[2019 Gib LR 122]

BACARISA and MENDEZ v. R.

COURT OF APPEAL (Kay, P., Rimer and Elias, JJ.A.): May 7th, 2019

Sentencing—kidnapping—sentence—victim forced into vehicle and taken to property where intimidated and assaulted concerning drugs debt—second kidnap offence interrupted by police—sentence of first appellant (also convicted of robbery) reduced on appeal from 8 years' imprisonment to 6; second appellant's sentence reduced from 6 years to 4

The appellants were charged with kidnapping.

The appellant Bacarisa was found guilty in the Supreme Court of one count of robbery. He confronted the victim, who allegedly owed Bacarisa £300 for drugs with which he had been supplied, assaulted him and stole £30 in cash, a pair of sunglasses and a mobile phone. Both appellants were found guilty of two counts of kidnapping against the same victim. In the first kidnapping, the appellants forced the victim into a car and drove him to a property where they intimidated and assaulted him. The victim estimated that he was detained for between 30 minutes and an hour. The drugs debt remained unpaid. In the second kidnapping, the victim was again forced into the appellants' car and intimidated, but fortuitously the offence was stopped by the police. Parts of the second kidnapping were captured on CCTV.

The victim was a reluctant witness. He made an initial witness statement, describing all three incidents, but subsequently signed a negative statement exculpating the appellants and stating that he did not want the case to proceed. When giving evidence at trial, the victim had been permitted to refresh his memory by reading his first witness statement. In his evidence-in-chief he said the appellants were his friends and that he

was not afraid of them, but also that he had been forced against his will into the car by the appellants, and that he had been assaulted in the car and in the property to which they took him. Subsequently, under cross-examination, the victim changed his account and described the events in a way which did not amount to criminal offences. In re-examination, the Crown made a hostile witness application, which was granted.

Two Spanish men had been passengers in the car on the occasion of the second kidnapping. They had given witness statements describing the second kidnapping which were largely consistent with the victim's account. At the time of the trial they were in Spain, and attempts to contact them had been unsuccessful. The judge granted the Crown's application to read their statements.

Bacarisa was sentenced to 8 years' imprisonment and Mendez was sentenced to 6 years.

The appellants appealed against their convictions and, if unsuccessful, their sentences. The main grounds of the appeal against their convictions were complaints as to the victim's evidence and the evidence of two passengers who had been in the car on the occasion of the second kidnapping. In respect of the victim's evidence they submitted that (a) when the victim was not coming up to proof in chief, the Crown should have made a hostile witness application at that stage rather than showing the victim his original witness statement to refresh his memory; (b) having not done so, the Crown should not have cross-examined its own witness by way of a series of manifestly leading questions; and (c) the judge should not have permitted the jury to retire with copies of the victim's original witness statement. The appellants were very critical of the judge's ruling permitting the Crown to read the Spanish witnesses' statements, submitting that (a) the Crown's application had been made too late; (b) formal requirements had not been complied with; (c) a nefarious deal between the Spanish witnesses and the police was a possibility; (d) the Crown had not satisfied the "not reasonably practicable" test in s.391(2)(c) of the Criminal Procedure and Evidence Act; and (e) the defence had been prejudiced by the late application to read the statements.

Held, dismissing the appeal against conviction; allowing the appeal against sentence:

(1) The court rejected the grounds of appeal in relation to the victim's evidence. It had been appropriate for the victim to have been permitted to read his witness statement to refresh his memory. The result was that the victim gave evidence broadly consistent with his statement. There was nothing in the complaint that the Crown should have made a hostile witness application during the victim's evidence-in-chief. Although he demonstrated a degree of reticence, at that stage he had not shown animus against the Crown. The complaint that the advocate for the Crown should not have asked the victim a series of leading questions-in-chief had more substance. At that stage the victim was not treated as hostile and there was no proper basis for cross-examining him in that manner. However it did

not render the convictions unsafe or unsatisfactory or amount to a material irregularity. When the leading questions were asked, the victim had already come up to proof in relation to the three incidents. The court did not condone that part of the questioning but it had not materially disadvantaged the appellants. It would have been better if the judge had not permitted the jury to retire with copies of the victim's first witness statement so as to avoid any risk of their treating it as evidence of greater value because it was contained in a formal document. The court was, however, satisfied that the course taken had not undermined the safety of the convictions. Even if it amounted to a material irregularity, no miscarriage of justice had been caused (paras. 14–20).

