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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 14th January 2009

B e f o r e:

LORD JUSTICE HUGHES

MR JUSTICE WILKIE

SIR GEOFFREY GRIGSON

R E G I N A

v

JACINTA KIBUNYI

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(Official Shorthand Writers to the Court)

Mr P Carter QC & Miss P Chandran appeared on behalf of the **Appellant**
Mr J Harrison appeared on behalf of the **Crown**

J U D G M E N T
(As Approved by the Court)

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1. MR JUSTICE WILKIE: On 18th December 2006 in the Crown Court at Basildon the appellant, Jacinta Kibunyi, aged 27, pleaded guilty on re-arraignment to a single count of possession of a false identity document and was sentenced to 12 months' imprisonment and recommended for deportation. An order was also made, under section 240 of the Criminal Justice Act 2003, that 149 days spent on remand should count towards sentence. An order was made for forfeiture of the false passport in question. She applied for an extension of time for leave to appeal against sentence which was initially rejected by the single judge on paper but she renewed that application before the full court on 17th October 2008 which granted leave to appeal against sentence.
2. The facts of the matter can be stated briefly. On 20th July 2006 the appellant entered a branch of HSBC in Grays in Essex, saying that she wanted to open a bank account. She was asked for identification and produced a Kenyan passport and telephone utility bill in the name of Mary Waru. The manager was suspicious of the genuineness of the passport and referred it to the bank's fraud department who advised that it appeared to be fraudulent; that subsequently being confirmed by a Home Office expert. The appellant was detained.
3. In interview she said that she had arrived in the United Kingdom four days earlier. A woman called "Margaret" had assisted her entry, had accompanied her to the bank and had provided her with a false passport which she knew was false and that it was wrong to produce it to open a bank account. Margaret told her: "Don't worry, this thing is genuine and you have to do me a favour because they didn't pay me anything from Kenya to here."
4. In the course of opening the matter the prosecution told the learned Recorder that the immigration service had, in response to enquiries, informed that they had no record of the appellant having entered the country, nor of her having sought asylum, though they accepted that she did say to the police that it was her intention to seek asylum and that in order to do that she wanted to open a bank account for herself. Unsurprisingly there was nothing known against the appellant in this country.
5. In the course of the opening the prosecution did give assistance to the Recorder in relation to sentence and referred to the case of R v Cheema [2002] 2 Cr App R(S) 79 and R v Kolawole [2005] 2 Cr App R(S) 14. In that latter case the appropriate sentence for using or having with the intention of use one false passport, even on a guilty plea by a defendant of previous good character, should be in the range of 12 to 18 months' imprisonment.
6. In mitigation the defence counsel informed the Recorder that she was under the impression that she had already applied for asylum. Counsel said that the lady who had brought her to this country had her passport and had kept it and had taken her through immigration. He referred to certain passages in the interviews, in particular one answer to a question: "Why did you continue to do it even though you knew it was wrong?" She said: "Because I didn't have others. I'm in a foreign country. This woman tells me

she is going to bring me direct to where there are asylum seekers. I don't have any money with me."

7. As far as the background to her coming to this country was concerned, counsel told the Recorder that his instructions were that the appellant had been born in Somalia and taken to various countries by her parents as a result of a problem there. Eventually she ended up in Kenya 4 years previously, where her parents and her two sisters were eventually killed. The two sisters had become involved unwillingly in a religious sect and were forcibly circumcised and died as a result of that. The appellant herself had been due to be circumcised and ran away and it was as a result of running away that her parents were killed. She could not stay in Kenya. She was taken in by somebody who used her effectively as a prostitute and was then taken in hand by a lady whom she believed was a pastor. She trusted that woman who had arranged for her to come to this country. She had brought her here and then had started to fail her by asking her to open the bank account.
8. The Recorder in his sentencing remarks referred to the account of events in interview and observed that, as he had already observed in the course of the hearing, her account in his view stretched credulity somewhat. He went onto say:

"It is said that you have merely been in the United Kingdom for some four days and that you were returning the favour by your actions to the lady who had assisted you in passing through Heathrow those four days previously, assisted by her, she keeping possession at all times of whatever identifying documents you had or that attached to you at that time."

