

# DISTRICT COURT OF QUEENSLAND

CITATION: *R v Cane* [2022] QDC 177

PARTIES: **THE QUEEN**  
v  
**MARK CANE**

FILE NO: 555/20; 72/22

DIVISION: Criminal

PROCEEDING: Sentence

ORIGINATING COURT: District Court at Cairns

DELIVERED ON: 30 May 2022 *ex tempore*

DELIVERED AT: Cairns

HEARING DATE: 30 May 2022

JUDGE: Fantin DCJ

ORDER: **The maximum penalty for the offence is 14 years' imprisonment.**

CATCHWORDS: CRIMINAL LAW – SENTENCE – KIDNAPPING FOR RANSOM – MAXIMUM PENALTY – where defendant pleaded guilty to one count of kidnapping for ransom – whether the maximum penalty was 10 years' imprisonment or 14 years' imprisonment – whether the person kidnapped was 'unconditionally set at liberty'.

LEGISLATION: *Criminal Code Act 1899* (Qld) s 354A, s 355

CASES: *R v Butler and Steltman* (QDC, Kimmins DCJ, 16 December 1994, unreported)  
*R v Carrington and Long* (QCCA, CA Nos 329 and 352 of 1985, 3 April 1985, unreported)  
*R v Awang* [2004] 2 Qd R 672

COUNSEL: Hancock M (solicitor) for the Crown.  
Jacobs J for the defendant.

SOLICITORS: Office of the Director of Public Prosecutions for the Crown.  
Hartley Whitla Lawyers for the defendant.

[1] This is an edited version of an *ex tempore* ruling made during the course of sentencing the defendant, following his plea of guilty.

- [2] An issue arose during sentencing submissions as to the correct maximum penalty for the offence of kidnapping for ransom, pursuant to subsections 354A(1)(a), (2) and (3) of the *Criminal Code*.
- [3] I heard oral submissions from each of the legal representatives. I was unassisted by written submissions or reference to relevant authorities.
- [4] I have considered the commentary in Carter's *Criminal Law of Queensland* with respect to section 354A, in particular, subsection (3). That commentary refers to two decisions, one of which precedes the relevant version of the section and discusses an earlier version of the section. The other decision, a single judge unreported decision from 1994, I was told was not available and could not be provided.
- [5] After hearing oral submissions, I stood the matter down to enable my associate to make enquiries of the Supreme Court library. I am satisfied, on the basis of those enquiries, that no other decisions considering the meaning of the phrase "unconditionally set at liberty" in section 354A(3) were able to be located, nor does there appear to be any other commentary about the issue.
- [6] The defendant is charged with a single count of kidnapping for ransom pursuant to that section.
- [7] The sentence is proceeding on the basis of an agreed statement of facts, which was not challenged by the Defence and was tendered by the Crown without objection.
- [8] The issue with respect to maximum penalty is that the Crown submits (and the statement of facts states) that the maximum penalty for the offence pursuant to s 354A(2) is 14 years imprisonment.
- [9] Defence counsel submitted that this was a case where subsection (3) of s 354A applied. That subsection provides:
- If the person kidnapped has been unconditionally set at liberty without such person having suffered any grievous bodily harm, the offender is liable to imprisonment for 10 years.*
- [10] In this case, although the victim suffered injuries, it is not contended that they amounted to grievous bodily harm. Therefore, the only question is whether the person kidnapped was "unconditionally set at liberty" within the meaning of that subsection.
- [11] Without repeating the detail of the lengthy statement of facts, the circumstances of the offence are these. The defendant, in company with two other people, detained the victim (a younger man) and, over the course of 10 or 11 hours, threatened and assaulted him in order to have the victim repay a debt he owed to the defendant. The course of conduct was protracted. The defendant was the instigator.
- [12] The victim was initially detained by being told to get into a car driven by the defendant with two co-offenders in the car. That, then, commenced a series of events which involved the victim being repeatedly assaulted by the defendant and at least one of the co-offenders. When it became clear that the victim did not have the money to repay the debt, he offered to see others who owed him money.

- [13] Over the course of the period in which the offence was carried out, the defendant told the victim that if he did not obtain the money or if he tried to get away, the defendant would go to the victim's mother's house and get the money from her. The defendant also made at least two threats to the victim, which I am satisfied were threats to kill, albeit those words were not expressly said.
- [14] The first of those is recorded at paragraph 6 where the defendant told the victim:
- You're not going in the boot. You're going to go in the ground.*
- [15] The second reference is at paragraph 13, where the defendant and the co-offender discussed "knocking" the victim, as well as putting him into a car and setting it alight. The co-offender also threatened to pour boiling water on the victim.
- [16] At different times the victim telephoned his mother and his brother to try to obtain money from them to pay the debt, explaining to them that he was "pretty banged up". While on the telephone to those people he was assaulted, and those assaults were audible to those on the call: see paragraph 15.
- [17] The victim's brother agreed to meet the defendant and the others at a place where he would give the defendant an amount of money. Further threats were made by the defendant to the victim, including to break the victim's legs if payment was not made: see paragraph 17.
- [18] When there was a delay in the victim's brother making the arrangements to provide the money, the defendant continued to assault the victim: see paragraph 18. By the time another person arrived, she described the appearance of the victim as "mangled" – see paragraph 20 – and "as if his eye was popping out of his head".
- [19] She was procured to drive a car. The defendant was in the car, together with a co-offender. The defendant was in the front passenger seat. The victim was in the rear with the co-offender.
- [20] Arrangements were made between the victim and his brother to meet his brother at a certain location where the brother was to be waiting with cash. The purpose of going to that location was clearly to get cash. Unbeknownst to the defendant and the co-offenders, the brother and mother had contacted the police who arranged to be present at that location
- [21] Eventually, after some confusion about the location of the meeting point, the female driver stopped the car, got out, and left. One of the co-offenders got out of the car to find the victim's brother. The victim got out of the car while on the phone to his brother, trying to find him. The defendant told the victim to get the money from his brother and meet him (the defendant) at McDonald's: see paragraph 22.
- [22] The victim located his brother. Police then intervened and brought the victim to hospital for treatment. The victim suffered very extensive injuries, including fractures to his right eye socket, right cheek, nose, and jaw. It is not suggested that those injuries amounted to grievous bodily harm as defined.
- [23] Defence counsel submits that the facts satisfy the expression "unconditionally set at liberty" in s 354A(3). He submits that by the defendant permitting the victim to get out of the car without further threat or violence, the victim was thereby unconditionally set at liberty.

