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IN THE COURT OF APPEAL
CRIMINAL DIVISION
Case No: 202103776/B3



[2022] EWCA Crim 859

Royal Courts of Justice
The Strand
London
WC2A 2LL
Thursday 26th May 2022

B e f o r e:

THE VICE PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION
(Lord Justice Fulford)

MRS JUSTICE McGOWAN DBE

MR JUSTICE FOXTON

REGINA

- v -

NEVADA HORATIO FARREL

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Mr A Morris appeared on behalf of the Applicant

Miss T McCarthy appeared on behalf of the Crown

J U D G M E N T

Thursday 26th May 2022

LORD JUSTICE FULFORD:

1. On 26th March 2021, following a trial in the Crown Court at Lewes before Mr Recorder Swirsky and a jury, the applicant (then aged 17, now aged 18) was convicted of two counts of being concerned in the supply of Class A drugs, contrary to section 4(3)(b) of the Misuse of Drugs Act 1971.
2. On 19th May 2021 the Recorder sentenced the applicant (then aged 17) on each count concurrently to a 12 month Youth Rehabilitation Order, with requirements to undertake 100 hours of unpaid work and six weeks' attendance at an Offender Behaviour Programme. His co-accused, Bilal Charles and Christopher Wilson (both aged 18 at the time of the offending), were acquitted on both counts.
3. The applicant's application for an extension of time (219 days) in which to apply for leave to appeal against conviction has been referred to the full court by the single judge.
4. On 6th February 2020 plain clothes police officers observed Charles, Wilson and the applicant (the latter was then aged 16), in the Preston Street area of Brighton. They were seen approaching known drug users and it was established that they were operating out of a room at the Prince Regent Hotel in Regency Square. At around 11.15 am Wilson and the applicant left the hotel. They then took part in a suspected drug deal and were both arrested. A search was conducted of their hotel room, where Charles was arrested. The police seized Class A drugs, which included 115 individual wraps lying on the floor, along with a larger package of wraps. The drugs were contained in either blue or white plastic wrappings, colour coded for cocaine (count 1) and heroin (count 2). The paraphernalia utilised by drug dealers was also seized; it included scales, a drugs line mobile telephone and cash.
5. It was submitted that this was a "county line" drug dealing operation. The three defendants accepted that they were supplying Class A drugs. They suggested that they were acting on behalf of a London gang (the Mali Boys), which was based in the Waltham Forest area of the Capital. They each claimed that they were a victim of modern slavery and relied on the defence pursuant to section 45 of the Modern Slavery Act 2015 ("section 45").
6. The prosecution did not accept that they had a valid defence under section 45. It is of note that the Crown relied on bad character evidence in the form of a Drill rap video in which the applicant could be seen dancing. The prosecution submitted that the video was evidence that showed that he was a willing associate of this gang.
7. The applicant admitted supplying drugs in county lines operations in various locations, selling drugs for older gang members. There was evidence, including from the applicant himself, that he had been involved with the Mali Boys since he was 14 years old and that he had been involved additionally with the 2Reckless Gang which had been running drug lines into Norfolk and other counties, as well as with the DM Crew.
8. The applicant had previously been arrested with adults in circumstances linked to drugs. His first arrest for possession of drugs with intent to supply was when he was 13 years old. He had frequently gone missing in the past, most notably during 2017. The applicant had been placed in care as a result of these and other linked events, and he had been subjected to domestic abuse from a young age. He is autistic, and his vulnerabilities would, it is suggested, have made him more susceptible than otherwise would have been the case to being recruited into criminality of this kind.

9. In his evidence to the jury, the applicant said that the Mali Boys forced him to travel to Brighton to sell drugs prior to his arrest for these offences. He bumped into Charles and Wilson by chance at Brighton Railway Station and he "hung out" with them because he knew them. He said that he was selling separately from his co-accused.

10. The prosecution relied on his somewhat different account in his defence statement in which he had suggested that he had gone to Brighton because he believed that Charles and Wilson would be in danger if they did not travel to sell drugs. In addition, the applicant appeared to change his account as to whether he had been a member of the 2Reckless Gang. He accepted that he had appeared in the Drill rap music video, and he said that he had participated in the filming because he thought that it would be fun. He testified that he had been unaware of the content of the lyrics at the time of the filming.

