BARBADOS:

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No: 29 of 1998

BETWEEN:

RYAN TREVOR O'NEAL BELGRAVE

Appellant

AND

THE QUEEN

Respondent

Before: The Honourable Sir Denys Williams, Chief Justice, The Honourable Mr. Justice George Moe, and the Honourable Mr. Justice Frederick Waterman, (ag.) Justices of Appeal.

1999: November, 24th.

2000: May, 23rd.

Mr. N.K. Simmons in association with Mr. M. Lashley and Mr. A. Sealy for Appellant.

Mr. D. Taylor for Respondent.

DECISION

On May 15, 1998 the appellant Ryan Belgrave was convicted of the offence of kidnapping contrary to section 30 of the Offences against the Person Act, Chapter 141 and sentenced to imprisonment for 5 years.

Section 30 enacts that any person who unlawfully removes another from any place without that other's consent, or the consent of some person legally authorised to consent on that other's behalf is guilty of kidnapping and is liable on conviction on indictment to imprisonment for life.

The particulars of the charge against the appellant were that he on September 1, 1997 in the parish of Christ Church removed Tanya Browne from Charnocks Land, Christ Church without the consent of her mother Clara Browne.

Clara Browne testified that she lives at Charnocks, Christ Church with her mother Selma Browne, her stepfather Ralph Layne, her 15 year old daughter Tanya Browne, her sister Nicole Browne, her brothers and her grandchildren. On September 1, 1997 she left home about 1 p.m. to go shopping. At home when she left were Selma, Tanya, Nicole and a baby. When she returned about 3 p.m. the house was shut down. She knocked, Selma spoke to her and she called the police. About 7.00 p.m. Tanya came home and she telephoned the police and informed them.

Selma's testimony was that she heard a very hard knocking on the window, looked out, saw that it was the appellant and asked him what he wanted. He did not answer. In her words the knocking was so terrible and he looked at me so cruel I told him he should call first. She told Tanya to hand her the phone to call the police. When Tanya gave it to her, she, in her words, "heard a crawling on the above side of the house where the phone cord is attached to the house". When she tried to dial, there was no dial tone. She went to the backyard and saw the appellant looking into the yard. She "hollered" for murder and went to the back door to call Tanya and Nicole but he was already in the house and had Tanya "grappled up" very close. He told Tanya to go and put on her shoes, that he come for her. She got a phone message from a neighbour's house and called the police. When she returned the front door was wide open, the baby which Tanya had had in her arms was on the floor and Tanya was gone.

Clara and Selma both testified that they had not given the appellant permission to take Tanya away.

Tanya's evidence was that, after her mother left, the appellant called her on the phone and asked her who was at home. She told him her grandmother, aunt and niece were all at home. A few minutes later there was a knock on the door. Her grandmother Selma asked who it was and looked through the window. She closed the window and said she was going to call the police but when she picked up the phone it was not working. Her grandmother then went into the backyard, "hollered" for murder and told her, Tanya, to come along. She was holding the baby. Then the appellant came through the front door with a gun in his hand. She was scared. He told her to go and put on her shoes because people up there think he is a cake. She put the baby on the floor, went into the bedroom and put on her shoes. He then told her to come along and she went with him because he had a gun. They walked for a while and eventually went to a house with a shanty attached to it. She heard a van

outside and he looked outside, said it was a police van, told her not to say anything “because the police out there”, and then ran and jumped over the paling. She remained until a man who lived at the house came home. She spoke to him, got a bus fare from him and went home. Her mother called the police and they came and took her to the Station. They questioned her but she did not tell them what had happened because she was still afraid of the appellant. He had told her that if any time she made a complaint and he got locked up, he would kill her when he come out. Days later she gave the police a statement.

Nicole Brown amplified the story told by the others. About 1.15 p.m. she was doing a puzzle when she heard a pounding on the window. Her mother pulled down the window flaps and asked the appellant what he was doing there. She went into the bedroom and finished the puzzle. Then she heard like the telephone wire being torn off the house. Through the front windows she saw a figure with locks. Her mother shouted for the telephone and she told her that the appellant had taken off the wire. Her mother told her and Tanya to come into the backyard and she did so. She saw the appellant climbing over the paling while her mother was shouting for help. She went to the kitchen for a knife and then saw the appellant inside the house. He was by the front door and had Tanya “grip up”. He told Tanya to go and put on some clothes. She ran to call her father and when she came back she saw the baby on the floor and the front door wide open.

Police officers testified that on September 1 a search warrant was executed in the appellant’s presence at his home in Flagstaff, St. Michael and a silver-coloured .22 revolver and five rounds of .22 ammunition were found under a wheel barrow. According to the evidence the appellant looked at it and said:-

“That is my gun that I hide under there, how you find it?”

Police officers also testified that at 8.50 p.m. on the said date the appellant was told at District B police station that they were investigating a matter in which Clara Browne of Charnocks, Christ Church had reported that he had taken her daughter Tanya Browne aged fifteen of the said address from her residence at gun point and without her permission and that he was believed to be the said person. According to the evidence the appellant was cautioned and said:-

“I did not know this would go so far, I only wanted to speak to Tanya.”

