

Neutral Citation Number: [2008] EWCA Crim 2835

No: 200802952/C1

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand

London. WC2A 2LL

Date: Tuesday, 2nd September 2008

Before:

LORD JUSTICE LAWS

MR JUSTICE JACK

SIR CHARLES GRAY

REGINA

v

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Mr P Carter QC & Miss P Chandran appeared on behalf of the **Appellant**
Mrs N Byrd appeared on behalf of the **Crown**

JUDGMENT

1. LORD JUSTICE LAWS: This is an unopposed appeal against conviction brought before the court by leave granted by Cox J on 26th June 2008. As will shortly appear the circumstances of the case are very troubling and, we hope, no less unusual.
2. On 17th March 2008 at the Canterbury Crown Court before Her Honour Judge Adele Williams, this appellant pleaded guilty to an offence of possessing a false identity card with the intention of using it as her own and was sentenced to 8 months' imprisonment less 16 days spent on remand.
3. The appellant had been arrested shortly after midnight on 29th February 2008 at the Dover Docks. She was on board a coach which was departing the United Kingdom bound for France. At French passport control in Dover she was asked for identification and she handed over a Spanish identity card in the name of Rosalia Majeda Segura, date of birth 10th November 1976. It was plain to the officer that the appellant did not resemble the woman on the photograph in the card. The police were called. The appellant insisted at that time that the identity card was hers. She said her name was Rosalia and she was 31. The arresting officer was to describe her as "a very young small black woman". On arrest she was taken to Dover police station where she persisted in giving the same details. However, at interview in the morning she admitted that the identity card was not hers. She gave her correct name and stated that she was a Nigerian national and had entered the United Kingdom about 2 months before on her own passport. She said that she was trying to get to France to see her uncle. She had lost her passport when her handbag had been stolen and she had obtained the false identity document from a friend. She gave a birth date in 1985. The Kent police custody record and charge sheet both give 10th December 1985 as her date of birth.
4. Entries in the custody record show that the officers had great difficulty understanding her, though she apparently stated that English was her first or her only language. There is also a comment at 1.28 am: "She appears to be very young and possibly juvenile."
5. Between 29th February 2008 and her plea of guilty in the Crown Court on 17th March 2008, her legal representatives obtained information from her on various occasions. In particular on 12th March 2008 she gave her date of birth as 10th December 1991, which would make her 16 though she said she was 17. She said that she had come to England with her boyfriend to escape from her father, who would kill her if she did not submit to an arranged marriage in Nigeria to a 63-year-old man who had five wives already. Once here she said she was "given to be a prostitute" and she ran away to avoid that. She said that she spoke the Edo language as well as broken English.
6. Also on 12th March 2008 the appellant's solicitors contacted the Crown Court to notify them that an interpreter would be required. The court officer said that would be difficult to arrange. At all events no interpreter was present at court on 17th March 2008, nor had there been one at the police station nor at any of the meetings between the appellant and her legal advisers.
7. Again on 12th March 2008 the appellant's solicitor was telephoned by a social worker from what is called "The Poppy Project". This is part of an organisation known as Eves Housing for Women. It was set up in 2003 and is funded by the Ministry of Justice. It supports vulnerable women who have been trafficked into England and forced into prostitution. The social worker suggested seeking an adjournment of the proceedings so that a member of The Poppy Project's outreach team could visit the prison and make an assessment of the appellant. The appellant remained in custody until bailed by Cox J on 26th June.
8. The brief that was delivered to counsel for the defence enclosed a letter from the Poppy social worker, and stated in terms that:

"The Poppy Foundation allege that the defendant is a victim of a sex trafficking organisation".

9. There is an attendance note of what took place at the Crown Court on 17th March 2008. It was presumably prepared by the appellant's solicitor. It records a meeting with the client and counsel in the cells at court. It states that the appellant told her representatives that she discovered that payment for her trip to England was to be made by prostitution. The attendance note also includes this:

"She makes no mention of the Witch Doctor in Nigeria or any of the information provided by the Poppy Project. As such, we are to deal with her on her instructions and her instructions alone."

