duty to make known to the defence the name of that witness. Having regard to the record of the cross-examination of Mr. & Mrs. Dredge it is clear that the prosecution were not of the view that they were likely to be untruthful witnesses. That being the case the prosecution must have assessed them as truthful witnesses who could give material evidence - albeit favourable to the appellant. The prosecution should, therefore, have called Mr. & Mrs. Dredge as witnesses. That is the fair and accepted practice normally followed by the prosecution.

For the reasons given I allow the appeal. The conviction is quashed and the sentence is set aside. This is not a case where it is appropriate to make an order for a retrial.



SIR JOHN SUMMERFIELD

9th November 1984.