[2023] EWCA Crim 803
IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NO 202201837/B2

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 29 June 2023

Before:

LORD JUSTICE CARR DBE

MR JUSTICE JAY

SIR NIGEL DAVIS

REX

V

"AJW"

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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)

MR B DOUGLAS-BROWN KC & MR J ROBOTTOM appeared on behalf of the Applicant.
MR A JOHNSON appeared on behalf of the Crown.

J U D G M E N T

LADY JUSTICE CARR:

1. We make an anonymity order in this case in order to protect the interests of the proper administration of justice. We bear in mind that the normal rule is open justice, but an anonymity order, on the facts of present case, is strictly necessary, pursuant to the principles identified in *R v AFU* [2023] EWCA Crim 23 at [1]. The risk to the applicant of being re-trafficked for criminal exploitation is real, and such an order is consistent with and so does not risk undermining anonymity orders made in respect of the applicant in other legal proceedings.

Introduction

2. This is a renewed application for leave to appeal against conviction alongside applications to adduce fresh evidence and for an extension of time of some eight years. On 9 April 2014, the applicant was convicted, following trial in Cardiff Crown Court before HHJ Richards and a jury, of conspiring to secure the avoidance or postponement of enforcement action by deception (a substantive offence under section 24A of the Immigration Act 1971), contrary to section 1(1) of the Criminal Law Act 1977. She was sentenced to two years' immediate imprisonment.

3. The matter has a complex factual and procedural history. The renewed application came first before the Court on 14 March 2023, when the matter was adjourned in order, amongst other things, for the respondent to attend and make representations. At that stage the respondent was resisting the application.

4. During the adjournment period the respondent has reconsidered its position in the light of recent case law, and the arguments have narrowed considerably. Now, although there remains disagreement as to the precise correct analytical approach to be taken, it is common ground between the parties that, one way or another, the applicant's conviction is unsafe. It remains, of course, for us to be satisfied this is the case.

The Facts

5. We need only summarise the facts. The detail can be found in the judgment of Underhill LJ in *R (MN & Or) v Secretary of State for the Home Department* [2020] EWCA Civ 1746; [2021] 1 WLR 1956, at [6] and [257] to [323]. The applicant arrived in the United Kingdom from Nigeria on 30 July 2012, on a student visa valid until 13 July 2013, with the applicant enrolled on a course in hospitality and tourism in London. On 22 March 2013 she and a man named Karoly Farkas (KF), a European national aged 43, went to City Hall in Cardiff to register their intention to marry. They saw the Superintendent Registrar who asked them questions about the proposed marriage. The applicant

provided information and documentation, including a birth certificate giving a date of birth of 27 October 1988, making her 24 years old at the time. She and KF gave a residential address in Newport. The applicant produced a Nigerian passport and KF a Hungarian one. Newport Registry Office was specified as the wedding location and a wedding date of 9 April 2013 was set.

6. The Superintendent Registrar had become suspicious about the couple and reported them to the Home Office. When the applicant and KF attended the wedding location on 9 April, they were apprehended and interviewed under caution. The applicant gave an account that the proposed marriage was genuine. She had met KF in a nightclub. They had started calling each other and in December 2012 began living together. He had proposed to her in February 2013. Immigration officers attended the Newport address that they had given as their residence but found the address to be occupied by another man and not the applicant and KF.

Trial and Conviction

7. The applicant was treated as an adult and tried alongside others including, so far as relevant, KF. The prosecution case was that the proposed marriage was a sham, planned in order to enable the applicant to reside in the United Kingdom permanently by reason of marriage to a European national. Evidence was adduced to the effect that her birth certificate had been false.

8. In her first Defence Statement, in June 2013, the applicant asserted that her relationship with KF was genuine. However, in a second Defence Statement, served in early February 2014, the applicant stated that she was in fact born in 1997, was 15 years old when she met KF and did not want to enter into a relationship with him. This set in train a series of correspondence, commencing with a letter dated 12 February 2014 in which the prosecution invited the applicant's solicitor, amongst other things, to arrange an age assessment. Details of a social worker who could assist were provided. It does not appear that that invitation was followed up; rather the applicant's legal team at the time took the view that the commission of an age assessment was something for the prosecution, and not the defence. All that appears to have happened is that the defence legal team responded to the prosecution, indicating that it was not for the defence to have commissioned an age assessment but rather the prosecution could undertake one if they needed to, and that the applicant was agreeable to such an assessment. No age assessment in the event took place.

9. At around the same time, in March 2014, the applicant's solicitor passed the applicant's complaints of multiple rapes by KF, as set out in her second Defence Statement, on to her prison police liaison officer. It is not clear what happened to those complaints; but what is clear is that they were never taken up in terms of any criminal process or further investigation.

