

Neutral Citation Number: [2018] EWCA Crim 185
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London WC2

Wednesday 24th January 2018

B e f o r e:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
(The Lord Burnett of Maldon)

MR JUSTICE WARBY
and

MR JUSTICE DOVE

ATTORNEY GENERAL'S REFERENCES

UNDER SECTION 36 OF

THE CRIMINAL JUSTICE ACT 1988

R E G I N A

- v -

MORGAN CLARKE
DECLAN ANDREWS
ANTON CRAIG THOMPSON

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(Official Shorthand Writers to the Court)

Mr P Jarvis appeared on behalf of the Attorney General

Mr M Brady appeared on behalf of the Offender Morgan Clarke
Miss S Duckworth appeared on behalf of the Offender Declan Andrews
Mr D James appeared on behalf of the Offender Anton Craig Thompson

J U D G M E N T Wednesday 24th January 2018

THE LORD CHIEF JUSTICE:

1. On 23rd October 2017, in the Crown Court at Manchester, the offenders, Clarke, Thompson and Andrews, were sentenced by Her Honour Judge Goddard QC for a range of serious offences, including kidnapping.

2. This is an application by Her Majesty's Attorney General, pursuant to section 36 of the Criminal Justice Act 1988, for leave to refer their sentences as unduly lenient. There is also an application for leave to appeal against sentence made by Andrews on the basis that the sentence imposed was manifestly excessive.

3. Before turning to the detail of the offending, it is important to note the ages of the offenders.

The offending occurred in early 2017. Clarke was born on 11th December 1998 and so was just

18 at the time of the offending. Thompson was born on 26th August 1997 and so was 19.

Andrews was born on 3rd December 1999 and so was 17.

4. In paragraph 40 of the Final Reference the submission was advanced that only Andrews should have received a discount by virtue of his youth. He was the only one under the age of 18 at the time of the offending. In support of his application for leave to appeal against sentence, Andrews made a similar point. Miss Duckworth refers to the Sentencing Council guideline for

the sentencing of children and young people. The guideline undoubtedly applied to Andrews. She submits that his sentence should have been reduced by half or more, pursuant to the principle articulated in paragraph 6.4(6) of that guideline, as compared with the other offenders. In the course of his oral submissions Mr Jarvis, on behalf of the Attorney General, accepted that there was no stark cut-off point that applies in sentencing an offender aged 18. Miss Duckworth accepted the same proposition.

5. Reaching the age of 18 has many legal consequences, but it does not present a cliff edge for the purposes of sentencing. So much has long been clear. The discussion in *R v Peters* [2005] EWCA Crim 605, [2005] 2 Cr App R(S) 101 is an example of its application: See paras [10]-[12]. Full maturity and all the attributes of adulthood are not magically conferred on young people on their 18th birthdays. Experience of life reflected in scientific research (e.g. The Age of Adolescence: thelancet.com/child-adolescent; 17 January 2018) is that young people continue to mature, albeit at different rates, for some time beyond their 18th birthdays. The youth and maturity of an offender will be factors that inform any sentencing decision, even if an offender has passed his or her 18th birthday. The ages of these offenders illustrate the point. The youth and immaturity of Clarke and Thompson were appropriate factors for the judge to take into account in these cases even though both were over 18 when they offended. It is apparent that the Judge did so, not only in the case of Andrews.

6. The offenders fell to be sentenced for the following offences:

All three offenders:

(a) Kidnap, the particulars of which were that between 20th January 2017 and 23rd January 2017 all three offenders unlawfully and by force or fraud took or carried away Carl Cain against his will.

(b) Blackmail, contrary to section 21(1) of the Theft Act 1968, the particulars of which were that between the same dates all three offenders, with a view to gain for themselves or another, made an unwarranted demand of monies from Connor Cain with menaces.

Clarke alone:

(c) Attempted robbery, contrary to section 1(1) of the Criminal Attempts Act 1981, the particulars of which were that on 19th May 2017 Clarke attempted to rob Ashley Bird.

(d) Having an offensive weapon, contrary to section 1(1) of the Prevention of Crime Act 1954, the particulars of which were that on 19th May 2017, without lawful authority or reasonable excuse, Clarke had with him in a public place an offensive weapon, namely a hammer.

Thompson and Andrews together:

(e) Doing an act tending and intended to pervert of public justice, the particulars of which were that on 4th March 2017 they entered the home address of the Cain

family and made a series of threats towards the family which had a tendency to pervert the course of public justice in that they intended the Cain family to retract their allegations.