11. There are four grounds of appeal as follows:

- (i) The Recorder incorrectly ruled that bad character evidence was admissible at trial;
- (ii) The Recorder misdirected the jury as to the elements of the section 45 defence;
- (iii) The Recorder misdirected the jury in relation to lies allegedly told by the applicant and as regards inconsistencies within the defence statement;
- (iv) The prosecution failed to disclose evidence which arguably would have been persuasive evidence to support the applicant's defence.

12. It is suggested that these grounds, considered individually or cumulatively, render the applicant's conviction unsafe. For reasons that will shortly become apparent, we need focus only on the second ground of appeal, namely the Recorder's direction vis-à-vis section 45. By way of an introduction to our analysis of this issue, we wish to pay tribute to the care the Recorder took over formulating the written directions and the Route to Verdict, both of which he had provided to the jury. He had clearly thought carefully about the structure and content of the summing up. Although for the reasons set out below we are wholly unable to accept the respondent's submission that there was no, or alternatively no material, misdirection as to a critical element of the applicant's defence, the Recorder otherwise approached the summing up with commendable care and diligence.

13. Section 45 of the Modern Slavery Act 2015 is in the following terms:

"Defence for slavery or trafficking victims who commit an offence

- (1) 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

(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.

(2) A person may be compelled to do something by another person or by the person's circumstances.

(3) 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.

(4) A person is not guilty of an offence if —

(a) the person is under the age of 18 when the person does the act which constitutes the offence,

(b) the person does that act as a direct consequence of the person being, or having been, a victim of slavery or a victim of relevant exploitation, and

(c) a reasonable person in the same situation as the person and having the person's relevant characteristics would do that act.

(5) For the purposes of this section —

'relevant characteristics' means age, sex and any physical or mental illness or disability;

'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."

14. The position is very significantly different as between those over and those under 18 years of age. The defence for those over 18 is available if the defendant did the act which constitutes the offence because he or she was compelled to do it **and** the compulsion is attributable to slavery or to relevant exploitation, **and** a reasonable person in the same position as the person, and having the person's relevant characteristics, would have no realistic alternative to doing that act.

15. In the case of an individual under 18, it is equally necessary that there was a direct causal link between the criminal act and the individual being (or having been) a victim of slavery or human trafficking, but there is no requirement of compulsion. Moreover, whereas in the case of an individual over 18 the defence requires that a reasonable person in the same situation with the same relevant characteristics would have "no realistic alternative" to doing the criminal act, in the case of an individual under 18, it simply requires that a reasonable person in the same situation and with the child's relevant characteristics would do what the child did.

16. Those two markedly different regimes as set out in section 45 for defendants who are over or under 18 are reflected in the example directions given in the Crown Court Compendium Part 1: Jury Trial Management and Summing Up 2021, paragraph 18.6.

17. The Recorder directed the jury during the summing up as follows:

"Modern Slavery

In this case each of the defendants admits all four elements of the offence on each count. The case then is about their defence.

Each defendant is arguing the same defence which arises under the Modern Slavery Act 2015. They say that they are the victims of modern slavery. The word 'slavery' is of course highly emotive, and many people have some idea of what historical slavery involved. Modern slavery is a concept defined in an Act of Parliament.

For the purpose of this case, a person would be a modern slave if another person or persons knowingly exploits by requiring them to carry out forced or compulsory work. In deciding whether or not a person has been required to carry out forced or compulsory work, you are entitled to look at all the circumstances of that person that you know about.

Mr Wilson and Mr Charles are adults, while Horatio Farrel is a minor. There are different considerations for you as regards the two adult defendants and Horatio Farrel. The defence for Mr Wilson and Mr Charles: 'A person will not be guilty of an offence which was committed when he was over 18 if the following three elements are present: that the person was compelled to do the act' – in this case drug dealing; 'that the compulsion was attributable to modern slavery; three, a reasonable person in the defendant's position and having the same characteristics as the defendant would have had no realistic alternative but to do the act'.

