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IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202000421/B5

[2021] EWCA Crim 832

Royal Courts of Justice

Strand

London

WC2A 2LL

Tuesday 18 May 2021

LADY JUSTICE NICOLA DAVIES DBE

MR JUSTICE SPENCER

MR JUSTICE FORDHAM

REGINA

V

REECE OSBORNE

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MR D BELL appeared on behalf of the Applicant.

J U D G M E N T

1. MR JUSTICE SPENCER: This is a renewed application for an extension of time in which to apply for leave to appeal against conviction following refusal by the single judge.
2. On 13 December 2019, in the Crown Court at Woolwich, the applicant, who is now 20 years of age, was convicted by the jury of conspiracy to kidnap. On 31 January 2020 he was sentenced by Her Honour Judge Hales QC to a suspended sentence order of 10 months' detention suspended for 15 months, with requirements to undertake 150 hours of unpaid work and to attend 15 days of a Thinking Skills Programme. An extension of time of 23 days is required to bring the appeal.
3. We are grateful to Mr Bell, who represented the applicant at trial and appears today pro bono.
4. The applicant was one of six defendants all convicted of the conspiracy in the same trial. The offence related to the kidnap of a 3-month old baby. The child was with his mother when he was forcibly taken from his pram by his father and the other co- defendants. The applicant's role was that of getaway driver, waiting in his car nearby. His car was fitted with a child seat to transport the baby away.
5. There is a reporting restriction order in force under section 45 of the Youth Justice and Criminal Evidence Act 1999. We shall therefore not refer to the father by name, but as RZ. Nor shall we refer to the baby or to one of the other defendants by name, observing the order which was made in the lower court.
6. The short ground of appeal is that the judge declined to leave to the jury a defence that the applicant mistakenly believed that RZ, as the father of the child, was entitled to remove the child.
7. The applicant's connection to the incident arose because he was at the time the boyfriend of RZ's sister.She was a co-defendant. The applicant was living in Cornwall. He had met his girlfriend online. He regularly drove from Cornwall to see her in London. He had also once driven to Wales to meet her family, including her brother RZ.
8. The relationship between the mother and father of the child had broken down soon after his birth. They had been living together in Wales. On 25 April 2019 the mother left Wales and returned with the baby to her previous home in London. The evening before she left Wales there had been a violent family argument over the baby which resulted in the police being called.
9. In the weeks that followed the father, RZ, made efforts to see the baby. including speaking to Social Services and trying to arrange mediation with the mother - all to no avail. The father then determined to take matters into his own hands by travelling to London and taking the child back by force. This was arranged for the weekend of 26 May 2019.
10. The applicant agreed that he would drive RZ for the purpose of enabling him to take away the baby without the mother's consent. The car seat was fitted and the applicant was directed to drive to an unfamiliar location in London. His girlfriend (RZ's sister) was with him and another co-accused. When they arrived at the appointed place the others got out of the car whilst the applicant waited in the car for a short time. Meanwhile a second vehicle had arrived at the scene containing the other co-accused.
11. The baby's mother was walking along the road with her sister and her mother, with the baby in the pram. They were going shopping. The five co-accused descended upon them. There was a physical altercation. The baby was forcibly removed from the pram.

His harness was broken in the process. The co-accused all returned to the applicant's vehicle, carrying the baby. The applicant drove off at speed, the intention being to drive the baby and the father, RZ, back to Wales.

