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IN THE COURT OF APPEAL

CRIMINAL DIVISION

NCN:[2020] EWCA Crim 1447

CASE NO 201904100/B2

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 22 October 2020

Before:

LORD JUSTICE HOLDROYDE

MR JUSTICE EDIS

HIS HONOUR JUDGE EDMUNDS QC

(Sitting as a Judge of the CACD)

REGINA

V

“PBL”

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MS M SIKAND appeared on behalf of the Appellant.

MR A JOHNSON appeared on behalf of the Crown.

J U D G M E N T

(Approved)

1. LORD JUSTICE HOLROYDE: On 28 March 2017, in the Crown Court at Portsmouth, this applicant pleaded guilty to an offence of being concerned in the production of cannabis. He was sentenced on the following day to 12 months' imprisonment. He had not, at that stage, been advised as to the availability and likely success of a defence under section 45 of the Modern Slavery Act 2015. He now applies for a long extension of time to apply for leave to appeal against his conviction, and he applies to this court to admit fresh evidence in support of his appeal. His applications have been referred to the Full Court by the Registrar.
2. We record, at the outset, our thanks for the written and oral submissions of Ms Sikand on behalf of the applicant and Mr Johnson on behalf of the respondent, neither of whom appeared in the court below.
3. The applicant has sought an order for anonymity in these proceedings. We have considered the principles summarised in R v L and N [2017] EWCA Crim 2129, in which the Court declined to give general guidance about such applications in cases of this kind but made fact-specific decisions on the cases before it. We are satisfied that it is necessary in this case to grant the applicant anonymity. That departure from the important principle of open justice is necessary because of the risk of reprisals faced by the applicant, both to him in this country and to his close family in his native Vietnam, if his true identity be disclosed. Moreover, the applicant was granted an order for anonymity in Tribunal proceedings to which we shall shortly refer. We think it important not to undermine that order. We accordingly direct, pursuant to section 11 of the Contempt of Court Act 1981, that the applicant's true name must not be published in connection with these proceedings. For the purposes of any report of these proceedings, we direct that he be referred to as "PBL".
4. The applicant, now in his mid-30s, was brought to this country in late 2015 at the behest of Vietnamese loan-sharks to whom he was heavily indebted. For the purposes of that travel he was provided with a passport and a visitor's visa, which were taken back from him on his arrival.
5. In late 2016 police entered a house in Hampshire which had been used to grow cannabis on a substantial scale. The applicant was found hiding in the house. He gave a false name and date of birth. He was arrested and taken to a police station.
6. The officer who carried out the process of booking the applicant into custody recorded that the applicant "is stating that he has been trafficked into the UK and is presenting as emotional and vulnerable". A later entry was made in the custody record to the effect that the applicant may be a victim of trafficking but that was yet to be established. The applicant's true name was subsequently identified. The police were informed by the immigration authorities of the visitor's visa which had been issued in that name but which had by then expired. As a result, the applicant was treated as an overstayer and it seems the police made no further enquiry into the possibility that he had been trafficked into this country. Nor did they refer the applicant to the National Referral Mechanism.
7. The applicant was charged, appeared before a magistrates' court and was sent to the Crown Court for trial. Following a waiver of privilege by the applicant, the advocate who represented him in the Crown Court has indicated that the instructions he initially received did not cause him to think that a defence under section 45 of the 2015 Act would be available. The applicant's instructions were to the effect that he had wanted to come

to the UK to improve his living standards, and had arranged to be brought here for a fee which he would repay when working. He was for a time homeless and had no contact with the people who had brought him. He then met two men who had offered him work and accommodation and took him to the house which was searched a few days later. He was not forced to do anything against his will. He worked as a cleaner in the house and was not involved in growing the cannabis.