The Recorder gave her credit for making admissions in interview. He also recorded that he was being informed that she may have a compelling or at least persuasive case for seeking asylum. However, the Recorder then said, as to the commission of the offence, that it was serious, it was a practised and deliberate prepared act of deception to bring about the creation of a bogus bank account. Such conduct called in to question the passport system, the identity document system and shakes people's faith in that. He referred to the fact that she had pleaded effectively at the last moment, but nonetheless he gave a generous discount, despite the late plea, in sentence, in the light of her good character and that she ultimately did plead guilty. In those circumstances he imposed a sentence of 12 months' imprisonment. He then turned to the question of deportation. He said this:

"... I am perfectly satisfied that it is in the public interest that you be, given the apparent uncertain circumstances attaching to you at the moment, recommended for deportation. I emphasise, as has already been said, that can but be a recommendation. If on scrutiny and examination it transpires you do have a case for asylum, I express the wish that that this recommendation not be counted against you."

9. The grounds for appeal rehearse a number of matters but in the course of argument they have effectively been distilled as follows. Firstly, it is said that the sentence of 12

months' imprisonment, whilst it is within the range of conventional sentences for this type of offence, even if committed by a person who has come to this country or has sought to come to this country and for that purpose used a false document, is wholly inappropriate where, as here, it is asserted that the appellant is a victim of trafficking so as to fall within the Council of Europe Convention on Action Against Trafficking in Human Beings. In particular reliance is placed on Article 26 entitled "Non Punishment Provision" which reads:

"Each party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities to the extent that they have been compelled to do so."

10. Mr Carter QC says in effect that the background as described by the appellant and stated in mitigation, coupled with the circumstances in which she lent her assistance to the commission of this offence does fall within the definition of trafficking and that accordingly she falls completely outside conventional sentencing principles.
11. In support of this contention an expert witness report has been prepared and presented to the court. The author of which is Klara Skrivankova, the trafficking programme co-ordinator, of an organisation called Anti-Slavery International. That report is explicitly based on the case facts provided by the appellant's solicitors. She identifies the definition of "trafficking" in the relevant protocols and conventions as follows:

"'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."

12. Mr Carter says that in this particular case exploitation involved forced services, exemplified by the role that she played in the commission of the offence in question. In the expert's report Miss Skrivankova identified that three elements had to be satisfied in the definition of trafficking, the third of which was "for the purposes of exploitation". She then goes on in paragraph 10 to say:

"In the case of Ms Kibunyi, the circumstances of her arrival in the UK, such as the control over her movement, false promises to her by a person described as Margaret, are consistent with other cases of trafficking into the UK and satisfy the first two elements of the trafficking definition. Although in the case of Ms Kibunyi the actual exploitation has not occurred, the actions of Margaret towards Ms Kibunyi could still be described as trafficking, as according to the definition of trafficking

contained in the Immigration and Asylum (Treatment of Claimants) Act 2004, an intent to exploit is sufficient for an act to qualify as trafficking."

In her conclusion she said this:

"Based on the information presented to me on the case of Ms Kibunyi, I am concerned that Ms Kibunyi's indicators are at present suggesting that she might have been a victim of trafficking for forced labour. I urge the court to consider these facts and take an action to allow for investigation of whether or not Ms Kibunyi is a victim of trafficking."