(2) The judge's decision to grant the Crown's application to read the statements of the Spanish witnesses could not be criticized. There was nothing to suggest that the judge took into account anything which should not have been taken into account, failed to take into account anything which required her consideration or reached a conclusion in relation to temporal or formal requirements that was not open to her. She had carefully considered whether it was not reasonably practicable to ensure the attendance at trial of the Spanish witnesses and was convinced that they were being deliberately evasive. The criticism of this aspect of her decision was unsustainable. The court considered that the prejudice in the conduct of the defence had been greatly overstated. The evidence of the Spanish witnesses concerned an incident that was also the subject of evidence from the victim and the police officers at the scene, who could be cross-examined. The incident was also partially captured on CCTV. Finally, in her summing-up the judge gave the jury adequate directions about the limitations of disputed evidence being given in this way. The appellants' appeals against their convictions would be dismissed (paras. 30–34).

(3) The appellants' appeals against their sentences would be allowed. The sentences would be quashed and the court would substitute a sentence of 6 years' imprisonment in the case of Bacarisa and 4 years in the case of Mendez. The court considered that the judge fell into error in viewing the kidnappings as higher up the scale of such offences than they actually were. The court accepted that the first kidnapping was a terrifying ordeal for the victim, and that he must have feared the second would have become worse before the police intervened. There was also an element of campaign in this case. However, the sentences imposed were too high, given the nature of the offences (paras. 45–47).

Cases cited:

(1) *R.* v. *Gibney*, [2015] EWCA Crim 2713; (2015), 1 Cr. App. R. (S.) 44, considered.

(2) *R.* v. *Spence* (1983), 5 Cr. App. R. (S.) 413; [1984] Crim. L.R. 372, considered.

Legislation construed:
Criminal Procedure and Evidence Act 2011, s.389: The relevant terms of this section are set out at para. 22.
s.391(1): The relevant terms of this sub-section are set out at para. 24.
s.391(2): The relevant terms of this sub-section are set out at para. 25.
s.414: The relevant terms of this section are set out at para. 17.

Criminal Procedure Rules 2015 (S.I. 2015/1490), r.20.2:
"(3) A prosecutor who wants to introduce such evidence must serve the notice not more than—
. . .
(b) 14 days after the defendant pleads not guilty, in the Crown Court."
r.20.5: "(1) The court may—
(a) shorten or extend (even after it has expired) a time limit under this Part;
. . .
(c) dispense with the requirement for notice to introduce hearsay evidence."

C. Finch for Bacarisa;
I. Watts for Mendez;
R. Rhoda, *Q.C.* and *I. Armstrong* for the Crown.

1 **KAY, P.,** delivering the judgment of the court: In August 2018 the appellants, Albert Manuel Bacarisa and Manuel Mendez, were tried on indictment in the Supreme Court before Ramagge Prescott, J. ("the judge") and a jury. The indictment contained three counts. The first in time charged Bacarisa alone with robbery of Daniel Taylor ("DT") in May 2016. The remaining and more serious counts charged both appellants with kidnapping DT, the two separate incidents having occurred on a date in August and September 14th, 2016. On August 6th, 2018, the jury returned verdicts of guilty on all three counts. On September 19th, Bacarisa was sentenced to eight years' imprisonment and Mendez to six years. They now appeal against their convictions and, if unsuccessful, their sentences.

The facts

2 The background to the case is that DT owed Bacarisa £300 for drugs with which he had been supplied. Bacarisa was aggrieved by the lack of repayment. In May 2016, Bacarisa confronted DT in Ocean Village. He punched and slapped him in the face and stole £30 in cash, a pair of sunglasses and a mobile phone from him. In August, the first of the two kidnappings occurred. The judge described it as the major incident. In her sentencing remarks, she said:

> "The Defendants had been up at the Alameda Gardens looking for the victim. They approached a Mr Green and by a process of force and threats they made Mr Green tell them where the victim was and drive them down to the victim's house. There they bundled the victim into the car, made Mr Green drive them to Flat Bastion Road where they got out of the car, entered the premises and intimidated and assaulted the victim . . . the length of the detention was, to the best of the victim's estimation, somewhere between half an hour to one hour."

