



Neutral Citation Number: [2023] EWCA Crim 808

Case No: 202201684 B2 & 202201552 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT WOOLWICH AND THE CROWN
COURT AT ISLEWORTH
His Honour Judge Shorrocks and His Honour Judge Matthews
T20137758 & T20177307

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 July 2023

Before :

LADY JUSTICE CARR
MRS JUSTICE MAY
and
THE RECORDER OF SHEFFIELD
(His Honour Judge Jeremy Richardson KC)

Between :

AISOSA HENKOMA

Appellant

- and -

REX

Respondent

Benjamin Douglas-Jones KC and James Robottom (instructed by **Philippa Southwell** of
Southwell & Partners Solicitors) for the **Appellant**
Andrew Johnson (instructed by the **Crown Prosecution Service**) for the **Respondent**

Hearing date : 7 July 2023

Approved Judgment

This judgment was handed down remotely at 10am on Friday 14 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Carr :

Introduction

1. On 9 October 2014, in the Crown Court at Woolwich before His Honour Judge Shorrocks, the applicant (then aged 16 years) changed his plea to guilty to the offence of possessing a firearm without a certificate, contrary to s.1(1)(a) of the Firearms Act 1968 (Count 2). The applicant also pleaded guilty to the offence of failing to surrender to custody, contrary to s.6 of the Bail Act 1976. We refer to these matters as “the Woolwich offences”. The applicant was sentenced to a 4 month Detention and Training Order on Count 2, and 7 days’ detention in a Young Offender Institution for the offence of failing to surrender, such sentences to run concurrently with each other.
2. On 14 July 2017, in the Crown Court at Isleworth before His Honour Judge Matthews, the applicant (then aged 19 years) pleaded guilty to the offence of possessing a prohibited firearm, contrary to s.5(1)(a) of the Firearms Act 1968 (Count 1) and possessing ammunition without a firearm certificate, contrary to s.1(1)(b) of the Firearms Act 1968 (Count 2). We refer to these matters as “the Isleworth offences”. The applicant was sentenced to 5 years’ detention in a Young Offender Institution on Count 1, and 12 months’ detention on Count 2, such sentences to run concurrently with each other.
3. The applicant was born in Nigeria on 13 May 1998 and is now 25 years old. He seeks leave to appeal against these convictions, alongside applications to adduce fresh evidence and for very significant extensions of time. He has an appeal as of right in respect of the Bail Act offence, subject to the need for an extension of time.
4. The grounds of appeal advanced in each matter are the same. In summary, it is said that it is now known that the applicant was a victim of trafficking (VOT) at the time of the offending. Had his status and the nexus of the trafficking to the offending been known, the Crown Prosecution Service (CPS) would or might well not have prosecuted him. The applicant’s criminality or culpability was significantly diminished and effectively extinguished. He had no realistic alternative but to comply with the dominant force of others. Further, the Crown and/or police did not effect their operational duties under Article 4 of the European Convention on Human Rights and Fundamental Freedoms (Article 4) to investigate the possible status of the applicant as a VOT. The convictions are unsafe as a result.
5. The applications are resisted by the respondent. Whilst it is accepted that there is credible evidence that the applicant was exploited by a criminal gang, and that there is nexus between the exploitation and the offences in question, the prosecutions were nevertheless in the public interest, given the gravity of the offending. There was no abuse of process and the convictions are not unsafe.
6. We record at this stage that shortly before this hearing we refused a very late application to intervene by ECPAT UK, a specialist anti-trafficking charity.

Facts: the Woolwich offences

7. On 29 November 2013, police officers attended a hostel in Lewisham following a stabbing (in respect of which the applicant was not implicated). A man named Wright

lived there. The caretaker at the premises found a black bag in a boiler cupboard in the laundry room. A police officer found a firearm with two barrels inside the bag, the butt of the firearm being wrapped in a red bandana/scarf. It also contained machetes and Samurai swords.

