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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 28 July 2020

LORD JUSTICE HOLROYDE

MRS JUSTICE ANDREWS DBE

RECORDER OF NOTTINGHAM
(HIS HONOUR JUDGE DICKINSON QC)

(Sitting as a Judge of the CACD)

R E G I N A

v

ESTREF ISMAILAJ

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Mr L Walker appeared on behalf of the **Applicant**

Ms K Wilkinson appeared on behalf of the **Crown**

J U D G M E N T

1. LORD JUSTICE HOLROYDE: As long ago as 5 October 2012 this applicant was convicted of offences including rape and sexual assault of a child under 13. He applies for an extension of time of about 5 years 8 months to apply for leave to appeal against his convictions. He further applies for leave to adduce fresh evidence.
2. The victims of the offences are mother and daughter. We shall refer to them as "S" and "J" respectively. Each is entitled to the lifelong protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during their respective lifetimes, no matter may be included in any publication if it is likely to lead members of the public to identify either of them as a victim of these offences.
3. The offences of which the applicant was convicted were committed during the period between 1 January and 6 April 2012, when S was aged 24 and J was aged 3. They came to the attention of the police in April 2012, when S approached police officers in Leicester Square and handed them a note saying that she was being forced to work as a prostitute and that if she did not do as she was told her child would be killed or abducted by the applicant.
4. S gave further details through an interpreter which resulted in the applicant's arrest. He was in possession of an Albanian passport in his own name and a Bulgarian passport which bore his photograph but was in a different name. In relation to the latter, the applicant (who is a national of Albania) later pleaded guilty to an offence of possession of a false identification document.
5. Both S and J, who was aged 4 years and 4 months by the time of the trial, gave evidence. S is also an Albanian national. Her evidence was that she had entered into a consensual sexual relationship with the applicant in Albania and had been persuaded by him to go to Spain where she was promised a better life. In Spain however another man, who was referred to as the applicant's "boss", required her to work as a prostitute. She was then trafficked into this country where she was forced to work as a prostitute. She and her daughter held genuine Albanian passports, but they had been retained by the boss in Spain. False Bulgarian passports, which contained the photographs of S and J but gave them different names, were used when they were brought to the United Kingdom from Spain via Ireland. S gave evidence that whilst in this country she was raped, sexually assaulted, physically assaulted and abused by the applicant. The applicant used J as a form of hostage to control S and persuade her to work as a prostitute. The applicant also assaulted and sexually abused J and frequently engaged in sexual activity with S in the presence of J.
6. S's evidence was to the effect that she had been accompanied by J when she first went to Spain. It was put to her in cross-examination that stamps in their Albanian passports showed that she had initially travelled to Spain alone and subsequently returned to Albania for a few days in order to collect J and take her to Spain. It was the defence case that this movement supported the applicant's account that S had always been free to travel as she pleased and was happy to bring J to join her in Spain. S denied this, maintaining that J was with her throughout her time in Spain.
7. J's evidence was that the applicant had beaten her twice, on occasions when her mother

was not there, had touched her between her legs and had rubbed against her "with his cock" when she was lying on her back. Her evidence about her initial movement from Albania was that her mother had returned from Spain to collect her.