(f) Theft, contrary to section 1(1) of the Theft Act 1968, the particulars of which were that on 4th March 2017 Thompson and Andrews stole a Transition Mountain Bicycle and a Cube Mountain Bicycle belonging to Connor Cain.

Thompson alone:

(g) Having an offensive weapon, contrary to section 1 of the Prevention of Crime Act 1953, the particulars of which were that on 4th March 2017, without lawful authority or reasonable excuse, he had with him in a public place offensive weapons, namely a hammer and a machete.

(h) A number of summary only driving matters and handling stolen goods were committed for sentence.

Andrews alone:

(i) Having an offensive weapon, contrary to section 1 of the Prevention of Crime Act 1953, the particulars of which were that on 4th March 2017, without lawful authority or reasonable excuse, had with him in a public place offensive weapons, namely a hammer and a machete.

7. In respect of those offences the offenders were sentenced as follows:

Offence	Clarke	Thompson	Andrews
Kidnap	4 years 8 months	4 years 8 months	3 years 1 month
Blackmail	3 years 4 months (concurrent)	3 years 4 months (concurrent)	2 years 5 months (concurrent)
Attempted robbery	2 years 4 months (consecutive)	–	–
Having an offensive weapon	12 months (concurrent)	–	–
Perverting the course of justice	–	2 years 4 months (consecutive)	2 years 5 months (consecutive)
Theft	–	NSP	NSP
Having an offensive weapon	–	12 months (concurrent)	–
Handling stolen goods	–	4 months (concurrent)	–
Summary driving offences	–	NSP 6 penalty points	–
Having an offensive weapon	–	–	NSP
Total	7 years' detention	7 years' detention	5 years 6 months' detention

8. Thompson was also in breach of a suspended term of detention. The judge activated four months of that sentence and ordered it to run concurrently. A little later, at a "slip rule" hearing, the judge also imposed an appropriate disqualification and other sentences relating to the driving offences.

9. Given their ages at the time of the sentencing exercise, Clarke and Thomson received sentences of detention in a young offender institution. Andrews was sentenced to detention, pursuant to section 91 of the Powers of Criminal Courts (Sentencing) Act 2000.

The Facts:

Kidnap and Blackmail

10. We deal first with the kidnap and blackmail counts. On 21st January 2017, acting together, all three offenders kidnaped a 16 year old boy named Carl Cain. They did so because they were aware that his brother Connor had received a few thousand pounds in compensation following a road traffic accident. They intercepted Carl outside a food takeaway in the early evening and told him to get his brother to come to see them. Connor was 18 at the time. Carl said that was not possible because his mobile phone had run out of credit. Thompson ordered him to accompany them. They walked towards his home address. Carl was pushing a bicycle. He tried to run off, but the offenders stopped him. They threatened him with violence were he to try to run off again. He tried to escape by jumping on his bicycle, but the offenders dragged him and pulled him from it. He was then punched and kicked.

11. Thompson and Andrews dragged Carl along the street. He was taken to a wooded area near the estate in Manchester where he lived. From there, one of the offenders phoned Connor Cain and gave Carl the telephone so that he could explain that he had been kidnaped. The offenders misidentified themselves as two men well known on the estate for being particularly tough. That caused the Cain family to panic. The offenders told Connor that a ransom of £2,000 should be paid to secure Carl's release. They also spoke to Carl's mother who genuinely feared that her son would be harmed.

12. The family immediately contacted the police. They attended quickly and were present when the offenders next telephoned. Thompson said that Carl would be stabbed and killed if their demands were not met. He, in fact, put a knife to Carl's throat. Mrs Cain explained that the most she could find was £1400. The offenders indicated that that would be sufficient. They gave instructions about where the money should be taken. Carl's father left with the money and followed the directions that the offenders had given.

13. By that time, the offenders were worried that the Cain family might have alerted the police. As a result, they moved Carl to a different spot in woods further away from his home and then kept him there all night. They told him that if he were to say anything to the police, they would rape him and kill his parents.

14. At first light the police launched a manhunt. A police helicopter was deployed. When the offenders heard the helicopter, they disposed of the knife and machete that they had with them and once more moved Carl roughly back to where they had started the evening before in the woods near to his home. They told him to take off his clothes. He removed his top. They then tied his feet and hands with his shoelaces and left him.

15. Happily, and without difficulty, Carl was able to untie the shoelaces around his ankles. He ran to the nearby house of a friend, from where he was taken home. The ordeal had lasted in total about twelve hours.

16. The impact of the events we have described were such that the family felt unsafe on the

estate in Manchester and temporarily removed themselves to Scotland.