10. At the hearing, after prosecuting counsel had opened the case very shortly, defending counsel first indicated to the judge that the appellant was 17. He then proceeded as follows (transcript page 3E):

"As my learned friend stated, she travelled to this country legally with a passport and Visa, fleeing her village where her father wished for her to partake in an arranged marriage with a 63-year-old man. Her father would then receive some land. She did not wish to go through with that but was threatened by her father if she did not and he said he would kill her.

So she came to this country really on credit, having been told that she would have work available to her when she arrived to repay her travel debt. That work involved prostitution. It was not something that she was prepared to go along with, and having no family in this country but an uncle in Paris, having lost her documentation and being scared that if she went to the police, she would simply be returned to Nigeria, she sought sanctuary in France and foolishly undertook to use a false instrument.

[THE JUDGE]: Was she on the coach going to France?

[COUNSEL]: Yes, and that is where she was stopped. She appreciates that it was wrong, but she had not appreciated the seriousness of these offences. Your Honour, I would ask that the inevitable prison sentence be kept to a minimum and the days so far served count against that sentence."

11. The first ground of appeal is the want of an interpreter. It is plain that there were some difficulties in understanding the appellant and she is clearly not literate in English or it seems at all. However, letters from her then solicitor confirmed that having met her on 1st March and 5th March 2008, he "was satisfied that she understood and spoke sufficient English without the necessity of finding an Edo interpreter." Apparently, she told the solicitor that for bail purposes she could come and live at his address and "be his daughter". Trial counsel for the defence, for his part, states that at first he had difficulty in following what she was saying but, "taking her account in stages", as he put it, it was quite possible to do so. At no time did she appear to have any difficulty understanding what he was saying to her. It is clear that the appellant has a strong accent which has presented some difficulty in following what she says. The solicitor's attendance notes, however, apparently record her instructions without any equivocation.

12. While we acknowledge that the representatives were sufficiently concerned at one stage to inquire of the court as to the availability of an interpreter, we do not consider in all the

circumstances that the absence of an interpreter has of itself undermined the fairness of the proceedings or the safety of the conviction. We would not allow the appeal on this ground.

13. There are, however, much graver matters to consider. The second ground of appeal invokes the Council of Europe Convention on Action against Trafficking in Human Beings (Council of Europe Treaty Series 197/1975). A prime purpose of this Convention is to protect the human rights of the victims of trafficking. Article 10 requires the States Parties to identify and protect victims of trafficking. It is clear that the particular focus of the Convention is the protection of trafficked children: Article 10(3) provides that where the age of a victim is uncertain, and there are reasons to believe that he or she is a child (that is a person defined as someone under 18 (Article 4D)) then he or she is to be presumed to be a child.

14. The United Kingdom is a signatory to this Convention but has not ratified it. As Mr Carter QC for the appellant has pointed out in his written grounds, the United Kingdom is accordingly obliged by Article 18 of the Vienna Convention on the Law of Treaties to refrain from acts which would defeat the object and purpose of the Trafficking Convention. In fact it is submitted that the United Kingdom has taken some measures expressly to support that purpose. There is not only the creation of criminal offences of trafficking (see sections 57 and 58 of the Sexual Offences Act 2003), but also the terms of two protocols: (i) on prosecution of defendants charged with immigration offences who might be trafficked to victims; and (ii) on prosecution of young offenders charged with offences who might be trafficked victims. These protocols are, we understand, both incorporated into the Code for Crown Prosecutors.