The debt remained unpaid.

3 She described the second kidnapping in these words:

> ". . . this seems to have been opportunistic. Both Defendants spotted the victim near the town area. They bundled him into the car, they intimidated him but they were fortuitously stopped by the police who had spotted the incident and approached the car a short distance after which they rescued the victim."

Parts of the second kidnapping were caught on CCTV.

Appeals against conviction

4 There are two principal grounds of appeal against conviction. They relate to (1) the evidence of DT, and (2) the evidence of two passengers in the rear of the car on the occasion of the second kidnapping. They have been referred to as "the Spanish witnesses." Other grounds of appeal have been advanced, in particular by Mr. Watts on behalf of Mr. Mendez, but he realistically accepts that, standing alone, they would not enable his appeal to succeed.

1. *The evidence of DT*

5 We have the transcript of DT's evidence on the first day of the trial. His evidence continued into the second day when, unfortunately, the recording system malfunctioned and we have only seen a transcription of the judge's notes of the remainder of his evidence. On any view, DT was a reluctant witness who manifested fear. He had made his initial witness statement on September 14th, 2016 in the immediate aftermath of the second kidnapping. It described all three incidents. However, on October 24th, 2016 he signed what has been described as a "negative statement." In it, he said:

> "I felt under pressure when I made the original allegations . . . and it is likely that I overstated the circumstances as a result of that pressure. The allegations of kidnapping and robbery are exaggerated and do not reflect what occurred, which was simply me paying back part of a debt I owed."

6 He added further words exculpating or minimizing the behaviour of the appellants, adding that he did not wish the case to proceed or to give evidence.

7 On March 30th, 2017, DT made another formal witness statement to the police, explaining the circumstances in which he had come to make the negative statement. He said that he had been approached by Bacarisa's brother Karl who had assured him that the appellants (who were remanded in custody at the time) would not harm him when they were released. Moreover, a lawyer acting for the appellants had drafted a statement for him to sign. This was to become the negative statement. Karl also promised to pay off the £300 debt and to attend to other matters for DT. DT later went to his own lawyer's office where he signed the negative statement in the presence of Karl and another member of the Bacarisa family. In his statement of March 30th, 2017, DT added:

> "I signed the letter because I did not want any problems and if [the appellants] stayed in prison, when they got out they may have come for me . . . Karl Bacarisa said to me that Albert . . . was really sorry for what he did."

8 Although DT was to be the central witness for the Crown, it is plain from this history that his evidence would be unpredictable. This was borne out by what happened at trial. The transcript of his evidence-in-chief demonstrates that he had decided on a policy of maximum reticence. As soon as Mr. Rhoda, Q.C. asked him about the events, he said he was having difficulty in remembering them. The judge permitted him to read his first witness statement to himself to refresh his memory. Having done so, he proceeded to give answers to Mr. Rhoda's questions which amounted to a hesitant, minimalist description of the three offences. However, towards the end of his examination-in-chief, Mr. Rhoda asked: "Are you afraid of Mr. Bacarisa and Mr. Mendez?" DT answered that he was not, adding: "they're my friends . . . it's not like a kidnap."

9 This led to the following exchanges which have attracted fierce criticism from counsel for the appellants:

> "MR. RHODA: Mr. Taylor, are you trying to have it both ways?
>
> DT: No.
>
> MR. RHODA: When you got into the car on the 14th of September . . . you were forced into the car, weren't you?
>
> DT: Yes.
>
> MR. RHODA: Yes. You hadn't wanted to go?
>
> DT: No.
>
> MR. RHODA: This was against your will.

DT: Yes.

MR. RHODA: Let me tell you this: that is kidnapping. And you were beaten, you were hit once you were in the car. When you went to Flat Bastion Road, had you wanted to go to Flat Bastion Road?

DT: Of course not.

MR. RHODA: No. You were put into the car and taken there, weren't you?

DT: Yes.

MR. RHODA: And once you got there you were beaten.

DT: Yes.

Mr. Rhoda: And when Mr. Bacarisa slapped you on the 1st of June and took your money and your phone and everything, you wouldn't have wanted to give it to him . . .?

DT: Mmm.

MR. RHODA: Sorry?

DT: Yes, yes.

MR. RHODA: Yes you wanted to or you didn't want to?

DT: Ah no, no I didn't want to.