8. The advocate has indicated that he viewed that account with scepticism, but the applicant firmly maintained it. The applicant pleaded not guilty on his first appearance before the Crown Court, and a defence statement was filed in terms consistent with his instructions.
9. On the day of trial, however, the applicant's instructions changed. He entered a guilty plea on a written basis, to the effect that he had been trafficked into the UK on a promise that he would be found work, and owed the traffickers payment for his travel. He was brought to the house by the traffickers in order to pay his debt by working as a gardener in the cultivation of the cannabis. That basis was not challenged by the prosecution and was accepted by the recorder who was hearing the case. It was submitted by the advocate that the applicant had played a lesser role in the offence. The recorder accepted that submission saying:
 - i. "It has also been said to me that this is an example of modern day slavery in as much as you were brought into this country illegally and were presented with this employment as a way of allegedly paying off the traffickers who brought you into this country.
 - ii. I say that you played a lesser role because you performed limited functions under the direction of others. I am satisfied you were engaged in that by way of pressure, coercion and intimidation and you were clearly in a situation whereby you have been exploited."
10. The applicant was subsequently served with a deportation order. He applied for leave to remain on human rights grounds and for asylum.
11. In his immigration and asylum proceedings, the applicant gave a fuller account of the circumstances in which he had been brought to the UK. In very brief summary, he said he had incurred a debt to loan sharks in Vietnam, which he could not repay, and was told that he would have to work abroad in order to pay it. He was abducted from his home and threatened that he and his family would be killed if he did not comply. Once in this country he was put to work in one location where he was cruelly treated and beaten. He was then moved and put to work in the cannabis factory, where again he was badly treated. He had tried to escape but was caught and beaten, and thereafter his legs were chained when he was not working. After his arrest he had managed to contact his family by telephone and had been told they were still receiving threats from the traffickers.
12. A medical examination found scarring, in particular on the applicant's arm, consistent with his account of being beaten.
13. The applicant was referred to the National Referral Mechanism by the Salvation Army. The Home Office, acting as the Competent Authority under the National Referral Mechanism, made a finding in September 2017 of reasonable grounds to believe that the applicant was a victim of human trafficking and the applicant was released from

- immigration detention. In January 2018 the Competent Authority made a conclusive grounds decision that he was a victim of human trafficking.
14. The applications for asylum and for leave to remain were refused by the Secretary of State, but the applicant appealed to the First-tier Tribunal and his appeal was allowed in a decision promulgated in August 2019. The Tribunal judge found that the applicant qualified for protection as a refugee and that, if returned to Vietnam, there was substantial grounds for believing that he would face a real risk of ill treatment of such severity as to amount to a breach of Article 3 of the European Convention on Human Rights. In December 2019 the applicant was granted refugee status by the Secretary of State. We understand that he has subsequently been granted, or at least is likely to be granted, leave to remain in this country for 5 years.
 15. Ms Sikand submits that, notwithstanding the guilty plea, the applicant's conviction is unsafe. She initially put forward two grounds of appeal. First, the applicant is a victim of trafficking, as was found by the Competent Authority, and his involvement in cannabis cultivation was in fact forced labour, integral to his trafficked status, such that his culpability was extinguished. In accordance with their own policy, the Crown Prosecution Service should have referred him to the National Referral Mechanism or decided not to prosecute him. Secondly, the express basis on which the guilty plea was entered effectively raised the statutory defence under section 45 of the 2015 Act, in that it asserted that the applicant was compelled to act as a consequence of being trafficked and in debt bondage. He should therefore have been advised of the defence. Given that the basis of the plea was accepted by the prosecution and by the court, the defence would have succeeded.
 16. In the course of these proceedings a number of concessions have very properly been made by the respondent. Ms Sikand does not abandon her first ground of appeal, which she submits remains important. Her principal submission, however, is that the applicant was wrongly advised about the availability of the defence under section 45 of the 2015 Act which was available to him, could not be disproved by the respondent and would therefore quite probably have succeeded. She submits that the plea which he entered was equivocal and that he was deprived of the defence through no fault of his own.
 17. The fresh evidence on which the applicant seeks to rely comprises, in summary, his own statements in the immigration and asylum proceedings; a report by a psychologist, who diagnosed the applicant as suffering from PTSD, with continuing intrusive symptoms of flashbacks and nightmares, and stated that ongoing psychological intervention was necessary; and expert evidence as to the risk that, if returned to Vietnam, the applicant would be re-trafficked.
 18. For present purposes, we can summarise the relevant law quite briefly.
 19. Section 45 of the 2015 Act reflects the UK's obligations under Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings 2005 and Article 8 of the European Union Directive 2011/36/EU on preventing and combating trafficking in human beings, to provide for the possibility of not prosecuting persons who have been trafficked for offences committed whilst subject to trafficking. Omitting subsection (4), which relates to those aged under 18 and is therefore of no relevance to this case, section 45 provides:

- i. "45 Defence for slavery or trafficking victims who commit an

offence

- (2) A person is not guilty of an offence if—
- (a) the person is aged 18 or over when the person does the act which constitutes the offence
 - (b) the person does that act because the person is compelled to do it
 - (c) the compulsion is attributable to slavery or to relevant exploitation, and
- ii. .
- iii. (d) a reasonable person in the same situation as the person and having the person's relevant characteristics would have no realistic alternative to doing that act.
- (3) A person may be compelled to do something by another person or by the person's circumstances.
- (4) Compulsion is attributable to slavery or to relevant exploitation only if—
- (a) it is, or is part of, conduct which constitutes an offence under section 1 or conduct which constitutes relevant exploitation, or
 - (b) it is a direct consequence of a person being, or having been, a victim of slavery or a victim of relevant exploitation.
- ii.
- (5) For the purposes of this section—
- i. 'relevant characteristics' means age, sex and any physical or mental illness or disability;
 - ii. 'relevant exploitation' is exploitation (within the meaning of section 3) that is attributable to the exploited person being, or having been, a victim of human trafficking.