Mr Charles also says that he has been the victim of human trafficking, and that he met someone in Somalia who helped him come back to the UK and then coerced him into working for a gang. If you decide that he was being truthful about this, that is something you should consider with regard to each of the factors that you have got to consider in his defence.

The defence of Horatio Farrel. A person will not be guilty of an offence which is committed when he was under 18 if the following two elements are present: one, a person did the act because he was a victim of modern slavery; two, a reasonable person in the defendant's position, having the same characteristics as the defendant, would have had no realistic alternative but to do the act. So, there is not a separate requirement of compulsion in the case of Horatio.

The reasonable person. Both defences require you to consider a reasonable person. This should be an ordinary person who found themselves in the same situation as the defendants as regards to compulsion and modern slavery, i.e., of exploitation in the cases of Mr Charles and Mr Wilson and as regards modern slavery, i.e., exploitation in the case of Horatio Farrel.

The burden on the prosecution. Do you recall what I said at the beginning? You will remember that the burden of proof is on the prosecution. This remains the case when the defendant says they have a modern slavery defence. It is for the prosecution to prove that the defence does not apply to each of these three defendants, and to do this the prosecution must make you sure that it does not apply.

The issue in this case. The only issue then for you to decide with respect to each of these defendants is whether the prosecution has made you sure that the modern slavery defence does not apply."

18. The Recorder's written legal directions contained the following:

"Modern Slavery

In this case each of the defendants admits all four elements of the offence on each count. The case then is about their defence. Each defendant is arguing the same defence which arises under the Modern Slavery Act 2015. They each say that they are victims of modern slavery.

The word 'slavery' is, of course, highly emotive and many people have some idea of what historical slavery involved. Modern Slavery is a concept defined in an Act of Parliament.

For the purpose of this case a person will be a Modern Slave if

another person or persons knowingly exploits them by requiring them to carry out forced or compulsory work. In deciding whether or not a person is being required to carry out forced or compulsory work you are entitled to look at the circumstances of that person that you know about.

[Christopher Wilson] and [Bilal Charles] are adults while [the applicant] is a minor. There are different considerations for you as regards the two adult defendants and [the applicant].

The Defence of [Christopher Wilson] and [Bilal Charles]

A person will not be guilty of an offence which was committed when he was over 18 if the following three elements are present:

- (1) That the person was compelled to the act – in this case drug dealing;
- (2) That the compulsion was attributable to Modern Slavery;
- (3) A reasonable person in the defendant's position, and having the same characteristics as the defendant would have had no realistic alternative but to do the act.

[Bilal Charles] also says that [he] has been the victim of human trafficking in that he met someone in Somalia who helped him come back to the UK and then coerced him into working for a gang. If you decide that he was being truthful about that, [that] is something you can consider with regard to each of the factors you have to consider.

The Defence of [the applicant]

A person will not be guilty of an offence which was committed when he was under 18 if the following two elements are present:

- (1) The person did the act because he was a victim of Modern Slavery;
- (2) A reasonable person in the [applicant's] position, and having the same characteristics as the [applicant] would have had no realistic alternative but to do the act.

So, there is not [a] separate requirement of compulsion in the case of [the applicant].

Reasonable Person

Both defences require you to consider a 'reasonable person'. This would be an ordinary person who found themselves in the same situation as the defendants as regards to compulsion and modern slavery (i.e. exploitation) in the cases of [Bilal Charles] and

[Christopher Wilson], and as regards modern slavery (i.e. exploitation) in the case of [the applicant].

The Burden on the Prosecution

If you recall what I said at the beginning you will remember that the burden of proof is on the prosecution. This remains the case when the defendants say they have a Modern Slavery defence.

It is for the prosecution to prove that the defence does not apply to each of these three defendants and to do this the prosecution must make you sure that it does not apply."

19. The relevant document entitled Route to Verdict set out:

"[The Applicant] – Route to Verdict

It is not in dispute that [the applicant] was concerned with drug dealing in the Preston Street area of Brighton on 6th February 2021. The defence case is that [the applicant] was compelled to do so due to the threats of violence he had received from the Mali Boys.

Accordingly, you must consider the following questions.

Question 1

Has the prosecution made you sure that [the applicant] was NOT a victim of modern slavery by being exploited so as to perform forced labour?