8. On 1 December 2013, police officers attended the applicant's address and he was arrested on suspicion of being linked to the firearm. He was subsequently interviewed and gave a 'no comment' interview. He was interviewed again the next day and shown CCTV footage from the hostel and asked about a picture of himself holding a gun with the same red bandana. Again, he made no comment.
9. CCTV footage from 29 November 2013 depicted a man, said to be someone named Makanju, leaving Wright's room at the hostel, carrying a black bag identical to that later found. He was with the applicant and another man. All three left the premises with Makanju carrying the bag. The applicant later returned to the premises and was depicted taking the black holdall into Wright's room. A short time later, the applicant, carrying the black holdall, and another man left Wright's room and went to the laundry room. They were recorded returning to Wright's room without the bag.
10. The applicant had previously shown his social worker a photograph of himself with a gun. On 14 November 2013, a woman attended Croydon police station and reported her daughter as missing. She showed the police a photograph of the man with whom she believed her daughter to be. The man was known to her as 'Sosa' and the photograph was of the applicant posing with a long-barrelled firearm with a red and white bandana wrapped around the handle. The applicant's social worker confirmed that the applicant was the person shown in both photographs. A Facebook account from a tablet device seized from the applicant's home contained another photograph of the applicant holding a firearm.
11. Following his arrest, the applicant had been bailed to attend before the Crown Court at Woolwich on 18 August 2014, but failed to surrender to custody. He was arrested on 5 October 2014 and later pleaded guilty to this offence.
12. The sentences imposed for the Woolwich offences were ordered to run concurrently to a sentence imposed a short time earlier for a bladed article offence. That conviction is apparently the subject of a separate application to the Criminal Cases Review Commission.
13. The applicant failed to comply with the terms of the Detention and Training Order, as a result of which those terms were varied so as to impose supervision and curfew requirements.

Facts: the Isleworth offences

14. On 12 June 2017, police officers attended the applicant's home address as a result of an anonymous call. The applicant's then partner and their two children, aged three and one, left the property, followed by the applicant. An officer at the scene saw an object fall to the ground out of a window to the rear of the property. The officer found a bag on the floor which contained a black revolver with eight casings and one live round of ammunition.

15. The applicant was arrested for possession of the firearm, and ammunition. He was subsequently interviewed and gave a ‘no comment’ interview, save for a prepared statement in which he stated that he did not know anything about the items found. They were not his and must have already been in the gardens and his DNA would not be on the firearm.
16. A forensic examination of the firearm identified the applicant’s fingerprint on the frame of the gun behind the cylinder. It was an Alfa-Proj model 620 revolver, less than 60 cms in length. The ammunition consisted of one unfired 4mm Flobert calibre cartridge. Testing of the firearm and ammunition revealed the performance of the firearm to be low compared to other firearms firing bulletted cartridges, but similar in kinetic energy to an airgun. The ammunition was undersized and not intended for that weapon. It would be discharged at a low velocity that was not capable of skin penetration.
17. In mitigation, it was stated that the applicant was holding the gun on behalf of someone else and had possession of it for only a matter of days before it was discovered by police. Both the applicant’s parents were deceased and he had been in the care of social services since he was six or seven years old.

Events following conviction and fresh evidence

18. Following deportation proceedings commenced in March 2018, on 10 March 2020, the applicant received a positive Conclusive Grounds decision. The Single Competent Authority found him to be a VOT for the purpose of forced criminality but determined that the period of trafficking was limited to between 2010 and 2014. Following submissions from the applicant’s immigration solicitors, the applicant received another Conclusive Grounds decision dated 6 August 2020 which determined that, on the balance of probabilities, the applicant was a victim of modern slavery for the purpose of forced criminality not only from 2010 to 2014, but also during the period 2014 to June 2017.
19. The applicant has provided a witness statement dated 30 March 2022, in which he gives fresh details of the offending, the compulsion that he was under as a trafficked person and the lack of advice given to him about modern slavery and exploitation.
20. He has also produced various expert reports, apparently prepared for the purpose of immigration proceedings, including a psychological report and a report relating to the applicant’s ability to integrate into society in Nigeria; and also extensive records from Greenwich social services.
21. The matters referred to above in this section are the subject of the applications to adduce fresh evidence, and we have considered them *de bene esse*.
22. Mr Douglas-Jones KC for the applicant draws on the following features in particular. The applicant came to the United Kingdom in 2007. He was “tortured” by his stepmother, with some 50 scarring injuries to prove it, and ran away from home. He was taken into care in 2008. Between March 2009 and June 2013 he was in a stable foster home. But he started going missing, with increasing signs of gang involvement. There were breaches of Article 4 from as early as July 2012, when he was 14 years old and disclosing association with gang members of a well-known gang. In 2013 he was talking of missing school because he was under threat from older people. At a school

meeting he said that he was “petrified” and it was noted that he was on the verge of gang involvement. There were, in short, grounds for credible suspicion that he was a VOT being recruited by gangs for the purpose of criminal exploitation. Yet no steps were taken to refer him to the NRM, or to remove him from the local area.

