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IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 2023002241

[2024] EWCA Crim 713

Royal Courts of Justice
Strand
London
WC2A 2LL

Monday 1 July 2024

Before:

LORD JUSTICE FRASER
MR JUSTICE HOLGATE
MR JUSTICE BRIGHT

REX
V
JING DU

MR RHYS ROSSER appeared on behalf of the Applicant/Appellant,
Instructed by Rustem Guardian Solicitors
MR HAMISH COMMON appeared on behalf of the Respondent

Hearing date: Thursday 6 June 2024

J U D G M E N T

LORD JUSTICE FRASER:

1. This is an application for leave to appeal against conviction, an extension of time of 363 days, and also leave to adduce fresh evidence pursuant to section 23 of the Criminal Appeal Act 1968. We shall refer to the applicant/appellant as Jing Du for reasons of convenience and no disrespect is intended. The Single Judge refused Jing Du leave on the first of her two grounds, but referred the application on the other ground, and the application for an extension of time, to the Full Court. We explain the grounds further at [9] below.

2. We received the fresh evidence *de bene esse*. Jing Du is a Chinese national and does not speak English. She had the benefit of an interpreter at the hearing before us, the language being Mandarin Chinese or Putonghua. She gave evidence in person, again *de bene esse*. At the conclusion of the hearing, we announced that all of the applications would be granted and the appeal would be allowed, quashing the conviction, with detailed reasons to be provided in writing. These are those reasons, and the issue of further consequential orders is addressed at [27] below.

3. On 16 June 2022 in the Crown Court by a majority of 11-1, Jing Du was convicted of one count of acquiring criminal property contrary to section 329(1)(a) of the Proceeds of Crime Act 2002. This was count 1 on the indictment, and she was acquitted on a second count, which was one of possessing criminal property, contrary to section 329(1)(c) of the same Act. On 16 September 2022 she was sentenced by Miss Recorder Revere, who had conducted the trial, to a term of 18 months' imprisonment which was suspended for 18 months, with a requirement to carry out 100 hours of unpaid work. She was also ordered to pay the victim surcharge of £140. She was represented under a representation order by Lincolns Solicitors and Mr Adil Syed, a solicitor, appeared for her as the advocate both at the trial and subsequent sentencing.

4. The particulars of count 1 contained on the indictment were that between 1 January 2018 and 31 December 2020 she had "acquired criminal property namely, £725,954.59 knowing or suspecting it to represent in whole or part and whether directly or indirectly the proceeds of criminal conduct. [This sum constitutes Faster Payments and cash deposits into Miss Du's accounts]." The explanation within the square brackets was included on the trial indictment. In respect of count 2 for which she was acquitted, the particulars read that she had "on or before the 23rd day of July 2020 possessed criminal property, namely a quantity of cash knowing or suspecting it to represent in whole or part and whether directly or indirectly, the proceeds of criminal conduct. [This sum represents cash seized on 23rd July 2020 at Jing Du's home address]."

5. The facts that led to her being charged are as follows. As a result of a police investigation, Jing Du was arrested at her home address on 23 July 2020, and cash (in the sum of £3,000), two phones and an iPad were seized. The police were successful in gaining access to the devices and it was discovered that there were seven bank accounts in her name; one was a joint account with her husband. The £725,954 that was the subject matter of count 1 constituted faster payments and cash deposits into these bank accounts. The subject matter of count 2, upon which she was acquitted, related to the quantity of

cash found at her home address. She gave a no comment interview.

6. The prosecution case against her was that the huge scale of funds passing through these accounts without explanation, and the cash found in her flat were sufficient, together with the connection of her phone to accounts for purchasing escort services and on web chats advertising sex services, to mean that the money must have been criminal property and that she was involved in running prostitution.

7. The prosecution also relied on the fact that the bank accounts were additionally used for ordinary purposes such as groceries and payment of rent to demonstrate that Jing Du was herself using the accounts during the relevant period. Account transactions showed that multiple payments were made to online advertising agents called AdultWork and Vivastreet, which are primarily used by individuals to advertise adult escort and related services. The police evidence at the trial included a table of account transactions and analysis, and the evidence of the officer in the case was that the large movement of money into the accounts without explanation, and without any income being declared by the applicant to HMRC during the relevant period, together with the link to the AdultWork account, indicated that the money was indeed criminal property. Identification documents of hers were used to open the different accounts, which were with well-known banks such as Barclays, Santander, Metro Bank and a Monzo account. She also had a joint Metro Bank account in her name together with her husband Mr J Xu.