The evidence of an officer P.C. Browne was that prior to this he had told the appellant that he had a right to consult an attorney-at-law and he had replied:-

“I don know I going to get charged. Don’t worry about that.”

P.C. Browne further testified that he showed the appellant the gun and five rounds of ammunition, asked him what he could say about it and cautioned him. He replied:-

“That is my gun that I had.”

The evidence is that the appellant was asked if he wished to give a written statement and cautioned. He replied:-

“I ain’t giving no statement.”

The deposition of Inspector Annel was read after appropriate evidence had been led that his evidence had been duly taken at the preliminary enquiry and that he was not in Barbados. His evidence was that the gun found when the search warrant was executed was a real gun.

The appellant, when informed of his rights, said that he had nothing to say. He called no witnesses and did not wish to address the jury.

The grounds of appeal are that the learned trial judge:-

(1) misdirected the jury and erred in law in that -

(1A) he failed to disclose to the jury the material elements of the offence of kidnapping;

(1B) his direction on consent as an element to the charge of kidnapping was inadequate and confusing to the jury;

(2) failed to direct the jury on how to treat oral statements made by the appellant to the prosecution witnesses i.e. the police officers;

(3) failed to warn and direct the jury as to how deposition evidence is to be treated; and

(4) failed to put the case for the defence to the jury.

Counsel also submitted that the verdict of the jury was unsafe and unsatisfactory. He sought an order that the conviction be quashed and set aside.

Ground (1)

The House of Lords in R v D [1984] 2 All E.R. 449 listed the ingredients of the common law offence of kidnapping. Lord Brandon at p.453 after stating that the nature of the offence is an attack on, and infringement of, the personal liberty of an individual, went on to say that the offence contains four ingredients as follows: (1) the taking or carrying away of one person by another (2) by force or by fraud (3) without the consent of the person so taken or carried away and (4) without lawful excuse. Later in his speech at p.457 he dealt at greater length with the third ingredient:-

“That third ingredient, as I formulated it earlier, consists of the absence of consent on the part of the person taken or carried away. I see no good reason why, in relation to the kidnapping of a child, it should not in all cases be the absence of the child’s consent which is material, whatever its age maybe. In the case of a very young child, it would not have the understanding or the intelligence to give its consent, so that absence of consent would be a necessary inference from its age. In the case of an older child, however, it must, I think, be a question of fact for a jury whether the child concerned has sufficient understanding and intelligence to give its consent; if, but only if, the jury considers that a child has these qualities, it must then go on to consider whether it had been proved that the child did not give its consent. While the matter will always be for the jury to decide, I should not expect a jury to find at all frequently that a child under 14 had sufficient understanding and intelligence to give its consent.”

Lord Brandon in the course of his speech considered the decision of the Irish Supreme Court in The People (A-G) v Edge [1943] IR 115. He said at p.454 that the question for determination in that case was whether a count in an indictment which charged the defendant with kidnapping a boy aged 14½ by unlawfully carrying him away and secreting him against the will of his lawful guardian disclosed any offence known to the law. He continued:-

“It was not in dispute that the boy concerned was on friendly terms with the defendant and went away with him entirely voluntarily, without the use by the defendant of either force or fraud. The Dublin Circuit Criminal Court held that the count properly disclosed the common law offence of kidnapping, and the jury, having been so directed, convicted him on that count of that offence. The defendant appealed to the Court of Criminal Appeal, which upheld the conviction. The defendant brought a further appeal to the Supreme Court, which, by a majority, allowed the appeal and quashed the conviction. The ground of the majority’s decision was that once a child reached the age of discretion, which in the case of a boy was, as a matter of law, 14 years, he was free to choose where and with whom he should live, and that, in such a case, the consent or absence of consent of the child’s lawful guardian was not relevant”.

The learned Lord went on to say (at p.455) that what Edge’s case decided was that where a man is charged with the common law offence of kidnapping a child, and it becomes necessary to consider whether the taking or carrying away of the child was with or without consent, the relevant consent depended on the age of the child. If the child was below the age of discretion fixed by the law as 14, the relevant consent was that of the parent or other lawful guardian of the child; but if the child was above the age of discretion, the relevant consent was that of the child himself.

At p.457 Lord Brandon dealt with the question whether the doctrine laid down by the Irish Supreme Court in Edge’s case that the person the absence of whose consent is an essential ingredient of the common law offence of kidnapping is that of the child if it has reached an age of discretion fixed by law, but that of its father or other guardian if it has not, applies also under English law and he reached the conclusion that it did not as is disclosed by the passage at p.457 of his speech earlier reproduced.