23. The failings continued into and beyond 2013. The applicant was reporting that he was being threatened for not selling drugs and being in debt bondage. He was recorded as being reduced to tears because of threats to his mother. He moved schools and a new foster placement broke down. There was a suggestion of a move to Folkestone, but that never took place. He went missing repeatedly during the summer of 2013. In November 2013 he was said to be involved with a “drug den” in Margate.
24. Then came the Woolwich offending described above, and in due course the Isleworth offending, committed in circumstances of significant threat. By this stage the applicant was attempting to extricate himself from gang activity and trying to hide from people looking for him. Despite the clear risks of harm, of which the police and social services were aware, no referral to the NRM was made.

The applicant’s trial lawyers’ responses

25. The solicitors who had acted for the applicant in relation to the Woolwich offences state that the applicant said nothing to them to indicate that he was a VOT. Likewise, the applicant’s counsel in relation to the Isleworth offences have no recollection of the applicant instructing them that his offending was borne out of a trafficking situation. Both sets of counsel were experienced in dealing with vulnerable witnesses. There was, they say, no outward sign or exhibition of vulnerability from the applicant. His solicitor (on the Isleworth matters) states that he described his younger self as ‘ruthless’. He was talkative, articulate and open to talking about himself. There was nothing to indicate that he was a VOT.

Submissions on appeal

26. For the applicant Mr Douglas-Jones submits in summary:
 - i) The applicant’s criminality was extinguished by virtue of his status as a VOT. The applicant was a vulnerable child and then vulnerable adult when the offences were committed; he had been recruited and perpetually threatened by gang members and exploited;
 - ii) In relation to the Isleworth matters, the police had told him to go to his then girlfriend’s house. He had been forced to hold the gun overnight. Given the applicant’s vulnerabilities and age, the enduring nature of the trafficking and the multiple failures of all branches of the state, prosecution was not in the public interest. The dominant force of compulsion reduced his level of culpability to such an extent that his prosecution was not in the public interest and an abuse of process;
 - iii) Further, the Crown and/or police did not effect their operational duties under Article 4, as discussed in *VCL v United Kingdom* [2021] 73 EHRR 9 at [148] to [162], and [197] to [199]. The applicant was not adequately safeguarded, notwithstanding that he had reported being a victim of exploitation to his foster

parents. He had made disclosures of his exploitation by gang members to foster carers, teachers and social services.

27. In summary, it is submitted that, had the applicant's VOT status and the nexus of the trafficking to the offending been known, the Crown Prosecution Service (CPS) would or might well not have prosecuted him. The Article 4 breaches are submitted to be self-standing reasons for finding the criminal proceedings to be an abuse, or at the very least a factor highly relevant to the prosecutorial decisions. Those decisions should be given particular scrutiny, given the human rights and international law obligations that are engaged. But for the State's failings, the Woolwich and Isleworth offences would not have been committed.
28. Mr Johnson for the respondent submits that the applications should be refused.
29. Having reflected carefully on the evidence, and in particular on the contemporaneous social services records that pre-date the CG Decision, the respondent does not consider that there is a basis to contend that this court should depart from the conclusions of that decision. The records show that reports about the applicant being exploited by gangs were made and recorded prior to his arrest for or conviction of criminal offences.
30. In terms of nexus, as the applicant was a child at the relevant time, it is not necessary to show that the applicant was compelled to commit the offences. On the basis of the CG Decision, the respondent accepts that the relevant nexus was present.
31. The third question is whether it would nevertheless have been in the public interest to prosecute. It is that question which the respondent respectfully suggests is central to the applications. The respondent submits that the prosecutions were in the public interest, given in particular the gravity of the offending.

Discussion

32. The applicant's convictions sit either side of the entry into force of the Modern Slavery Act 2015 (the Act) (on 31 July 2015). In relation to the Woolwich offences, a defence under s. 45 of the Act (s.45) was thus not available to him. In relation to the Isleworth offences, possession of a prohibited firearm is an offence listed in schedule 4 to the Act; thus, by reason of s. 45(7), a s.45 defence again was not available. The only offence to which a s.45 defence might have applied was count two, namely possession of ammunition without a firearm certificate.
33. The relevant law is now well-established: see in particular *R v S(G)* [2018] EWCA Crim 1824; [2019] 1 Cr App R 7 at [76]; *R v AAD and others* [2022] EWCA Crim 106; [2022] 1 Cr App R 19 at [142]; and *AFU* at [81] to [90] where the principles engaged in both pre- and post-Act cases are summarised. It can be seen that, in certain circumstances, the convictions of VOTs following either guilty pleas or trial may be unsafe on grounds of abuse of process: see in particular *AFU* at [105] to [119].
34. The question is whether, on the present facts, abuse of process is made out such as to render the applicant's convictions unsafe. In answering it, we proceed on the basis of what is common ground, namely that there were multiple breaches of Article 4 affecting the applicant both before and after the relevant offending occurred. In particular, there were multiple occasions when he should have been referred to the NRM, and was not.