MR. RHODA: Yes. He took it by force, didn't he?

DT: Yes."

10 The evidence-in-chief concluded with some questions and answers about the negative statement. When asked why he had signed it, DT said: "Because they were going to come for me." Soon after that, the judge adjourned for the day because DT had become too unwell for cross-examination.

11 When cross-examination took place on the following day, in answer to Mr. Miles (who was then representing Mr. Bacarisa) and Mr. Watts, DT changed his account and described the three events in a way which did not amount to criminal offences. He also said that the police had harassed him into giving an exaggerated account.

12 Early in Mr. Rhoda's re-examination, he made a hostile witness application which the judge granted. Cross-examined by Mr. Rhoda, DT said that what he had said in his first witness statement and in-chief was true and "Yes, it's true, I am frightened of these people."

13 Counsel for the appellants advance essentially three complaints about the way in which DT's evidence emerged and was treated. They are: (i) that when he was not coming up to proof in chief, the Crown ought to have made a hostile witness application at that stage, rather than resort to showing the witness his original witness statement as a memory-refreshing exercise; (ii) having not made a hostile witness application at that stage, Mr. Rhoda ought not to have cross-examined his own witness by way of a series of manifestly leading questions; and (iii) the judge ought not to have permitted the jury to retire with copies of DT's original witness statement. We now turn to these complaints.

(i) *The approach to DT's evidence-in-chief*

14 We have no doubt that, when DT was permitted to read his witness statement to himself as a memory-refreshing document, it was the appropriate course for the Crown and the judge to take. He was giving incomplete answers to questions and, when asked if he was having difficulty remembering, he said: "Kind of, yes, because it happened a long time ago." Mr. Rhoda then laid the ground for resort to the witness statement in a series of conventional, unobjectionable questions. Indeed, neither defence counsel raised any objection. The result was that DT then gave evidence broadly consistent with his statement. There is nothing in the complaint that the Crown ought to have made a hostile witness application during his evidence-in-chief. Whilst he had demonstrated a degree of reticence, at that stage he had not manifested animus against the Crown.

(ii) *The leading questions*

15 The second complaint—that Mr. Rhoda ought not to have asked DT a series of grossly leading questions in chief—has more substance. We agree that, at that stage, when the witness was not being treated as hostile, there was no proper basis for cross-examining him in that way. The questions ought not to have been asked; the defence could have objected (but did not); and, with or without a defence objection, the judge ought to have intervened. The question, however, is whether all this is such as to render the convictions unsafe or unsatisfactory or to amount to a material irregularity. In our judgment, it is not. It is significant that, at the time when the series of leading questions was asked, DT had already come up to proof in relation to the three incidents, albeit after reading his witness statement as a memory-refreshing document. Also, with the benefit of hindsight, we can assess the significance of the leading questions in the context of the trial as a whole. It is now clear that, if Mr. Rhoda had not asked the questions at that stage, he would have done so in re-examination. By then, DT had contradicted and undermined his evidence-in-chief when cross-examined on behalf of the appellants. The

eventual hostile witness application had become inevitable and irresistible and cross-examination, including leading questions, by Mr. Rhoda was bound to ensue. It follows that, while we do not condone the exuberance of Mr. Rhoda towards the end of his examination-in-chief, in truth it did not materially disadvantage the appellants.

(iii) *DT's witness statement given to the jury*

16 We turn to the complaint that the judge ought not to have allowed the jury to take copies of DT's first witness statement with them in retirement. Our assessment of this development is to some extent hampered by the fact that there is no transcript of the exchanges between counsel and the judge on the issue. However, it seems not to be disputed that defence counsel objected and also submitted that if, contrary to their objection, the witness statement was to be entrusted to the jury, the negative statement and the later witness statement ought to be entrusted to them as well. It seems that the judge rejected both submissions.

17 We have been referred to various provisions of the Criminal Procedure and Evidence Act 2011. We doubt that any of them was enacted in anticipation of circumstances such as these, where the witness statement was deployed first as a memory-refreshing document but, later, as a tool for cross-examination of a hostile witness. On any view, to entrust to a jury copies of a pre-trial statement of a witness is not usual. It is exceptional. This is clear from s.414, which provides:

> "414. If on a trial before a judge and jury for an offence—
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> (a) a statement made in a document is admitted in evidence under section 394 or 397; and
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> (b) the document or a copy of it is produced as an exhibit,
>
> the exhibit must not accompany the jury when they retire to consider their verdict unless—
>
> (c) the court considers it appropriate; or
>
> (d) all the parties to the proceedings agree that it should accompany the jury."