12. The police had been alerted. The applicant's car was stopped in London on The Embankment by armed police officers. Fortunately the baby was unharmed and he was returned to his mother who had been greatly distressed.
13. The prosecution case was that the kidnap was well planned. The two vehicles had arrived containing six people at exactly the time the baby was expected to be there with his mother. There was evidence of telephone contact and messaging between the co-accused beforehand and afterwards. There had been meticulous planning including the obtaining of the car seat and baby bottles. The fact that the baby's harness was snapped indicated the level of force used by RZ to take the baby. In addition to the evidence from the baby's mother and the mother's sister there was independent eyewitness evidence of an unseemly and violent physical struggle over the baby.
14. The applicant's case at trial was that although he knew that RZ wanted to take the baby back and that this was the purpose of his going to London, he did not know that what was proposed was illegal; had he known that he would not have done it. He had no idea that force was going to be used. He could not see the pram from where he was parked.
15. The issue for the jury was whether they could be sure there was an agreement to kidnap the baby by force and whether the applicant had been an active party to that agreement.
16. It was common ground that the offence of kidnap requires proof of the following four elements:
    (a) the taking and carrying away of the victim;
    (b) by force;
    (c) without the consent of the victim; and
    (d) without lawful excuse.
17. When it came to formulation of the judge's directions of law to the jury it was submitted on behalf of this applicant, and on behalf of RZ and his sister (the applicant's girlfriend), that the judge should leave to the jury, as a potential lawful excuse for taking and carrying away the baby, the issue of "parental authority". The judge declined to do so.
18. In her written ruling the judge identified that there was no dispute that the baby had been taken and carried away without his consent. The defence case was there was never an agreement to take the baby by force or, if there was such an agreement, it was not one which any individual defendant joined and no force was ever used against the baby.
19. The defence case was that such agreement or plan as might have been known to any defendant was merely to facilitate the father RZ seeing his son but nothing more. RZ asserted that he understood that, as the father of the child, he could not be prosecuted for kidnap and if he did no more than lift the child out of the pram that could not amount to kidnap. The judge acknowledged in her ruling that if what the father asserted was true, i.e. simply lifting the child out of the pram, that probably would not amount to sufficient force to sustain a charge of kidnap. But what was alleged here by the prosecution was a violent and forceful taking, and the prosecution case was that this was what was intended by the conspirators.
20. In her ruling the judge referred to the summary of the legal position in relation to parental authority given by the Law Commission in their consultation paper on kidnap and related offences (No 355, at paragraph 2.86):

> "Taking by a parent will therefore amount to kidnapping either if there is no right of custody (for example, because of a court order) or if there is such a right but the exercise of it exceeds the bounds of reasonable parental discipline."

21. Continuing the quotation from the Law Commission Consultation Paper the judge said:

> "... it is possible for a parent to kidnap his or her own child, whatever the child's age. In that sense there is no automatic defence of parental authority. There is a defence where (1) the taking was otherwise lawful -- that is, not forbidden by any provision of the Children Act 1989 and is not in breach of the rights of the other parent, or parent with parental responsibility – and, (2) it falls within the bounds of reasonable parental discipline."

22. The law summarised there was clarified in this regard by the House of Lords in R v D [1984] AC 778.
23. The judge observed in her ruling that it was not, and could not be suggested in the present case that the father of the child was exercising parental discipline. The judge was satisfied that if force was used against the child, as the prosecution alleged, there was no room for leaving any defence of parental authority to the jury. Parental authority cannot operate as a defence to what would otherwise amount to kidnap.
24. The judge then considered the further submission made on behalf of the applicant that if he honestly believed that what was agreed to was lawful, based on the premise that as the father of the baby RZ had the right to take his son, then he could not be guilty of the conspiracy. The judge declined to direct the jury in such terms. She pointed out that this submission was founded upon the applicant's remarks at the time of his arrest: "If I knew this was illegal I would not have done it", and "If I knew this was going to happen I would not have done it. I would have said no." The judge observed that the applicant's account in his evidence to the jury was consistent with what he told the police in interview. He said he was asked to drive the father to collect the baby with a view to giving both of them a lift back to Wales. He said he did not see what happened in the street because he was parked out of sight.
25. The judge pointed out in her ruling that if the jury concluded that the applicant's account was or might be true then plainly he would not be guilty of conspiracy because he would not have been a party to the indicted conspiracy. In that respect the applicant's belief that what he agreed to do was lawful would be correct. The judge continued:

> "However, if the jury are sure that there was an agreement to kidnap [the baby], and that [the applicant] joined in that agreement intending that it should be carried out by one of his co-conspirators, his mistaken belief that the law permits a father to kidnap his own child is not a mistaken belief in circumstances which if true would render his act or that of his co-conspirators an innocent act. It is a mistaken belief as to the law, and ignorance

> of the law cannot afford a defence. The jury will be directed in accordance with the written directions and Route to Verdict."