(6) In this section references to an act include an omission.

(7) Subsections (1) and (4) do not apply to an offence listed in Schedule 4.

(8) The Secretary of State may by regulations amend Schedule 4. "

20. The offence of which the applicant was convicted is not one of those listed in Schedule 4. Once a defendant has raised evidence of the elements listed in subsection (1), it is for the prosecution to disprove those elements to the criminal standard.
21. Crown Prosecution Service policy requires prosecutors, when applying the Full Code test, to consider whether there is a reason to believe a suspect is a victim of trafficking and, if so, to consider whether there is clear evidence of a statutory defence under section 45. If there is the case should not be prosecuted, or should be discontinued on evidential grounds.
22. A decision by the Competent Authority to the effect that an offender was a victim of trafficking is not binding on a criminal court: see R v N [2019] EWCA Crim 984, at paragraph 40. Such a decision must however be borne in mind by the criminal court and, as this court noted in R v JXP [2019] EWCA Crim 1280, the Competent Authority is "a specialist authority with particular expertise and knowledge in this area of trafficking". Similarly, a decision of the First-tier Tribunal as to whether a person is a victim of trafficking does not bind the court or prosecutors, but it should be respected unless there is a good reason not to follow it: see R v GS [2019] 1 Cr App R 7.
23. The respondent points out that on general principles, a defendant who has entered an unambiguous guilty plea thereby admits that he is guilty of the offence and cannot subsequently appeal against his conviction: see R v Asiedu [2015] 2 Cr App R 8. The respondent accepts however that this court may exceptionally allow an appeal against conviction following a guilty plea, if a defendant has been deprived of a defence which would quite probably have succeeded and concludes that a clear injustice has been done: see R v Boal (1992) 95 Cr App R 272.
24. The respondent, relying on the recent decision in R v DS [2020] EWCA Crim 85, resists the first ground of appeal insofar as it is based on a challenge to the decision to prosecute, but accepts that the issues of whether the applicant was a victim of trafficking, and whether the section 45 defence was available, were not properly considered in the criminal proceedings. The respondent further accepts that the statutory defence would probably have succeeded. The respondent therefore does not challenge the proposed fresh evidence in support of the grounds of appeal, so that it has been unnecessary for any witness to appear before this court, and does not resist the applications for an extension of time and for leave to appeal.
25. This is, in our judgment, a clear case. Within an hour of his arrival at the police station the applicant had been recorded as saying that he was a victim of trafficking. The information received from the immigration authorities to the effect that the applicant was or might be an overstayer was not a reason not to refer him to the National Referral Mechanism. Thus an immediate opportunity to investigate the possible availability of statutory defence was missed. Thereafter, no proper enquiries were made by the prosecution, even though the circumstances were such that at the sentencing hearing the

prosecuting advocate told the recorder the applicant was thought to be a victim of modern slavery.

26. We recognise that the defence advocate was initially limited by his instructions. We do not however need to consider the detail of the advice he could or should have given in the early stages of the proceedings because it is, in our view, clear that he should have considered the possibility of the statutory defence, at the latest, at the time of the sentencing hearing. The basis of the applicant's guilty plea, and the basis on which he was sentenced, amounted in substance to an assertion of the statutory defence.
27. The recorder too should have raised the issue, given that he accepted the defence submissions, and felt it right to make a reduction in the sentence which would otherwise have been appropriate because he was satisfied that the applicant was a victim of trafficking forced to offend as he did. It is relevant in this regard to note that the Judicial College's Crown Court Compendium, at section 18-6, provides a convenient summary of the statutory defence and states:

- i. "The judge, as well as the defence and prosecution, must be alert to the possibility that D is a victim of modern slavery or trafficking. It may become
- ii. apparent from the evidence, even if not expressly raised by D."

28. In recent years a number of cases in this court have addressed the statutory defence in cases of offences committed by victims of human trafficking. The Judicial College has given guidance to judges and recorders in this regard. We are bound to say that it is disappointing that in this case no one identified the likely availability of the defence at any stage of the criminal proceedings. It was not until after the applicant had served his sentence that the solicitors representing him in the subsequent immigration proceedings took the steps which should have been taken much earlier.