- [24] The commentary in Carter's refers to the decision of *R v Butler and Steltman* (QDC, Kimmins DCJ, 16 December 1994, unreported) in which the sentencing Judge ruled that the amended section required some conduct on the part of the kidnapper to set the victim free. Police intervention to free a victim who had not suffered grievous bodily harm did not allow a reduction of the maximum penalty.
- [25] Defence counsel conceded that when the defendant released the victim from the car, he may well have expected the victim to meet him with the money later, but submitted that it was not a condition of his release. He emphasised that no threat was made to the victim on his release.
- [26] The Crown submitted that the victim's release was clearly subject to two conditions: first, that the victim get the money from his brother, and second, that he meet the defendant at McDonald's and hand over the money to him. The Crown emphasised that the release occurred in circumstances where police were then present with the brother and were able to, in effect, intervene or rescue the victim.
- [27] I have also considered the decision of *R v Carrington and Long* (QCCA, CA Nos 329 and 352 of 1985, 3 April 1985, unreported), a copy of which was made available by the Supreme Court library. However, as was accepted by counsel, that decision involved an earlier version of the section. As a consequence of that decision, the section was later amended by omitting from the third paragraph the words "set at liberty in any manner whatsoever", and substituting the words "unconditionally set at liberty".
- [28] It is accepted that the setting at liberty must be caused by the defendant.
- [29] Although it appears that expression "unconditionally set at liberty" has not been the subject of other judicial consideration, other relevant terms have been. In *R v Awang* [2004] QCA 152; [2004] 2 Qd R 672 the Court of Appeal considered section 355 of the *Criminal Code*, the offence of deprivation of liberty, which includes the expression "any person who unlawfully confines or detains another". The court there held (Williams JA, with McPherson JA agreeing) that the terms "detains" and "liberty" should be given their ordinary and natural meaning.
- [30] The Court, at paragraph 21, referred to the meaning of "liberty" found in the Oxford English Dictionary as:
- The condition of being able to act in any desired way without restraint; power to do as one likes.*
- [31] It referred to "detain" as having a variety of meanings, including "keep in confinement", "hold back, delay, stop".
- [32] At paragraph 22, the Court observed that it will always be a question of fact whether there has been conduct on the part of an accused which deprives another of that person's liberty.
- [33] Similarly, it is a question of fact in the circumstances of this case whether what occurred when the victim left the car amounted to having been unconditionally set at liberty within the meaning of subsection (3) of section 354A.
- [34] Giving those words their ordinary meaning, "unconditionally" is defined in the Macquarie Dictionary as: "Not limited by conditions; absolute".

- [35] A condition, in this context, includes something demanded or required as an essential part of an agreement. Put another way, was the victim's release contingent upon something?
- [36] "Liberty" is defined in the Macquarie Dictionary relevantly as:
- Freedom from control, interference, obligation, restriction, hampering conditions etc; power or right of doing, thinking, speaking, etc, according to choice.*
- [37] In this case, I am comfortably satisfied to the requisite standard of proof on the basis of the agreed facts that the defendant did **not** unconditionally set the victim at liberty.
- [38] In allowing the victim to leave the car at the relevant time, the defendant did so on not only one, but two, conditions. That is, that the victim get the money demanded from his brother, and that he meet the defendant at another location to hand over the money. The defendant did not need to assault the victim again, nor did he need to make an express threat to impose those conditions. Because his conduct had to be seen, not in isolation in the circumstances set out in paragraph 22 of the statement of facts, but in the overall context of what had occurred over the previous 10 or 11 hours.
- [39] When the defendant told the victim to get the money from his brother and meet him at McDonald's, he was permitting the victim to leave, having beaten and threatened him over a lengthy period of time, on condition or under a sense of obligation that he had to then obtain the money from his brother and provide it to the defendant.
- [40] Those were matters demanded or required as an essential part of the agreement to release him.
- [41] On no analysis was his release absolute and free of control or obligation by the defendant.
- [42] I am also satisfied that it was ultimately the police presence with the brother that set the victim at liberty in the true sense; that is, absolute liberty. Therefore, it was also not an unconditional setting at liberty *by the defendant*.
- [43] Subsection (3) of section 354A does not apply. The maximum penalty for the offence is 14 years imprisonment.