35. However, an appeal against conviction is not a vehicle for ‘restoring’ international law rights that are said to have been infringed. Breaches of Article 4 do not, by themselves, render a prosecution unlawful. The focus must be on the safety of the conviction. See *R v LM and others* [2010] EWCA Crim 2327 at [31] and [32]; *R v AAJ* [2021] EWCA Crim 1278 at [40]; and *R v Thakoraka-Palmer* [2023] EWCA Crim 491 at [41]. At the end of his oral submissions, Mr Douglas-Jones sought to rely on Article 4 breaches by reference to the second limb of abuse identified in *R v Horseferry Road Magistrates Court ex parte Bennett* [1994] 1 AC 42. However, we do not consider that such reliance adds anything for present purposes to the existing line of authority as to when the prosecution of a VOT will be an abuse of process, as set out above.
36. In this case the exercise involves reviewing the respondent’s decision to oppose these applications on the basis of its retrospective review of the evidence and assessment of the public interest in prosecution of the applicant whom they now know and accept to be a VOT.
37. The context for that review is the important general principle that decisions to prosecute are ordinarily for the prosecutor (see for example *R (Barons Pub Company Limited)* [2013] EWHC 898 (Admin) at [51(i)]). As was stated in *AFU* at [113] and [117], the decision to prosecute is ultimately for the prosecution, and not the court. Where the prosecution has applied its mind to the relevant questions in accordance with the applicable CPS guidance, it will not generally be an abuse of process to prosecute unless the decision to do so is clearly flawed. The court does not intervene merely because it disagrees with the ultimate decision to prosecute. It will review the decision by reference to rationality and procedural fairness.
38. Although on the present facts we are considering retrospective, hypothetical statements by the respondent as to whether the prosecutions would have been pursued, those statements are still to be accorded appropriate deference. We are satisfied that they have been made only after full, fair and careful consideration by the respondent.
39. There are undoubtedly cases where, even where an applicant has been identified post-conviction as a VOT and vulnerable, the decision to prosecute would have been the same – see for example *R v A* [2020] EWCA Crim 1408 at [68].
40. The gravity of the offending is clearly a material factor. So much is clear from the Code for Crown Prosecutors in place at the material time for the purpose of addressing the public interest stage of the prosecutorial decision-making process. It required prosecutors to consider each of the following questions (in what was a non-exhaustive list):
 - i) How serious is the offence committed?
 - ii) What is the level of culpability of the suspect?
 - iii) What are the circumstances of and the harm caused to the victim?
 - iv) Was the suspect under the age of 18 at the time of the offence?
 - v) What is the impact on the community?
 - vi) Is prosecution a proportionate response?

vii) Do sources of information require protecting?

41. In relation to question iv) above (age), the Code stated that there may be circumstances which meant that, notwithstanding the fact the suspect is under 18, a prosecution is in the public interest. These included where the offence committed was serious.
42. The CPS Guidance in force at the time also stated that where a victim of human trafficking had been compelled to commit the offence, but not to a degree where duress was made out, it would generally not be in the public interest to prosecute “unless the offence [was] serious” or there were other aggravating factors.
43. Mr Johnson accepted, rightly in our judgment, that the Article 4 breaches referred to above need to be considered as relevant factual matrix and part of the prosecutorial decision-making process. The applicant was a child in a very vulnerable situation interacting with gangs, and there were multiple occasions when he should have been referred to the NRM, and was not. Mr Johnson was also right, however, to point out that this was not a case of total inactivity on the part of the social services. Attempts were made to move the applicant to safety from time to time, for example, and it is not clear that the applicant himself was always prepared to do so.
44. Mr Johnson explained that the basis of the respondent’s position that prosecution of the Isleworth offences would have been pursued despite these failings is as follows.
45. This was offending of the utmost seriousness. The public interest is exemplified by the mandatory minimum sentence of 5 years’ imprisonment for possession of a prohibited firearm, and by the fact that Parliament decided that the offence should not be amenable to a s. 45 defence. The applicant sought to conceal or dispose of the firearm when police attended. The presence of two very young children in the property with a firearm containing a live round was a highly aggravating feature, whatever the cause of the applicant’s presence in the property. To that there needed to be added the applicant’s previous relevant (Woolwich) offending. Whilst no actual harm was caused, the risk of harm was significant. Against this fell to be balanced the applicant’s age and status as a VOT, which impacted on his level of culpability, set in the context of the Article 4 failings but also the attempts to seek to help him. The scales were tipped firmly in favour of prosecution in the public interest. The offending was so serious in nature that only very rarely would the public interest not favour prosecution.
46. In the respondent’s assessment, prosecution would have been entirely proportionate in all the circumstances.
47. Mr Johnson accepts that the position in respect of prosecution of the Woolwich firearm offence is weaker. The applicant was much younger at the time. The offending did not involve a prohibited firearm, and no children were involved. Nevertheless, the offending was still serious, as confirmed by the photographs of the applicant holding the gun in question. There was thus positive evidence of his physical contact with the firearm. There was also the presence of other weapons in the bag found to contain the firearm.
48. There is no proper basis on which to second-guess the respondent’s positive assertion that, even if all the information had been before the CPS when making the decisions to