15. Under the first protocol, where a "credible" trafficked victim is prosecuted for an immigration offence, which includes possession of a false identity document, prosecutors are required to consider whether the public interest is best served in continuing the prosecution. The prosecution should set in hand appropriate enquiries into the question whether the person has in fact been trafficked and review the case. In the case of young defendants the Code says this:

"Where there is clear evidence that the youth has a credible defence of duress, the case should be discontinued on evidential grounds. Where the information concerning coercion is less certain, further details should be sought from the police and youth offender teams, so that the public interest in continuing a prosecution can be considered carefully. Prosecutors should also be alert to the fact that an appropriate adult in interview could be the trafficker or a person allied to the trafficker.

Any youth who might be a trafficked victim should be afforded the protection of our child care legislation if there are concerns that they have been working under duress or if their well being has been threatened.

In these circumstances, the youth may well then become a victim or witness for a prosecution against those who have exploited them. The younger a child is, the more careful investigators and prosecutors have to be in deciding whether it is right to ask them to become involved in a criminal trial".

16. It is submitted for the appellant that the court's duty to protect the rights guaranteed by the European Convention on Human Rights should promote an approach to cases such as this which respects the Trafficking Convention. More straightforwardly, in our judgment, a question arises as to what should be the impact of these provisions in the Code for Crown Prosecutors, to which we have referred, in the light of the Convention's provisions. It will be convenient to consider this question compendiously with the other grounds of appeal.

17. We turn to the third ground of appeal. This is that the appellant may well have been entitled to rely on the defence of duress, on the footing that victims of trafficking are known to be at risk of physical violence if they seek to escape or obtain official help. This possibility should have been investigated, it is said, by the appellant's lawyers. Since it is a real and not a fanciful possibility the conviction must be regarded as unsafe. Again, we will consider this along with the other grounds.

18. Of these the fourth ground of appeal concerns the appellant's age. It was submitted to the Crown Court, as we have shown, that she was 17. Given the date of birth she had supplied (10th December 1991), she might have been no more than 16. Aged 17 or under, she should have been proceeded against, if at all, in the Youth Court. The case should not have been sent to the Crown Court. The court was obliged to enquire into the appellant's age (see section 99(1) of the Magistrates' Courts Act 1980). Where such enquiry has been made and the court makes a finding:

"The order of judgment of the court shall not be invalidated by any subsequent proof that the age of that person has not been correctly stated to the court, and the age presumed or declared by the court to be the true age of the person so brought before it, shall, for the purposes of this Act, be deemed to be the true age of that person."

Here there was no such enquiry. It is perhaps unnecessary to enter into the nice question whether, absent such an enquiry, an erroneous assumption by the court as to the defendant's age might be fatal to its jurisdiction to entertain the proceedings. Here the court was in fact told that the appellant was 17. It made no further enquiry. There was no consideration of any kind given to any need to protect the appellant as a child or young person. That is a serious state of affairs in respect of any technicalities arising in the context of section 99(1). We shall have more to say about it.

19. Grounds 5 and 6 are to the effect that the appellant's lawyers took no proper steps to appreciate her possible position as a victim of trafficking and a child or young person. Indeed they did not. On 17th March 2008 they determined to proceed without regard to any input from The Poppy Project. They failed entirely to consider whether she might have been a victim of trafficking, or what might have been the consequences of her age, if it was 16 or even 17 as stated. A note from trial counsel shows that he was unaware of the protocols to which we have referred; so it seems was his instructing solicitor and, if the prosecutor or his instructing solicitor from the Crown Prosecution Service was aware of them, they took no steps to act on them once reference had been made to the possibility that this appellant had been put to prostitution.

20. Mr Carter this morning has told us that the protocols (incorporated, as we have said, into the Code for Crown Prosecutors) make no appearance in either of the standard Criminal Law textbooks, Archbold and Blackstone. We earnestly hope that that omission will swiftly be corrected.

21. The seventh and last ground of appeal is not a ground of appeal at all but an application to admit fresh evidence in three categories: (i) a report by The Poppy Project prepared after the trial date, 17th March; (ii) the file of the trial solicitors; (iii) correspondence between the appellant's present solicitors and trial lawyer. We doubt whether we need the third of these. We have already referred to some of the materials contained in the second and that file is plainly rightly admitted before us under section 23 of the Criminal Appeal Act 1968.