26. In her directions of law the judge explained to the jury the concept of "without lawful excuse" in this way:

> "... examples of lawful excuse as a defence to kidnap include a police officer, for example, exercising powers of arrest, or a person acting in reasonable self-defence or defence of someone else. Another example of lawful excuse is parental authority. This can provide a lawful excuse for taking and carrying away one's own child but only where the taking was otherwise lawful and it falls within the bounds of reasonable parental discipline. In this case parental discipline does not arise, and irrespective of what any of the defendants thought, neither [RZ], nor anyone else, would have had a lawful excuse for taking and carrying [the child] away by force, using force against him to the extent alleged by the prosecution."

27. In explaining to the jury the direction of law as to what the prosecution had to prove to establish the charge of conspiracy the judge said:

> "Knowledge of the law on the part of a conspirator is immaterial. The prosecution does not need to prove that a conspirator knew that what was agreed was unlawful. If you are sure that there was an agreement to kidnap [the child], and you are sure that the defendant whose case you are considering joined in that agreement intending that it should be carried out, it is not a defence for the defendant to say 'I thought the law entitled [RZ] to do what we agreed, namely, to take and carry away his son by force'.
>
> To prove Count 1, conspiracy to kidnap, the prosecution must make you sure of three things: (1) that there was a conspiracy or agreement between two or more people to kidnap [the child], meaning an agreement to take and carry him away by force in the way that I have already directed you; (2) that the defendant whose case you are considering joined in that conspiracy or agreement; and (3) that when the defendant joined in, he intended that [the child] would be kidnapped by himself and/or one or more of the other conspirators, even if he did not appreciate that it was unlawful. If you are sure of all three of these things, then your verdict will be guilty. If you are not sure of all three of those things then your verdict will be not guilty."

28. In his advice and grounds of appeal Mr Bell submits that the judge's ruling was wrong. The reasons for that assertion were not developed fully in the written submissions but in

his oral submissions Mr Bell made it clear that his submission really is that this was not a case of a mistake of law but a mistake of fact as to the circumstances, the applicant honestly believing that the father had a lawful excuse for doing what he did.

29. We are unable to accept Mr Bell's argument, having considered carefully all his submissions, written and oral. We think the judge's ruling was quite correct, and that her directions to the jury were impeccable. The applicant's real defence was that he was not a party to an agreement to carry out a kidnap at all. He had no idea the child was going to be forcefully snatched. That is why he did not think anything illegal was going to take place. The judge's directions correctly focused the jury's attention on what was assented to by each of the co-conspirators. The directions made it crystal clear that the jury had to be sure in the case of this applicant, as in the case of the other accused, that he knew and intended that the agreement was to take and carry away the child by force.
30. We note that this is entirely consistent with and reflects the way the applicant's case was put in his defence statement. There he said he had met up with the others in London and was directed to a particular road. There were no conversations in the car which led him to believe that anything untoward was going to happen. He remained in the car. He assumed the others had gone to pick up the child. When RZ returned with the child and got into the car the applicant had no idea of what had just occurred: he only became suspicious when the police stopped the vehicle. He was never part of any plan to kidnap the child and had no idea as to what had actually happened.
31. That was the applicant's case, and the jury rejected it. As the judge rightly identified in her ruling, the applicant was seeking to rely not on a mistake of fact but on a mistake of law, namely that a father is entitled to kidnap his own child. A mistake of law cannot afford the applicant a defence. Everyone is presumed to know the law.
32. We are quite satisfied that the applicant's true defence was faithfully left to the jury. The jury rejected that defence. The jury were sure that the applicant was knowingly party to an agreement to take the child by force. Parental discipline could not afford the applicant or any of the co-accused a defence in those circumstances.
33. It is not arguable that the applicant's conviction is unsafe. For all the reasons we have given, we refuse the renewed application for leave and consequently also the extension of time.
34. We note in conclusion that the applicant’s mitigation, such as it was in relation to the facts of the offence, was reflected amply by the leniency of the sentence which the judge imposed on the applicant, in contrast to the sentence of 2 years immediate custody which was imposed on the father of the child, RZ.

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