10. At trial the applicant's case was that the marriage was a sham, but not because she wanted to evade immigration enforcement action; rather it was because she was being threatened by KF and felt that she had no alternative but to go along with his wish to marry her. Her true date of birth was 27 March 1997, making her only 17 years old at trial. She had just turned 16 in April 2013. A second yellow birth certificate was genuine, as was her passport. She accepted that she did not live at the given Newport address. She gave evidence as to how she had run away from home in Benin city at the age of nine because of the risk of female genital mutilation ("FGM"). She had stayed with an older man, Sam Okoro, for some six years. He had sex with her, although he also taught her to read and write. When she was 15, he helped her to leave the country. He obtained the false birth certificate which showing her to be older than she was. He paid for her flight and half of her college fees. When she arrived in this country, she had no accommodation and was on her own. A friend allowed her to stay at an address in London. She had an older sister who lived in Leicester. When visiting that sister, she had met KF whilst walking from a bus station and ended up going to his home. He had forced himself upon her sexually and made threats to kill her and her sister. Out of fear she had stayed with him. They had discussed marriage. He told her that he had a friend in Newport where they could get married. He had authority over her, and she had to do what he said. He took her to the Cardiff Registry Office. She had done everything because he wanted it, under threats, and because he had said that otherwise he would kill her sister. She had not agreed to marry him in order to improve her chances of staying in the United Kingdom.

Events following conviction and fresh evidence

11. Following sentence and having been served with Notice of Liability to Automatic Deportation, the applicant made an asylum claim. That was refused and she appealed unsuccessfully to the First-tier Tribunal. In the context of that appeal, she gave an account which led to a referral to the National Referral Mechanism ("NRM") in June 2015. An age assessment carried out that year found her date of birth to be as she had claimed, namely 27 March 1997. In December 2016, it was found that there were reasonable grounds to believe that she was a victim of trafficking ("VOT"). In February 2018 however, a conclusive grounds decision held that that was not the case. The applicant commenced proceedings for judicial review against that decision, which ultimately succeeded in the Court of Appeal in December 2020 (see the decision in *R (MN & Or)* to which we have referred above).

12. On reconsideration, it was then accepted in a Conclusive Grounds Decision of September 2021, that the applicant had been a victim of modern slavery as follows: sexual exploitation in Nigeria between 2006 and 2012; sexual exploitation and domestic servitude in the United Kingdom during 2012 and 2013; forced criminality in the United Kingdom during 2013. The applicant's date of birth was again accepted as being 27 March 1997.

13. There are available a number of medical reports dated between November 2016 and 2022, addressing the applicant's psychiatric and psychological condition, together with a statement from her.

14. The matters that we have identified in this section are all the subject of the application to adduce fresh evidence under section 23 of the Criminal Appeal Act 1968. That application and the application for an extension of time are supported by a witness statement from the applicant's solicitor dated 2 August 2022. The statement contains, amongst other things, an outline chronology of events since the solicitor's instruction in May 2019.

Grounds of Appeal and Response

15. In overview it is said that the applicant committed the offence against a background of being subject to the threat of FGM, rape and violent abuse in Nigeria as a child. She was then trafficked or smuggled to the United Kingdom and trafficked through exploitation in which she was subject to forced prostitution and criminal activity - at all material times remaining a child. Yet, and although the applicant had said at the time in terms that she was a minor, the defence took no steps to obtain or secure a formal age assessment and no one made any inquiry as to whether the applicant should be referred as a possible VOT. She was not advised about human trafficking or modern slavery law or of the possibility of a referral to the NRM.

16. It is now clear, it is said, that the applicant was targeted by KF for the purpose of criminal and child sexual exploitation. This was against a background of modern slavery. If what is now known about the applicant's status as a VOT had been known at the time, the Crown Prosecution Service would or might well have not prosecuted her. These submissions are strengthened, it is said, by virtue of the fact that the applicant was a child. Thus, the prosecution was an abuse of process and the conviction unsafe.

17. Mr Johnson sets out the respondent's revised position as revised:

    i) In the light of what is now known, the prosecution would have accepted at trial that the applicant was, when arrested, 16 years old.

    ii) The prosecution would not have accepted her account of her relationship with KF, in particular that she was coerced to marry him. It would have remained the prosecution case that she sought to marry KF in order to regularise her immigration status.

iii) The proceedings below do not fall to be treated as an abuse of process on the basis that the applicant was a VOT. The real issue is whether the fresh evidence undermines the jury's conclusion that the applicant was party to the conspiracy. It is said that it does not. If there is no basis to go behind the jury's verdict then the proceedings cannot, it is said, be an abuse of process on trafficking grounds.

iv) However, the respondent recognises that even whilst maintaining its case as set out above, what is now known is that the applicant was a victim of prior exploitation, who was 16 years old at the time she sought to marry KF. Had that been known at the time she would not have been prosecuted on public interest grounds.