8. Jing Du gave evidence in her own defence at trial and explained that she had come to the UK legitimately on a student visa in 2018, studying on a two year course at the University of Huddersfield. She had no convictions in China and was from a family that was successful in business and had money. A few weeks after she arrived, she and a friend went to London to go out and have some social experiences. They were in a bar with a group of people they had met and were having a good time. These people bought them both drinks, and the next thing she knew was when she woke naked in a strange flat, surrounded by men she did not know, two of whom had been in the bar with her. They must have drugged her by means of spiked drinks and she had no recollection of the period from taking the drink in the bar, to waking up naked in the flat surrounded by men. They showed her explicit photos they had taken of her whilst naked, threatened to send these to her family, and used these photographs to coerce her into working for them as a sex worker. Her friend was there too at the same time and in the same situation, and the same thing happened to her. She explained that these men took her identity documents and bank cards, physically beat both of them, and threatened her, and this led to her working in the sex industry for a period of over two years. She refused to identify these individuals, who she said were Chinese and based in Chinatown, and she said that threats had also been made to her young daughter who was, at the time of the trial, a small child who had been born in August 2020. Her defence was that she had no knowledge of, or control over, the bank accounts that were the subject matter of count 1 of the indictment, and in law her representative argued that she was a victim of modern slavery.

9. The judge provided written directions and a route to verdict. We shall return to these

directions later. Her two grounds are as follows. Notwithstanding the refusal of leave by the Single Judge on Ground One, the contents of that are relevant because its subject matter goes to the explanation provided by Jing Du concerning delay which is relevant to the extension of time application.

Ground One: There was fresh evidence in the form of text messages sent to Jing Du which ought to be admitted and rendered the conviction unsafe.

Ground Two: The Learned Judge erred in her directions to the jury in respect of the elements of the offence upon which she had been convicted.

10. In respect of Ground Two, it is submitted that the legal directions given to the jury failed to direct the jury to consider separately the questions: (a) whether Jing Du had "acquired" the money which was paid into the bank accounts, given the claim that the accounts were being controlled by others without her consent; and (b) whether she knew or suspected that it was "criminal property" as defined in section 340 of the Proceeds of Crime Act 2002. That latter point should have included the question whether she knew or suspected that it constituted or represented a person's benefit from criminal conduct. What the jury were told in the route to verdict was as follows:

    "So, on count one, the first question that you have to ask, deals with whether in fact Ms Du knew or suspected that the funds had been transferred into her accounts. And you have heard evidence about what her state of knowledge was, in relation to the transactions. If you think that she did not, or may not, have known that the funds had been transferred, then you find her not guilty, and that is the end of count one."

11. The separate element of whether the funds were known or suspected to be criminal property is integral to the offence. Even though her case was that she had no knowledge or control over these bank accounts at all, as an element of the offence it still must be considered. Because by the time of the trial, Jing Du had accepted that the money was or was likely to be in fact criminal property on what she knew by then (as given her account including the very sizeable figures, a reasonable person would accept) that separate element of the offence became blended into the single direction given. There are two separate parts to this offence, which could be described acquisition; and the nature of the property (whether criminal or not). This argument attracted the Single Judge, who stated that had the application for leave to appeal been made within time he would have granted it, but he referred it to the Full Court due to the extension of time required.

12. It is this technical deficiency in the legal directions concerning the elements of the offence of count 1 which sits at the heart of Ground Two. The Grounds, and advice on appeal, were provided by fresh counsel and Jing Du waived her rights concerning privilege over her communications with her previous legal advisers in accordance with ***R v McCook*** [2014] EWCA Crim 734. The response from the solicitor who represented her at trial was to confirm the factual accuracy upon which the application for leave to appeal had been prepared.

13. We accept the criticisms of the written directions and route to verdict made on Jing Du's behalf by Mr Rosser. There is no doubt that the learned Recorder did not obtain the assistance she was entitled to expect from both the Crown and Mr Syed, as these

directions were agreed by counsel. The Recorder gave accurate legal directions in respect of all the other aspects of the case, including those necessary to deal with the potential defences under the Modern Slavery Act 2015. However, the jury were not instructed to consider the two elements of the offence to which we have referred separately.