In Barbados the Offences against the Person Act 1994 No. 18 which came into operation on September 1, 1994 was according to its long title, an Act to revise and amend the law with respect to offences against the person and kidnapping was made an offence by section 30 of that statute. On the assumption that previous to the commencement of Act 1994-18 kidnapping was an offence at common law - and it was not suggested in argument that it was not - and that the ingredients of that offence were as stated by Lord Brandon in R v D, what the statute did was to modify those ingredients and, additionally, increase the punishment that may be imposed on anyone who is convicted of that offence. A person who is convicted of the statutory offence of kidnapping may be sentenced to imprisonment for life.

In Barbados the ingredients of the statutory offence are therefore (1) the taking or carrying away of one person by another (2) by force or by fraud (3) without the consent of the person so taken or carried away or the consent of some person legally authorised to consent on that other’s behalf and (4) without lawful excuse.

In this case, the charge against the appellant being that he removed Tanya Browne from her home without the consent of her mother Clara Browne, the question that arises is this: Clara having testified that Tanya was born on November 4, 1981 and Tanya being about two months short of sixteen years old at the time of the incident, can it be said that Clara was a person who was legally authorised to consent to Tanya’s removal from her home?

The age of discretion was judicially set at 14 for boys and 16 for girls: See Re Agar-Ellis, Agar-Ellis v Lascelles (1883) 24 Ch D. 317 at 326 and Thomasset v Thomasset [1894] P.295 at 298. So that Tanya had not at the time of the incident reached the age of discretion.

Moreover section 40(1) of the Family Law Act Cap. 214 enacts that each of the parents to a marriage or union is a guardian of every child of the marriage or union who has not attained the age of 18 years; and the parties to the marriage or union have the joint custody of each child; and section 3(1) of the Minors Act Cap. 215 enacts that a person shall attain full age on attaining the age of 18 and section 4(1) that on the death of the father of a minor, the mother, if surviving, shall, subject to the Act, be guardian of the minor, either alone or jointly with any guardian appointed by the father. In Bernardo v McHugh [1891] A.C. 388 it was accepted that a mother had a legal right to custody of her illegitimate child up to the age of 16.

So that whether or not Tanya was the child of a marriage or union, her mother Clara had custody of her according to law.

Parental rights do of course shrink as a child gets older. Lord Denning MR recognised this in Lewer v Bryant [1969] 3 All ER 578 when he described (at p.582) the parental right as

“a dwindling right which the courts will hesitate to enforce against the wishes of a child the older he is. It starts with a right of control and ends with little more than advice”.

But the right remains during a child’s minority for the protection of the child against third parties. As Lord Scarman said in Gillick v West Norfolk Area Health Authority [1985] 3All ER 402 at p.420 -

“Parental rights clearly do exist and they do not wholly disappear until the age of majority. Parental rights relate to both the person and the property of the child: custody , care and control of the person and guardianship of the property of the child”.

In our view according to Barbadian Law Tanya’s age did not preclude a charge being lawfully brought against the appellant for unlawfully removing her from her home without the consent of her mother.

The trial judge gave the jury the following direction at the commencement of the summing up:-

“So this offence, with a very big name, kidnapping, is simply an offence against personal liberty and the section under which it is brought reads like this: any person who unlawfully removes another person from any place without that other’s consent or the consent of some person legally authorised to consent on that other person’s behalf is guilty of kidnapping.

So that is all kidnapping is. You don’t have to have ransom notes, get away cars and that sort of thing. You merely have to be satisfied that Tanya Browne was removed from her home and you have to be satisfied that it was without any consent, it was without her mother’s consent, because her mother wasn’t home, her grandmother was home, so you have to be satisfied that it was without her grandmother’s consent or without the consent of any person who would be in a position to consent. That is all that matters”.

Counsel’s complaint that the trial judge did not disclose to the jury the material elements of the offence had some substance. He did not tell them that for the removal to be unlawful it had to be by force or by fraud and without lawful excuse. The criticism of the directions on consent is also not without substance because in the light of the charge, what the prosecution had to prove was that it was without the consent of Tanya’s mother and not of anyone else.

But Clara gave evidence that she did not consent to Tanya’s removal from her home and the evidence is overwhelming that the removal was effected by the use of force. Tanya testified that he had a gun and she went with him because she was scared.

The other grounds are in the circumstances of the case entirely without merit. He put forward no defence. The explanation that he gave for his action was that he only wanted to speak to Tanya. Inspector Annel’s deposition would have revealed that the gun which the police found at his residence was a real gun but, whether that was so or not, was immaterial. A mock gun is capable of causing as much fear and panic as a real one.

The trial judge did not direct the jury as to the elements of the charge as fully as he should have done but we are satisfied that a jury properly directed would inevitably have returned a verdict of guilty.

In our view there has been no miscarriage of justice and the proviso is applied and the appeal is dismissed.

As to the sentence, the evidence disclosed a case that merited severe punishment. The abduction of someone from his or her home at gun point strikes at the foundations of orderly and civilised behaviour and would cause great offence to all right-minded persons in the community. Such conduct must receive an appropriate sanction.

The sentence is affirmed to run from June 26, 1998.

Chief Justice.

Justice of Appeal. Justice of Appeal.