18. Mr Douglas-Jones KC, for the applicant, accepts that the applicant's conviction is unsafe for the reasons identified by the respondent. But in the alternative, he submits that the conviction is unsafe by reason of the abuse of process doctrine as it applies to VOTs. This is, he suggests, an orthodox VOT abuse of process appeal. It is irrelevant that it follows a conviction following trial or that the applicant gave evidence at trial. The question, namely whether it was fair to try the applicant, remains the same. The real issues are whether the conviction is safe by reference to breaches of the non-prosecution principles under the relevant international and regional instruments, breaches of the Crown Prosecution Service Guidance and failures by the applicant's lawyers, whether it was fair to try the applicant and whether this is a case in which the prosecution would or might well not have been maintained. Further, the prosecution of a child as an adult itself rendered the trial process unfair.

Analysis

19. The applicant's conviction predated the advent of the Modern Slavery Act 2015 but not the United Kingdom's international obligations under the Palermo Protocol, the Council of Europe Convention on Acting Against Trafficking in Human Beings and the EU Directive 2011/36 on preventing and combating trafficking human beings and protecting its victims.

20. The relevant principles relating to abuse of process and the context of offending predating the Act can be found in *AFU* (supra) at [105] to [113]. One way of formulating the relevant question is to ask whether the applicant would or might not have been prosecuted in the public interest. If the answer is "yes", then the proper course is to quash the conviction.

21. The common ground here is:

i) There was a failure to identify the applicant as a VOT, albeit the respondent does not accept that she was a victim at the hands of KF.

ii) There was a failure to identify the applicant as 15 years old at the beginning of the alleged conspiracy, and only just 16 at the end of it.

iii) There was a failure by the respondent to comply with the Crown Prosecution Guidance as it applied at the time.

iv) That, had these failures not occurred, the prosecutorial decision would have been not to prosecute on the grounds of public interest.

22. The respondent is right to note that this is not a typical case where it is common ground that an offence was committed, and the question is whether there is a nexus and, if so, to what extent between the trafficking and the commission of the offence. For here, the applicant denies having committed any offence whatsoever. The jury, properly directed, and after hearing from the applicant in the witness box, rejected that denial.

23. Against that the applicant can suggest that it is wrong to proceed by reference only to the jury's verdict following trial, when that trial provided neither the requisite safeguards for a child or a (child) VOT.

24. We do not consider it necessary for present purposes to resolve the narrow legal dispute between the parties as identified above, namely whether the application falls to be assessed by reference to trafficking grounds or by reference only to public interest grounds. The position is that it is now accepted that the applicant was only 17 years old at the time of her conviction and just 16 at the time of her attempt to marry KF set against a history of prior exploitation. The prosecution concedes that, in the light of this understanding, the applicant would not have been prosecuted on the basis that such a prosecution would not have been in the public interest.

25. This seems to us to be an entirely realistic and appropriate concession on the particular facts of the case. The decision that it was in the public interest to prosecute was made on the basis that the applicant was an adult. There is no evidence that receipt of the applicant's second Defence Statement led to any meaningful reconsideration of public interest or, most essentially, any meaningful further inquiry into her true age. Had the full picture been known, the prosecution would have been aware that it was considering the prosecution of a child who had been previously exploited and who had sought to enter into a marriage with a 43-year-old man. It would also have been aware that the child had done so in circumstances where the legal requirement for consent to marriage had not been met, and where any sexual activity, even if consensual, that had occurred at any time

up until very shortly before the intended marriage date would *prima facie* have involved the man in committing an offence contrary to section 9 of the Sexual Offences Act 2003. Prosecution would not have been in the public interest.

26. The general principle that decisions to prosecute are ordinarily for the prosecutor is an important one (see for example *R (Barons Pub Ltd) v Staines Magistrates' Court* [2013] EWHC 898 Admin, at [51(i))]. However, in circumstances where, as set out above, the respondent has itself concluded that the public interest test was not met, there can be no question that a judicial decision to the same effect would offend it. This is therefore one of those very rare cases where, despite the applicant's conviction following trial, we conclude that her conviction is unsafe.

Conclusion

27. For these reasons and in these circumstances, we consider it to be in the interests of justice to extend time and to grant leave together with permission to adduce the fresh evidence. The conviction is unsafe, and we quash it accordingly.

28. Finally, we express our thanks to Mr Douglas-Jones and Mr Johnson for their able assistance in this matter.