14. We repeat what has been said in a number of previous cases about the importance of legal representatives complying with their professional obligations when contacted through the ***McCook*** process, where those representatives have acted previously for applicants who are seeking to appeal, and where those applicants – by definition - have waived their rights concerning privilege. Here, Mr Syed's response initially was to confirm that no text messages had been provided to him for the trial, but that this occurred after conviction. When asked by the Civil Appeals Office for further information, he said that he had "no observations" on the grounds of appeal, or the advice, confirmed that the factual basis of the grounds was correct, and had nothing to add. It is an important part of the information available to the Full Court to know what happened at trial where, as here, an applicant or appellant is represented by fresh counsel. Jing Du's trial representatives accept that she was orally given advice that there were no grounds to appeal, which is logical from their standpoint, given the written directions to the jury were expressly agreed by them on her behalf. However, this advice was not provided to her in writing. This is not one of those cases, which occur rarely, such as ***R v O*** [2019] EWCA Crim 1389 where, because the extension of time sought was so long (10 years), counsel and solicitors acting for the appellant at the time genuinely could not assist, as they understandably had no recollection and no documents were available. Sufficient recollection was available to those representing her at the trial to confirm that the technical defect in the legal directions which sits at the heart of Ground Two was not brought to her attention as a potential ground of appeal. By implication, this had escaped their attention.

15. Jing Du was called to give evidence in person before the Full Court (with the benefit of an interpreter) by Mr Rosser to explain the relevant features to support her application for an extension of time. Mr Common made no application to cross-examine her. In her oral evidence before us, she explained that she had tried her best to find out what her options were following her conviction and also her sentencing, even to the extent that Mr Syed asked her to stop contacting him so often as he was very busy. She also explained that it took some time for her to summon up the courage to identify the individuals who had threatened her, and to produce the text messages (relevant both to Ground One for which leave had been refused, and the extension of time application).

16. Part of the fresh evidence adduced on her behalf was from a paralegal at her solicitors' firm, Mr Xiaoyong Ding, who is dual qualified in the sense that he has law degrees both from the UK and also China, and is (as he expressed it himself) a native Chinese speaker. He translated the text messages provided to him by Jing Du, which were contained on her phone. These text messages were highly abusive, aggressive to her, and also threatening. They included threats to kill her, to kill her family in China, threats against her baby daughter as well as her, and were dated in the period from her arrest but particularly leading up to the dates of the trial itself. There are a great many. It is unnecessary to list

them all, but two will give a sufficient outline.

1. "You do not say anything about me before the police; do not say anything about me in court; the social worker will give me the daughter. I will never let you see her again.

2. "Fuck you, if you do not follow my words, I will surely get someone to kill you. Don't forget, I also know your address in China."

17. Mr Common for the Respondent had not appeared for the prosecution at the trial, and Mr Morgan who had done so has since left practice. Mr Common sensibly accepted that the legal directions in respect of the elements of the offence for which Jing Du was convicted were technically deficient, and that the Recorder had not separately directed the jury to consider whether Jing Du knew or suspected at the time that the funds were criminal property. He submitted that nonetheless, the conviction was not unsafe. He challenged the veracity of the text messages, although admitted that they did provide corroboration to the defence that was in fact mounted at the time by Jing Du in her evidence. Although the provenance of the text messages was not formally admitted by him, and in the Respondent's Notice doubt had been cast on this by reason of the fact that they were not on the phones seized by the police upon her arrest, given the delay between her arrest and the trial, and the date of the messages themselves, this does not seem to us to be a relevant point. She also gave an explanation in evidence in response to questions from the court that the messages were sent to her on what she called her "new phone", which was the one she had obtained to replace the ones seized.

18. In our view, her explanation for the provenance of the text messages, and why they had not been used at trial, was credible and we accept it.

19. We turn therefore to consideration of her application for permission to adduce fresh evidence under Section 23 of the Criminal Appeal Act 1968. That section provides as follows in Section 23(1):

"For the purposes of an appeal, or an application for leave to appeal, under this Part of this Act the Court of Appeal may, if they think it necessary or expedient in the interests of justice –

… (c) receive any evidence which was not adduced in the proceedings from which the appeal lies."

20. Under Section 23(2), the Court of Appeal is to have regard to the factors listed at (a) to (d) of that sub-section when considering whether to receive any evidence. These are as follows:

(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. Section 23(2)(d) includes whether there is a reasonable explanation for the failure to

adduce the evidence in the proceedings the subject of the appeal. Given the refusal of leave on Ground One by the Single Judge, section 23(2)(b) does not apply in this case, other than to observe that the subject matter of the fresh evidence does afford a ground for granting the extension of time. We consider that there is a reasonable explanation for the failure to adduce the evidence of Mr Xiaoyong Ding in the proceedings in the Crown Court. The text messages were available, but there is nothing to suggest that any translation of them was available in any event. Added to this is the evidence we accept which is that Jing Du was in fear for the reasons explained (and which she explained at the time in her oral evidence). We also accept as credible her explanation for the reasons that she did not give the full story, including identification of relevant individuals, when she gave evidence in the Crown Court. We grant the application for fresh evidence for the purposes of the Court of Appeal considering the application for the extension of time. We therefore turn to consider the delay in this case and that application.