22. The report from The Poppy Project is dated 23rd June 2008. It is written by Ishah Jawaid, a senior outreach worker for The Poppy Project. It shows that, after the appellant's

conviction and sentence on 17th March 2008, she was assessed by another senior outreach worker, who identified her as a victim of trafficking. A detailed history was at this stage obtained from the appellant. It is set out in the report. According to what she said, she was brought to the United Kingdom by a man called Osas, who insisted she would have to pay 60,000 Euros. In the United Kingdom she was installed in a flat with a woman called "Kate". She was threatened and raped by a man there. Before that she was a virgin. Kate told her that she would have to work as a prostitute in order to repay Osas; and she was forced to do so three days after she had been raped and thereafter for over a month before she escaped. The report, which is clearly carefully written in moderate and objective terms, makes horrifying reading. We admit it as fresh evidence on this appeal.

23. As we indicated at the outset, the Crown did not oppose the appeal. They made that plain before Cox J who gave leave on 26th June. On that occasion Cox J said this at transcript paragraph 1.6:

"...having heard from Mr Carter QC today, it is clear that those representing the appellant wish to seek guidance from this court in relation to the issues which have arisen very starkly on the facts of this case concerning the trafficking of this appellant for sexual exploitation. For this reason, I have asked, and I agree, that the perfected grounds should all be considered by the full court at the hearing of this appeal."

We have not accepted the ground of appeal concerning the absence of an interpreter.

24. It is convenient to deal with the other grounds compendiously. There was in this case material before the defence which should plainly have raised at least the apprehension that this appellant had been trafficked to the United Kingdom for the purposes of prostitution. The defence had information from her suggesting that she was at most 17, as counsel indeed submitted to the court, and perhaps only 16. From the custody record the Crown should have appreciated that she might have been a very young person.

25. No steps were taken by the defence to investigate the history. No consideration was given by the defence as to whether she might have a defence of duress. The possibility that she might have been trafficked was ignored. There is nothing in the transcript to suggest that any thought had been given to the State's possible duty to protect her as a young victim. Nobody considered that if she was 17 or less, she should not have been in the Crown Court at all. Counsel for the defence thought it right to refer to "an inevitable prison sentence". The judge passed what she described as an "inevitable prison sentence" of 8 months. If the appellant was 17 or less, a sentence of imprisonment as such was unlawful. For good measure the judge sentenced her without a report.

26. This appeal against conviction must obviously be allowed. We would put it most simply on the footing that the common law and Article 6 of the European Convention on Human Rights alike require far higher standards of procedural protection than were given here. There was no fair trial. We hope that such a shameful set of circumstances never occurs again. Prosecutors must be aware of the protocols which, although not in the text books are enshrined in their Code. Defence lawyers must respond by making enquiries, if there is before them credible material showing that they have a client who might have been the victim of trafficking, especially a young client. Where there is doubt about the age of a defendant who is a possible victim of trafficking, proper inquiries must be made, indeed statute so required. All this is obvious. It marches with what was said by the report of a joint Committee in the House of Lords and House of Commons on human trafficking published in October 2006 (see in particular paragraphs 134 and 159). We hope that this case serves as a lesson to drive these messages home.

27. For all those reasons then the appeal is allowed. An order by Cox J preserving the anonymity of the appellant will be maintained in being.
28. LORD JUSTICE LAWS: Mr Carter, outside court, check with the interpreter that the appellant has understood what has transpired.
29. MR CARTER: Indeed I will. Whilst your Lordship was out, I made sure that she understood what the consequences of the court's order were to be, and she confirmed that she did. Thank you very much for everything that has taken place today.
30. LORD JUSTICE LAWS: Nothing else arises?
31. MR CARTER: I think not, my Lord.