

Neutral Citation Number: [2008] EWCA Crim 2022
IN THE COURT OF APPEAL
CRIMINAL DIVISION

No: 200803398/A1

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 19th August 2008

B e f o r e:

MR JUSTICE GAGE

MR JUSTICE TREACY

MR JUSTICE BEAN

R E G I N A

v

ISHMAEL JOHN

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(Official Shorthand Writers to the Court)

Mr T Jacobs [solicitor advocate] appeared on behalf of the **Appellant**

J U D G M E N T

1. Lord Justice Gage: This appellant, Ishmael John, is now aged 24. On 30th April 2008 at Leeds Crown Court he pleaded guilty to two offences of possession of false identity documents with intent and one offence of possession of a false identity document. So far as the first two offences are concerned, he was sentenced to 15 months' imprisonment on each to run concurrently. So far as the third offence of possessing a false identity document, he was sentenced to six months' imprisonment concurrent with the other offences. The total sentence was therefore 15 months' imprisonment. Two further offences of possessing false identity documents were left on the file on the usual terms. He appeals by leave of the single judge.
2. The circumstances of the offences are as follows. The appellant is a native of Zimbabwe. He and his family apparently supported the opposition party in that country and were, as a result, targeted with threats of violence. He arrived in this country on a date which is not entirely clear from the documents but is either 2002 or 2003. He applied for asylum on arriving in this country. His claim was refused in 2004, because in the view of the Home Office at that stage the political situation in Zimbabwe did not support the grant of asylum. He remained apparently in contact with the Home Office throughout his time in this country and has reported to them.
3. In August 2007 he bought a false Malawian passport and a Home Office resident permit from an acquaintance. The documents were used to register with an employment agency in Leeds. He subsequently obtained employment via the agency for a total of some four days. The use of the documents to register with the employment agency is the conduct covered by the first two offences to which he had pleaded guilty.
4. When the matters came to light, the appellant was arrested in March 2008. His home address was searched and a forged Home Office letter purporting to give him indefinite leave to remain in this country was found. He accepted in interview that he had obtained this letter with the intention of using it in a similar way to obtain employment. Possession of this document represented the third offence to which he pleaded guilty. In addition, he admitted in interview to further occasions on which he had obtained short periods of employment using false documents. Those matters were the two offences which were taken into consideration when he was sentenced.
5. He is a man with one previous conviction of a minor nature in November 2003. It was for an offence of threatening and abusive behaviour.
6. There was a pre-sentence report before the court which recommended a community order with a requirement of supervision and unpaid work. It was said that there was a low risk of him reoffending.
7. In sentencing him the judge, having set out the facts as we have recorded, came to the conclusion that it was inevitable that an immediate custodial sentence should be passed. At page 3 of the transcript of the sentencing remarks, line 3, the judge said:

"On your behalf, Mr Jacobs has urged in your favour your plea of guilty, which I take into account and give full credit for. He also says you had

rather have worked honestly. That may be true, but the fact is that you did work dishonestly. And although you have not claimed support from the National Asylum Support Service, although you would be entitled, I am satisfied that there was a reason for that, namely that you wanted to keep your remuneration out of sight of the authority."

8. The judge went on to explain that these sort of offences had been considered by the Court of Appeal Criminal Division on a number of occasions and regarded as serious offences. He said:

"All these offences strike at the heart of immigration policy and deterrent sentences are called for."

In the circumstances he imposed the sentences to which we have previously referred.

9. The grounds of appeal put forward by Mr Jacobs on behalf of this appellant focus on a recent decision of this court which was probably not before the judge. That is a decision in Attorney General's Reference Nos 1 and 6 of 2008 [2008] EWCA Crim 677. The court in that case dealt with two reference by the Attorney General involving similar offences to those with which we are concerned. However, the facts of the two reference were quite different. One, Laby, involved what the court described as an offence designed to undermine immigration control. The other, Dziruni, was quite different and has some but not complete similarities with the appeal before us.
10. The respondent Dziruni was a native of Zimbabwe, who, like this appellant, entered this country on a valid passport. He was refused asylum but remained in this country and believed that he was not entitled to support from the National Asylum Support Service. Accordingly, he purchased and used false documents to obtain work. He did not want to be a financial burden on his family. He was sentenced by the judge to six months' imprisonment suspended for two years with an order that he performed 80 hours unpaid work. Of him the court said at paragraph 19:

"Judge Murphy [the sentencing judge] was faced with, on all the evidence, a decent young man, looking to find work and to earn more than £35 weekly subsistence allowance vouchers. He felt that he was a burden to his family and he wished to lift the burden. So he bought these false documents in order to enable him to obtain work. He knew he should not be doing so; he pleaded guilty. We emphasise, he was not someone hiding or trying to avoid removal out of this country, or using the documents for that purpose. His status may appear clear enough in law but in practice it was, to put it neutrally, confused. Precisely what his legal status is does not matter for the moment, but what is clear is that the authorities in this country were not prepared to, and did not intend to do anything to procure his removal because of the situation in his home country."

11. We pause there to record that it is submitted on behalf of the appellant in the instant case that his immigration status was precisely the same as that of Mr Dziruni in the case which the court was dealing with in the Attorney General's Reference.
12. Of the sentence imposed by the judge the court in the Attorney General's case, Dziruni, after dealing with the reference in respect of Laby, said at paragraph 31 and 32:

"Dziruni is a quite different case. The decision of Judge Murphy is not, in our judgment, open to the slightest criticism. The facts which he spelled out with such care speak for themselves. Suspending a sentence and requiring the offender to do some work for the country will sufficiently punish him and offer practical value to the community.

We understand that, in the light of the authorities and in the way in which a number of courts (we are told Manchester and Sheffield) have been approaching these issues, this application was justifiably made. We must, however, record that the sentence of Judge Murphy was not a lenient sentence at all. It was therefore certainly not an duly lenient sentence. It was a merciful sentence, in a case where the exercise of the judicial quality of mercy was entirely appropriate."

Accordingly the court refused to interfere with the sentence.

13. As we say, it seems unlikely that this decision was before the learned judge. There are, however, some differences between the facts in that case and in the instant case. In the instant case the appellant used two different identities. In addition, the judge recorded that he was intending to keep out of sight of the authorities. Furthermore, he had one previous conviction, for admittedly a minor offence. Nevertheless, the decision in the Attorney General's Reference case is of significance.
14. However, there are other decisions of this court which suggest that for offences such as these the appropriate sentence is in the region of 12 to 18 months: see, for instance, the decision in Kolawole [2005] 2 Cr App R(S) 14. Although this is not, as said by the court, specifically to be a guideline decision, it remains a case of some significance. In R v Mabengo [2008] EWCA 1699 the court took the opportunity of stressing the significance of Kolawole in cases of this sort.
15. At paragraph 10 of the judgment of the court in Mabengo and others Goldring J, giving the judgment of the court, said of the four appellants before it:

"10. These four appellants had failed in their applications for asylum. It may be that they had subsequently renewed them. They remained in the United Kingdom. They knew they could not work. In order to deceive and to avoid their true status being discovered, they used false passports. That is a matter which in our view merits a more serious penalty than that that was substituted by this court in Mutede. It seems to us that the judge was entitled to impose sentences of twelve months' imprisonment and that they were not manifestly excessive or wrong in principle."

16. So far as this appeal is concerned it seems to us that the facts of this case falls somewhere between the decision in Mabengo and the decision of the court in the Attorney General's Reference of 2008. There are differences in the instant appeal between all those authorities. The important fact, it seem to us, in this case is that this appellatant is a Zimbabwean whose status in this country remains uncertain.
17. However, taking into account all the facts of this case, we have reached the conclusion that an immediate custodial sentence was inevitable. We conclude that the sentence passed by the judge was longer than was necessary and was manifestly excessive. In the circumstances what we propose to do is to quash the sentences of 15 months' imprisonment. For those we propose to substitute sentences of eight months' imprisonment, each to be concurrent. The remaining sentence in respect of the third offence will stay as it is. Accordingly, the total sentence is eight months' imprisonment. To that extent and for those reasons this appeal is allowed.