8. The prosecution called as a witness an expert document examiner, Dr Sheppard. He said that the stamps in the Albanian passports appeared to be standard EU border crossing stamps. He was not able to say whether or not they were genuine. The prosecution did not seek to prove that they were not.
9. The applicant gave evidence. He said that his relationship with S had at all times been loving and consensual and that she had willingly engaged in prostitution in order to make money. Her allegations against him were a malicious fabrication.
10. The applicant's sister gave evidence, denying that he had mistreated either S or J in any way, and asserting that any knowledge which J might have of sexual matters had been learned from watching S. The defence also called a witness who had worked with S in Spain. She said that S had travelled from Spain back to Albania to collect J, had mistreated J when they were together in Spain and had been happy to go to the United Kingdom.
11. It is unnecessary to go into further detail about the evidence at trial. The jury were clearly faced with head-on conflicts of evidence as to the applicant's behaviour towards S and J. They convicted him on two counts of rape of S, one count of causing S to become a prostitute for his gain, one count of assault occasioning actual bodily harm to S, one count of cruelty to J, a person under 16, and three counts of sexual assault of J, a child under 13. The applicant was sentenced on 3 January 2013 to a total of 18 years' imprisonment.
12. It is necessary now to summarise the events since conviction and sentence. The applicant had been represented at trial by Mr Cooper QC, instructed by Faradays Solicitors. Mr Cooper gave a written advice on appeal on the day after the convictions. He said that the prosecution had not been able to prove that the stamps in the Albanian passports were not genuine. They were important because they showed a freedom of movement on S's part which undermined the prosecution case. He advised that there was at present no arguable ground of appeal, but that expert evidence should be sought to confirm that the stamps were genuine. He also advised steps to be taken in relation to an issue about a mobile phone which is no longer of any relevance.
13. It is to be noted that neither in this advice nor in any other document put before this court is any explanation given for why expert evidence of this nature was not obtained before the trial or, if necessary, during the trial.
14. Faradays Solicitors acted on counsel's advice. In March 2013 they made enquiries of the Albanian Embassy in London and subsequently provided photocopies of S and J's Albanian passports. On 10 May 2013 an official at the Embassy sent an email saying the stamps were legitimate and authentic, adding that it would be necessary to pay a fee if "a signed document" was required. The solicitors wrote to the applicant on 17 May 2013, saying that they had requested a signed copy of the documentation, which they would be able to use "as evidence in support of your appeal". They sent a cheque to the Embassy on 13 June 2013. However, they then received a letter dated 25 June 2013, indicating that the appellant had instructed another firm of solicitors, Wilson Barca LLP, to act on his behalf. Faradays therefore took no further steps. It does not appear that any signed documentation was ever received by them from the Embassy. The cheque which they

- had sent was later cancelled.
15. Very little information has been provided to this court about what steps were taken by Wilson Barca LLP. They wrote to the applicant on 29 April 2014, saying that they had applied for a transcript of the summing-up.
 16. In a written statement of his reasons for requesting an extension of time the applicant says that Wilson Barca "kept me waiting for 3 years" and that his efforts to contact them were unsuccessful. He has given no further details, though we are told today that his family and friends were unable to raise the full amount of the fees sought by Wilson Barca. The applicant himself did not mention that in any document provided to the court, nor has he said anything to indicate why he changed his solicitors when Faradays were in the process of obtaining the material which counsel had said would support an appeal.
 17. The applicant has also provided this court with a copy of a letter dated 22 June 2017, by which another firm, Deton Solicitors, sent him an advice from counsel, who had concluded that there were no grounds of appeal against conviction or sentence. We do not know when or for how long Deton were instructed. We assume the applicant was referring to Deton when he said in his reasons for seeking an extension of time: "I later contacted another legal team but we had some disagreements".
 18. The applicant eventually made his application for leave to appeal against conviction, together with applications for an extension of time and fresh evidence. He relied on three grounds of appeal of his own composition, the first of which was that the stamps in the Albanian passports of S and J were genuine and not faked. We need not say anything about the other two grounds, which are no longer pursued. The applications were referred to the full court by the single judge.
 19. On 17 December 2019, this court heard submissions from Mr Walker, who had very recently been instructed on behalf of the applicant, and from Ms Wilkinson on behalf of the respondent. Mr Walker requested an adjournment, which the court granted. The court gave directions including as to the filing of any proposed fresh evidence. The applicant has not sought to call any witness before this court, it being agreed by the respondent that none is needed at this stage. He seeks to rely, by way of fresh evidence pursuant to section 23 of the Criminal Appeal Act 1968, on the following documentary material:
 - (a) The email exchange in May 2013 between Faradays Solicitors and the Embassy official;
 - (b) A statement by Arben Kalaja, the Chief of Police Commissariat in the Republic of Albania, who says that he has checked the stamps in the Albanian passports against official records and can say they are authentic.
 - (c) Copies of the Embassy documents relating to the stamps in both passports which show the following movements: on 3 September 2011 S flew from Albania to Spain; on 5 October 2011 S crossed from Greece into Albania, either in a vehicle or as a foot passenger; and on 15 October 2011, S and J crossed from Albania into Greece, again either in a vehicle or as foot passengers.
 20. By section 23(1) of the Criminal Appeal Act 1968, this court may receive any evidence which was not adduced in the trial, if it thinks it necessary or expedient in the interests of justice to do so. By subsection (2) the court, when considering whether to receive any evidence, shall have regard in particular to:

- i. "(a) whether the evidence appears to the Court to be capable of belief;
 - (b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;
 - (c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and
 - (d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings."
21. On the applicant's behalf Mr Walker submits that each of those four questions should be answered in the affirmative and that consideration of those factors should therefore lead the court to admit the fresh evidence. From that starting point Mr Walker goes on to submit that the convictions are unsafe for the following reasons. Ground 1, the fresh evidence proves that S deliberately lied and sought to mislead the jury. The Crown's case was that S's inability to exercise free will to leave her house, let alone travel abroad, was central to the case. The fresh evidence completely undermines S's credibility. Ground 2, if available to the jury at trial, the evidence would have been admissible. Ground 3, if admitted at trial, the trial judge would have had to assist the jury by directing them on the creditability of S in the light of the proven lie.
22. Developing these grounds, in his well-presented oral submissions, Mr Walker has invited our attention to specific passages in the transcript of the evidence of S. He points to the fact that S, when shown the Albanian passport stamps, denied that she left Albania on 3 September 2012 and said that the passport was genuine but the stamps might be false. She further alleged that the applicant had criminal contacts capable of forging passports.
23. Mr Walker relies on principles stated by the House of Lords in the well-known case of R v Pendleton [2002] 1 WLR 72. He also relies on the case of R v Wickens [2003] EWCA Crim 2196. He argues that the trial turned on the credibility of S and of the applicant and that the fresh evidence would prove categorically that S had lied to the jury on oath. Mr Walker has also made submissions in support of the application for an extension of time. He submits that it has been clear throughout that the applicant has been trying to progress his appeal. He further submits that the issue as to the authenticity of the stamps in the passports only arose at trial, being raised for the first time by S.
24. For the respondent, Ms Wilkinson submits that there is no reasonable explanation for the failure to adduce this evidence at trial and that in any event it does not afford any ground for allowing the appeal. She too has made submissions about the relevant passages in S's evidence.
25. We are grateful to both counsel for their submissions. The three applications which are before the court are closely interlinked. We think it appropriate to start by considering the application for an extension of time.

26. We have already referred to the sequence of relevant events following the applicant's convictions, and to the scant information provided by the applicant in the reasons for seeking an extension which he put forward when acting in person. Mr Walker has done his best to assist us but little has been added to that information. No Gogana affidavit has been filed. As we have already noted, no explanation has been put forward for the failure to obtain this evidence before trial, other than the suggestion that it was first raised at trial. No explanation has been put forward for the failure to obtain the evidence during the trial. All that is said is that the evidence became available after trial. Although the applicant in his initial grounds of appeal expressed some criticism of his trial representatives, it is not submitted on his behalf that this is a case of inadequate representation. The applicant withdrew his instructions from Faradays Solicitors, despite the fact that they were obtaining the relevant documents from the Embassy. He has not indicated whether he immediately instructed his new solicitors to pursue that documentation.
27. As to the long period of apparent inactivity which then ensued, the applicant himself has only made the bald assertion that Wilson Barca kept him waiting for 3 years. Mr Walker, on instructions, has today added a reference to a difficulty about raising the necessary funds, but that is not something ever raised by the applicant and is inconsistent with his complaint that the solicitors kept him waiting.
28. We are not able to accept the submission that the applicant has plainly sought throughout to progress his appeal. It must be remembered that the applicant is here seeking an extension of time of well over 5 years. The need to explain the long period of delay is obvious; but in relation to much of that long period, no explanation at all has been given. Such explanation as has been provided is plainly inadequate. It is, for example, clearly insufficient to assert that solicitors failed to take any action for 3 years, without providing much clearer detail as to how that situation arose and what efforts were made to resolve it. In our judgment, no sufficient basis has been shown for granting the extension of time.
29. We would be reluctant to decide against the applicant purely on the basis of delay if there may be merit in the grounds of appeal. We have therefore, in fairness to the applicant, gone on to consider the merits. We begin, since the grounds of appeal rely on the proposed fresh evidence, by considering the factors mentioned in section 23(2) of the 1968 Act. We readily accept that the fresh evidence is capable of belief. We accept, for present purposes, that it would have been admissible at the trial. Two of the four factors can therefore be regarded as assisting the applicant. However, we agree with Ms Wilkinson's written submission that the other two factors weigh heavily against him.
30. Looking first at paragraph (d), we accept that the evidence was in fact gathered after the trial. We cannot however accept that the evidence was not available at trial or that there is a reasonable explanation for the failure to adduce the evidence at trial. It was part of the applicant's case, raised in his defence statement, that S had worked voluntarily as a prostitute in Spain. The Albanian passports of S and J were exhibits in the case and the relevant stamps therefore could be considered. The issue of whether S had initially gone to Spain without her child, and had then returned to Albania to collect J, was first raised in cross-examination of S on 20 September 2012. It was not until 2 weeks later, on 4 October, that the jury retired to consider their verdicts. Even if S's answers in cross-examination may have been unexpected, there was, on the face of it, ample time to