22. This brings us to consideration of that delay and the lengthy extension of time required. The delay in this case has been considerable and is approaching one year in length. This is not one of those cases where the extension of time is exceptionally long, but a year is still a lengthy extension. The time limits are there for a reason and must, unless there is good reason to extend them, be observed. The principles to be applied in an extension of time case are well known. In ***R v Hughes*** [2009] EWCA Crim 841 at [20] it was said that an extension would "be granted only where there is good reason to give it, and ordinarily where the defendant will otherwise suffer significant injustice". In ***R v Thorsby*** [2015] EWCA Crim 1 it was stated "the principled approach to extensions of time is that the court will grant an extension if it is in the interests of justice to do so". It was also said in that case that "the public interest embraces also, and in our view critically, the justice of the case and the liberty of the individual…" and "the court will examine the merits of the underlying grounds before the decision is made whether to grant an extension of time." It was also noted that the passage of time may put the court in difficulty in resolving whether an error has occurred and if so to what extent.

23. Here, the first point to consider is that the delay has caused no difficulty in resolving whether the substantive basis for Ground Two is justified or not. The legal directions and route to verdict are available on the DCS system and were also provided to the jury in writing. Mr Syed has confirmed that they were agreed, and the Single Judge, the Full Court and indeed the respondent accept that there is a technical deficiency within them concerning the proper treatment of the different elements of the offence for which Jing Du was convicted.

24. The delay falls to be considered in two tranches, namely that until December 2022 when her new solicitors were instructed, and the period from them until July 2023 when those new solicitors issued the different applications. These two periods fall to be considered differently. In a sense, the duration of the second period was out of Jing Du's hands, and her new solicitors and counsel observed their obligations under ***R v McCook*** as one would expect. New counsel must satisfy themselves that what they are told is correct, and indeed the case of ***McCook*** itself demonstrates the risks if this is not done. The response from her previous representatives was not exactly prompt, added to which transcripts of

her evidence in the Crown Court were required. These all confirmed her instructions and the necessary applications for her appeal to proceed were made. The first period of delay is however something that can be laid squarely at her door. Looked at in that way, five months is a closer approximation to the period of delay for which she herself is responsible. Whilst long, that is a period that is understandable given her explanation for what she was wrestling with at the time.

25. Nobody reading this judgment should assume that it means that delays of this nature will be waved through or overlooked, and we repeat the importance of complying with time limits. However, in this case and on these specific facts, we have concluded that an adequate explanation has been provided in respect of both periods of delay. There is therefore good reason to grant the necessary extension of time, as without it significant injustice will be suffered by Jing Du.

26. In our judgment, the nature of the deficiency in the directions to the jury on the elements of count 1 renders the conviction unsafe. Jing Du was entitled to have each element of the offence considered by the jury, and the jury were required to satisfy themselves so that they were sure that she had acquired the property in question (namely the funds); and also that she knew or suspected the property to have been, either directly or indirectly, the proceeds of criminal conduct. That knowledge or suspicion on her part could not be assessed as at the date of trial, by which time Jing Du would have known, and did know, far more about the nature of the funds by reason of the police investigation than she did, on her case, know before she was arrested.

27. We therefore grant her application for leave to appeal on Ground Two, and also allow the applications to adduce the fresh evidence both of Jing Du herself and also Mr Xiaoyong Ding. We grant the necessary extension of time, and we allow the appeal. We quash the conviction. As explained at [2] above, we announced the outcome of these applications and the appeal at the conclusion of the hearing on 6 June 2024. We did this in order that the necessary directions for any re-trial could be addressed and made by the court immediately, with both counsel for Jing Du and the prosecution present, in the usual way. However, Mr Common had specific instructions that in the event of a successful appeal, the Crown did not in this case seek a retrial. A decision had been taken by the Crown Prosecution Service prior to the hearing that in the event of success on her part, a second trial would not be in the public interest, particularly as Jing Du had already served her sentence which had been imposed in September 2022. There will therefore be no re-trial. The outcome of this appeal is therefore that her conviction is quashed, with no consequential orders.