Perverting the course of justice and having offensive weapons

17. By 4th March 2017, the Cain family had returned from Scotland. On that date Carl was at home with his mother and father when two figures were spotted in their back garden. They were Thompson and Andrews. Carl's father ran towards the phone to call the police, but before he could do so he heard the sound of the kitchen window being smashed. The family ran upstairs. Both Carl and his mother were hysterical. They hid, whilst Mr Cain picked up a baseball bat and waited at the top of the stairs. Thompson was wearing an open ski mask and Andrews had his hood up. Thompson had a machete in one hand and a hammer in the other. He made a demand for money, which Carl's father rebuffed. Thompson started to ascend the stairs whilst Andrews remained at the bottom. That provided Mr Caine with an opportunity to swing at Thompson with the baseball bat. He made contact and that forced Thompson down the stairs. Both Thompson and Andrews went into the living room of the house, where they caused some damage. They then left and stole the two bicycles referred to in the theft count.

18. They were both originally charged with aggravated burglary to reflect the event which we have set out. It is clear from the transcript of the proceedings that the Crown was content to accept guilty pleas to the alternative counts which were added to the indictment, not least because there were obvious difficulties in proving the necessary intent – that is to say, an intent to steal, cause serious injury or rape – necessary to secure a conviction for aggravated burglary. The offenders accepted their aim was to discourage the family from giving evidence.

Handling stolen goods and the summary driving matters

19. Overnight on 4th/5th May 2017 a Yamaha motor cycle, worth about £1400, was stolen. On 6th May it was spotted by an off-duty police officer being ridden by Thompson.

Attempted robbery and having an offensive weapon

20. On 19th May 2017, at about 2.30am, a Mr Arem and his friend Mr Bird were driving along in a Mercedes car, eating pizza. They saw Clarke and another man running towards them shouting abuse. Mr Arem had to swerve to avoid them. He then drove home. He got out of the vehicle and left Mr Bird inside. Suddenly, both front doors of the car were opened. The other man who had been with Clarke appeared at the driver's door with an axe in his hand, and Clarke appeared on the other side with a hammer. Clarke indicated that they were after Mr Arem and it had nothing to do with Mr Bird. Nonetheless, Clarke aimed a number of blows at Mr Bird with the hammer, but fortunately Mr Bird was able to deflect them all .

21. The second man then got into the Mercedes and tried to start it. At the same time, Clarke attempted to get in through a passenger door. Mr Arem saw what was happening and ran from the house. Clarke started to swing the hammer at him. Both Clarke and the second man dropped their weapons and ran off. They stole a mobile phone which had been in the car.

Discussion

22. The offenders pleaded guilty to all the offences in circumstances which entitled them to a full discount of one-third.

23. Andrews had no previous convictions, cautions or reprimands.

24. The same was not true of the other two offenders. Clarke had fourteen previous convictions resulting from five court appearances. These included convictions for offences of possessing cannabis, shoplifting, having a bladed article in a public place, possessing an offensive weapon, criminal damage and battery. On 9th December 2016, Clarke had been made the subject of a youth rehabilitation order, with a number of requirements. That order lasted until 8th December 2017. It followed that all of the offences with which we are concerned were committed during the currency of that order.

25. Thompson had 42 convictions from 28 previous appearances. They included convictions for breaching the terms of an Anti-Social Behaviour Order, burglary, theft, affray, malicious wounding, battery, possessing offensive weapons, and possession of Class A and B drugs. On 5th January 2017, Thompson had received a community order for the offence of shoplifting. On 21st February 2017, that sentence was varied to a four week period of detention, suspended for twelve months. All the offences to which Thompson pleaded guilty were committed during the period of the community order or suspended sentence.

26. The offences had a profound impact upon the Cain family, as one would expect. There are deeply affecting victim personal statements from Carl, his brother Connor and from their parents which lay bare the nightmare they had endured. Mrs Cain has been treated for anxiety and depression, and Carl has suffered adverse psychological consequences.

27. The mitigation advanced on behalf of Clarke focused on his youth (we remind ourselves

that he was only a month beyond his 18th birthday at the time of the kidnapping offence) and his immaturity, which was referred to in the pre-sentence report.