contact the Albanian Embassy during the trial in order to investigate the authenticity of the stamps in the passports. If the point was as important as it is now said to be, it could and should have been investigated at the time. The more it is now said that this was a matter of central importance, the more striking is the failure to provide any explanation for not acting at the time.

31. Turning to paragraph (b), we cannot accept that there is any arguable basis for saying that the proposed fresh evidence may afford a ground for allowing the appeal. The key factors, in our view, are these. First, the prosecution at trial could not prove that the passport stamps were not genuine. Dr Sheppard accepted that they appeared to be standard border crossing stamps. S, when cross-examined, accepted that the passports were genuine but suggested that the stamps might in some way have been forged. She was contradicted by her daughter, by the applicant and by defence witnesses. The proposed fresh evidence would therefore, at most, provide some additional basis for the jury to find that the stamps were genuine and that S and J did travel as shown.
32. Secondly, it does not necessarily follow that the fresh evidence would prove that S had told any deliberate lie. In her cross-examination she referred to an occasion when she had crossed the border with J and their passports had not been stamped. She made the point that if the border officials had inspected their passports, they would have seen that she and her child had different surnames and would not have allowed J to leave Albania with her. It is far from clear when this was. In the absence of any more detailed enquiry during cross-examination there was, in our view, room for misunderstanding. Thirdly, and more importantly, evidence that the passports' stamps were genuine could not provide any support at all for the defence case that S was free to come and go as she pleased. The stamps could tell the jury nothing about whether S was travelling alone on any of the occasions recorded, or about whether she travelled of her own accord or under compulsion. We are therefore unable to accept Mr Walker's written submission that the passport stamps establish that S was able to travel freely with her child and that she lied to the jury about that issue. Fourthly and in any event, the issue of whether S lied about returning to Albania to collect J and taking her to Spain was a peripheral matter. It did not, in our view, have any significant bearing either on S's general credibility or specifically on the credibility of her evidence as to what happened when she was in this country. We therefore reject the premise of ground 2.
33. In relation to the events in this country which were the subject of the charges, S was challenged about many aspects of her evidence. It was put to her that she had destroyed her SIM card before giving her account to the police. The applicant and his witnesses gave evidence contradicting everything she said. It is however clear from the jury's verdicts that they accepted S's evidence as to the offences and disbelieved the applicant's evidence.
34. In those circumstances, it is, in our view, impossible to argue that the convictions are unsafe because the proposed fresh evidence might have caused the jury to take a different view of S's credibility. It follows that it is not necessary or expedient in the interests of justice to receive the fresh evidence and we decline to do so. It further follows that no purpose would be served by our granting an extension of time because the appeal, based as it is on the fresh evidence being admitted, has no prospect of success.
35. For those reasons, grateful though we are to Mr Walker, all of these applications fail and are refused.

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

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