18 It is difficult to second-guess the judge's thinking because there was no formal ruling on the issue. However, it seems to us that the likely explanation is that, in re-examination, DT effectively asserted that the contents of the witness statement were all true. This is plain from the judge's note. It would have been permissible for Mr. Rhoda to have taken the witness through the statement line by line at that point but Mr. Rhoda asserts (and has not been contradicted) that, by that time, DT was in no fit state to cope with such an exercise and needed to conclude his evidence as soon as possible. In these circumstances, the judge may have thought that

permitting the jury to retire with copies of the statement was an effective way of communicating to them the full extent of what DT had adopted. In the event, in her summing-up she was at pains to tell the jury that it was very important that they did not give the statement undue importance. She also reminded them that the statement was completely at variance with what DT had said in cross-examination and it was for them to decide which version was true.

19 For our part, we think that it would have been better if the judge had not permitted the jury to retire with copies of the statement so as to avoid all risk of their treating it as evidence of greater value because it was contained in a formal document. However, we are satisfied that the course she took was not such as to undermine the safety of the convictions. Even if it amounted to a material irregularity (and, without knowing precisely what the judge's reasoning was, we cannot be certain about that), we are sure that no miscarriage of justice was eventuated by it. The live evidence of DT was quite dramatic and we consider that any jury would have formed a view of where its truth lay long before they were provided with copies of the statement. Nor do we believe that the appellants were actually disadvantaged by the judge's refusal to let the jury have copies of the negative statement or the later witness statement. At best, they were two-edged.

20 For all these reasons, we reject the grounds of appeal in relation to DT's evidence.

2. The Spanish witnesses

21 At the time of the second kidnapping, two Spanish men, Hinchado Perez and Montero Saavedra, were rear-seat passengers in the car that was being driven by Bacarisa. Initially, they too were arrested when the police stopped the car. However, they were later bailed without charge. A month later, on October 19th, 2016, they each made witness statements describing the second kidnapping in terms which were largely consistent with DT's account. It was the intention of the Crown to call them to give evidence at the trial. However, by the time of the trial, almost two years after the event, they were in Spain and the most recent attempts to contact them had been unsuccessful. At the trial, the Crown applied to read their statements and, having heard evidence from Detective Constable Goodson and submissions from counsel, the judge ruled in favour of the Crown.

22 The governing statutory provision is s.389 of the Criminal Procedure and Evidence Act, the relevant parts of which state:

> "389.(1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if—

. . .

(d) the court is satisfied that it is in the interests of justice for it to be admissible."

23 Sub-section (2) then lists nine factors to which the court must have regard when deciding whether the statement should be admitted in the interests of justice.

24 Section 391, dealing specifically with the situation where a witness is unavailable, provides:

> "(1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if—
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> (a) oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter;
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> (b) the person who made the statement (the relevant person) is identified to the court's satisfaction; and
>
> (c) any of the five conditions mentioned in subsection (2) is satisfied."

25 We are concerned with the condition mentioned in s.391(2)(c), that is that "the relevant person is outside Gibraltar and it is not reasonably practicable to ensure his attendance . . ."

26 Under the Criminal Procedure Rules, where the Crown wants to adduce hearsay evidence in this way, it is required to serve a notice not more than 14 days after a defendant pleads not guilty: r.20.2(3)(b). However, the court has the power to shorten or extend the time limit and to dispense with the notice requirement: r.20.5. This is a necessary and frequently used provision, not least because it often happens that the need to resort to s.389 does not crystallize until close to or even at trial.