28. So far as Thompson is concerned, the points advanced in mitigation, apart from his relative youth, may be summarised as follows. He was brought up in very troubled circumstances with almost no parental boundaries. He was a wild child. He had started to take drugs when he was aged only 11 or 12. He progressed from cannabis to harder drugs. His father was largely absent, at least from his immediate day-to-day care, but kept in touch throughout his childhood. Four years prior to the offending, Thompson's father committed suicide. Thompson was aged only 15 at that time. His mother had long-standing and prominent mental health problems. In consequence, it was his sister who provided the familial mainstay. His antecedent record shows that he was effectively left to run amuck in his formative years. However, since 2013 the pattern of offending had been entirely different, until the offences with which we are concerned were committed. His offending was limited to minor shoplifting (at least minor as compared with what went before and what followed).

29. The reason that Thompson appeared to be turning a corner was that he had formed a serious relationship with a young woman. She placed before the sentencing judge a detailed written explanation of all of the difficulties with which Thompson had battled during his childhood and adolescent years. Then a few months before this offending, Thompson's sister committed suicide. In short, he was completely overwhelmed by the events which had occurred and once more went off the rails. Thompson himself attempted suicide and was hospitalised. He was then referred to psychiatric services. He suffers from epilepsy and depression. Thompson has demonstrated real remorse as a result of this offending, as have the other two offenders.

30. So far as Andrews is concerned, he too had been brought up in deeply dysfunctional and tragic circumstances. His medical records show that he was out of control as a young boy. The first medical intervention occurred when he was only 6 years old. He was a problem pupil and was excluded from school from time to time. There has been a recent diagnosis of adult ADHD. He was brought up by his mother who herself was troubled and seriously ill.

31. In April 2016 (when he was 16, some nine months before the offending with which we are concerned), Andrews' mother committed suicide, having been in pain for years. He reacted badly and received a provisional diagnosis of post-traumatic stress disorder. He suffered from depression, anxiety, stress and insomnia, for which medication was provided. We note, additionally, that he was himself the victim of a very serious assault in 2015. He has been assessed as being at risk of suicide.

32. On behalf of the Attorney General, Mr Jarvis submits that the sentences were unduly lenient on the following bases:

(1) The sentence for kidnap should have been much higher for all the offenders, having regard to recent authority. He refers in particular to *R v Warren* [2016] EWCA Crim 1344; *Attorney General's Reference No 102 and 103 of 2014* [2014] EWCA Crim 2922; and *Attorney General's Reference No 92 of 2014* [2014] EWCA Crim 2713. The overarching submission advanced by Mr Jarvis in this regard is that the starting point for the kidnapping offence alone should have been in double figures, before affording reduction for youth, other

mitigation and for the guilty pleas.

(2) Clarke and Thompson should have received significantly higher sentences than Andrews for the kidnap offence, because they were already subject to court orders.

(3) Clarke's separate conviction for attempted robbery should have attracted a longer, significant consecutive sentence.

(4) The separate conviction of Thompson and Andrews for perverting the course of justice in the circumstances we have described should have resulted in a significant consecutive sentence – much longer than that in fact imposed by the judge.

(5) Mr Jarvis submits that there are parallels, given the circumstances between that offending and aggravated burglary. Accordingly, the guideline on aggravated burglary should have been more firmly in the mind of the judge. His submission is that the events that occurred on that occasion should themselves have attracted a starting point of ten years or more.

(6) Whilst totality was properly taken into account by the judge, significantly higher sentences were warranted.

(7) Although Andrews had the benefit of the youth guideline, and whilst the

youth of the other two offenders was a factor that the judge could properly take into account, the circumstances of the offending in these cases was such that only a very modest reduction in what otherwise would be an appropriate sentence for a mature adult should have been allowed.

33. On behalf of the offenders, it is submitted that the judge carefully evaluated all of the relevant factors. Indeed, it is not suggested on behalf of the Attorney General that the judge failed to take account of important factors, or that she took account of factors which should have been left out of account. In the round, it is submitted on behalf of the offenders that the sentences certainly cannot be stigmatised as unduly lenient – that is to say, outside the ranges of sentence appropriate, given the circumstances of the offending and these offenders. Additionally, each of the offenders, through their counsel, reminds us of the mitigating features that apply in his case. Moreover, Miss Duckworth, on behalf of Andrews, submits that his sentence should have been significantly lower than that imposed on either of his co-accused to reflect the fact that he was 17, rather than 18 or 19 years of age. In oral argument she developed what might be described as a disparity argument. She also reminded us that Andrews had been subject to a curfew, albeit one that did not qualify for the statutory reduction in his sentence. She submits that it is, nonetheless, a factor which should bear on the totality of sentence in his case.

