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IN THE COURT OF APPEAL

CRIMINAL DIVISION

NCN Number: [2021] EWCA Crim 729

CASE NO 201903466/B2

Royal Courts of Justice

Strand

London

WC2A 2LL

Thursday 11 March 2021

Before:

LORD JUSTICE BEAN

MRS JUSTICE WHIPPLE DBE

MR JUSTICE CALVER

REGINA

V

TANYA JAYNE BROOKES

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MR P JARVIS appeared on behalf of the Applicant.

J U D G M E N T

(Draft for Approval)

MRS JUSTICE WHIPPLE: This is a renewed application for permission to appeal against conviction. It is brought out of time by 5 years and 5 months and an extension of that length of time is now sought.

The background is this. On 28 February 2014, following trial in the Crown Court at Winchester before HHJ Barnett, the applicant was convicted of 25 counts of dishonest conduct which took place between 2009 and 2012. On 10 March 2014 the applicant pleaded guilty to eight counts, under a separate indictment, shortly before she was due to face her second trial on that separate indictment. Other counts were left on the file.

On 6 May 2014 the applicant was sentenced to a total of 30 months' imprisonment. On 29 July 2014 her appeal against sentence was allowed to a limited extent to reduce her sentence to 18 months. The Court on that occasion gave a full judgment, which is relevant in one way to the matters before us today.

The facts which underpin this offending are set out in the Criminal Appeal Office summary and we do not repeat them here. We do however note one fact of particular relevance to these applications, namely that the applicant had a history of surgery in 2005 to remove a brain tumour. She was a police officer at the time and a successful police officer. She went back to work after her brain surgery and progressed in the police force. While occupying the role of the Chief Inspector of Police in January 2012 she was arrested for these offences.

The sole ground of appeal concerns an application for leave to adduce fresh evidence. That application is dated 21 August 2019 and proceeds under section 23 of the Criminal Appeal Act 1968. It is submitted that the fresh evidence is relevant to the issue of the applicant's dishonesty and it consists of the expert report of Professor Kopelman dated 23 July 2018 accompanied by his statement of 9 July 2019.

Professor Kopelman is a consultant neuro-psychiatrist. He interviewed the applicant on 2 December 2016. Later in time he reviewed the applicant's MRI scans and produced his report. He observed brain injury resulting from the removal of the brain tumour in 2005. His view was that at the time of the offending the applicant was suffering from certain behavioural effects which were a consequence of the injury, which itself was caused by the removal of the brain tumour. By her applications the applicant submits that if the jury had been aware of the extent to which the removal of the brain tumour adversely affected her perception of her own conduct they may well have had a reasonable doubt as to the dishonesty of her actions. It is also submitted that the law in this area remains in a state of flux since the Supreme Court altered the test of dishonesty in Ivey v Genting Casinos (UK) Ltd t/a Crockfords [2017] UKSC 67.

The Crown has resisted the grant of an extension of time and indeed resisted permission to appeal in this case and has filed a respondent's notice.

The applications in this case were considered by the single judge on the papers and he refused all of them.

Before us Mr Jarvis has renewed his applications and we are grateful for the clarity of his submissions and the succinctness with which they were put. However, after careful considerations we find ourselves in full agreement with the single judge and we gratefully adopt his reasons. There is no need to repeat them here because the applicant has them already.

We would add these specific points.

First, the Court of Appeal confirmed when it dealt with the sentence appeal in July 2014 that, on the facts, there was no basis to conclude that the applicant bore a lower responsibility for her offending. That offending, so the Court of Appeal found, had been deliberate and

sustained and had occurred during a time when the applicant held a senior position in the police force. That was of course a conclusion in relation to sentence but it has some significance in relation to the matters raised in these applications.

Secondly, the evidence offered by Professor Kopelman as to the nature and extent of the interference with brain functions as a result of the surgery seems to us to be similar in its essentials to that offered by Professor Neil Greenberg many years before. In our judgment, there is broad agreement that the applicant underwent, or might have undergone, a changed personality as a result of the surgery and that she may have had a confused understanding of right and wrong as a result. Before us this morning Mr Jarvis has submitted that there is a material difference in this respect between the first and the second reports of Professor Greenberg, noting that it was only the first Greenberg report that was in the possession of the defence team prior to trial. We cannot accept that submission. In our judgment the Greenberg reports (both first and second reports) focus on personality aspects which may have been important in understanding the applicant's views about right and wrong. That the origin of those personality aspects or defects may variously have been put as mental health reasons (in the first report) and as organic damage (in the second report). But that differing explanation for the cause of the personality changes is not material. The central point that Professor Greenberg is striving to make is that the surgery may well have impacted on the applicant's personality and functioning.

Thirdly, and connected, it is important to be clear that Professor Greenberg's first report was available before trial. Trial counsel, Mr Yeo, has confirmed that and has explained in clear terms why Professor Greenberg's views were not, and his evidence was not, relied on at trial: it was because that evidence would not have assisted the jury on the key question of dishonesty under R v Ghosh (as was then the law) and because that evidence could have

undermined the applicant's defence by giving the jury an explanation for her allegedly dishonest actions.

This was all encapsulated in clear written advice given by Mr Yeo in advance of trial. The specific points now raised relating to the scope of Professor Greenberg's first report, and its utility to the defence, was dealt with in terms. It is therefore clear that the issue concerning personality change and brain disorder consequent on surgery was very much under consideration at trial. It is not a matter which has arisen since.

Fourthly, the difference between the experts (Professor Greenberg and Professor Kopelman) lies not so much in their expert medical psychiatric opinion but in their view as to whether the jury would or would not be assisted by knowing this evidence. Professor Kopelman thought this evidence could have affected the jury's view of dishonesty, objectively assessed. That is what he says in the second paragraph 5 of his opinion section in his report. Professor Greenberg and trial counsel were firmly of the view that it could not, as we have already discussed, and that latter view is now supported in the respondent's notice. We agree with that latter view. We do not see that the evidence about the applicant's compromised mental functioning, knowing the facts of the offences which involved a deliberate series of actions including fraudulent representations over a lengthy period of time, would have assisted the jury when considering whether she was dishonest; indeed such evidence may have served to undermine rather than assist her defence.

Fifth and finally, the change in law brought about by Ivey does not, in our judgment, assist the applicant. There might have been room to argue under the Ghosh test that a person was not subjectively dishonest, but that is no longer part of the test. Ivey is an objective test: the state of the person's mind or their belief is to be established as a matter of evidence for the jury then to determine whether the conduct was dishonest judged by the standards of

ordinary decent people (that is the point at paragraphs 60 and 74 of Ivey). The jury plainly thought the applicant was dishonest judged by that standard. Their verdicts speak for themselves.

In all the circumstances we refuse the three applications before us for extension of time, for admission of fresh evidence and for permission to appeal.

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