29. In the circumstances we have summarised there is no reason for this court to differ from the conclusions of the recorder, the Competent Authority and the judge of the First-tier Tribunal that the applicant was a victim of human trafficking. We accept the submission that his offence was committed under compulsion, in the course of forced labour, and was so closely linked to his status as a victim of trafficking as to extinguish his culpability. We accordingly accept the submission that the applicant was deprived of an offence which was available to him and which would probably have succeeded. We bear in mind of course that the applicant pleaded guilty and that his application for leave to appeal against conviction is well over 2 years out of time. Nonetheless, a serious injustice would be caused if we did not grant the applications which are before the Court.

30. We therefore grant the necessary extension of time and leave to appeal. We receive the fresh evidence. We allow the appeal against conviction and quash the conviction.

MS SIKAND: My Lord, I am sorry to detain you but I have an ancillary application if I could make it very briefly.

LORD JUSTICE HOLROYDE: Please do.

MS SIKAND: I appear here on a representation order for counsel only. It does not cover any post-lodging work of my solicitor. This Court does have a power to grant a retrospective representation order for the post-lodging work of my instructing solicitor. She then makes the application to the Billing Department of the Court of Appeal and they decide what is

reasonable and what is not. But it simply covers the post-lodging work. It is a limited amount of money and I ask this Court to please make that order.

LORD JUSTICE HOLROYDE: Can I just ask, was an application made to the Registrar for the certificate to be extended, because your solicitor must have been engaged in collating the fresh evidence and making that application?

MS SIKAND: Well ... the work around collating the fresh evidence is covered by a slightly different scheme, a CDS scheme, which did cover the pre-lodging work.

LORD JUSTICE HOLROYDE: What has been done post-lodging?

MS SIKAND: It is simply all the correspondence that goes on post-lodging between the Court of Appeal and my instructing solicitor, relating for example to the communications with previous representatives, any clarification about the further evidence that then comes about following a coat procedure. Also then that all has to be explained to the applicant who then needs a translator and interpreter so my solicitor then has to take instructions, for example, on the evidence that comes about during that procedure and then the respondent's notice so it is that level of work.

LORD JUSTICE HOLROYDE: Yes.

MS SIKAND: It is not for a particular sum, it will be assessed. It is something that was granted in as far as that assists this Court in JSP and --

LORD JUSTICE HOLROYDE: Yes. Just so I understand, because what you have just summarised is quite a lot of work and presumably there were some interpreter fees to pay along the way. Was there an application post-lodging to extend the representation order?

MS SIKAND: My understanding is that those are never granted these days but I do not think there was.

LORD JUSTICE HOLROYDE: I am not sure that saying "they are never granted" is your strongest point in asking us to make a slightly different order to the same effect.

MS SIKAND: I am sorry, I do not mean to speak against myself in a sense that it is difficult to persuade the Registrar is my understanding, but I do not think such an application was made and I can certainly pass on the message that in future that is the course that this Court would prefer.

LORD JUSTICE HOLROYDE: I am speaking only for myself and speaking as I listen to your submissions, Ms Sikand. All right, thank you. Mr Johnson, do you want to contribute to this at all?

MR JOHNSON: I only say that these applications I have heard a number of times and it has been said more than once that these applications are invariably refused by the Registrar. But I will probably say in the cases that I have been involved in the past 12 months or so they have more often than not been allowed by the Full Court. I am not sure if that assists.

LORD JUSTICE HOLROYDE: All right.

(The Bench Conferred)

LORD JUSTICE HOLROYDE: The court having allowed this appeal against conviction Ms Sikand applies for an order that the representation order be retrospectively extended to cover work done by the appellant's solicitor following the lodging of the Notice of Appeal. As we understand, work done by the solicitor prior to the lodging of a Notice of Appeal is remunerated in any event.

31. We are sympathetic to the broad merits of the application, though we observe that in circumstances of this nature it seems to us that it is much preferable that a prospective

application should be made to the Registrar for any appropriate extension of the certificate of the representation order.

32. Ms Sikand, who is experienced in cases of this nature, tells us helpfully that the court does have the power to extend the representation order retrospectively in this way. The practical effect being that the solicitors' costs would be assessed within the Criminal Appeal Office. On that footing, and being, as we have indicated, sympathetic to the broad merits of the application, we do direct that the representation order be so extended.

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Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400
Email: rcj@epiqglobal.co.uk