27 We are told that the Crown first raised the possibility of an application under s.389 at a case management hearing before Butler, J. on October 9th, 2017 but the application was not pursued at that time. The application was eventually made at the commencement of the trial in August 2018. The judge conducted a full inquiry into the circumstances, at the end of which she produced an impressive 18-page ruling. She carefully considered the list of factors prescribed by s.389(2). She then focused on s.391(2)(a) and the question whether it was not reasonably practicable to ensure the attendance of the witnesses. Her ruling contains a detailed chronology, derived from the evidence of D.C. Goodson, which itemized 16 attempts, by telephone, email and witness summonses, to contact the witnesses with a view to ensuring their attendance. Her conclusion was expressed in these terms:

> "It is possible the police could have done more but in my view they have done enough. The harsh reality is that if a witness outside the jurisdiction refuses to attend, there is little that can be done to secure their attendance. I am satisfied that the police were persistent in their efforts to secure attendance and that no amount of letters or phone calls would have yielded a different result. I am entirely satisfied beyond reasonable doubt in relation to the factors that I must have regard to that it is in the interest of justice that these statements be read."

28 She had previously stated her impression that the witnesses "simply do not want to come and give evidence against their friends."

29 Mr. Finch and Mr. Watts are very critical of the judge's ruling. The main points arising from their submissions are that (i) the application came too late; (ii) formal requirements had not been complied with; (iii) there remained the possibility of a nefarious deal between the Spanish witnesses and the police, pursuant to which they provided witness statements in return for not being prosecuted; (iv) the Crown had not satisfied the "not reasonably practicable" test; and (v) the defence cases had been prepared on the assumption that the Spanish witnesses were no longer being relied upon by the Crown but, as a result of the late application, counsel were now handicapped in the conduct of their defences.

30 The first two matters, (i) and (ii), were essentially matters for the trial judge, exercising her powers under r.20.5. There is nothing before us to suggest that she took into account anything which ought not to have been taken into account, failed to take into account anything which required her consideration or reached a conclusion in relation to temporal or formal requirements which was not open to her. Accordingly, her decision on these points is unassailable.

31 The "deal" issue, (iii), clearly called for careful investigation. However, that is precisely what it received. It turned on the evidence of D.C. Goodson, who emphatically denied the existence of a deal. The judge found him to be a very credible and honest witness. Nothing submitted to us would enable us to go behind that finding.

32 The "not reasonably practicable" issue, (iv), was also a matter for assessment by the trial judge. Her consideration of it could not have been more careful. As she was convinced that the witnesses were being deliberately elusive and that nothing else the police could have done would have made any difference, the criticism of this aspect of her decision is unsustainable.

33 As regards prejudice in the conduct of the defence, (v), we consider that this has been greatly overstated by counsel. The evidence of the Spanish witnesses dealt with an incident that was also the subject of

evidence from DT and the police officers at the scene. They could be cross-examined about it. It was partly captured on CCTV. The appellants, if they had wished, could have given evidence about it but they chose not to do so. It was suggested to us that if the defence had known of the Crown's application earlier, they might have carried out their own investigations in Spain in an attempt to secure the attendance of the witnesses. We regard this suggestion as utterly fanciful.

34 In summary, we are entirely satisfied that the judge's decision to grant the Crown's application to read the statements of the Spanish witnesses cannot be criticized. Moreover, in her summing-up she gave the jury adequate directions about the limitations of disputed evidence being adduced in this way and the need to keep it in cautious perspective.

The other grounds of appeal against conviction

35 The remaining grounds are relied upon, principally by Mr. Watts, but, the main grounds having failed, he realistically acknowledges that these matters, taken separately or cumulatively, cannot be enough to sustain a successful appeal.

(i) *The CCTV evidence*

36 The second kidnapping was partly captured on CCTV. The complaint is that the judge "downgraded" the value of the recording at trial. Mr. Watts' point is that it does not depict an incident as frightening as that described by DT, the Spanish witnesses or the police officers. The judge described it to the jury as being of "poor quality" and "limited use," whilst emphasizing that its ultimate value was a matter for the jury. We find nothing in this ground of appeal. The CCTV footage did not cover the whole incident and, for the parts when it was running, the view was often partial or obscured. Obviously, it did not show the interior of the car. As the judge said, it was a matter for the jury to decide how much assistance could be derived from it.

(ii) *"Daniel"*

37 Mr. Watts complains that it was prejudicial for the judge to refer to DT as "Daniel" during the summing-up. This, it seems to us, is greatly to underestimate the fairness and objectivity of juries.