charge the applicant, it would still have been concluded that both prosecutions were in the public interest.

49. As indicated above, we are satisfied that the respondent has conscientiously revised the decision to prosecute the applicant in light of the relevant material, and that its position that the prosecution would have been pursued is not flawed, let alone clearly so. There was a balancing exercise to be carried out. Even recognising the applicant's age at the time of the offending, and the circumstances underlying it, there is nothing irrational in the view that it nevertheless remained in the public interest to prosecute. Nor would the court have stayed the prosecutions had any application to that effect been made. In short, there was no abuse of process.

The Bail Act offence

50. There is one discrete matter that remains for us to address, namely the application to appeal the applicant's conviction for failure to surrender, for which leave is not required but an extension of time is. The instigation of that charge was a matter for the court, not the CPS.
51. The detail of the history, taken from the prosecution opening, is as follows. After a period on remand following the plea and case management hearing in March 2014, the applicant was finally granted bail on 23 May 2014, with a condition of residence at a hostel in Wales. He complied with bail conditions by returning to court for another hearing on 16 June 2014. It was only after that hearing that he went on the run. He did not appear back at the hostel in Wales and was at that point in breach of bail conditions. A warrant was issued in August, upon his failure to attend court that month.
52. He told the author of the relevant pre-sentence report that he had gone on the run whilst on bail because he hated his placement home in Wales and was isolated. However, in his statement dated 30 March 2022, the applicant states that he was "told to go on the run by the elders, and he was told that this was best option to sort out the case. I did not know I would be committing another offence by not attending court. I did what I was told and had no choice and feared them. I was still in debt to them as the firearm was seized."
53. Given the chronology set out above, and the contents of the pre-sentence report, the reliability of applicant's statement as to the circumstances surrounding his failure to surrender is at the very least questionable. For example, he would have been warned when first granted bail that any breach would be a separate offence for which he could be separately punished, and again on 16 June 2014. There is in fact also a social services record dated 11 July 2014 with the following entry:

"[The applicant] was bailed to the LA and placed at the Meadows in Wales. He was not happy at the placement as it was far from London and could not have contact with friends. He made threats of breaching his bail so that he could be sent to jail as he wanted to be with other Gang Members..."

This would suggest that the applicant knew full well that breach of his bail conditions would result in custody.

54. We do not, however, need to resolve these difficulties with the applicant's witness statement. That is because we are satisfied that, whatever the correct position, the court, fully appraised of all the material now available, would have proceeded with the prosecution relating to the applicant's failure to surrender. That failure involved deliberate conduct on the part of the applicant but, more importantly, the charge of failure to surrender was not to be pursued in isolation, but rather was to run alongside the proceedings for firearms offending.

Conclusions

55. Standing back, despite the significant delay in making these applications, we consider that it is in the interests of justice that we should grant the necessary extensions of time and leave as necessary. We would admit fresh evidence but only to this extent:
- i) The contemporaneous social services and probation records relating to the appellant;
 - ii) The CG decision;
 - iii) The appellant's (unchallenged) witness statement of March 2022 as background to the appeal (despite our reservations as to its reliability at least in parts).
56. However, we would dismiss the appeals on the merits. For the reasons set out above, the convictions on both firearms offences and the Bail Act offence are safe. Although the appellant was a VOT at the time of the offending, and the relevant nexus existed, and although the appellant was not adequately safeguarded by the relevant authorities, there is no proper basis for going behind the prosecution's positive assertion that it would have maintained both prosecutions as being in the public interest.