34. The sentencing hearing commenced on Friday 20th October and lasted two and three-quarter hours. During that hearing, with the assistance of counsel, the judge explored carefully all of the circumstances surrounding this offending, together with the mitigation available. There was a significant amount of written material placed before the judge. It included pre-

sentence reports, a very detailed psychological report on Andrews and a letter from Thompson, together with that from his girlfriend, to which we have already referred. The judge reflected on the relevant sentences over the weekend and sentenced the offenders on Monday afternoon.

35. The starting points implicit in the overall sentences imposed by the judge, before discount for the guilty pleas, but after taking account of all other mitigation, were as follows: Clarke, ten and a half years' detention; Thompson, ten and a half years' detention; and Andrews, eight years and three months' detention. Although the judge did not indicate where she had started before taking account of mitigation, including youth and immaturity – and in Andrews' case the distinct guideline relating to young offenders – it is apparent that were these offenders mature adults, they would have received sentences which would have been very much longer. There was explicit reference to the guideline relating to young offenders in the course of argument before the judge.

36. The various cases to which Mr Jarvis has drawn our attention undoubtedly demonstrate that lengthy sentences will be imposed in cases of kidnapping, especially where aggravating features are present. There is no guideline for kidnapping. As was emphasised in the cited cases, the circumstances of such offending can be very varied. We accept that the additional offences committed by these offenders were in themselves serious. That said, we do not consider that close comparison with the facts in any of the three cases with the facts of the offences with which we are concerned would provide any useful assistance.

37. We have noted that Mr Jarvis submits that the offending which surrounded the offence of perverting the course of justice had similarities with aggravated burglary. So much flows from

the fact that aggravated burglary was originally charged. We have referred already to the circumstances which led to the alternative counts being preferred. Mr Jarvis recognises that the judge, not only in the course of argument with counsel but also in the course of her sentencing remarks, herself drew the parallel with aggravated burglary. He submits that she should have explicitly taken account of and referred to the definitive guideline on aggravated burglary, albeit, as we remind ourselves, that it was not submitted to her by the prosecution at the time that she should do so. Mr Jarvis submits that section 125 of the Coroners and Justice Act 2009 required the judge to consider that guideline. Section 125(1) is in these terms:

"Every court –

- (a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case, and
- (b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function,

unless the court is satisfied that it would be contrary to the interests of justice to do so."

Mr Jarvis submits that the aggravated burglary guideline was "relevant" to the offending because of the coincidence of at least many of the factual circumstances.

38. We do not accept the submission that in using the word "relevant" Parliament intended to impose upon a judge a statutory duty to have regard to any definitive guideline from the Sentencing Council which might be useful in helping to determine the appropriate sentence for

an offence for which no guideline exists. Put differently, we do not consider that a judge has a duty to consider guidelines to help with range finding in a case for which no guideline exists. The word "relevant" in this context is to be read as referring to a guideline that applies to the offence or to the circumstances of the offender. By way of example, if a youth is to be sentenced for robbery and has pleaded guilty at any stage, then at least three guidelines will obviously be in play, perhaps together with others which deal with general matters. That said, the judge plainly had in mind that the offending shared many of the indicia of aggravated burglary, and she took that into account.

39. We do not accept the submission advanced on behalf of the Attorney General that the circumstances that underpin this case should lead to the conclusion that any notional reduction in the sentences to reflect the youth of Andrews, or the relative youth of both Clarke and Thompson, should have been minimal. Such a feature may be a potent factor in determining the eventual sentence. It is quite clear from the totality of the hearing and then the sentencing remarks that this experienced judge was sensitive to the questions of youth and immaturity.

40. The underlying question for us, when considering the application made on behalf of the Attorney General, is to determine whether the sentences imposed "fell outside the range of sentences which the judge, applying her mind to all relevant factors, could reasonably consider appropriate". That is how the matter was put by Lord Lane CJ in *Attorney General's Reference No 4 of 1989* (1989) 11 Cr App R(S) 517, at 521. Whilst we recognise that a different judge may have imposed longer sentences in this case, given the youth of the offenders and the mitigation available to them, we do not consider that the sentences can be viewed as unduly lenient by reference to that test.

41. For these reasons we refuse leave.

42. Moreover, we consider that the sentence imposed on Andrews cannot be attacked on the ground that it is manifestly excessive. True it is that a different judge might have drawn a greater distinction between Andrews and the other two offenders. But we are unable to accept the submission that there is any objectionable disparity in this case. Furthermore, we do not consider that the point advanced by reference to the non-qualifying curfew carries Andrews anywhere in that argument.

43. For these reasons we refuse him leave to appeal against sentence.