- If you are sure that [the applicant] was not a victim of modern slavery, return a verdict of 'Guilty'.
- If you think that [the applicant] was or may have been a victim of modern slavery, go on to consider the next question.

Question 2

Has the prosecution made you sure that a reasonable person in the same situation as [the applicant] and of [the applicant's] age and sex, sharing any of [the applicant's] physical characteristics or his personal and family circumstances, including his level of education, would have had a realistic alternative to drug dealing?

- If the prosecution has made you sure that a reasonable person (as I have explained that concept to you) would have had a

realistic alternative, return a verdict of 'Guilty'.

- If you are not sure, then your verdict will be 'Not Guilty'."

20. The Recorder therefore clearly acknowledged that the applicant was in a different position as regards the elements of the section 45 defence from his two co-accused. His summing up in this context for Wilson and Charles was appropriate. But he made a fundamental error as regards the applicant in that, although he correctly identified that the element of compulsion did not apply in his case, he simultaneously incorporated one of the elements of the defence for those over 18, namely that "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", instead of the requirement for those under 18, namely that "a reasonable person in the same situation as the person, and having the person's relevant characteristics, would do that act".

21. Miss McCarthy, on behalf of the respondent, in the written Respondent's Notice did not acknowledge that there were any difficulties in the Recorder's summing up in this regard. In oral submissions before us, however, she accepted that parts of the direction for those over 18 had indeed been incorporated into the direction as regards this applicant. She submitted, nonetheless, that the dynamic of the trial and the way in which the case evolved as regards all of the accused meant that this misdirection did not taint the summing up, and the issues in relation to modern slavery in relation to all of those on trial were, in her submission, appropriately explored, developed and explained to the jury.

22. We are unable to accept these submissions. There are two fundamental difficulties which flow from the Recorder's direction in this regard. First, there is a material difference between the notions, on the one hand, that a reasonable person in the same situation as the applicant, and having the applicant's relevant characteristics **would have no realistic alternative to doing that act**, and, on the other hand, that the same reasonable person simply **would do the act**. The words "no realistic alternative" act to limit, potentially significantly, the circumstances in which the defence can apply. Second, the requirement that the applicant should have had no realistic alternative is a clear and unavoidable reference back to the requirement of compulsion for those over 18. In the event, the direction made no sense and was logically unworkable. The Recorder directed the jury that for the applicant the requirement of compulsion was not present, whilst he simultaneously directed them that the defence required that the applicant acted as he did because he had no realistic alternative, thereby describing, or strongly alluding to, the defence as it applies to those over 18 years of age.

23. It is self-evident that the ingredients of this defence should have been properly set out in the summing up. In the present circumstances there is no way of telling whether the jury would have come to a different verdict if they had understood that the defence in the applicant's case did not involve the jury needing to consider whether a reasonable person in the same situation would have had a realistic alternative to drug dealing.

24. Parliament has created markedly different provisions within section 45 for those over and those under 18, providing that the two groups should not be treated in the same way in this context. As a result of a mistake, regrettably unnoticed by counsel who had been provided with the written directions and the Route to Verdict in advance of the summing up, the Recorder, in our view, fatally incorporated a significant element of the wrong defence in his directions regarding this applicant, thereby rendering the applicant's conviction on these two counts unsafe.

25. It follows that we reject the wholly unjustified assertion in the written Respondent's Notice that this application has been brought solely to disrupt a subsequent trial in which the applicant is advancing a defence under section 45. Assertions of bad faith of that kind, which include direct criticism of the applicant's counsel, should only be made if they have the clearest sustainable foundations. That is not the case here. Indeed, the position is quite the contrary.

26. We grant the application for leave, we allow the appeal, we quash the two convictions for being involved in the supply of Class A drugs, and, as we have already indicated, it is unnecessary in these circumstances to consider the other grounds of appeal.

(The Crown's application for a retrial was resisted on behalf of the Appellant)

LORD JUSTICE FULFORD:

27. In our judgment it is not in the interests of justice to order a retrial, given the particular circumstances of this case, and including the result of the recent trial at Snaresbrook Crown Court.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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