(iii) *The evidence of DT's parents*

38 In re-examination, DT's father said that, on one occasion, DT had shown him where the first kidnapping had taken place. This evidence was not sought by Mr. Rhoda. It just emerged. Such things happen in criminal trials. It is unfortunate that the judge referred to it in her summing-up as possibly worthy of consideration. It was manifestly hearsay. However, it

was scarcely prejudicial to the appellants. Evidence about the incident had been given by DT and by the driver, Johannes Green. The defence case was that either the incident never happened or, if it did, the appellants were not the perpetrators. In the totality of the evidence, the father's throwaway line counted for little or nothing.

39 The evidence of DT's mother was relevant to the first kidnapping. She described DT returning home straight after it. To the extent that she described his distress, it was direct admissible evidence. She also attributed to DT the words that "he had to get out of here—they're going to kill me." It seems to us that that too was admissible, not least because it amounted to a recent complaint tending to negative fabrication in circumstances where the defence were seeking to cast doubt on whether the incident had occurred at all.

40 It follows from what we have said that the grounds of appeal against conviction, considered separately and cumulatively, do not sustain the appeals against conviction.

Appeals against sentence

41 We turn to the appeals against sentence. The judge explained her approach in this passage:

> "The Defendants have expressed no remorse whatsoever. They take no responsibility for their actions. There is no recognition of the effect of their actions on the victim. They are assessed by the Probation Officer as posing a high risk of reoffending and posing a high risk of causing harm to the public. Of course I do not sentence for the possibility of the commission of future offences but it is a matter which I take into consideration."

42 She referred to the previous convictions of both men—none for kidnapping but Bacarisa had been convicted of drugs offences and for an offence of causing grievous bodily harm with intent in 2007. The antecedents of Mendez were less serious but he had previous convictions for common assault and carrying an offensive weapon.

43 The judge then referred to the current offences in these terms:

> "The offending behaviour in this case arises out of a course of conduct which stems from a drugs debt in the sum of £300 . . . All three offences take place within a relatively short period of time from May to September and therefore what I propose to do is to sentence for the most serious of these offences which is the [first] kidnapping . . . and I will treat the others as significant aggravating factors. In doing so I do not impose a sentence that would be higher if I were to deal with these sentences by way of consecutive sentences, having looked at the totality principle as well. In relation to the second

> kidnapping . . . in terms of harm that was low because they were stopped by the police but in my view the culpability in respect of that offence is high because but for the timely intervention of the police the second offence was likely to have followed the pattern of the first. I find . . . that Bacarisa was the ringleader. The money was owed to him and he clearly directed Mendez. In addition he faces . . . a charge of robbery."

44 She proceeded to impose sentences of eight years' imprisonment on Bacarisa and six years on Mendez.

45 We do not consider that the judge's approach or her observations can be faulted. She considered the English authorities of *R.* v. *Spence* (2) and *R.* v. *Gibney* (1). The submission on behalf of the appellants is that, to the extent that *Gibney* and other recent cases in England and Wales reflect concern about the prevalence of offences such as these in that jurisdiction, they ought not to be followed in Gibraltar where there is no such prevalence. Thus, it is submitted, the appropriate guidance should remain that in *Spence.* There a planned abduction with hostage and ransom connotations was said to attract a starting point of not less than eight years.

46 The judge rejected these submissions and considered *Gibney* to contain guidance which should be followed, whether or not there is a prevalence differential. We agree. Moreover, it does not seem to us that prevalence was central to the reasoning in *Gibney.* There the eventual sentence was one of ten years' imprisonment. However, the offender had a past history of very serious offending, including an offence of false imprisonment for which he had received a sentence of seven years. His case was a more pronounced example of vicious underworld thuggery than the present case.

47 We have come to the conclusion that the one error into which the judge fell when sentencing the appellants was to view the kidnappings as being higher up the scale of such offences than they actually were. We entirely accept that the first one was a terrifying ordeal for DT and he must have feared that the second one would have become worse until the police intervened. We bear in mind that he remained in fear at the time of the trial. We also accept that there is an element of campaign in this case, the more so on the part of Bacarisa, who had been solely responsible for the initial robbery. However, at no stage did the kidnappings reach the level of viciousness present in *Gibney* (1), nor are the appellants blighted with antecedents as bad or as recent as those in that case. In our judgment, the sentences imposed in the present case were too high, given the nature of the offences. We shall quash the sentences of eight years in the case of Bacarisa and six years in the case of Mendez and substitute sentences of

six years and four years, respectively. To that extent, their appeals against sentence are allowed.

Order accordingly.