13. In our judgment the circumstances as described by the appellant and rehearsed before the Recorder in mitigation fall significantly short of the description of exploitation in the ways identified in the definition of trafficking as focussing on the purpose of her being brought to this country and the circumstances in which she was brought to this country. At its highest it seems to us that what she has disclosed evidences, in effect, a commercial relationship, no doubt entered by her in circumstances where she felt she had little option but to agree; whereby in return for being brought here and guided through the airport or other port of entry, she agreed to perform the criminal act to which she had pleaded guilty as a means of ensuring that the agent received payment. Indeed that was explicitly stated to be the purpose of the commission of the offence. In our judgment, there is nothing in the expert witness's report which indicates anything beyond that and therefore, in our judgment, this is not a case where we feel in any way constrained by the operation, in the appellant's case, of the Convention.
14. As an alternative Mr Carter also argued that, even if she were outside the trafficking definition, the circumstances as described were so close to trafficking as to constitute mitigation, so substantial that it causes her case to fall outside the conventional sentencing structure. In our judgment, for the reasons we have already indicated, we are not satisfied that that is the case. We do not necessarily associate ourselves with the expression of incredulity given expression to by the Recorder. However, we do observe that, subsequent to the criminal proceedings, she did make an asylum application. The Home Office refused it. She challenged that by way of appeal to the AIT, which rejected her appeal on the grounds that they did not find her account to be credible. That process has yet to be completed because there is an outstanding application before the Administrative Court. But the views expressed both by the Home Office and the AIT in respect of credibility by no means indicate that the Recorder was off beam in expressing difficulties with accepting her account. However, even if accepting that her account may be true and that the circumstances of the commercial arrangement which led to her being here and in payment for services rendered, agreeing to participate in this criminal offence. In our judgment, that does not cause this case to fall outside the conventional sentencing guidance given in the case of Kolawole.
15. Mr Carter has not sought seriously to develop an argument that, if that were the case, a sentence of 12 months, after a very late guilty plea, would be either wrong in principle or manifestly excessive. Therefore, in those circumstances, we dismiss the appeal against the sentence of imprisonment.

16. There is, however, a second limb to the appeal and that is in respect of the recommendation of deportation. Mr Carter has told us, and we fully accept from him, that notwithstanding the contingent terms in which the recommendation was made, the Home Office, acted upon the recommendation, made an order for deportation and, as a consequence of that, upon the expiration of her sentence of 12 months, she was detained from January 2007 until 15th May 2008 on the basis that her anticipated deportation at that time to Somalia was thought to be imminent. At the end of that period she was granted bail, apparently associated with a change of mind on the part of the Home Office as to the destination to which she would be deported, it then being their intention to deport her not to Somalia but to Kenya.
17. The essential point being made by Mr Carter is that the decision to recommend her for deportation did not follow any kind of an enquiry conducted by the Recorder, necessary to establish the grounds for a recommendation of deportation to be made. In particular in this case, it was necessary for him to consider the question of the likelihood of her obtaining asylum, given the fact that he explicitly stated that, in the event that her asylum application were to succeed, he would wish the recommendation to fall away. We wish to emphasise that our conclusion in respect of this aspect of the appeal is rooted in the rather unusual circumstances of the present case and, in particular, the procedural difficulties to which Mr Carter has referred. We would not wish anything that we say in any way to indicate any prohibition upon a court, in an appropriate case, making a recommendation for deportation, even where it is said that an asylum application has been made or is to be made. However, in this case it is perfectly clear that the Recorder was very much in two minds. If the asylum application were to succeed, he was not minded to have any recommendation for deportation operate so as to affect the asylum application. On the other hand, he simply did not apply his mind to making any findings about underlying facts asserted other than to make the veiled reference to him having difficulty in accepting them in their entirety. It seems to us that, in those particular circumstances, the appropriate course for the Recorder would have been either to conduct some form of a Newton hearing, at the end of which he could have made his decisions on fact and on that basis made a firm recommendation or not, or, alternatively, not to make any recommendation at all, even if he chose to cover himself by indicating that but for the asylum claim, he undoubtedly would have made some recommendation as to deportation.
18. However, essentially for procedural reasons, in our judgment, the Recorder did not act lawfully in making the recommendation of the deportation in the circumstances that he did and therefore this appeal succeeds to at least to this extent, that the recommendation for deportation is quashed.